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# THE HUMAN RIGHT TO WATER

## A TESTING GROUND FOR NEOLIBERAL POLICIES

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# THE HUMAN RIGHT TO WATER – A TESTING GROUND FOR NEOLIBERAL POLICIES

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## **INTRODUCTION**

The fundamental right to water was recognised by the higher judiciary in the early 1990s. In effect, this was an early recognition by international standards since debates around the recognition of the right to water in international law started in earnest in the last few years of the century.<sup>1</sup> Yet, while the early recognition of the right was progressive, the necessary legal framework to make its realisation a reality for everyone is yet to be effectively developed or amended in view of the formal recognition of the right.

The discrepancy between the clear recognition of the right and the missing framework for its realisation has opened the door to different influences on the way the right has been implemented over time. Firstly, in a context of missing legal norms for a right that cannot be ignored by any elected government, the executive progressively increased its reliance on administrative directions to ensure progress in terms of water provision, in particular in rural areas.<sup>2</sup> Secondly, the recognition of the right by the higher judiciary happened to coincide with an era of intense water policy activity at the international level seeking to turn water into an economic good, thereby directly and indirectly opening the door to various forms of privatisation. One of the crucial elements of these international water policy reforms is that they have been enshrined mostly in soft law instruments. The result has thus been that it is a combination of non-binding instruments at the national and international levels that have had the greatest influence on the ways in which the right has been realised in the past couple of decades.

Controversies linked to the place and role of the private sector in domestic water supply arise for a variety of reasons.<sup>3</sup> A central issue is the question of whether there is opposition between the recognition of a fundamental right and its delivery through private sector actors.<sup>4</sup> In general terms, this has been largely answered in the negative by international human rights bodies.<sup>5</sup> Yet, this does not answer all the questions that arise in practice at the local or national level. In general, the presence of private sector actors is not necessarily unknown in the realisation of various fundamental rights. At the same time, in the context of water, private sector actors generally participate only in certain specific tasks that are seen as being

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<sup>1</sup> eg PH Gleick, 'The Human Right to Water', 1/5 *Water Policy* 487, 488 (1999) stating that '[t]his paper argues that access to a basic water requirement is a fundamental human right' (emphasis added).

<sup>2</sup> This could happen relatively naturally because administrative directions had already been used to foster domestic water provision since the 1970s in the context of the Accelerated Rural Water Supply Programme.

<sup>3</sup> Domestic water includes water for drinking, cooking, bathing, hygiene, sanitation and may also include some livelihood uses.

<sup>4</sup> Cf. Farhana Sultana & Alex Loftus, 'The Right to Water: Possibilities and Prospects', in Farhana Sultana & Alex Loftus eds, *The Right to Water: Politics, Governance and Social Struggles* 1, 3 (Abingdon: Earthscan, 2012).

<sup>5</sup> eg UN Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, Resolution 15/9, UN Doc. A/HRC/RES/15/9 (2010), para 7.

commercially viable. This typically does not include laying down the massive infrastructure necessary to provide individual piped connections. Yet, since this is one of the easiest way to charge water users, piped metered individual connections are seen as a desirable asset by private sector actors. There is thus a basic unresolved dichotomy which sees the realisation of the fundamental right being dependent on massive state infrastructure investments that may be handed over to the private sector for management.

The twin push for the recognition of water as a human right and as an economic good has led policy-makers to make ‘access’ and ‘affordability’ the concepts around which the definition of the right hinges.<sup>6</sup> Whereas the human right to water may be a right to the provision of water, as specifically recognised for instance by the high court of Kerala a decade ago,<sup>7</sup> the international mainstream understanding of the right to water has been restricted to a right of access, as confirmed by specific mentions of the term ‘access’ in constitutional recognition in such varied countries as South Africa and Uruguay.<sup>8</sup> Similarly, whereas the core content of various fundamental rights have been provided free, policy debates around the right to water have strongly emphasised the notion of affordability and the rejection of the idea that the recognition of the right may be linked to a right to free water.<sup>9</sup>

The reason why the tags attached to the right to water matter is nowhere better illustrated than in the Dublin Statement of 1992 that specifically subordinated the right to water to the recognition of water as an economic good.<sup>10</sup> This could be dismissed as an aberration but the overwhelming influence of the Dublin Statement on water policy in the past twenty-five years has progressively led to a de facto attempt to reconcile the two, without always clearly enshrining the primacy of the fundamental right claim. The problem is that instruments like the National Water Policy, 2012 neither discuss nor engage with the right to water. This has led to a situation where lawyers and human rights practitioners understand that there is a fundamental right to water that prevails over other conceptions of water while water practitioners generally understand water as an economic good within which context a priority is given to domestic water.<sup>11</sup>

This chapter starts by examining the recognition of the right in India and the various ways in which it has been partly realised through legal instruments that do not refer to the right. The next section then examines the challenges that arise in a context of evolving water policy and the push for privatisation. This examines the way in which the push for commodification has altered our understanding of the right to water and discusses some of the issues arising in this regard, such as the push for affordability and efficiency as markers of a good water policy. The third section then looks at some dimensions of the right that need to be addressed to ensure that it does not remain subservient to economic understandings of water. The focus is on the need to end disconnections, in particular automated disconnections, the need to realise the core content of the right through provision of free water and the need to rethink the

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<sup>6</sup> Eg Sustainable Development Goal 6.1, in United Nations General Assembly Resolution 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015).

<sup>7</sup> *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala* 2006 (1) KLT 919 (High Court of Kerala, 2006).

<sup>8</sup> South Africa – Constitution, 1996, s 27 and Constitution of the Oriental Republic of Uruguay, 1967/2004, art 47

<sup>9</sup> General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2002/11 (2002).

<sup>10</sup> Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992.

<sup>11</sup> eg National Water Policy, 2012, s 1.3.

content of the right in light of new thinking around water as a shared substance, based on the need to recognise it as common heritage and the need to manage it based on the principle of subsidiarity.

