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# **RIGHT TO WATER IN INDIA**

## **PLUGGING CONCEPTUAL AND PRACTICAL GAPS**

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## Right to water in India – plugging conceptual and practical gaps

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This article examines the content of the human right to water. It starts from the premise that the right is firmly anchored in international and national law. It thus moves beyond debates concerning either the existence or the legal status of the right in favour of a more in-depth discussion of its content. It focuses on India, a country where the right is well entrenched at a broad level but where the actual content of the right is not well defined in legal instruments. It considers some of the aspects of the right that are most critical at this juncture from a policy perspective, including the need to ensure that the universality of the right in theory is matched by universal realisation, the need for the core content of the right to be provided by the state and the need to recognise the right as including a free water component if it is to make a difference for the overwhelming majority of poor people.

**Keywords:** right to water; India; universal entitlement; free water provision

### Introduction

The human right to water has been increasingly debated over the past couple of decades.<sup>1</sup> This is not surprising given that water is, after air, the second most immediate substance human beings need to stay alive. Further, freshwater is also indispensable for life on earth, thus ensuring that discussions of the right to water must take place in a context going far beyond the immediate survival needs of human beings.

The central role that water plays in supporting life has never been contested. Yet, legal instruments at the international and national levels, as well as the case law, have only been giving increasing importance to the right to water over the past two decades. On the one hand, this is surprising because of the immediate link between water and life. On the other hand, it can be argued that this intrinsic link with life means that water is included as a right in any human right instrument or bill of rights, whether it is formally included in the list of recognised rights or not.<sup>2</sup>

The mainstreaming of the right to water can be partly linked to the increasing acceptance of a rights-based approach.<sup>3</sup> This indicates that the recognition of the right to water is becoming less controversial, as confirmed by the increasingly positive view taken by the corporate sector.<sup>4</sup> At the same time, this leaves open vast questions concerning the content of the right. Indeed, while the Committee on Economic, Social and Cultural Rights (CESCR) has given its own interpretation of the right, this is not binding on states.<sup>5</sup> Further, while there may be an international interpretation of the content of the right by the CESCR, this does not necessarily mean that individual countries follow this

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framework. This is, for instance, the case in India where an independent understanding of the right has evolved over time.<sup>6</sup>

The mainstreaming of the right to water ensures that there is no need anymore to argue over its existence. At the same time, the right to water is and will remain a contentious right for a long time. This is partly due to the fact that campaigns for the recognition of the right to water have often been linked to an anti-privatisation agenda.<sup>7</sup> While there has been an increasing body of work arguing that the right to water is compatible with various forms of privatisation or commercialisation,<sup>8</sup> this is not sufficient to close the debate. Indeed, there are significant issues that need to be addressed in addition to the privatisation debate. Debates concerning the right to water need to be placed in the context of a vast set of policy reforms in the water sector that has arisen concurrently over the past two decades.<sup>9</sup> These policy reforms that have not been translated into any binding treaty framework are based on a series of principles centred on the concept of water as an economic good, as expounded in the Dublin Statement.<sup>10</sup> These principles are linked to a privatisation agenda, but more fundamentally they seek to change the status of water from a common heritage or public trust to that of a commodity. The right to water thus has the potential to bring about a paradigmatic shift away from the conception of water as an economic good.<sup>11</sup>

The dichotomy between water conceived as an economic good and water conceived as a fundamental human right helps to explain the increasing discomfort with the growing promotion of the human right to water by the corporate sector.<sup>12</sup> The debate needs, however, to move beyond the question of the compatibility of the involvement of private sector actors with a human rights approach. Indeed, the issues that arise concern not only the content of the human right to water but also the whole of water law. At the international level, this has been relatively unexplored because international water law is under-developed and includes, for instance, no treaty addressing drinking water.<sup>13</sup> At the domestic level, water law in India has been developing in recent years on the basis of an understanding of water as an economic good, including with regard to drinking water. Yet, at a broad generic level the fundamental human right to water has been strongly asserted.<sup>14</sup>

The very idea of using the human right to water as a way to realise everyone's aspirations has been criticised as constituting a strategic error.<sup>15</sup> This is an apt point but does not preclude the need for engaging with the right to water that may in many situations be the most important handle people can use in their campaigns.<sup>16</sup> In a context where there is no legally binding universally accepted definition of the right to water, it is necessary to give further thought to the different ways in which the right can be conceived. Thus, while mainstream policy and academic literature may be increasingly arguing that the right to water does not imply that water should be free,<sup>17</sup> this cannot preclude further arguments. Firstly, at a conceptual level, the link between water, dignity and life calls for serious engagement with the content of the right to water.<sup>18</sup> Secondly, paying for water is 'at odds with cultural and religious views on water access in many parts of the world'.<sup>19</sup> Thirdly, in a country like India, drinking water in rural areas has essentially been provided free for decades. This raises a very different set of questions than where people 'accept that commodities are not inconsistent with human rights',<sup>20</sup> especially in India where there have been long-standing debates on the right to food and the right to education.

This article examines the right to water as it has developed in terms of law and policy frameworks. It starts with a brief general discussion of the right to water at the international level. It then examines the way in which the right has been recognised and implemented in India and the impacts of the changing policy context over the past two decades. The third section moves on to examine some of the aspects of the right to water that need specific

attention in India. India has been chosen as a case study for a variety of reasons. The right to water has been recognised by the Supreme Court for the past two decades, thus giving it an uncontested basis in Indian law. In addition, the importance of water in most people's daily lives has ensured that drinking water has been given significant policy and political importance for decades by both the central and state governments. Further, India has been in the midst of a series of water policy reforms for the past two decades based on the principles adopted at the international level, thus making its experience similar to various other countries in the South.<sup>21</sup> In addition, India has not only experienced significant policy reforms in the water sector, but also adopted a variety of new water laws. The whole law and policy framework related to water has evolved rapidly in recent years, thus making India a key example of the kinds of issues that arise where a fundamental human right to water is asserted at the same time as policy and law reforms influenced largely by the set of economic principles espoused in the Dublin Statement.<sup>22</sup>

In the context of the analysis of the right to water in India, this article argues that some elements of the right need to be given more attention or reinforced. Firstly, it argues that the right must not only be universal in theory but also in the practice of its implementation. This is something that is not controversial, in theory, in a human rights context, but practice in India shows that the point needs to be firmly restated. Secondly, this article argues that the right to water must be based on an understanding of the state having the duty to provide its realisation, something which is well established in India but has suffered erosion in recent times. This is, however, something that may be less well established in other countries. They could make use of India's experience in progressively realising social rights, such as the right to water. Thirdly, this article argues that the right to water should include a free water dimension. This is something that has been provided to the majority of people for decades and should thus not be particularly controversial but for the fact that the mainstream consensus at the international level is not in favour of free water or under very restrictive conditions. Finally, this article argues that the right to water must be conceived in a way that not only takes into account the intrinsic link between various water uses but also the intrinsic link with other rights, such as the rights to health and food.

## **1. The right to water – general context**

This section briefly outlines developments concerning the right to water at the international level. It then examines some of the general conceptual issues that inform the sections of this article focusing more specifically on India.

### **A. Recognition of the right to water at the international level**

The human right to water is already well recognised in international human rights treaties. The increasing recognition of the right in recent treaties can be identified by examining the six core international human rights treaties adopted since the 1970s.<sup>23</sup> Among these treaties, water is mentioned in three of them: the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities.<sup>24</sup> There is no reference to water in the other three conventions, but the subject matter would not require it. Taking the CRC as an example, this confirms that all UN member states, apart from Somalia and the United States which have not ratified the CRC, already recognise the existence of a right to water at the international level.<sup>25</sup> The shortcoming of the existing treaty recognition of the right to water is that these conventions do not recognise an independent and separate right to water. This recognition does not yet exist in treaties since the International

Covenant on Economic, Social and Cultural Rights (ICESCR) does not specifically mention water.

Beyond treaties, a number of soft law instruments confirm the existence of the right. Since at least 1999, the UN General Assembly has made it clear that it recognises a right to water.<sup>26</sup> Yet, as late as 2007 a report of the UN High Commissioner for Human Rights stated that ‘the debate is still open as to whether access to safe drinking water and sanitation is a human right’, questioning in particular its nature as a derived or self-standing right.<sup>27</sup> Such doubts have subsequently been laid to rest in 2010 with the adoption of a UN General Assembly resolution emphasising the separate identity of the right to water.<sup>28</sup>

In addition to treaty recognition and soft law instruments, the Committee on Economic, Social and Cultural Rights has attempted to give further prominence to the right to water within the context of the ICESCR with the adoption of a General Comment.<sup>29</sup> The committee defines the right to water as entitling ‘everyone to sufficient, safe, acceptable, physically accessible and affordable water’.<sup>30</sup> It goes on to identify the normative content of the right, made of freedoms and entitlements. The former include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. The latter include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.<sup>31</sup> The General Comment is a key statement on the right to water at the international level.<sup>32</sup> Yet, it does not bind member states and the expert body nature of the committee precludes it being more than a possible source of inspiration for states to consider when determining the content of the right at the international level.

