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EVOLVING REGULATORY FRAMEWORK FOR RURAL DRINKING WATER

NEED FOR FURTHER REFORMS

Philippe Cullet

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10 Evolving Regulatory Framework for Rural Drinking Water

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INTRODUCTION

The provision of drinking water in rural areas has been a major concern of successive governments in India for several decades. This can be explained easily by the immediate link between water and human survival, as well as that between sufficient safe water and an adequate standard of living. This immediate link between water and human life ensures that it has direct political implications from the local to the national level.

The regulatory framework for rural drinking water surprisingly does not reflect this sense of importance. Indeed, beyond the frequent assertion and reassertion of a fundamental right to water by the superior courts, little effort has been made to develop a comprehensive legislative framework operationalizing the fundamental right. An additional complication is that states have primary responsibility over drinking water. This has led to a maze of instruments that include mostly general provisions in legislation such as panchayat acts at the state level and secondary instruments adopted by the executive at the union level that have had a strong influence in the states because these instruments have come with financial incentives for states to adopt their principles.

The framework that was put in place in the decades following independence was progressively strengthened

alongside the increasing importance of rural drinking water supply as a political and policy issue. Yet, the general characterization of the pre-reform framework was that it was piece-meal. Since the early 1990s, different waves of reforms have swept the water sector. In terms of legal reforms, one of the most important changes in recent decades has been the adoption of the 73rd amendment to the Constitution providing for a significant devolution of competences to panchayats. A number of states have accordingly amended their panchayat legislation. This has been complemented by a variety of other reform efforts through other types of instruments ranging from broad national and state water policies to government guidelines specifically focused on rural drinking water supply.

The regulatory framework for rural drinking water supply went through a phase of turmoil from the late 1990s until 2009. The adoption of a new framework, the National Rural Drinking Water Programme (NRDWP; See Box 10.1), replacing the 1970s framework taking into account the reform efforts of the past decade seemed to signal a pause and the time for consolidation of the present set of reforms. Yet, the past two years have confirmed that the evolution of the regulatory framework is not over. This is highlighted, for instance,

by the preparation of a strategic plan for the period up to 2022, and a new scheme to foster private sector participation in rural water supply.

This chapter looks at the existing regulatory framework for rural drinking water supply, its evolution over the past two decades, and proposals for further reforms. It also proffers some recommendations as to the desirable direction for further reforms of the regulatory framework in a way that contributes towards realizing the existing basic legal principles in this area, and ensures that the poorest get preferential treatment and that all residents of the country get the same entitlements to drinking water.

LEGAL FRAMEWORK GOVERNING RURAL DRINKING WATER

Fundamental Right to Water

The Constitution does not specifically include a fundamental human right to water. Yet, a number of judicial pronouncements have made it clear that the right exists in India. The Supreme Court has repeatedly derived a fundamental right to water from the right to life.¹ Courts have also derived the fundamental right to water from Article 47 of the Constitution. In the Hamid Khan case, the complaint focused on the health consequences of the supply of water with excessive fluoride content. The High Court found that under Article 47 the state has a duty 'towards every citizen of India to provide pure drinking water'.²

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

[w]e have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities

would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has it(s) priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service.³

The cases mentioned above confirm that the right to water is well established. Yet, the actual content of the right has not been elaborated upon in judicial decisions. Further context is thus to be found in legislation and subsidiary legal instruments.

Laws Regulating Rural Drinking Water Supply

Drinking water is acknowledged as the primary concern in the water sector. Yet, recognition in legal terms is largely limited to the recognition of the fundamental right to water. Indeed, there is no framework drinking water law to complement the recognition of the fundamental right to water and as a result there is neither any general set of principles that applies to drinking water supply throughout the country nor are there any specific rules giving content to the fundamental right to water.⁴

The absence of broad drinking water legislation notwithstanding, a number of more specific initiatives have been taken over time. Thus, following the adoption of the 73rd Constitutional Amendment, various states have either confirmed or adopted legislative provisions giving panchayats control over water supply at the local level. Different formulations are used and different acts give a different set of competences to panchayats. There is nevertheless broad agreement among panchayat acts in giving control to panchayats over drinking water supply at the local level.⁵ Some acts are more detailed than others. Some specify the

¹ *Subhash Kumar v. State of Bihar* AIR 1991 SC 420 (Supreme Court of India 1991).

² *Hamid Khan v. State of Madhya Pradesh*, AIR 1997 MP 191 (Madhya Pradesh High Court 1996), para 6.

³ *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, 2006 (1) KLT 919 (High Court of Kerala 2006), para 3.