## **I. RIGHT TO WATER – RECOGNITION AND IMPLEMENTATION**

The drafters of the Constitution of India did not specifically mention the right to water in the catalogue of fundamental rights. Yet, the judiciary has repeatedly confirmed its existence.<sup>12</sup> The right is thus well entrenched. In addition, a number of states have adopted legislation that provides a general context for the realisation of the right. Further, policy instruments adopted by the Union Government have also made an important contribution towards the realisation of the right in rural areas.<sup>13</sup>

Yet, at this juncture, there are real challenges concerning the right to water's content and 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. Statutory instruments include various provisions that contribute to the realisation of the right in practice. At the same time, there is no law that specifically refers to the right to water as a basis for the regulatory measures adopted, for instance, concerning domestic water supply. In the case of administrative directions, when reference to the right was introduced in the National Rural Drinking Water Programme, they were quickly expunged in the next version of the policy instruments.<sup>14</sup>

In general terms, the right that is recognised is directly linked to the uses of water necessary for a life of dignity since it is a conceptual extension of the right to life.<sup>15</sup> Courts have also specifically mentioned duties of state provision while confirming that domestic water supply is one of the basic functions giving governments legitimacy in the eye of the people.<sup>16</sup> In addition, the right that courts have recognised is a universal right and generally covers domestic water needs.

There is little additional specificity provided by the courts or legislation. With regard to quality, it can be inferred that water must be safe according to extant quality standards. However, since no legislation directly makes the link between water quality standards and the right to water, this remains to be more formally stated. With regard to quantity, debates have taken place nearly entirely in the context of policy documents and administrative directions. An absolute minimum of 40 litres per capita per day (lpcd) can be identified as the floor against which the realisation of the right would be measured.<sup>17</sup> Yet, there are different standards for rural and urban areas and standards have evolved over time, with the aspiration for rural areas being now 70 lpcd.<sup>18</sup> On the whole, different elements of the content of the

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<sup>12</sup> eg *Subhash Kumar v State of Bihar* AIR 1991 SC 420 (Supreme Court of India, 1991) and *FK Hussain v Union of India* AIR 1990 Ker 321 (High Court of Kerala, 1990).

<sup>13</sup> Government of India, Accelerated Rural Water Supply Programme Guidelines (1999-2000) and Ministry of Drinking Water and Sanitation, National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India (2013) [hereafter NRDWP 2013].

<sup>14</sup> Department of Drinking Water Supply, National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India (2009) s12(1) and the next version published in 2010.

<sup>15</sup> Most of the judicial decisions concerning the right to water use as a starting point the right to life.

<sup>16</sup> *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala* 2006 (1) KLT 919 (High Court of Kerala, 2006).

<sup>17</sup> Government of India, Accelerated Rural Water Supply Programme Guidelines.

<sup>18</sup> NRDWP 2013 (n 13) Annexure 1.

right can be inferred from court decisions, legislation, administrative directions and practice at the local level but this does not amount to a clear universal framework for the realisation of the right to water.

This unfortunately leads to unwelcome outcomes, as reflected in a pronouncement on the right to water by the Bombay High Court. In its 2014 order in *Pani Haq*, it confirmed the existence of the right to water but then went on to direct that the right can be realised differently for different groups of people, in this case based on the legal status of their dwelling.<sup>19</sup> The Court came up with the bizarre conclusion that the legality of one's housing should affect the level of the realisation of the right to water even though it did recognise that everyone is entitled to the right to water. As a result, occupants of slums 'cannot claim a right to supply drinking water on par with a right of a law abiding citizen'.<sup>20</sup> The Court was happy to condone differential pricing of water, with residents of the slums (in principle much poorer than people living in planned colonies) paying 'a higher rate than the rate which is charged for water supply to the authorized constructions'.<sup>21</sup>

On the whole, 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 also 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.

## **II. REALISING THE RIGHT TO WATER IN A CONTEXT OF EVOLVING WATER POLICY**

The formal recognition of the right to water did not signal the start of concerns for domestic water supply since this had been a central policy concern of governments for decades. At the same time, recognition took place alongside sweeping water sector reforms that have sought to change the nature of water from a shared substance to an economic good that can be traded like any commodity. While effort has been made to try and reconcile the two developments, this can only be done up to a certain extent since a fundamental right does not lend itself well to the kind of understandings promoted in water sector reforms.

### **A. PRIVATISATION AND THE REALISATION OF THE RIGHT TO WATER**

The recognition of the right to water is largely contemporaneous with the push for the recognition of water as an economic good, itself linked to the participation of the private sector in water services. The end of the Cold War was marked by a strong acceleration of the push for the commodification of new resources. This can already be seen in the National Water Policy, 1987 that devoted a separate section to water rates and calling for them to be 'such as to convey the scarcity value of the resource to the users and to foster the motivation for economy in water use'.<sup>22</sup> At the international level, the Dublin Statement, 1992 marks a

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<sup>19</sup> *Pani Haq Samiti v. Brihan Mumbai Municipal Corporation*, Public Interest Litigation No 10 of 2012, High Court of Judicature at Bombay, 15 December 2014.

<sup>20</sup> *ibid* para 21.

<sup>21</sup> *ibid*.

<sup>22</sup> National Water Policy, 1987, s 11.

turning point in specifically calling for water to be recognised as an economic good. This happened at the very same time as the privatisation and liberalisation reforms were unleashed after the 1991 financial crisis.<sup>23</sup>

This corresponds with a period of expansion of human rights. At the international level, the move towards recognising all rights (civil and political, and socio-economic) as human rights was cemented at the 1993 World Conference on Human Rights.<sup>24</sup> At the national level, this is a period where the higher judiciary reads into the right to life in particular several rights, including the right to water.

The recognition of the right to water thus intervenes at the very point at which private enterprises are looking for new economic opportunities in a changing economic scenario. The central role of water for survival, livelihoods and economic development ensures that a great deal of private interest is given to water. This has influenced directly and indirectly the manner in which measures have been taken to realise the right to water.