On the whole, given the various developments that have taken place over the past couple of decades, it can now be argued that existing legal instruments ‘contribute to the elevation of the right to water to a principle of international custom’.<sup>33</sup> At the same time, this recognition is at a very general level and the actual content of the right has not yet been conclusively identified in binding international law.

### ***B. Beyond the consensus – elements of the right requiring further attention***

The increasing acceptability of the right to water at a conceptual level has led to a situation that appears consensual at a superficial level. Yet, the central role of water in all aspects of human life, life on the planet and development in the broadest sense ensure that this consensus does not resist deeper analysis. Some of the elements that have caused most controversy are the ones that relate directly or indirectly to the broader changes proposed in the water sector through water sector reforms seeking to see water in all its dimensions as an economic good.

Divergences start at the level of the first qualifier often added to definitions of the right to water, that of a right to ‘access’ water. A significant segment of the international mainstream academic and policy literature specifically limits the right to a right of access.<sup>34</sup> This is access, which can be opposed to provision. While a right based on ‘access’ seems to have been increasingly accepted internationally, this needs to be understood as a consensus among a particular epistemic community that is not necessarily representative of a consensus among all concerned actors. Indeed, in India, which is the focus of this article, the right to water defined by the judiciary includes a strong duty of provision.<sup>35</sup>

Focusing on access in the context of the right to water does not necessarily have direct implications for the way in which the right is realised. As stated by one of the key architects

of General Comment 15, privatisation was for the CESCR a political question that they left open, and they ‘took a neutral stance on whether private sector involvement was ultimately good or bad’.<sup>36</sup> This position was restated by the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation when she stated that ‘[t]he human rights framework does not call for any particular form of service provision’.<sup>37</sup> Yet, the same paragraph adds that this does not exempt the state from its obligations since it remains the primary duty-bearer.

The controversy over the respective duties of the state, private sector actors and rights bearers is particularly visible with regard to the question of pricing of water. Historical developments in various parts of the world confirm that making citizens pay has not necessarily been taken as a given in all situations.<sup>38</sup> Yet, debates in recent years have increasingly focused on the inevitability of pricing. This can be explained in part by the prominent place of policy reforms in the water sector emphasising cost recovery over the past two decades. Thus, one of the early policy statements on water sector reforms specifically stated that there ‘must be widespread promotion of the fact that safe water is not a free good’.<sup>39</sup> In a human rights context, the increasing prominence of pricing can also be linked to the fact that it has often been found not to be conflicting with a human rights perspective.<sup>40</sup> This perspective is reflected in the UN Special Rapporteur’s statement that ‘a human rights framework does not require that water and sanitation services be provided free of charge’.<sup>41</sup>

Yet, the fact that pricing may not be incompatible with a human rights perspective does not indicate whether this is the best strategy for realising it for all. The case of the evolution of the rights to food and education in India indicates that there is no single answer to this question.<sup>42</sup> In the case of water, the celebrated example of South Africa’s free water policy signals that the reflexion needs to be more nuanced.<sup>43</sup> Indeed, despite the failure of the Mazibuko case in extending the content of the free water policy,<sup>44</sup> its very existence is a reminder that pricing cannot be the only default position with regard to the right to water, at the very least in countries with high prevailing rates of poverty.<sup>45</sup> In addition, it is unclear whether pricing is the best instrument to achieve the goals it sets for itself in the water context. Thus, higher pricing as a mechanism to force users to understand the real value of water may fail to work in equity terms where higher rates do not translate into lower demand by affluent customers.<sup>46</sup>

Questions around access, pricing and the right to water come together in the context of the key issue of disconnections. In the context of piped water services, the possibility for the utility to cut supply fits well with a cost recovery perspective. Indeed, this was the perspective adopted by the South African Constitutional Court when it stated that ‘the system of pre-paid water meters was introduced initially only into Soweto, because Soweto was the area where an enormous quantity of water was being distributed, but for which costs were not being recovered’.<sup>47</sup> The same court also found that

The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.<sup>48</sup>

The justification of disconnections through pre-paid meters in a country that is touted as the example the world should follow with regard to water law and policy is disturbing. It is even more so when this is compared with the situation in England and Wales, where even in a context of privatised utilities, the judiciary banned a similar practice.<sup>49</sup> In addition,

various countries ban disconnections without necessarily formally recognising the water in their constitution.<sup>50</sup> The dichotomy identified in South Africa between a constitutional recognition of the right to water and the unwillingness of the higher judiciary to expand the content of the right confirms that the issues that need to be debated go not only beyond the generic recognition of the right but also beyond general statements about the right that may appear applicable in every country. On the basis of these general remarks, the rest of the article focuses on the case of India, which, like South Africa, exhibits progressive as well as regressive traits in the realisation of the right to water.

## **II. Scope and limitation of existing recognition in India**

In India, the Constitution fails to recognise a human right to water. Yet the judiciary has repeatedly confirmed its existence.<sup>51</sup> The right is thus well entrenched. At this juncture, the real challenges concerning the human right to water in India concern its actual content and effective realisation. Indeed, while courts have clearly confirmed the existence of the right, they have not provided much elaboration concerning its content. This is in a sense appropriate since this is not the courts' responsibility. However, the legislature has failed to take up the challenge of giving content to the right and as a result important gaps exist in the legal framework.

In the Indian context, the basic outline of the content of the right is not subject to much dispute. A consensus can be easily found around the proposition that the right is universal and covers drinking water needs. Beyond such general statements, there is little agreement on the specific content of the right. Indeed, even the premise of universality is not always fully implemented in practice. This requires further engagement with the specific content of the right to ensure its full and effective realisation for everyone.

The absence of constitutional recognition has not stopped the development of the right in different directions and contexts. Firstly, courts have been at the forefront of an explicit discussion of the human right to water, providing visibility to its existence under Indian law. Secondly, a number of states have adopted legislation that has provided a general context for the realisation of the right. Thirdly, policy instruments adopted by the union government have also made an important contribution towards the realisation of the right in rural areas.

The different contributions made by different arms of the state to the development and implementation of the human right to water are significant. Yet, they are limited and insufficient. The courts' strictures are neither uniform nor sufficiently specific to bring relief on the ground, existing legislation does not actually focus on the realisation of the human right though it may indirectly contribute to its implementation, and the executive's administrative directions are not long-term markers of the content of the right since they can, and do, change regularly.

### **A. Contribution of the courts to the development of the right**

Courts have taken a lead in filling the gap left by the absence of the specific recognition of the human right to water in the Indian Constitution. They have repeatedly discussed water in relation to human rights and have repeatedly asserted the existence of a human right to water.

The Supreme Court and the high courts have on various occasions read the right to water into the right to life. Thus, in *Subhash Kumar v. State of Bihar*, the Supreme Court asserted that the '[r]ight to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life'.<sup>52</sup>

Some decisions have linked the right to water to article 47 of the Constitution which enjoins the state to ‘regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties’.<sup>53</sup> In *Hamid Khan v. State of Madhya Pradesh*, the government was sued for not taking appropriate precautions to ensure that the drinking water supplied through handpumps in Mandla District was free from excessive fluoride.<sup>54</sup> The court ruled that under article 47, the state has the responsibility to ‘improve the health of public providing unpolluted drinking water’.<sup>55</sup> The judges first ruled on this ‘primary responsibility’ of the state and then went on to state that the right to life also covers the issue.

Judicial decisions have also outlined some of the general parameters that must guide the realisation of the right. Thus, in *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, the court specifically provided that the government ‘is bound to provide drinking water to the public’ and that this should be the foremost duty of the government.<sup>56</sup> Additionally, the judges ruled that the failure of the state to ‘provide safe drinking water’ to citizens amounted to a violation of the right to life.<sup>57</sup>

The case law can generally be assessed as making a contribution to the recognition of the right and the development of its content. Yet, the case law has not necessarily ensured that the right actually provides remedies to citizens.<sup>58</sup> Further, there have been several controversial decisions with regard to the right to water. This is, for instance, the case of the judgement concerning the Sardar Sarovar Project.<sup>59</sup> This case concerned a variety of issues linked to the Sardar Sarovar dam and its network of canals. The Supreme Court justified its support for the dam in part by relying on the right to water. It thus asserted that the project was important from the point of view of the right to water because it would contribute to meeting the water needs of individuals residing in the command area.<sup>60</sup> The judges, however, made no mention of the negative impacts of their decision on the realisation of the right to water of the people displaced by the dam, thus instituting a framework wherein some people’s entitlements are put in a hierarchically superior position.