⁴ The only proposal for drinking water focused legislation at the union level is limited to certain issues linked to water quality and would not constitute a comprehensive drinking water legislation if it is adopted. See Department of Drinking Water Supply (2007).

⁵ For example, Himachal Pradesh Panchayati Raj Act, 1994, s 11(2).

kind of activities that panchayats can engage in, such as constructing, repairing and maintaining tanks or wells, streams, and watercourses and specify their powers, such as the capacity to contract someone for water supply.⁶ While panchayat acts are not detailed with regard to water supply rights and obligations of the panchayats, they provide a general binding framework within which all the water supply at the local level must be organized.

Some states have also adopted sectoral legislation that specifically addresses drinking water from the perspective of the regulation of one specific body of water. This is, for instance, the case in Karnataka, Madhya Pradesh, and Maharashtra where groundwater legislation focuses specifically on drinking water.⁷ These acts focus on water conservation and availability. They thus neither include any list of principles governing drinking water supply in general nor specifically regulate water supply in detail.

In addition, the union has introduced various quality standards for drinking water supply. These include the Bureau of Indian Standards (BIS) Water Quality Standards (BIS: 10500) 1991 and the *Manual on Water Supply and Treatment* issued by the Central Public Health and Environmental Engineering Organization.⁸ While these are, in principle, applicable countrywide, the absence of any legislation directly referring to these standards means that to date their legal status is partly inchoate. They are applicable but not legally binding on water service providers.

ADDITIONAL INSTRUMENTS GOVERNING RURAL DRINKING WATER SUPPLY

The limited framework existing to give shape to the fundamental right to water implies that there are significant gaps in the regulatory framework. This has been filled at different levels and in different ways over

time. At the most general level, a number of states have adopted state water policies. These documents make a general reference to drinking water and all give it the highest priority in terms of inter-sectoral allocation of water.⁹

At the union level, the centre felt increasingly compelled to involve itself in rural drinking water supply. Since drinking water supply, in principle, falls under the competence of states, the centre decided to use a mix of executive instruments and financial incentives to make its mark at the local level. Over time, while states have retained the overall mandate over rural drinking water supply, the influence of the union framework has been increasingly visible throughout the country.

From a legal point of view, the key dimension of the different instruments adopted by the union government over time is that they create no rights and obligations. These should thus be considered as subsidiary instruments. Yet, in practice, the frameworks of the union government have had a disproportionate influence. This can be explained in part by the financial incentives offered by the centre and in part by the fact that the framework proposed by the centre is similar to what international development agencies propose and implement through the projects they finance in individual states.

Accelerated Rural Water Supply Programme

The first key framework put out by the union to foster better drinking water supply in rural areas was the Accelerated Rural Water Supply Programme (ARWSP). The ARWSP Guidelines were first introduced in 1972 and formally abandoned in 2009. For a number of years, they provided the core framework used by the Rajiv Gandhi National Drinking Water Mission in ensuring the provision of drinking water to all habitations in the

⁶ For example, Karnataka Panchayat Raj Act, 1993, s 77.

⁷ Karnataka Ground Water (Regulation for Protection of Sources of Drinking Water) Act, 1999, available at www.ielrc.org/content/e9905.pdf; Madhya Pradesh *Peaya Jal Parirakshan Adhiniyam* 1986, available at www.ielrc.org/content/e8603.pdf; and Maharashtra Ground Water Regulation (Drinking Water Purposes) Act, 1993, available at www.ielrc.org/content/e9301.pdf. On the Maharashtra Act, see Phansalkar and Kher (2006).

⁸ Bureau of Indian Standards Specifications for Drinking Water [BIS Specification 10500], (1991) and Ministry of Urban Development (1999).

⁹ Kerala State Water Policy, 2008, available at www.ielrc.org/content/e0804.pdf

country.¹⁰ Some of the salient points of the ARWSP Guidelines included the following:

- They first defined different levels of coverage in terms of quantity. Non-covered habitations were defined as having access to less than 10 litres per capita per day (lpcd). Partially covered habitations were those having access to 10 to 40 lpcd. Covered habitations were defined as having access to 40 lpcd.
- The Guidelines further specified that the source of water had to be within 1.6 km or 100 metre elevation in mountain areas. The water was not to be affected by quality problems even though no specific standards for determining quality were included. Another criterion was that a given public source of water such as a handpump was not to be used to serve more than 250 people.
- The Guidelines also acknowledged the direct link between drinking water for human beings and water for cattle. Consequently, in a certain number of states especially affected by drought, the guidelines mandated that an additional 30 lpcd be provided for cattle.
- The minimum level of 40 lpcd was acknowledged as a minimum level of coverage, to be increased over time.