At the point at which the right to water was recognised, the state already had a number of statutory duties concerning drinking water supply. Thus, ‘obligatory’ functions of municipal corporations in Uttar Pradesh have included for decades the construction or acquisition of waterworks necessary for a sufficient supply of water as well as to guard from pollution water used for human consumption.<sup>25</sup> In rural areas, even before panchayat acts were strengthened in the mid-1990s, the Union Government had indicated through the Accelerated Rural Water Supply Programme (ARWSP) that it saw the provision of domestic water as a central duty.<sup>26</sup>

The 1990s were a period of significant policy change. An important development with respect to domestic water supply was the adoption of the constitutional mandate for decentralisation.<sup>27</sup> This led to attempts at strengthening local bodies with regard to domestic water supply. However, this took place in a context of overall reform whereby the state was seeking to withdraw from provision of welfare entitlements. There was thus limited appetite for providing significant new resources to local bodies to ensure they could take the decentralisation mandate forward. As a result, there has been increasing recourse to private sector actors to fill the gaps.

Participation of private sector actors, such as contractors used for specific tasks within the broader drinking water supply sector, is not a particularly new phenomenon. Yet, economic reforms seeking much more drastic privatisation, including complete privatisation of water utilities, constituted a new challenge. Indeed, while the local laws predating the recognition of the right to water were not specific and could accommodate either public or private operations, privatisation of water services went against the government’s own longstanding supply-led policies and against long-held understanding of water as a public resource.

The push for privatisation of water services thus challenges older understandings of water and put pressure on actors seeking to implement the right to water to do so in a specific manner condoning private sector participation. This brings the question of the extent to which

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<sup>23</sup> Eg Editorial, ‘Manmohan Singh’s 1991 Budget: The Day that Changed India Forever’, *The Hindu* 24 July 2016 <<http://www.thehindu.com/business/Economy/Manmohan-Singhs-1991-Budget-the-day-that-changed-India-forever/article14505003.ece>>.

<sup>24</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights in Vienna, 25 June 1993.

<sup>25</sup> eg Uttar Pradesh Municipal Corporations Adhiniyam, 1959, s 114.

<sup>26</sup> Government of India, Accelerated Rural Water Supply Programme Guidelines.

<sup>27</sup> Constitution of India, 73<sup>rd</sup> and 74<sup>th</sup> amendments.

the state can relinquish certain functions related to water supply that were traditionally seen as part of its obligatory duties, duties that have in principle been strengthened by the recognition of the right to water, whose duty holder is the state.

The mainstream policy consensus has increasingly been that it does not matter whether the state or non-governmental actors deliver domestic water to rights holders as long as the state remains accountable as a measure of last resort. This remains insufficient conceptually since there are various types of non-governmental actors and it should be for the state to determine which non-state actors who can best deliver welfare entitlements. For-profit companies should be last in line because there is an inherent ethical conflict between profit and realisation of fundamental rights. In between, a variety of different actors including non-governmental organisations and social enterprises have the potential to fill some of the gaps. However, as demonstrated by the last couple of decades of ngo-isation of development work, this must still fall under the guidance and control of the state that is alone able to give welfare interventions the long-term stability they need and that is the only one to have the broad view allowing it to target preferentially the most disadvantaged. Many individual initiatives have shown over time that they can provide good stop-gap progress but in all the cases where permanent solutions are needed, it is the state that must not only be ultimately accountable but also in overall command.

Another issue is that for-profit enterprises will only get involved in profitable activities. This drastically limits the scope for privatisation. Indeed, as has been amply demonstrated over decades,<sup>28</sup> this, for instance, does not include the laying of the whole network of pipes to individual houses that will ensure access to water. As a result, private sector management can be an attractive business proposition where the pipes are already laid, as was the case in England and Wales in the late 20<sup>th</sup> century, but this is not the case in areas of Indian cities where pipes have not been laid yet. What this dichotomy illustrates is the fact that the domestic water supply is only attractive to private sector actors if it is boxed in a particular form and context.

## **B. DIVERGENT TRENDS: PUBLIC TRUST AND COMMODIFICATION**

Control over water has been subject to multiple influences that are partly contradictory. This is not new but has become much more visible and significant in the past few decades. On the one hand, access to water has for long been linked to land rights, giving landowners preferential access to surface and groundwater. On the other hand, water has historically been understood as a common substance that is so vital to humankind and life on earth that it cannot be treated like other natural resources.

The push for commodification and privatisation of water led to conflicts that stretched the traditional understanding between these two positions where the state was seen as a largely neutral arbiter. In a context where existing arrangements were being put the test by increasing private claims, the Supreme Court, following developments in other countries, formally recognised water as a public trust in the mid-1990s.<sup>29</sup> This has significant implications for the way water is conceived in its different forms and uses. In the first case where the doctrine of public trust was extended to water, the dispute revolved around interference with the course

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<sup>28</sup> eg C Ward, *Reflected in Water – A Crisis of Social Responsibility* (London: Cassell, 1996) 96 and Helen Ingram, John M Whiteley & Richard Perry, ‘The Importance of Equity and the Limits of Efficiency in Water Resources’, in John M Whiteley, Helen Ingram & Richard Perry eds, *Water, Place, and Equity* 1, 7 (Cambridge, Mass: MIT Press, 2008).

<sup>29</sup> *MC Mehta v. Kamal Nath* (1997) 1 SCC 388 (Supreme Court of India, 13 December 1996).

of a river by property developers as they were seeking to force back the river into a course, which would not affect their property interests.<sup>30</sup> This provided the basis for addressing directly the question of property rights. The Court concluded that where the public trust applies, such resources are meant for public use and cannot be converted into private ownership.<sup>31</sup>

In other words, the public trust severs the link with traditional property rights since the trustee can neither alienate the trust nor fundamentally change its nature. It rather has a fiduciary duty of care and responsibility to the general public. This has proved to be a difficult position to maintain over time as private interests have vied to undermine the recognition of the new status of water. Thus, in *Mrs Susetha v. State of Tamil Nadu*, the Supreme Court used an earlier statement it had made that the public trust 'does not exactly prohibit the alienation of the property held as a public trust'.<sup>32</sup> It ruled concerning a shopping complex that had been sanctioned at the spot of a disused temple tank, that it had to take a 'pragmatic view' of the doctrine of sustainable development and could thus condone the alienation of the property.<sup>33</sup>

The recognition of the public trust as a basis for controlling and conserving was an important attempt to take the conversation around water appropriation to a new level. Yet, not only did the judiciary find it difficult to uphold the strict principles it had put forward in subsequent case law but no statute has been amended to reflect the new thinking. This has essentially meant that the recognition of water as a shared substance has made little difference on the ground.