This decision confirms that the recognition of the right to water is fraught with difficulties. Whereas courts have enthusiastically embraced the right, they have failed in certain cases to adhere to the framework, which underlies fundamental rights. In particular, judges have sometimes failed to uphold an understanding of fundamental rights based on the fact that the entitlement is exactly the same for every single individual.<sup>61</sup> This confirms that, even if they could, it would be inappropriate to expect courts to provide the totality of the framework for ensuring the realisation of the right.<sup>62</sup>

## **B. Legislative framework contributing to the development and realisation of the right**

The case law concerning the right to water is supplemented by a variety of legal instruments that give some additional content to the right. Most of these instruments are at the state level, in keeping with the constitutional scheme that gives states the main mandate in this area.

The first characteristic of existing legislation related to the human right to water is that it neither makes the link directly nor provides the broad context and principles within which the right is implemented. There are thus gaping holes at the core of the legal framework since, in effect, existing legislation fails to address the human right to water directly. Seen from a different viewpoint, water law fails to comprehensively address drinking water, one of the core dimensions of the human right to water. Indeed, no state has a dedicated comprehensive drinking water legislation. Further, existing legislation fails to provide



some of the basic terms for water supply. Thus, while quality standards have been defined in different contexts,<sup>63</sup> there is no legislation that makes these standards binding on anyone supplying water.

The legislation that exists in a number of states is generally not water specific and only addresses water supply as part of other issues. This is, for instance, the case of legislation regulating public services in urban areas and panchayat legislation. These acts have in common that they address themselves to specific tasks, such as determining which entity has the responsibility for water supply, without either referring to the right to water or to a set of broader principles.

With regard to urban areas, legislation ranges from city-specific to statewide acts that address water, for instance, in the context of a municipal act. In the case of Bihar, the Municipal Act 2007 makes water one of the core functions of municipalities.<sup>64</sup> Chapter XXII of the Act is specifically devoted to water supply. It starts by asserting the duty of the municipalities 'to provide, or to arrange to provide, a supply of wholesome water in pipes to every part of the municipal area in which there are houses',<sup>65</sup> and moves on to address various issues, including the duties of municipalities related to fire hydrants, to water quality and the regulation of the sinking of tubewells.<sup>66</sup>

In rural areas it is usually the panchayat Act that regulates water supply. The provisions that exist tend to give shape to the mandate of article 243G and the Eleventh Schedule of the Constitution without being very specific. This is, for instance, the case in Uttar Pradesh where the panchayat legislation gives panchayats powers over water supply 'for drinking, washing, bathing purposes and regulation of sources of water supply for drinking purposes'.<sup>67</sup> Panchayats are also given control over waterways within their jurisdiction and are tasked with fostering improvement in sanitation.<sup>68</sup> The rules bring in some additional inputs that stay at a relatively general level.<sup>69</sup>

Certain states have taken additional initiatives. Madhya Pradesh has, for instance, adopted legislation that focuses on the introduction of specific regulatory measures in times of water scarcity.<sup>70</sup> Karnataka and Maharashtra have both come up with ground-water-focused drinking water legislation.<sup>71</sup> Other states, such as Uttar Pradesh, have focused their efforts on the setting up of institutional structures specifically devoted to water supply in all areas of the state.<sup>72</sup> The existence of these acts confirms that drinking water has been an important policy issue for a long time. At the same time, each of these constitutes a limited intervention in a broader field that needs to be regulated more comprehensively.

### ***C. Administrative directions for drinking water supply in rural areas***

The limited legislative framework highlighted in the previous section concerns legislation at the state level. At the union level, the absence of additional legislation can be explained in part by the fact that the Constitution does not give it a specific mandate in this area.<sup>73</sup> At the same time, the union can and has taken the initiative when it wanted to.<sup>74</sup> Despite the absence of legislative initiative, drinking water supply has been an area of policy and political concern for decades. As a result, the union government has attempted to make its mark in this area through non-legislative means, such as programmes and schemes backed by financial incentives to induce states to comply with proposed principles.

One of the main areas of intervention of the union government has been in the context of rural drinking water supply. The first major programme, the Accelerated Rural Water Supply Programme (ARWSP) was introduced in the early 1970s. The ARWSP Guidelines provided, until 2009, the core framework used to foster the provision of drinking water to

all habitations in rural areas.<sup>75</sup> They introduced several important criteria, starting with a cut-off level of 40 litres per capita per day (lpcd) as representing the basic minimum level of supply deemed sufficient for each individual. Besides quantity, the guidelines also addressed the issue of proximity by determining that habitations could only be deemed to be ‘covered’ if the source of water was within 1.6 km, or 100 metres elevation in mountain areas, if the water was not affected by quality problems and if a public source of water, such as a handpump, was not used to serve more than 250 people.<sup>76</sup>

The ARWSP contributed significantly over its decades of existence to a vast improvement in rural water supply throughout the country. It thus made a major contribution to the realisation of a basic level of implementation of the human right to water even though no specific reference to the right was made. This was not particularly surprising since the ARWSP predated by many years the formal recognition of the human right to water by the courts.

The overall success of the ARWSP notwithstanding, the government started a comprehensive process of reform of its water supply policy as part of broader water policy reforms in the late 1990s.<sup>77</sup> This eventually led to the adoption in 2009 of a completely new policy framework now known as the National Rural Drinking Water Programme (NRDWP).

The NRDWP is based on the new water policy principles that propose a much-reduced role for the government in the water sector. This builds on the policy framework tested from 2003 onwards in the context of the Swajaldhara Guidelines.<sup>78</sup> From a human right to water perspective, the striking feature of the NRDWP is that it ignores the existence of the human right to water. This could be simply an oversight and a legally inappropriate choice of language. The fact that the NRDWP consciously evacuates the language of human rights is, however, confirmed by a comparison of the two different versions put out respectively in 2009 and in 2010. Indeed, the 2009 version specified that ‘demand for basic drinking water needs is a fundamental right’.<sup>79</sup> 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’.<sup>80</sup> 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 position drinking water supply within the context of human rights.

The NRDWP goes further than simply evacuating the language of human rights. In fact, it operates a complete break with the policy followed since the 1970s by suggesting that measuring drinking water provision in terms of a quantity of water per capita per day is inappropriate. The NRDWP suggests moving from a fixed minimum to the concept of drinking water security. This is not given a specific definition but is opposed to the per capita norm followed earlier. Indeed, the NRDWP specifically states that it is necessary to ‘move *ahead* from the conventional norms of litres per capita per day (lpcd) norms to ensure drinking water security for all in the community’.<sup>81</sup> 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’.<sup>82</sup> It does not, however, explain how the shift ensures better coverage in a given habitation.

More recently, signs that the new approach is not acceptable within the government have surfaced. In particular, the new Rural Drinking Water, Strategic Plan (2011–2022) not only reverts to a per capita measure but also provides that the goal is to achieve 70 lpcd by 2022.<sup>83</sup> This document constitutes an important turnaround that confirms the need to consider water needs at the individual level. At the same time, it entirely fails to mention or engage with the human right to water, thus ensuring that the latest major

policy statement of the government does not engage or make any contribution to the development of a legal framework for implementing the right.

### **III. Rethinking the right to ensure equal realisation for everyone**

As highlighted above, the higher judiciary in India have repeatedly recognised the right to water. Yet, it remains lacking from various perspectives. Firstly, as indicated above, courts have failed to recognise the right in a consistent manner in the case law. Secondly, there is no legislation setting out the principles guiding the implementation of the right to water. Thirdly, the use of administrative directions by the union government is not an appropriate tool to foster the realisation of the right, in part because different documents take widely different positions relating to the right to water on the basis of adoption mechanisms that are at the discretion of the executive rather than constitutionally mandated, as in the case of legislation.

The present situation calls for a much more specific engagement with the substance of the right to water. This requires revisiting some of the tenets of the right to ensure that its basic content is specified and in accordance with the surrounding legal framework. This section examines some of the elements that need re-affirmation or strengthening at this juncture.