Reform of the Framework Governing Domestic Water Supply in Rural Areas

The progressive implementation of the ARWSP was carried out until the mid-1990s. Since then, a string of reforms efforts eventually led to abandoning the ARWSP altogether. The first harbinger of reforms was a pilot project sponsored by the World Bank whose principles were adopted in the Swajaldhara Guidelines, 2002. The latter were used as a template for reforms, which eventually led to a complete rethinking of the existing policy framework and the adoption of an entirely new set of guidelines in the context of the NRDWP.

Kicking off the Reforms—The Swajal Project and the Swajaldhara Guidelines

The Uttar Pradesh Rural Water Supply and Environmental Sanitation Project (Swajal Project), a World Bank-funded project started in 1996, was one of the important drivers of change in the rural drinking water sector. The Swajal Project introduced a number of important policy propositions that have, in the meantime, become the standard basis for rural drinking water supply. In particular, it advocated the shift from a supply to a demand-driven approach and the introduction of cost recovery of capital costs and operation and maintenance (O&M).

The Swajal Project and related initiatives taken in the late 1990s, such as the Sector Reform Project, were generally assessed positively by policy makers. This led to the formulation of the Swajaldhara Guidelines, which extended the key principles of the Swajal Project to the whole country during the Tenth plan period.¹¹ The Swajaldhara Guidelines were premised on the fact that the understanding of water as a social right was misplaced and that it should rather be seen as a socio-economic good.¹² Further, they were based on an understanding that the delivery of the social right by the government did not sufficiently take into account the preferences of users and was ineffective in ensuring the carrying out of O&M activities. This called for a demand-led approach. The link between the demand-led approach and the new conception of water as an economic good was succinctly brought together where the Guidelines argued that the idea of demand-driven system was to take into account the preferences of users 'where users get the service they want and are willing to pay for'.¹³ The imposition of full cost recovery of O&M and replacement costs on the communities was expected to generate a sense of ownership and ensure the financial viability of the schemes.¹⁴

¹⁰ Government of India, Accelerated Rural Water Supply Programme Guidelines (1999–2000) (ARWSP Guidelines), available at www.ielrc.org/content/e9914.pdf

¹¹ Ministry of Rural Development (2002).

¹² Ibid., Section 1, sub-section 1.

¹³ Ibid., Section 1, sub-section 2.

¹⁴ For more details on the Swajaldhara Guidelines, see Cullet (2009).

The New Policy Framework—The NRDWP

The experience gathered during the 10th Plan led the government to suggest an entirely new framework for rural drinking water supply. In a bid to demarcate the new policy principles from earlier reforms, the instrument is now known as the NRDWP.¹⁵ The NRDWP brings a number of key changes to the policy framework for drinking water supply in rural areas.

First, the NRDWP sees water as a ‘public good’ that everyone can demand and it sees water as a ‘basic need’.¹⁶ This characterization is not particularly remarkable in general but does not fit well within the existing legal framework. Indeed, the Supreme Court has repeatedly stated that water is a ‘public trust’.¹⁷ This specifically rests on the basis that water is of such importance to people that ‘it would be wholly unjustified to make [it] a subject of private ownership’.¹⁸ The Court further specified that the government was supposed to protect water for the enjoyment of the general public rather than allow its use for commercial purpose. Water being a public trust, thus, cannot be a good, even in its characterization as ‘public’.

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

Second, the NRDWP goes further than simply evacuating the language of fundamental rights. In fact, it operates a U-turn on the policy followed since the 1970s by suggesting that measuring the realization of the fundamental right to water in terms of a quantity

of water per capita per day is inappropriate.¹⁹ The NRDWP suggests moving from a fixed minimum to the concept of drinking water security.

Drinking water security is not given a specific definition but it is opposed to the per capita norm followed earlier. Indeed, the NRDWP specifically states it is necessary to ‘move *ahead* from the conventional lpcd norms to ensure drinking water security for all in the community’.²⁰ 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’.²¹ It does not, however, explain how the shift ensures better coverage in a given habitation.

The new framework is surprising from the perspective of the right to water. At one level, the policy framework has been tightened by bringing down the focus from the habitation to the household. Yet, at the same time, by sidelining per capita norms, it is of concern in terms of the right to water that is an individual entitlement under Indian law. In addition, the foreword to the guidelines specifically indicates that ‘norms and guidelines need to be flexible’ and further states that flexibility is preferable to the ‘adoption of universal norms and standards’.²² This makes sense in terms of giving panchayats the scope to manage drinking water in the way most suited to local conditions. However, in terms of broad regulation, this does not fit within the framework of the right to water that is essentially based on ensuring the exact same realization of the right (at least its ‘core’ content) to everyone.