At the same time, there have been further developments in terms of appropriation of water by private actors. The entry point for this was laid long ago since the link between land and water rights had already brought water within the scope of economic assets. Yet, this was constrained by two factors. Firstly, the recognition of water rights to landowners came within a broader understanding of the special life-giving nature of water prohibiting its ownership by anyone. This led to the construction of water rights being usufructuary rights as far as surface water was concerned and to a right that was not called ownership for groundwater (even if in practice this is essentially what it amounts to). Secondly, water rights were dependent on the rights in the land and could not be dissociated from the latter. This was due in large part to the understanding that the productivity of the land seen primarily as a source of agricultural crops was dependent on the availability of water.

Moving towards full commodification of water is thus in a way a logical step since water was already partly considered from within the context of property rights. At the same time, it goes against the understanding of water as held and regulated by communities and against the idea that existing property rights were subordinate to the broader ideal and understanding of water as a shared resource. In short, developments over the past few decades have completely changed the understanding of water and consequently the way to approach rights to water. Commodification of water gives it a singularity it has never had before. It brings together all water sources and water uses to a single meeting point that sees it as an economic asset that can be traded like any other good.

Commodification is necessary for the entry of private sector actors in the water sector since there can be no profit-making on the basis of a universally shared resource. However, this

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<sup>30</sup> *ibid.*

<sup>31</sup> *ibid* para 34.

<sup>32</sup> *Intellectuals Forum, Tirupathi v. State of Andhra Pradesh* AIR 2006 SC 1350 (Supreme Court of India, 23 February 2006), para 60.

<sup>33</sup> *Mrs Susetha v. State of Tamil Nadu* AIR 2006 SC 2893 (Supreme Court of India, 8 August 2006), para 9.



shows that the visible conflicts that arise in terms of ‘privatisation’ of water, in particular at the point of the privatisation of water supply services only constitute a manifestation of a potentially much broader phenomenon. Interestingly, the most visible and often most controversial aspect of privatisation has been where urban water supply is handed over in part for management to a private company.<sup>34</sup> The visibility arises from the fact that the company ends up dealing directly with water users but in most cases, what is privatised is not the water but specific services provided by the company. There are only few exceptions where the commodification of water has gone further and led to the resource itself being commodified, as in the case of the lease of a stretch of the Sheonath river to a private company,<sup>35</sup> something that remains an exception to the rule.

### C. EFFICIENCY IN ADDITION OR INSTEAD OF EQUITY

Discussions around the private sector’s role in the provision of domestic water revolve around the failures of the state in ‘efficiently’ managing water as a resource and the infrastructure that is used to supply it to users.<sup>36</sup> Efficiency has indeed been a central term of art in water policy for the past few decades and has provided a justification for progressively side-lining the state in the provision of water services since a welfare state is not set up to achieve economic efficiency but social justice. This should not come as a surprise since social entitlements should not be provided on basis of efficiency. This is the reason why efficiency is still usually associated with equity, since it is widely understood that water being so basic to life, it can never be managed exclusively on a basis of efficiency.

The problem that arises is that equity has progressively become little more than a mantra that has limited or no impact on the ground. In other words, while the policy discourse still tends to consistently invoke equity next to efficiency,<sup>37</sup> the former has been increasingly side-lined. As a result, access to water is increasingly mediated through pricing justified on the basis of the need to recover costs of investments made. Pricing is a difficult concept to apply since cost recovery is in most cases an inexact approximation of costs engaged, as is the case in all situations where the cost of providing bulk water for distribution to households within a given city is not built into the costs because it is in most cases the state that has invested in such large-scale infrastructure. As a result, the very idea of full cost recovery remains at best something desired by policy makers that has no relevance on the ground since individual users cannot and will not be able to bear such costs.

Efficiency is usually called for on the understanding that there is global water scarcity. While social and economic water scarcity is indeed one of the defining features of our age, it is unclear that physical water scarcity should be the primary inspiration for policy-making in the water sector. Firstly, scarcity is not the prevailing issue in all parts of the country with some regions more concerned by floods than scarcity. Secondly, global water scarcity is a useful starting point to take into account the fact that ever-growing water use in a context of increasingly erratic rainfall due to global environmental change must be addressed immediately and earnestly. At the same time, efficiency is based on the understanding of an environmental crisis (water scarcity) but the answer (cost recovery, pricing etc.) is devoid of

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<sup>34</sup> Naren Prasad, ‘Privatisation of Water: A Historical Perspective’, *3/2 Law, Environment and Development Journal* 217 (2007).

<sup>35</sup> B. Das & G. Pangare, ‘Privatisation: In Chhattisgarh, a River Becomes Private Property’, *41(7) Economic & Political Weekly* 611-12 (2006).

<sup>36</sup> Dublin Statement, n 10 above.

<sup>37</sup> eg United Nations Development Programme, *Human Development Report 2006 – Beyond Scarcity: Power, Poverty and the Global Water Crisis* 153 (New York: UNDP, 2006).

environmental content. Thirdly, domestic water uses less than 10 percent of available water. There is thus no physical scarcity for domestic water and the real issue is one of allocation to different uses.

The paradox of the law and policy framework governing the water sector is to be at the same time based on an understanding of the importance of water as a common resource needed by all while neither emphasising equity in use nor emphasising conservation per se. In fact, the market mechanisms that are put in place under the guise of efficiency do not necessarily lead to lower water use but nearly invariably lead to reallocation of water from certain users to others. This is, for instance, the case with tradable water entitlements that are introduced in the name of increasing the efficiency of water use. This is achieved by breaking the century-old bond between water and land by allowing water to be sold separately from the underlying land.<sup>38</sup> This provides a basis for transfers of water use from agriculture to other uses but neither addresses the underlying question of scarcity nor addresses the consequences of depriving the land from its access to water in terms of its own productive use, for instance, to produce food crops.