#### **A. A universal entitlement in theory and in practice**

The liberal conception of human rights is based on the understanding that these are rights that every single individual possesses. The basic understanding is thus that everyone has a similar basic entitlement to what is protected. In conceptual terms, there is consensus that the right to water includes entitlements, which are held by every single human being to the same extent. This is crucial in a context where secondary legal instruments increasingly talk of a 'need' rather than a 'right' when referring to water.<sup>84</sup> This reflects two different conceptions of water, the former as a commodity and the latter as an entitlement. The right creates obligations whereas the need carries no assurance of its provision.<sup>85</sup> Further, there is a general difference in approach between needs and rights.<sup>86</sup> Human rights are based on a premise of universality but needs can be 'targeted'.

This is illustrated in the case of the Millennium Development Goals (MDGs) that have been central to much development policy over the past decade.<sup>87</sup> The MDGs are not informed by a universal perspective in the sense that they target only half of the people whose basic water needs were not met in 2000.<sup>88</sup> This will correspond to a basic level of realisation of the right to water for these people. Yet, the MDGs, in effect, exclude half of the people whose right to water is not realised from their purview. This lack of a universal perspective distinguishes MDGs from human rights.<sup>89</sup> There is potential for a move towards universalisation with the proposal for the adoption of sustainable development goals to replace MDGs after 2015 in the context of the forthcoming United Nations Conference on Sustainable Development (Rio + 20).<sup>90</sup> Yet, the uncertainty surrounding their actual shape precludes further comments at this juncture.

At the national level, an understanding of the right as a need provides a basis for 'targeted benefits' that are by definition distinct from universal entitlements. Policies that make limited exemptions for the poor, such as in the case of lifeline tariffs,<sup>91</sup> are inappropriate because targeting does not coincide with a human right entitlement.<sup>92</sup> Further, they inappropriately single out the poorest and most marginalised. A human rights approach calls for the opposite, namely a universal entitlement to the provision of the basic content of the right supplemented with exceptions whereby the rich may be excluded from certain benefits.<sup>93</sup> Should anyone be targeted, this should be focused on the quarter of the population earning more than Rs 20 a day.<sup>94</sup>

A universal entitlement to water entails that everyone can expect the same level of realisation of the right. Since the right to water is often considered in terms of an entitlement to a certain quantity of water, the said quantity must be the same for everyone. This appears to be an obvious statement that bears no further comment in a human rights context. Yet, the water regulatory framework has shown an extraordinary ability to distinguish between the entitlements of different holders of the right within the country. Rural and urban residents are thus generally categorised as having different entitlements. Policy documents have provided in effect that the basic level of the realisation of the human right to water is equivalent to a minimum of 40 lpcd in rural areas (70 lpcd in the future) and different quantities in urban areas ranging from 70 lpcd to 150 lpcd according to the size of the city.<sup>95</sup>

Significant changes in the existing water regulatory framework will need to be made to effectively realise the right to water as a universal entitlement. The starting point for the entitlement should not be the different positions in which different people find themselves. Rather, the situation of the more fortunate urban residents should be the yardstick by which everyone's entitlement is defined. Interestingly, this is already indirectly government policy, since the need to provide 'urban amenities' in rural areas has been officially recognised for some years.<sup>96</sup>

### **B. *An entitlement to the provision of safe water***

The state has a duty to ensure the realisation of human rights. Indeed, the primary responsibility is with the state, which alone commands the necessary economic and institutional resources necessary to ensure the realisation of the right, because the state is generally responsible for safeguarding constitutional rights.<sup>97</sup> Starting with international law, states have a number of positive duties with regard to the realisation of human rights. In certain cases, such as in the case of the right to education, member states have taken a commitment to provide free and compulsory primary education.<sup>98</sup> In the case of water, the covenant does not include any such level of specificity. Yet, more recent instruments, such as the African Charter on the Rights and Welfare of the Child 1990, specifically provide that states must 'ensure the provision of adequate nutrition and safe drinking water'.<sup>99</sup>

In India, article 47 of the Constitution does not specifically mention water but there has never been any doubt that the state has a major role to play in the realisation of the human right to water, as confirmed by the case law analysed above.<sup>100</sup> Until the past decade, there had in fact been little discussion around this because the government-made water supply was one of its key duties. This led successive governments to at least attempt to ensure the provision of water in cities, by laying out the necessary infrastructure allowing individuals to access water at a cost if they had individual connections at home and freely if they accessed water through a common standpoint. Similarly, in rural areas the government attempted to provide the infrastructure, such as handpumps, that gave free access to water in the overwhelming majority of cases.

The policy reforms that have been progressively introduced over the past 15 years seek to completely rethink the way in which the state engages in water supply. In policy terms, the shift is supposed to take water supply away from supply-led policies, where the state took the lead, in favour of demand-led policies, where user choices are given a pre-eminent position.<sup>101</sup> At a conceptual level, this does not necessarily seem to have major implications for the right to water. In practice, this is significant because demand-led presupposes that people pay and implies that the state does not 'provide' but only 'facilitate'.<sup>102</sup>

The current policy context thus necessitates taking a much closer look at the actual obligations of the state in the context of the right to water. Interestingly, over the past decade,

significant developments have taken place concerning human rights and the Directive Principles of State Policy. With regard to human rights, the implementation of the right to education through the right to education legislation has confirmed the obligations of the state with regard to the provision of free and compulsory education.<sup>103</sup> With regard to rights mentioned more specifically in the Directive Principles, like the right to food, the public interest litigation that has been going on for a decade has already led a series of orders that have imposed on the state additional obligations to provide, such as in the case of mid-day meals in schools.<sup>104</sup> This has been enshrined in the National Food Security Bill 2011.<sup>105</sup>

In the context of water, starting in the 1970s and for more than 30 years, the government put in significant effort and resources that in effect contributed to the realisation of the human right to water.<sup>106</sup> This was done in a context where there was little if any talk of a right to water. Yet, the actions of the government were motivated by the understanding that providing water to everyone was one of its primary obligations.<sup>107</sup> With all its faults and shortcomings, in a span of a few decades, the ARWSP ensured that rural areas made tremendous progress towards the realisation of the basic content of the right.<sup>108</sup>

In a human rights context, there are strong reasons why basic water should be provided to everyone, in the same way that basic education is provided. In practical terms, the very reason why water supply was brought into the hands of the public sector in the nineteenth and twentieth centuries was to remedy the perceived shortcomings of private sector water supply and attendant severe disease burden borne by the population.<sup>109</sup> The exchequer had to bear the cost of the infrastructure, as water users would not have been able to pay the costs involved. The situation has not changed and in most places around the world users are still not able to pay the capital costs involved in setting up new infrastructure.

Controversies over whether the realisation of the right to water implies a duty for the state to 'provide' rather than simply facilitate 'access' is partly linked to the fact that policy and international legal instruments have tended to suggest that there is only a right to access water.<sup>110</sup> Yet, in reality there is little to debate in the Indian situation. Firstly, as highlighted above, Indian courts have established the duty of the state to provide basic water. Secondly, in practice there is no alternative to provision by the state since imposing full cost recovery of capital costs on users would end up automatically denying the fulfilment of the right to the majority of the population.<sup>111</sup>

The duty to provide also implies that water supply cannot be disconnected. Indeed, disconnections of water supply or withdrawal of access should be prohibited as a matter of principle under the right to water. As noted above, this is the conclusion reached even in England and Wales where water supply services were entirely privatised.<sup>112</sup>

Finally, the duty of the state to provide does not imply that it is the only actor involved and responsible. Indeed, the fact that the state has a primary responsibility to ensure that sufficient safe water is provided does not mean that everyone else is absolved of any obligation. Thus, despite the state's duty to provide, everyone is obliged to ensure that no-one is severely affected by lack of water, implying that there is not only a duty to share equitably common sources of water but also individual sources.<sup>113</sup>

### ***C. An entitlement to the provision of free water***

As highlighted above, the right to water includes an obligation to provide. This article argues that the entitlements included in the right should also include an obligation to provide free water, at least to the extent necessary to cover basic water uses linked to life and livelihood.<sup>114</sup> The proposition that the right to water includes a right to the provision

of free water should not be particularly controversial since some rights, like the right to education, have been provided free. In addition, recent developments in the context of the right to food in India indicate recognition of the duty of the state to provide free food at least in some contexts.

In the case of the right to water, for decades the government provided free water supply infrastructure to everyone. In general terms, the government had carved for itself the role of provider of all the basic infrastructure necessary to access water, something which was in line with what most governments started doing during the twentieth century. Yet, much more was done. Indeed, in rural areas, access to water was free in most localities throughout the country. Beyond the policies of the government over several decades, field visits in villages of Rajasthan in the context of the introduction of new drinking water schemes imposing a capital cost contribution on villagers elicited clear statements from villagers that they believed that drinking water should be free.<sup>115</sup> The main exceptions to free provision were the relatively few places where piped water with individual connections had been introduced. In urban areas, individual connections have attracted a connection fee for a number of years. Yet, a large part of the population has been provided free water for decades through handpumps or public standposts. On the whole, the government had indicated through its regulatory actions over past decades that it acknowledged a duty to provide free water to the overwhelming majority of its population.