Third, the NRDWP emphasizes the question of ‘sustainability’ of water supply. This is significant because sustainability is intrinsically linked to equity and has the potential to foster an understanding of drinking water

¹⁵ NRDWP (2010).

¹⁶ NRDWP (2010) s 2.

¹⁷ *MC Mehta v. Kamal Nath* (1997) 1 SCC 388 (Supreme Court, 1996).

¹⁸ *Ibid.*, para 25.

¹⁹ Note that at the same time the guidelines indicate that the overall goal is to ‘provide every rural person with adequate safe water for drinking, cooking and other domestic basic needs’ (NRDWP 2010: s 1).

²⁰ *Ibid.*, s 4 (emphasis added).

²¹ *Ibid.*, s 9 (1).

²² *Ibid.*, p. iv.

security that contributes to the realization of the fundamental right to water. The main text of the NRDWP does not define sustainability but an annex on sustainability provides interesting insights. The starting point is the notion of sustainable development expounded in the report of the World Commission on Environment and Development (Brundtland Commission 1987).²³ According to the Brundtland Commission, sustainable development is development that meets today's needs without compromising future generations' options. One of the key tenets of the definition is the need to give 'overriding priority' to the essential needs of the world's poor.²⁴

The understanding of sustainability propounded under the NRDWP is fundamentally different from that of the Brundtland Commission. It emphasizes four components: source, system, financial, and finally social and environmental sustainability.²⁵ The focus is on ensuring availability of water and not access (source sustainability), on optimizing the cost of production of water and capacity building (system sustainability), on cost recovery of 'at least' 50 per cent (financial sustainability) and on '[p]roper reject management and involvement of all key stakeholders' (social and environmental sustainability).²⁶

The above definitions fall within a context where there is no generally agreed definition of sustainable development in either Indian law or international law. Yet, the NRDWP frames its understanding of sustainability in the context of the Brundtland Commission's report. In doing so, it acknowledges that sustainability first evolved from an environmental perspective and gave utmost priority to the poor.²⁷ It is thus surprising to find that 'social and environmental sustainability' is the fourth and last component of the definition. In addition, the NRDWP frames the environmental dimension of sustainability in a narrow framework focused on waste management. On the whole, the sustainability dimension of drinking water security as expounded in

the NRDWP fails to provide a basis for fostering the realization of the fundamental right to water.

Fourth, the NRDWP places emphasis on the need for infrastructure that provides water from outside a given village through a grid, fed by pipelines or other means of connecting major water sources.²⁸ Alongside the focus on conjunctive use of surface and groundwater and reliance on multiple sources of water, a grid can make an important contribution to the provision of water. It could also lead to more equity among regions since everyone could, in principle, be provided the same amount of clean water regardless of their geographical location. This would constitute a major step forward in ensuring that the fundamental right to water is realized in the same way for everyone.

At the same time, this is a momentous change from reliance on local sources of water and should be integrated in a much broader policy discussion. Indeed, from the point of the principles and concepts being proposed, there is a tension or maybe even an opposition between the move to foster decentralization and participation and the move towards having a grid covering all villages. The latter will by definition imply a new level of centralization which has, in fact, never been present in rural drinking water supply until now. This may be a positive factor to the extent that the whole new framework is conceived with appropriate safeguards and accountability. It cannot, however, be introduced under the guise of participation and decentralization and the two streams thus need to be clearly distinguished.

FURTHER REFORMS

The earlier parts of this chapter brought out two key dimensions of the regulatory framework for rural drinking water supply. On the one hand, there are a series of binding legal principles and instruments governing the field. In particular, rural drinking water supply is on the whole governed by the fundamental

²³ Brundtland Commission (1987).

²⁴ *Ibid.*, p. 54.

²⁵ NRDWP (2010: Annexure II: Guideline for Implementation of Sustainability–Swajaldhara Project).

²⁶ *Ibid.*, Annexure II, s 2.

²⁷ Brundtland Commission (1987: 54).

²⁸ NRDWP (2010: s 6).