#### **D. ACCESS AT AN AFFORDABLE PRICE AND THE PUSH FOR PRIVATISATION**

The framing of the right to water as a right to access water at an affordable price has been the hallmark of policy developments since the 1990s. In principle, the language of access is meant to be neutral and this is how it has been portrayed. Yet, it is remarkable in a fundamental rights context since no other right has been qualified in this way and so systematically. Indeed, the rights to food and health are not seen as rights to access food or health. Introducing access is thus significant and must be opposed to ‘provision’ that signals a much stronger duty of the state as the duty holder to provide for the realisation of fundamental rights.

The idea of access is thus directly related to the idea that the state should act as a facilitator rather than as a provider, the gap between the two having to be filled by other non-governmental actors. In this sense, speaking of access is directly linked to forms of privatisation.<sup>39</sup> In policy terms, this is framed as a move from supply-led to demand-led interventions.<sup>40</sup> By ‘demanding’ new infrastructure, rights holders are deemed to be participating in the process leading to a sense of ownership over the said infrastructure. The quid pro quo is that to instil this sense of ownership, water users are made to pay varying percentages of the cost of building and/or running the water supply system.<sup>41</sup> The result is that rights holders will only demand something they can afford.

The novelty and controversial nature of the shift in the state’s role in the realisation of fundamental rights led one of the key architects of General Comment 15 to indicate that 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>42</sup> Where

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<sup>38</sup> eg Maharashtra Water Resources Regulatory Authority Act, 2005, s 11(i)(i).

<sup>39</sup> Cf Heloise Weber, ‘When Goals Collide: Politics of the MDGs and the Post-2015 Sustainable Development Goals Agenda’, 34/2 *SAIS Review of International Affairs* 129-139, 131 (2014).

<sup>40</sup> Ministry of Rural Development, Guidelines on Swajaldhara, 2002, preface.

<sup>41</sup> Planning Commission, Report of Working Group on Tenth Plan for Drinking Water Supply and Sanitation 2002-07, 4.

<sup>42</sup> E Riedel, ‘The Human Right to Water and General Comment No.15 of the CESCR’, in E Riedel & P Rothen eds, *The Human Right to Water* 19, 29 (Berlin: Berliner Wissenschafts-Verlag, 2006). See also SC

access is linked to affordability as is the case in General Comment 15, this implies that rights holders are called upon paying for accessing water. One of the central questions that arise at this juncture is that of the ability of rights holders to pay. However, the language that has been used for a number of years is that of ‘willingness to pay’, a concept that does not particularly consider whether people are able to pay or whether paying implies reallocating resources from other unavoidable expenses, such as food or health.

One of the most striking elements of the debate over affordability is that there has been increasing emphasis on the inevitability of pricing. 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>43</sup> This is linked to the emphasis on full cost recovery, a notion introduced in water sector reforms in general and specifically concerning domestic water, for instance, in the context of the Swajal project from 1996 onwards.<sup>44</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>45</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>46</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. In addition, it is unclear that 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>47</sup>

### **III. BEYOND PRIVATISATION – RECLAIMING THE RIGHT TO WATER FOR ALL**

The right to water has been at the centre of a massive experiment whereby the formalisation of a right has been linked to policies of commodification and privatisation of water. While the involvement of private actors in the realisation of fundamental rights is nothing new, what has characterised the right to water in recent years is the pointed attempts made to link the recognition of the right to a new framework wherein the state is specifically limited to a role of facilitation, as opposed to rights recognised earlier that were premised on the idea of the state as the only duty holder. The pendulum has moved fast and several aspects need to be addressed to ensure that the recognition of the right has positive impacts for everyone, and in particular the most disadvantaged. This section examines several issues that need to be

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McCaffrey, ‘The Human Right to Water’, in E Brown Weiss, L Boisson de Chazournes & N Bernasconi-Osterwalder eds, *Fresh Water and International Economic Law* 93, 105 (Oxford: Oxford University Press, 2005).

<sup>43</sup> New Delhi Statement, Global Consultation on Safe Water and Sanitation for the 1990s, UN Doc. A/C.2/45/3 (1990), principle 4.

<sup>44</sup> World Bank, Implementation Completion Report – Uttar Pradesh and Uttaranchal Rural Water Supply and Environmental Sanitation (Swajal) Project (Report No. 27288, 2003).

<sup>45</sup> eg P Sangameswaran, Review of Right to Water: Human Rights, State Legislation, and Civil Society Initiatives in India 30 (Bangalore: Centre for Interdisciplinary Studies in Environment & Development, Technical Report, 2007).

<sup>46</sup> Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, UN Doc. A/66/255 (2011), para 19.

<sup>47</sup> Sangameswaran (n 45 above) 31.

addressed. These include the question of disconnections, universal provision and free water, gaps in the legal framework and the need to link water justice to the right to water.

## **A. BANNING DISCONNECTIONS AND DISCRIMINATION IN SUPPLY OF DOMESTIC WATER**

Disconnection of domestic water was until recently an issue that arose mostly in the context of individual piped water supply. The possibility to disconnect is not new since local laws have provided for this possibility for decades. At the same time, questions arise as to whether disconnections can be justified once the right to water has been formally recognised.