Over the past 20 years, the international and national policy discourse has progressively moved away not only from backing government involvement in the provision of basic water but also started to emphasise the notions of affordability and willingness to pay as central tenets of all water policies. This has led to a situation where today's mainstream policy consensus is that everyone must pay for water. Some institutions like the Asian Development Bank go as far as promoting 'the phased elimination of direct subsidies to the poor for accessing basic water services',<sup>116</sup> while in other cases subsidies are conceived as an exception that must be 'well targeted and transparent'.<sup>117</sup> This is premised on the need for more 'efficient' use of water and the need to control increasing water scarcity.

A key justification advanced for the proposed changes is that reforms will not affect the situation of the poor but in fact make their lives better. One of the arguments is that the urban poor pay proportionally more than the rich for their water.<sup>118</sup> This is indeed the case in all cases where the water utility does not provide services and where the poor find themselves at the mercy of private vendors. Yet, it is impossible to generalise. Indeed, as witnessed in Delhi,<sup>119</sup> in a given locality some lanes are fully serviced by the Delhi Jal Board (DJB), some are entirely serviced by tankers from the DJB and some have separate infrastructure paid for by the quota of the local Member of the Legislative Assembly (MLA), where water is provided entirely free of cost to residents.<sup>120</sup> Similarly, in resettlement or unauthorised colonies a whole range of solutions are found to cope with insufficient water provision by the utility, ranging from collective pooling of resources for installing additional water pumping infrastructure, to situations where residents benefit from free water supply whose cost is borne by the local MLA.<sup>121</sup>

In social terms, one of the main justifications for forcing everyone to pay for water is that the poor will end up paying less than they do today. Yet, this firstly only applies to a specific segment of the urban poor population rather than to all the urban poor. Secondly, such arguments exclude rural residents who have in their overwhelming majority never paid for basic water. Thirdly, the very idea that the poor agree to pay for the cost of water or water-related infrastructure because they have a 'willingness' to pay is fallacious. This was acknowledged already in the 1990s by the World Bank stating that willingness to pay would be dependent on the availability of alternative and traditional sources of drinking

water as well as the quality and level of service being provided before the introduction of the reform.<sup>122</sup> The fact that the response of people suffering from insufficient access to water may not necessarily fit this proposed model was highlighted in the World Bank's call for a widespread campaign 'to communicate the message that water is a scarce resource and must be managed as an economic good'.<sup>123</sup> This may also explain why some reform projects are premised on the removal of existing community based infrastructure for accessing water.<sup>124</sup>

In addition, as long as water remains a pre-condition of survival and a decent quality of life, human beings will prioritise water over less immediately urgent needs, even if these happen to have significant negative long-term impacts, e.g. where health needs are neglected. Thus, the fact that the poor end up paying cannot be explained simply by economic factors. This is probably why some studies arguing that the poor have a willingness to pay exclude people not paying for water from their scope.<sup>125</sup>

The reasons for the current emphasis on affordability become clearer when questions surrounding the right to water are put in the broader context of 'water sector reforms'. One of the key elements of these reforms, kick-started in policy terms with the Dublin Statement, has been the understanding that water is an economic good and the consequent imposition on water users to pay for every water use.<sup>126</sup> This has provided a basis for linking the right to water with what are essentially economic reforms in the water sector. Indeed, the progressive formalisation of the right to water has interesting business consequences since it leads governments to invest more in basic water infrastructure, thus potentially increasing the number of individuals connected to a piped water network. In a context where neoliberal reforms may lead to the privatisation of water distribution, the right to water can present an interesting business opportunity. This explains why multinational water companies are not particularly opposed to the right to water language and, to an extent, actively participating in its development. Thus, already a decade ago, Suez was officially calling for the right to access water to be recognised while arguing that their business is to make this right a reality.<sup>127</sup> The right is 'viewed, valued and promoted for the business opportunities it creates' but this does not lead private companies to see the right as having any sort of legal effect on their work.<sup>128</sup> Further, the private sector industry's understanding of the right to water is one that requires users to pay for the water provided. Indeed, the main concern raised by multinational water companies with regard to the right to water is its association with the provision of free water.<sup>129</sup>

The proposition that the right to water is linked to a notion of affordability should be rejected. Indeed, economic reforms should not dictate the shape of the right to water, or for that matter any other right. Interestingly, the weakness of the argument for recognising an intrinsic link between the right to water and affordability is highlighted by the first constitutional discussion of the right to water in South Africa, which has included the provision of free water since 2001.<sup>130</sup> In the *Mazibuko* case, the Constitutional Court, accepting the City of Johannesburg's contentions, ruled that a 'universal per person allowance would administratively be extremely burdensome and costly, if possible at all'.<sup>131</sup> This is an inappropriate starting point, in particular in countries like South Africa or India where the real question is one of allocation of resources rather than actual availability of resources.<sup>132</sup> This ends up masking the more fundamental issues that need to be addressed.

A universal entitlement should translate into a claim for universal free basic water. This would not be novel since the government has implemented this policy for decades. There is also no apparent reason to move away from this position, at least as long as the poor constitute the overwhelming majority of the population. In addition, where the government implemented free water for everyone on the basis of political compulsions earlier, it is

now guided in this endeavour by the formalised right to water. In other words, the legal framework has come to reinforce what was already done in practice.

Universal free basic water as an entitlement can easily be implemented in all rural or urban areas where water has been provided free through handpumps, standposts or other common infrastructure. At this juncture, one of the big challenges is that the current policy framework for rural drinking water supply advocates moving away from community based sources of water towards individual connections to such an extent that the contribution of handpumps is envisaged as declining from 70% to 10%, while that of community standposts is meant to decrease from 30% to 10%.<sup>133</sup> Beyond this, in cases where piped water supply is provided, the need for a new free water regulation would be necessary. It is likely that South Africa's experience would be the framework that policy-makers will try to replicate. This could be done but would probably need not only adaptation to Indian conditions but also further thinking in view of the challenges faced in South Africa. Indeed, beyond practical problems of implementation, one of the limitations of the free water policy in South Africa has been its introduction alongside commitments to market mechanisms. This has had the unfortunate consequence of indirectly providing a justification for disconnections and restrictions beyond the free water allowance.<sup>134</sup> There has also been questioning of the amount of free water that has been seen as some to be linked not so much to basic survival needs but rather to the fact that is constitutes the break-even point between the cost of collecting payment and the amount collected.<sup>135</sup> This confirms that in an overall policy context that is still informed by neoliberal reforms, the implementation of a free water policy for piped water supply in India is likely to be an arduous task that will require significant involvement and pressure from civil society actors to ensure its success.

#### **D. *Rethinking the scope of the right – towards a comprehensive understanding***

The entitlement contained in the right to water needs to be conceived as a comprehensive entitlement that goes beyond concerns for fundamental needs for survival like drinking water. Indeed, there are a range of water needs that must be fulfilled to ensure a life of dignity, as well as a range of water needs that are inseparable from other human rights, such as the rights to food and health. Additionally, links with the right to environment also need to be taken into account given that water is an intrinsic part of the environment.

Firstly, the right to water must be comprehensive in the sense of addressing all uses of water and all water bodies. Indeed, the realisation of the right (however narrow or broad its scope may be) may require the use of water from a variety of sources. In a context where Indian water law addresses irrigation separately from drinking water, and surface water separately from groundwater, the human right to water cannot afford to replicate this sectoral dimension of water law. In many contexts it is impossible to distinguish irrigation from drinking water because the same sources of water are used or because one impacts the other. Similarly, distinguishing water pollution, sanitation and drinking water has the potential to lead to a situation where polluted water threatens gains achieved in terms of the provision of drinking water. This implies that the scope of the right goes far beyond the survival needs of humankind. This is why the term basic water is used here rather than drinking water.<sup>136</sup>

Secondly, the right to water must address the different water needs necessary to realise all human rights dependent on water. This includes obvious links with the right to life that have in fact been one of the key issues addressed by judges in formalising the existence of the human right to water. This also includes the rights to food and health whose realisation



cannot be dissociated from water. Linking the rights to water, food and health has the disadvantage of making discussion of each individual right more complex. At the same time, sectoral perspectives do not yield adequate results. This is confirmed by the case of water law, which is still structured in sectoral ways, even though there is a general understanding today that water must be addressed in an integrated manner. Similarly, the different rights based or dependent on water must be considered together.