At the international level, the mainstream consensus is that the only thing that is prohibited by the right to water is arbitrary disconnections.<sup>48</sup> In a bid to take into account the fact that any disconnection immediately threatens life, a report of the UN independent expert on the right to water adds that in cases where disconnection is due to inability to pay, ‘individuals must still have at least access to minimum essential levels of water’.<sup>49</sup>

It is morally questionable whether any disconnection is acceptable. In fact, even in situations where the legal framework provides for the possibility of disconnections as in the case of Delhi, officials tend to acknowledge that in practice this outcome is nearly always avoided even if conditions for the same are met because they understand that people cannot live without water.<sup>50</sup> In any case, in situations where water is provided through a piped water network, disconnections tend to follow a set procedure that will see domestic water users be warned that they are in arrears before moving on to more serious consequences, with at each stage the possibility for the user to intervene to try and stop the process if needed or to pay their arrears.<sup>51</sup>

In recent years, a new and even more controversial form of disconnection has emerged in the context of new forms of water supply through so-called water ATMs. These are water dispensers accessed through a prepaid card. The analogy with bank cards is what explains the use of the term ATM. This is fitting in the sense that water ATMs reflect the understanding of water as an economic good. These water ATMs may be installed in a variety of places, including in localities where domestic water supply is insufficient. The usual model is one of a filtering unit that is used to provide water to one or a series of local dispensers where users can access water by paying a per litre charge.

These initiatives are important because they bypass the need for heavy infrastructure and can provide access to safe water where there has been none. At the same time, they do not necessarily provide an appropriate framework for the realisation of the right to water. Several issues may arise. Firstly, the entity running the water ATM usually does not take responsibility for providing water but rather sees its mission as a benefit provided to society. Secondly, it is not always clear which water quality standards are followed, who is in charge of monitoring water quality and what consequences are or can be applied in case standards are breached. At present, water ATMs seem to have the public’s trust on the understanding that filtered water is by definition better than unfiltered water but this is no substitute for binding quality standards. Thirdly, water ATMs raise significant concerns because these

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<sup>48</sup> General Comment 15 (n 9) para 10.

<sup>49</sup> UN Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, UN Doc. A/HRC/15/31 (2010), para 48.

<sup>50</sup> Personal communications with Delhi Jal Board staff members.

<sup>51</sup> eg Uttar Pradesh Water Supply and Sewerage Act, 1975, s 72.

systems are based on pre-payment, implying that no water will be dispensed to anyone whose credit has run out. In effect, there is no procedure preceding the disconnection and where individuals cannot afford to recharge their card when credit runs out, the disconnection is immediate. Interestingly, this form of automated disconnection linked to pre-payment cards that had been introduced in England and Wales at the time of water services privatisation, was found unacceptable even without relying on the right to water that is not formally recognised there.<sup>52</sup>

The introduction of water ATMs as an alternative source of domestic water supply raises discrimination concerns in terms of disconnections. This is due to the fact that procedural guarantees that apply to users benefitting from piped water supply do not apply here. Worryingly, the only court order to-date that has specifically addressed water ATMs in India specifically promoted their use for a particular group of people defined by the legal status of their dwelling.<sup>53</sup> In other words, the court order seems to imply that automated disconnections can be imposed as a form of punishment on people whose dwellings are not regularised. The order is not specific on this point but it is specific on the point of it being appropriate to let these people be charged more for their water, hence an element of differentiation seems to be in-built in the thinking informing the decision.

Overall, water ATMs highlight some unfortunate developments. On the one hand, the recognition of the fundamental right to water is regularly reconfirmed and increasing attention has been given to fostering supply of safe domestic water. On the other hand, some of the interventions deployed to foster access to safe domestic water undermine some aspects of the right to water while contributing to its realisation in part. This is, however, not a situation where to do a great right, a little wrong can be condoned. Fundamental rights are structured around the idea that their minimum level of realisation should be similar for everyone. This does not provide space for initiatives like water ATMs, especially as long as they are not regulated like other water providers. The fact that many of these schemes are corporate social responsibility initiatives whereby the private sector makes some contribution to social welfare is not sufficient to allow them not to follow the same norms that water utilities need to comply with.

## **B. ENSURING UNIVERSALITY OF FREE PROVISION**

The provision of free water as part of the realisation of the right to water has been much more controversial than in the case of other fundamental rights. This is again due to the fact that the recognition of the right has coincided with the push towards commodification and privatisation. At the outset, the rejection of free water is surprising because this is what the government had been implementing for decades in rural areas in the context of the ARWSP. Free provision was undertaken much before the courts intervened and formally recognised the fundamental right to water. This was not only uncontroversial but seen as a duty of the government.

The distrust for providing free water as part of the realisation of the right to water cannot be ascribed to the fact that it was deemed impractical since it was already being implemented. It can also not be ascribed to a conceptual contradiction in terms of fundamental rights since other rights are realised through state provision in part or fully.<sup>54</sup> The real reason is thus the

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<sup>52</sup> *R. v Director General of Water Services*, Queen's Bench Division (Crown Office List), 20 February 1998, [1999] Env. L.R. 114.

<sup>53</sup> *Pani Haq Samiti* (n 19).

<sup>54</sup> eg Right of Children to Free and Compulsory Education Act, 2009, s 3.

change of economic policy in the 1990s that comes loaded with an understanding of the state as having failed to deliver, as being incapable of being reformed and thus having to take a back seat in the provision of welfare. The gap created is filled by the private sector but this can only be achieved by changing people's perception that water is a shared substance and that domestic water, or the infrastructure to access it, is something that is provide free.

This translates into a push for pricing water for all users. The rationale given is linked to water scarcity, which is used to explain that people need to be taught efficiency of use through pricing since they otherwise tend to waste water. It is ironical that this argument was made in a country where hundreds of millions of people do not have access to water within their household and for whom every litre of domestic water used involves the effort (overwhelmingly borne by women) of bringing it home from somewhere else.