A comprehensive perspective does not necessarily imply that all water uses should be included. As a general guideline, these limits should be defined as coinciding with the basic content of relevant rights, such as the rights to food and health. In terms of the right to food, this includes livelihood uses of irrigation water but should not include water intensive cash crops planted on a large scale. Similarly, where alternatives exist, priority should be given to the least water intensive variety. In the context of the right to health, there is, for instance, a need to include sanitation in its purview given the tremendous disease burden caused by inadequate sanitation. Some limits may need to be introduced given that the health dimensions of the right to water cover not only sanitation directly but also drainage and waste water generally. However, even if limits are introduced, it is imperative to cover sanitation and drainage given the direct links with safe drinking water and the fact that sanitation is itself a human right.

Thirdly, the right to water must also be considered in relation to rights whose realisation is only linked to water in part. This is, for instance, the case of the right to equality, whose link with water is addressed specifically in the Constitution.<sup>137</sup> Two main dimensions of equality can be highlighted here. Firstly, it is linked to formal equality, whose realisation implies that each and every individual is entitled to the realisation of the human right to water to the same extent. Secondly, equality is also linked to substantive equality, which requires that some categories of people, such as women, the poor, the chronically ill and children, be given preferential treatment.<sup>138</sup> This can be necessary to remedy existing inequalities, such as in the case of the huge burden that women bear in relation to domestic water. This can also be called for by the special position of certain groups of people in society, such as in the case of the special disease burden that children bear in terms of waterborne diseases, or in the case of the particular burden borne by certain groups of people such as dalits. The fact that discrimination in access to water has not disappeared implies that non-discrimination must be built into a comprehensive understanding of the right to water.<sup>139</sup>

## Conclusion

The right to water is well established in India. Indeed, the higher judiciary has consistently upheld the right over the past couple of decades and no legislation or administrative direction has specifically denied the existence of the right. At the same time, there remain a number of steps that need to be taken to ensure that the right is realised for everyone.

Firstly, it is not sufficient to rely on courts beyond the general recognition of the right. The courts themselves acknowledge this. Thus, in *Voice of India v. Union of India*, the petitioner had prayed that water should be provided to every citizen free of cost. The Supreme Court lamented the fact that 'even after 60 years a citizen of this country is not getting clean potable water'.<sup>140</sup> However, it found that it was unable to grant relief on an all-India basis because water supply is essentially the function of municipal corporations and other local bodies.

Secondly, there is a need for a legislative framework at the state or union level that sets out the broad principles and parameters guiding all actors involved in drinking water supply, including, for instance, with regard to water quality.

Thirdly, the realisation of the right to water needs to move out of the realm of administrative directions of the executive. This will ensure that the basic content of the right is not subject to administrative fiat but is governed by long-term principles laid out in legislation.

It is thus clear that the formal structure underlying the right to water needs a lot more attention than it has been given to date. At the same time, the simple adoption of additional legal instruments will not in itself suffice to ensure the realisation of the right to water. The formal framework needs to be accompanied by a strong right to water campaign by civil society actors. There have already been various anti-water privatisation campaigns in cities,<sup>141</sup> some of them with positive outcomes,<sup>142</sup> but a broader right to water campaign encompassing rural areas is yet to emerge. This additional pressure is necessary, for instance, to ensure that people are better aware of their rights and accountability mechanisms.

This overall process towards ensuring more effective realisation of the right needs to be guided by a series of substantive safeguards that will ensure that the right is not largely devoid of content for the majority of poor people. The questions highlighted in this article are some of the most crucial issues for the effective realisation of the right in India. While the situation of other countries may differ in significant ways from India's, various issues like the question of the provision of free water also need to be debated in many other countries and in regional forums.

The right to water has become progressively more palatable to most actors around the world. At this juncture, it is imperative to ensure that this increasing consensus does not turn the right into an empty shell that makes no difference to the hundreds of millions of people whose fundamental human right to water is not fully realised at present.

## Notes

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2. For example, P.H. Gleick, 'The Human Right to Water', *Water Policy* 1, no. 5 (1999): 487, 493.
3. For example, A. Iza and R. Stein, *Rule – Reforming Water Governance* 21 (Gland: IUCN, 2009).
4. For example, A.F.S. Russell, 'Incorporating Social Rights in Development: Transnational Corporations and the Right to Water', *International Journal of Law in Context* 7, no. 1 (2011): 1.
5. Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water* (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).
6. See section II.
7. For example, K. Bakker, 'Commons versus Commodities: Debating the Human Right to Water', in *The Right to Water: Politics, Governance and Social Struggles*, ed. F. Sultana and A. Loftus (Abingdon: Earthscan, 2012), 19.
8. Cf. F. Sultana and A. Loftus, 'The Right to Water: Possibilities and Prospects', in *The Right to Water: Politics, Governance and Social Struggles*, ed. F. Sultana and A. Loftus (Abingdon: Earthscan, 2012), 1, 3.
9. For example, R. Madhav, 'Context for Water Sector and Water Law Reforms in India', in *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India*, ed. P. Cullet, A. Gowlland-Gualtieri, R. Madhav and U. Ramanathan (Abingdon: Routledge, 2010), 109.
10. Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, Ireland, January 31, 1992, principle 4.

11. S. Scheuring, 'Is There a Right to Water in International Law?', *UCL Jurisprudence Review* (2009): 146.
12. Cf. Sultana and Loftus, 'The Right to Water', 2.
13. For example, P. Cullet, 'Water Law in a Globalised World – The Need for a New Conceptual Framework', *Journal of Environmental Law* 23, no. 2 (2011): 233.
14. See section II.
15. Bakker, 'Commons versus Commodities'.
16. For example, K. Bywater, 'Anti-privatization Struggles and the Right to Water in India', in *The Right to Water: Politics, Governance and Social Struggles*, ed. F. Sultana and A. Loftus (Abingdon: Earthscan, 2012), 206.
17. For example, United Nations High Commissioner for Human Rights, *Report 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*, UN Doc. A/HRC/6/3 (2007), 28.
18. For example, R. Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Clarendon, 1994), 96.
19. Bakker, 'Commons versus Commodities', 27.
20. *Ibid.*, 27.
21. For example, Madhav, 'Context for Water Sector and Water Law Reforms in India'.
22. See generally, P. Cullet, *Water Law, Poverty and Development – Water Law Reforms in India* (Oxford: Oxford University Press, 2009).
23. For a list of 'core' human rights treaties, see the webpage of the Office of the United Nations High Commissioner for Human Rights at <http://www2.ohchr.org/english/law>.
24. Convention on the Elimination of All Forms of Discrimination against Women, New York, December 18, 1979, art. 14; Convention on the Rights of the Child, New York, November 20, 1989, art. 24; and Convention on the Rights of Persons with Disabilities, New York, December 13, 2006, art. 28.
25. Cf. Bakker, 'Commons versus Commodities', 26.
26. United Nations General Assembly Resolution 54/175, The Right to Development, December 17, 1999, UN Doc. A/RES/54/175. See also H. Smets, 'Le droit à l'eau dans les législations nationales', in *La mise en oeuvre du droit à l'eau – Actes du XXIXe Congrès ordinaire de l'IDEF*, ed. G. Grisel (Geneva: Schulthess, 2006), 49, 56, arguing that this confirmed the status of water as a fundamental human right.
27. United Nations High Commissioner for Human Rights, *Report on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water*, 21.
28. United Nations General Assembly Resolution 64/292, The Human Right to Water and Sanitation, UN Doc. A/RES/64/292 (2010).
29. Committee on Economic, Social and Cultural Rights, *General Comment 15*.
30. *Ibid.*, para. 2.
31. *Ibid.*, para. 10.
32. For example, S. Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', *Netherlands Quarterly of Human Rights* 23, no. 1 (2005): 35, and the ensuing debate in volume 24, number 3 of the same journal.
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34. For example, H. Smets, 'Le droit à l'eau, un droit pour tous en Europe', *Environmental Policy and Law* 37, nos 2–3 (2007): 223.
35. See section II.
36. E. Riedel, 'The Human Right to Water and General Comment No.15 of the CESCR', in *The Human Right to Water*, ed. E. Riedel and P. Rothen (Berlin: Berliner Wissenschafts-Verlag, 2006), 19, 29. See also S.C. McCaffrey, 'The Human Right to Water', in *Fresh Water and International Economic Law*, ed. E. Brown Weiss, L. Boisson de Chazournes and N. Bernasconi-Osterwalder (Oxford: Oxford University Press, 2005), 93, 105.
37. *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, Human Rights Council, Fifteenth Session, UN Doc. A/HRC/15/31 (2010), para. 63.
38. For example, Smets, 'Le droit à l'eau dans les législations nationales', 60.