There are various reasons why water needs to remain free for everyone. Firstly, the right to water is a universal right and everyone has an entitlement to a minimum quantity of water to live a life of dignity. This is what the Delhi Government free water policy does admirably by not limiting its ambition to an amount of water necessary to meet survival needs but an amount that ensures a decent dignified life.<sup>55</sup>

Secondly, the realisation of the right to water is a duty of the state like for all other fundamental rights. The complication with water is that there is no scope for full privatisation of the delivery of water supply because private sector actors are generally only willing participants for certain specific tasked. These tasks are on the whole limited to the actual distribution of water once the water has been made available in bulk form by the government. In the increasingly frequent situation where water for large cities has to be brought from long distances, these huge capital investments remain as a rule government initiatives. Further contracts for private water sector delivery tend to give the government a duty to provide bulk water without which the private sector actor is not responsible for non-provision.<sup>56</sup> On the whole, this is what mainstream policy documents capture under the idea that the 'the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations'.<sup>57</sup>

Thirdly, pricing is a self-contradictory proposition in terms of the right to water. Indeed, no report or policy document ever advocates that people in absolute poverty have the capacity to pay. For people officially recognised as being in absolute poverty, an exception is thus often carved out. In certain case, this is framed as a 'lifeline tariff',<sup>58</sup> which phrase sadly reflects an understanding that the duty of the government is essentially limited at ensuring survival needs. The idea that an exception can be carved out for the poorest but that on the whole everyone shows 'willingness to pay' is an inappropriate starting point for policy measures to realise the right to water.<sup>59</sup> On the one hand, any categorisation is problematic because the threshold chosen to distinguish the poor from the rest will always be arbitrary. On the other hand, if a distinction needs to be made and a group singled out, it should be the richest quintile (or any appropriate percentage) whose capacity to pay is unchallenged. In a context

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<sup>55</sup> Delhi Jal Board, Notification – Free water supply upto 20 Kl per month to every house hold having domestic water connections including Group Housing Societies, DJB/DOR/Policy/2014-15 (27 February 2015).

<sup>56</sup> eg Nagpur Municipal Corporation, 24 x 7 Water Supply Project for Nagpur City - Tender No.: 203/PR/07/08/08 - Volume-II: Part 3 - PPP Contract (Revision-4), 2009, para 6.5.

<sup>57</sup> UN Human Rights Council (n 5) at para 6.

<sup>58</sup> eg Asian Development Bank, Water for All – The Water Policy of the Asian Development Bank, 2001, para 46.

<sup>59</sup> On willingness to pay, eg World Bank, Rural Water Supply in India – Willingness of Households to Pay for Improved Services and Affordability (Policy Paper 44790, 2008) 6.

where the right is universal and where the majority of people are poor (even if not ‘poor’ according to official definitions), the starting point should be a policy that provides for everyone, as has been implemented in Delhi since 2015.

A campaign against the idea of free provision of water has been unleashed in the context of neoliberal economic reforms that have particularly targeted the water sector. The argument that seems to win people’s hearts is that the scarcity of water (a real issue but not the only one or even necessarily the dominant one in terms of domestic water supply) calls for everyone to be parsimonious in their water use. This is then coupled with the idea that it is the poor that are dispendious and it is thus appropriate to ask them to pay too.<sup>60</sup> Once the idea of pricing is accepted, the recognition of the right to water becomes indirectly an instrument for the expansion of private sector activities in water services. This explains the strength of the campaign against free water that has been unleashed but does not make the argument of free water any weaker.

The argument against free water then often runs along the lines that state resources are better spent elsewhere in a context where users (now called consumers) fail to use water sparingly. This point sidelines the fact that the state remains the primary investor in bulk water infrastructure and in laying down costly pipes that provide the basis for individual piped water supply. This expenditure acts as a massive subsidy since water prices would be infinitely higher without this investment. The consensus around pricing for water would immediately disappear if this cost was borne by users. This confirms that every user is quite satisfied to see their water heavily subsidised and this is indeed something the right to water demands from the state to justify its existence. The actual provision of free water at the level of individual users is only a minor extension of this and presents no conceptual difficulty, only a political one. The only thing that may need to be debated is the way in which free water policies are implemented so that they cover the needs of life with dignity but not recreational needs such as filling individual swimming pools.

In addition, free provision of the basic content of fundamental rights is nothing unusual. Indeed, other rights have been realised through universal free provision, as in the case of the right to education and components of the right to food like the midday meals. In both cases, the central dimension of the free elements provided is that they are provided universally. In this sense, the Delhi free water policy is a correct approach from a right to water perspective in its imagination, if not fully in its delivery.<sup>61</sup> Indeed, Delhi residents very much appreciate the measure.<sup>62</sup>

### **C. RECLAIMING THE RIGHT TO WATER**

The formal recognition of the right to water has been one of the major developments in human rights law over the past couple of decades. It signalled the filling of a gap that was glaring and obvious but had not been addressed in the first decades of the development of human rights treaties at the international level or fundamental rights in post-World War Two constitutions. Conceptually, this makes a big difference since it turns people often termed ‘beneficiaries’ of water sector interventions, such as providing handpumps in villages, into

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<sup>60</sup> eg *Wazirpur Bartan Nirmata Sangh v Union of India* WP(C) No. 2112/2002 (High Court of Delhi, Judgment of 28 September 2006) recalling a direction to the government ‘to remove all unauthorized structures, jhuggies, place of worship etc. which are polluting the river Yamuna’ (p. 9).

<sup>61</sup> P. Cullet, ‘In Defence of Free Water – Beyond the Delhi Experiment’, *The Statesman*, 2 March 2014, p. 6.

<sup>62</sup> Eg Gyaneshwar Dayal, ‘AAP Government Performance in Delhi since 2015’ (6 April 2017) <<http://www.elections.in/blog/aap-government-performance-in-delhi-since-2015>>

‘rights holders’. At the same time, the winds of water commodification brought privatisation, the focus on water as an economic good and a new understanding of water users as ‘consumers’.

Mainstream human rights policy interventions have contributed to shaping the right to water as a neoliberal right through a qualification of the right as a right of ‘access’ to water. In addition, criteria like affordability and the acceptability of disconnections as long as they are not arbitrary have ensured that most people understand the right to water as a right that is more qualified than other fundamental rights. This is not necessarily surprising in a context where water has been the next frontier in terms of appropriation of natural resources and the past couple of decades have seen a very strong push towards opening up new markets in this sector.

The right to water needs to be brought back to a place where it is conceived primarily in terms of the entitlements of its rights holders. Firstly, the universal nature of the right needs to be further emphasised to ensure that domestic water policies are not framed around ‘targeting’ the poor or certain classes of disadvantaged people.