39. *New Delhi Statement, Global Consultation on Safe Water and Sanitation for the 1990s*, UN Doc. A/C.2/45/3 (1990), principle 4.
40. For example, P. Sangameswaran, *Review of Right to Water: Human Rights, State Legislation, and Civil Society Initiatives in India* (Bangalore: Centre for Interdisciplinary Studies in Environment & Development, Technical Report, 2007), 30.
41. *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, UN Doc. A/66/255 (2011), para. 19.
42. See below at p. 12.
43. Regulations Relating to Compulsory National Standards and Measures to Conserve Water, South Africa, 2001. See also L. Mehta, 'Do Human Rights Make a Difference to Poor and Vulnerable People? Accountability for the Right to Water in South Africa', in *Rights, Resources and the Politics of Accountability*, ed. P. Newell and J. Wheeler (New York: Zed Books, 2006), 63, 65.
44. *Lindiwe Mazibuko v. City of Johannesburg*, Case CCT 39/09, [2009] ZACC 28 (Constitutional Court of South Africa).
45. For a broader analysis of the free water policy and the Mazibuko case see, for example, L.J. Kotzé, 'Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-Economic Rights in South Africa?', *Journal of Human Rights and the Environment* 1, no. 2 (2010): 135; and A. Gowlland-Gualtieri, 'South Africa's Water Law and Policy Framework: Implications for the Right to Water', in *Water Governance in Motion – Towards Socially and Environmentally Sustainable Water Laws*, ed. P. Cullet, A. Gowlland-Gualtieri, R. Madhav and U. Ramanathan (New Delhi: Cambridge University Press, 2010), 388.
46. Sangameswaran, *Review of Right to Water*, 31.
47. *Lindiwe Mazibuko v. City of Johannesburg*, para. 149.
48. *Ibid.*, para. 120.
49. *R v. Director General of Water Services* [1999] Env LR 114 (Queen's Bench Division (Crown Office List), 1998). The resulting legislative changes can be found in Water Industry Act 1991 (modified by Water Industry Act 1999) s. 61(1A).
50. Smets, 'Le droit à l'eau dans les législations nationales', 69.
51. For example, *Subhash Kumar v. State of Bihar* AIR 1991 SC 420 (Supreme Court of India, 1991), ielrc.org/content/e9108.pdf; and *FK Hussain v. Union of India* AIR 1990 Ker 321 (High Court of Kerala, 1990), ielrc.org/content/e9002.pdf.
52. *Subhash Kumar v. State of Bihar*, para. 7.
53. Constitution of India, art. 47.
54. *Hamid Khan v. State of Madhya Pradesh* AIR 1997 MP 191 (Madhya Pradesh High Court, 1996), ielrc.org/content/e9613.pdf.
55. *Ibid.*, para. 6.
56. *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, 2006(1) KLT 919 (High Court of Kerala, 2006), para. 3, ielrc.org/content/e0642.pdf. Similarly, in *Lucknow Grih Swami Parishad v. State of Uttar Pradesh* 2000(3) AWC 2139 (High Court of Allahabad (Lucknow Bench), 2000), at para. 4, ielrc.org/content/e0013.pdf, the court ruled that 'it is the bounden duty of the State to assure the supply of sufficient amount of qualitative drinking water to its people'.
57. See *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, para. 3.
58. V. Upadhyay, 'Water Law and the Poor: Emerging Issues and Concerns', in *Legal Grounds – Natural Resources, Identity, and the Law in Jharkhand*, ed. N. Sundar (Delhi: OUP, 2009), 132.
59. *Narmada Bachao Andolan v. Union of India* AIR 2000 SC 3751 (Supreme Court of India, 2000), reproduced in P. Cullet, ed., *The Sardar Sarovar Dam Project – Selected Documents* (Aldershot: Ashgate, 2007), 138.
60. *Ibid.*, para. 274.
61. This has been the case, for instance, in the Sardar Sarovar case mentioned here as well as in *Wazirpur Bartan Nirmata Sangh v. Union of India* WP(C) No. 2112/2002 (High Court of Delhi, 29 September 2006), ielrc.org/content/e0636.pdf.
62. Similarly, in the case of land, K. Bo Nielsen, 'Land, Law and Resistance', *Economic and Political Weekly* 46, no. 41 (2011): 38, 39.
63. For example, Bureau of Indian Standards Specification for Drinking Water (BIS 10500: 1991) and Central Public Health and Environmental Engineering Organisation, *Manual on Water Supply and Treatment* (New Delhi: Ministry of Urban Development, 1999).

64. Bihar Municipal Act 2007, s. 45, [ielrc.org/content/e0715.pdf](http://ielrc.org/content/e0715.pdf).
65. *Ibid.*, s. 170(1)(b).
66. *Ibid.*, ss 175, 181 and 183–5.
67. Uttar Pradesh Panchayat Raj Act 1947, s. 15, [ielrc.org/content/e4702.pdf](http://ielrc.org/content/e4702.pdf).
68. *Ibid.*, ss 17–18.
69. Uttar Pradesh Panchayat Raj Rules 1947, s. 147.
70. For example, Madhya Pradesh peya jal parirakshan adhiniyam 1986, [ielrc.org/content/e8603.pdf](http://ielrc.org/content/e8603.pdf).
71. Karnataka Groundwater (Regulation for Protection of Sources of Drinking Water) Act, 1999, [ielrc.org/content/e9905.pdf](http://ielrc.org/content/e9905.pdf); and Maharashtra Groundwater (Regulation for Drinking Water Purposes) Act 1993, [ielrc.org/content/e9301.pdf](http://ielrc.org/content/e9301.pdf). For an analysis of the latter act see, for example, S. Phansalkar and V. Kher, 'A Decade of the Maharashtra Groundwater Legislation – Analysis of the Implementation Process', *Law, Environment and Development Journal* 2, no. 1 (2006): 67, [lead-journal.org/content/06067.pdf](http://lead-journal.org/content/06067.pdf).
72. Uttar Pradesh Water Supply and Sewerage Act 1975, [ielrc.org/content/e7501.pdf](http://ielrc.org/content/e7501.pdf).
73. Constitution, Schedule 7, List II. For additional comments on the basic framework for water law see, for example, Cullet, *Water Law, Poverty and Development*, 36.
74. This is the case of the Water (Prevention and Control of Pollution) Act 1974, adopted in accordance with article 252 of the Constitution concerning a matter 'with respect to which Parliament has no power to make laws'.
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79. 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* (New Delhi: Department of Drinking Water Supply, 2009), s. 12(1).
80. *Ibid.*, s. 2.
81. Department of Drinking Water Supply, *National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India – Framework for Implementation* (New Delhi: Department of Drinking Water Supply, 2010), s. 4 (emphasis added) [hereafter *NRDWP 2010*].
82. *Ibid.*, s. 9(1).
83. Department of Drinking Water and Sanitation, *Rural Drinking Water, Strategic Plan (2011–2022) – Ensuring Drinking Water Security In Rural India* (Department of Drinking Water and Sanitation, 2011).
84. Department of Drinking Water Supply, *NRDWP 2010*, second basic principle.
85. For example, J. Astle, 'Between the Market and the Commons: Ensuring the Right to Water in Rural Communities', *Denver Journal of International Law and Policy* 33 (2005): 585, 586.
86. L.-E. Pettiti and P. Meyer-Bisch, 'Human Rights and Extreme Poverty', in *Human Rights: New Dimensions and Challenges – Manual on Human Rights*, ed. J. Symonides (Aldershot: Ashgate, 1998), 157.
87. UN General Assembly Resolution 55/2, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000).
88. *Ibid.*, para. 19. On the definition of the term basic water see, for example, K.J. Joy and S. Paranjape, 'Water Use: Legal and Institutional Framework', in *Water and the Laws in India*, ed. R. Iyer (New Delhi: Sage, 2009), 213, 221.
89. On the links between MDGs and human rights see, for example, P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly* 27, no. 3 (2005): 755.
90. See *Rio + 20: Sustainable Development Goals (SDGs) – A Proposal from the Governments of Colombia and Guatemala* (2011), <http://www.uncsd2012.org/rio20/content/documents/colombiasdgs.pdf>.

91. For example, Asian Development Bank, *Water for All – The Water Policy of the Asian Development Bank* (Manila: Asian Development Bank, 2001), para. 46.
92. For example, A.S. Himanshu, ‘Why Not a Universal Food Security Legislation?’, *Economic and Political Weekly* 46, no. 12 (2011): 38, 39; arguing that only universalisation is consistent with a rights-based framework. See also J. Drèze, ‘Universalisation with Quality – ICDS in a Rights Perspective’, *Economic and Political Weekly* 41, no. 34 (2006), 3706, 3709.
93. Cf. J. Drèze and R. Khera, ‘The BPL Census and a Possible Alternative’, *Economic and Political Weekly* 45, no. 9 (2010): 54, in the case of the right to food.
94. National Commission for Enterprises in the Unorganised Sector, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (New Delhi: Ministry of Small Scale Industries, Government of India, 2007), 1. This figure adapted to inflation amounts to about Rs 30 today.
95. For rural areas, Government of India, *Accelerated Rural Water Supply Programme Guidelines*; and Department of Drinking Water and Sanitation, *Rural Drinking Water; Strategic Plan (2011–2022)*. For urban areas see, for example, Central Public Health and Environmental Engineering Organisation, *Manual on Water Supply and Treatment* (New Delhi: Ministry of Urban Development, 1999), 11.
96. The idea of Provision of Urban Amenities in Rural Areas (PURA) was announced in 2003, first implemented in a pilot phase and then launched in 2011 for the eleventh Five Year Plan. See *Provision of Urban Amenities in Rural Areas (PURA) Guidelines – A Public Private Partnership (PPP) Scheme* (New Delhi: Ministry of Rural Development, 2011).
97. J. Drèze, ‘Democracy and Right to Food’, *Economic and Political Weekly* 39, no. 17 (2004), 1723, 1726.
98. Covenant on Economic Social and Cultural Rights, New York, December 16, 1966, art. 13(2).
99. African Charter on the Rights and Welfare of the Child 1990, art. 14.
100. Cf. Drèze, ‘Democracy and Right to Food’, 1723, making a similar point concerning the right to food. On article 47 of the Constitution, see text at note 53 above.
101. For example, Ministry of Rural Development, *Guidelines on Swajaldhara*, s. 3(1)(i).
102. *Ibid.*, s. 3(1)(vii). At the international level, this can be traced as far back as 1990. See *New Delhi Statement, Global Consultation on Safe Water and Sanitation for the 1990s*, principle 2, contending that the role of the government should change ‘from that of provider to that of promoter and facilitator’.
103. Right of Children to Free and Compulsory Education Act 2009.
104. *People’s Union for Civil Liberties v. Union of India* Writ Petition (Civil) No. 196 of 2001, Supreme Court Order of 28 November 2001.
105. National Food Security Bill 2011, s. 5.
106. On the ARWSP, see text at note 75.
107. For example, Rajasthan Municipalities Act 1959, s. 98.
108. Coverage in rural areas was estimated to have increased from 18% in 1974 to 94% in 2004. See M. Black and R. Talbot, *Water – A Matter of Life and Health* 5 (New Delhi: Oxford University Press, 2005).
109. For example, C. Ward, *Reflected in Water – A Crisis of Social Responsibility* (London: Cassell, 1996), 96; and H. Ingram, J.M. Whiteley and R. Perry, ‘The Importance of Equity and the Limits of Efficiency in Water Resources’, in *Water, Place, and Equity*, ed. J.M. Whiteley, H. Ingram and R. Perry (Cambridge, MA: MIT Press, 2008), 1, 7.
110. See above at p. 4.
111. Concerning problems linked to the imposition of partial capital costs on users in drinking water supply see, for example, P. Sampat, ‘“Swa”-jal-dhara or “Pay”-jal-dhara – Sector Reform and the Right to Drinking Water in Rajasthan and Maharashtra’, *Law, Environment and Development Journal* 3, no. 2 (2007): 101, <http://www.lead-journal.org/content/07101.pdf>  
See n. 49.
112. See n. 49.
113. Cf. Drèze, ‘Democracy and Right to Food’, 1726, in the case of the right to food.
114. The extent to which water is provided free does not necessarily exhaust the scope of the right to water and there may be other uses that fall within its scope.
115. Village visits in 2006–2007 in Rajsamand and Bhilwara districts of Rajasthan.
116. Asian Development Bank, *Water for All*, para. 45.
117. National Water Policy 2002, s. 11.

118. For example, United Nations, *Water for People – Water for Life* (Paris: UNESCO, 2003), 341; and L. Mehta and O.M. Canal, 'Financing Water for All – Behind the Border Policy Convergence in Water Management 12' (IDS Working Paper 233, 2004).
119. For a willingness to pay argument in Delhi see, for example, S. Misra and B. Goldar, 'Likely Impact of Reforming Water Supply and Sewerage Services in Delhi', *Economic & Political Weekly* 43, no. 43 (2008), 57. For a critical analysis of the figures proposed by Misra and Goldar, see Cullet, *Water Law, Poverty and Development*, 174.
120. This is, for instance, the case in Garhi Jharia Maria, a locality in Delhi close to East of Kailash.
121. The former, for instance, in Bawana, North-West Delhi, and the latter in an informal settlement in Okhla Phase I, South-East Delhi.
122. World Bank, 'India – Water Resources Management Sector Review – Rural Water Supply and Sanitation Report' (Report No. 18323, 1998), 49.
123. *Ibid.*, 53.
124. In the case of Agra's reforms under the Jawaharlal Nehru National Urban Renewal Mission, the 'Checklist for the "Urban Reforms Agenda" under JNNURM', available at [http://jnnurm.nic.in/wp-content/uploads/2010/12/reform\\_agra.pdf](http://jnnurm.nic.in/wp-content/uploads/2010/12/reform_agra.pdf), states at p. 65 that the level of access through handpumps is scheduled to diminish from 70% to 0% between year three and year six of the project.
125. World Bank, 'Rural Water Supply in India – Willingness of Households to Pay for Improved Services and Affordability' (Policy Paper 44790, 2008), 6.
126. Dublin Statement on Water and Sustainable Development.
127. G. Mestrallet, 'Lettre ouverte – La vraie bataille de l'eau', *Le Monde*, October 26, 2001, reproduced in Suez, *La vraie bataille de l'eau* (Paris: Suez, 2001).
128. Russell, 'Incorporating Social Rights in Development', 14.
129. *Ibid.*, 19.
130. Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001.
131. *Lindiwe Mazibuko v. City of Johannesburg*, Case CCT 39/09, [2009] ZACC 28 (Constitutional Court of South Africa), para. 89.
132. The fact that India has the financial capacity to take up the challenge is, for instance, borne out by a 27% increase in allocation for rural drinking water and sanitation in the union budget 2012–2013 (from \$2.03 billion to \$2.59 billion).
133. Department of Drinking Water and Sanitation, *Rural Drinking Water, Strategic Plan (2011–2022)*, 8.
134. For example, A. Loftus, "'Free Water" as Commodity – The Paradoxes of Durban's Water Service Transformations', in *The Age of Commodity – Water Privatization in Southern Africa*, ed. D.A. McDonald and G. Ruiters (London: Earthscan, 2005), 189.
135. J.A. Smitha and J.M. Green, 'Free Basic Water in Msunduzi, KwaZulu-Natal: Is it Making a Difference to the Lives of Low-income Households?', *Water Policy* 7 (2005): 443–67.
136. Joy and Paranjape, 'Water Use'.
137. Constitution of India, art. 15(2).
138. This can be contrasted with the position taken by Scheuring, 'Is There a Right to Water in International Law?', 148, arguing that 'a right to access water simply requires reasonable accessibility to water on a non-discriminatory basis'.
139. R. Tiwary, 'Explanations in Resource Inequality – Exploring Scheduled Caste Position in Water Access Structure', *International Journal of Rural Management* 2 (2006), 85.
140. *Voice of India v. Union of India*, Writ Petition (Civil) No. 263 of 2010, Supreme Court, Order of September 20, 2010, para. 3.
141. Concerning Mumbai see, for example, Afsar Jafri, *World Bank Attempt to Privatise Mumbai's Water Runs Aground; Citizens Reject Spurious Consultants Report* (2007), [http://www.manthan-india.org/IMG/pdf/Report\\_by\\_Afsar\\_Jafri\\_on\\_K\\_East\\_Second\\_Stakeholder\\_Meeting\\_2-3\\_June\\_2007.pdf](http://www.manthan-india.org/IMG/pdf/Report_by_Afsar_Jafri_on_K_East_Second_Stakeholder_Meeting_2-3_June_2007.pdf).
142. Concerning Delhi's campaign in 2004–2005 see, for example, A. Bhaduri and A. Kejriwal, 'Urban Water Supply: Reforming the Reformers', *Economic & Political Weekly* 40, no. 53 (2005), 5543.

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