Secondly, the right needs to be conceived in its individual and collective dimensions. The mainstream understanding of the realisation of the right to water has been increasingly oriented towards individual realisation that translates into calls for individual piped metered water connections. Providing water supply in each home is an essential component of the realisation of the right to water given the importance of water for most domestic activities. At the same time, this does not mean that it needs to be conceived on an individual basis. The sharing can happen at several levels. Pipes could be shared between houses, just like until now for crores of people, sources of water, such as handpumps, are shared.

In other words, the disconnect between the recognition of water as a public trust or common heritage and the realisation of the right to water as an individual entitlement linked to the commodification of water needs to be broken. In fact, the right to water constitutes an appropriate starting point for broadening the understanding of rights in a context where the realisation of the right depends not just on actions at the local and national level but also international level. Global environmental change (climate change) is increasingly affecting what were earlier understood as relatively stable rainfall patterns. Since rainfall is the main source of water for all human uses, it is inconceivable to link the fundamental right to water to mercantilist perspectives that look at water only from the point of view of water as a finite good whose finiteness provides the basis for allocation to the highest bidder.

The realisation of the right to water thus depends on factors that are beyond the control of individual actors and individual states. This is indeed the reason why ownership of water was not condoned for thousands of years in different parts of the world. The recognition and formalisation of the right to water provides an excellent opportunity to build on this understanding of water as something that is too important to allow private appropriation. While current privatisation policies generally prohibit outright ownership of water by private actors, this is only a legal fiction that makes little or no difference to what the ‘consumers’ of these companies experience in practice.

The next step needs to be the recognition of water as a common heritage. This brings a novel perspective insofar as it is based on the idea that every user of water has a stake in the conservation, use and benefits derived from its use. This has been used now mostly at the international level to address resources that are not under state sovereignty where cooperation



among states is easier to achieve.<sup>63</sup> In the case of water, the same idea needs to be introduced from the local to the global level. This is in consonance with the age-old idea that no-one should own water and reflects the fact that despite claims to the contrary in some places,<sup>64</sup> states are not able to assert control over water in terms of the global water cycle and rainfall, despite advances in cloud seeding techniques, for instance.

The second change that needs to be introduced in view of the fact that water is often very local, either because it is found in the ground or because it is difficult and very expensive to transport over long distance. This local dimension should be reflected in the introduction of the subsidiarity principle as an organising principle. This fits the nature of water that is at the same time extremely local, national and global well. Decisions should be taken at the local level because that is often where the only level where they can be taken but at the same time, this needs to be done within a context that recognises the multiple layers needed for an overall view of water.

Overall, our understanding of the right to water has been overwhelmingly influenced by the strong pull of neoliberal policies that coalesced at around the same time. It is time to rethink the context within which the right is conceived and implemented so that it does not focus on responding to economic policy choices but is based on the nature of water and the main issues arising in the water context at present.

## **CONCLUSION**

The recognition of the right to water is a significant development. However, despite its potential to change the lives of hundreds of millions of people, dozens of countries refused to vote in favour of a non-binding UN General Assembly resolution recognising the right in 2010.<sup>65</sup> At the same time, major water multinational companies already welcomed the right in the early 2000s as long as this was not a right to free water.<sup>66</sup>

The recognition of a right whose basic component of access to domestic water no one would publicly reject has been made more complex than should have been the case by the fact that this progressive formalisation happened when water was becoming the next big business opportunity. In India, what may have seemed like an obvious recognition of the fundamental right to water by the Supreme Court in the early 1990s was thus immediately complicated by the fact that policies in the water sector were at that very same time moving in a different direction. There have been many attempts to reconcile the right to water with commodification and commercialisation, and the mainstream position is that this has been successfully articulated through the understanding of the right as a qualified right of ‘access’ and strong emphasis on pricing and affordability as elements deemed inseparable of the recognition of the right because of physical water scarcity.

The current mainstream framework fails however to account for the fact that water has never been seen as a natural resource like others. The push towards privatisation is thus full of contradictions. It largely condones the recognition of the right to water because this ensures

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<sup>63</sup> eg United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc A/CONF.62/122, part XI.

<sup>64</sup> eg International Law Commission, Draft articles on the Law of Transboundary Aquifers, Official Records of the General Assembly, Sixty-third Session, Supplement No. 10, UN Doc. A/63/10 (2008), art 3.

<sup>65</sup> United Nations General Assembly Resolution 64/292, The Human Right to Water and Sanitation, UN Doc. A/RES/64/292 (2010).

<sup>66</sup> AFS Russell, ‘Incorporating Social Rights in Development: Transnational Corporations and the Right to Water’, 7/1 *Int’l J.L. Context* 1, 19 (2011).

that the state gives added priority to building piped networks that are a pre-condition for the involvement of private actors in water services delivery. Similarly, private sector actors thrive on the bulk infrastructure that the state is building to bring more water to cities that increases business opportunities. This additional water is then distributed to ‘consumers’ on the premise of scarcity that justifies a tariff that is ‘affordable’ but ideally as high as is politically acceptable to the government of the day.

The realisation of the right to water whose recognition was spearheaded by the higher judiciary has been marred in different ways by the counter-push for commodification and privatisation, spearheaded in part by development agencies as in the case of the World Bank’s Swajal project whose basic principles became national policy through the Swajaldhara guidelines. In the meantime, the shortcomings of the commodification route have become increasingly apparent. In rural areas, the attempt to impose capital cost recovery on water users was abandoned in 2009 with the introduction of the National Rural Drinking Water Programme. In urban areas, Delhi illustrates the increasing focus put progressively on reclaiming water publicly. The collapse of the privatisation project in 2005 eventually led in 2015 to the introduction of the free water policy that clearly signals to the electorate the state’s resolve in providing water to all and understanding this as one of its primary functions. The next step will be to link such efforts to the right to water to give further coherence to measures that reinforce each other. This must be done within a context that clearly understands water as a shared substance and the policy priorities need to be aligned to the idea that water is a common heritage from the local to the global level whose management should be organised on the principle of subsidiarity.