Box 10.1 National Rural Drinking Water Programme

- The NRDWP replaced the ARWSP since 2009.
- Its basic goal is to provide every rural person with adequate safe water for drinking, cooking, and other domestic basic needs. It seeks to ensure that ultimately all rural households be provided with adequate piped safe drinking water supply within the household premises. This water should meet minimum water quality standards and be readily and conveniently accessible at all times and in all situations.
- The NRDWP is based around a string of principles, including the principle that water is a public good; that it is the ‘lifeline activity’ of the government to ensure that water needs are met; and that ‘market forces alone’ should not be the main driving force in fulfilling basic water needs.
- The NRDWP moves away from a measurement of water needs in terms of lpcd towards the concept of ‘drinking water security’ that considers the household as the basic unit rather than the individual.
- The NRDWP envisages the need for a ‘grid supplying metered bulk water’ as an alternate supply system at the sub-district, district and/or state level.
- The NRDWP calls for the active participation of stakeholders and envisages that the level of service should be linked to user ‘demand’. In addition, it forecasts that the government will not be able to provide all the necessary resources. As a result, it calls for cost sharing between all actors involved and specifically requests panchayati raj institutions to manage the drinking water supply systems created. The role of the state government is to be limited to the responsibility for the bulk transfer of water, its treatment, and distribution up to the doorstep of the village.

right to water. This is supplemented by some legislative instruments, such as panchayat acts. On the other hand, there are various non-binding instruments adopted by the executive, in particular the union government, that govern rural drinking water supply. These instruments have in common that they do not create rights and obligations and can be adopted and modified without any particular procedure, as opposed to the case of an Act of Parliament.

The evolution of the past two decades highlighted above shows that the part of the regulatory framework that has evolved dramatically is the one that is mostly controlled by the executive. This permits a lot of flexibility, rapid changes, and adaptation to new contexts. Yet, at the same time, the Swajaldhara Guidelines and subsequently the NRDWP are crucial instruments that have and will completely redraw the regulatory framework for rural drinking water supply. These instruments have and will affect the way in which the fundamental right to water is realized and the way in which existing legislation, such as panchayat acts are implemented. However, since none of these reforms have ever been adopted by Parliament, there has never

been any assessment of their impact on the existing legal framework or of their compatibility.

The reforms that have been introduced to-date raise a number of key questions that need to be much more widely debated. This section seeks to propose a few suggestions concerning the way in which the regulatory framework should move beyond the existing reforms. Yet, this cannot be done in a vacuum since there are already proposals and new instruments seeking to take the rural drinking water sector along the path of further significant reforms. Two of these efforts are introduced here.

New Reform Proposals

The NRDWP framework is yet to be fully operational in some parts of the country, as witnessed in different districts of UP where block and district authorities are at most aware that a new paradigm exists in Lucknow. Yet, the Department of Drinking Water and Sanitation has already moved towards adopting further sweeping reforms. This comes in the form of a strategic plan for the period leading up to 2022.²⁹

²⁹ Ministry of Rural Development (2011).

This strategic plan does not necessarily imply rescinding the NRDWP but can be seen as an additional framework guiding the overall sector for the next decade. The overall conceptual framework of the strategic plan is highlighted in a section entitled ‘aspirations’ that calls for all rural households to have access to piped water supply in adequate quantity with a metered tap connection providing safe drinking water. The implication of this aspiration is a complete redrawing of the physical map of water supply throughout the country. As indicated in the plan, what is envisaged is on the whole abandoning handpumps whose contribution to water supply is visualized as declining from 70 to 10 per cent while community stand-posts’ contribution is meant to decrease from 30 to 10 per cent.

Interestingly, the strategic plan seems to reverse in part the NRDWP decision to abandon a per capita measurement of water supply by suggesting that the goal by 2022 should be that every person should have access to 70 lpcd within 50 metres from their household. This is, however, not conceived as a universal norm. Indeed, the plan goes on to identify three different levels of service: the first one includes basic piped water supply with a mix of household connections, public taps and handpumps and is designed for 55 lpcd. The second one comprises piped water supply with all metered, household connections and is designed for 70 lpcd or more. The third option to be adopted ‘in extreme cases’ includes handpumps, protected open wells, protected ponds supplemented by other local sources and is designed for 40 lpcd.³⁰

The plan does not indicate how these choices will be made. However, it specifies that the first two options are based on at least partial cost recovery, leaving each state to decide on the basis of ‘affordability and social equity’ within the cost ceiling.³¹ The third option to be adopted only in extreme cases is the one where water is still provided free of cost. This seems to imply that the level of service provided will depend on the capacity of water users to pay for it, as experimented for more

than a decade in the context of the Swajal Project and Swajaldhara Guidelines.

The plan is clearer than the NRDWP in specifically recommending what it calls ‘outsourcing’. The participation of the private sector is thus openly called for in rural water supply for the first time. This is likely to usher in a revolution in the functioning of the rural water supply sector.

Thus, the plan is directly linked to a scheme that is to be implemented in the eleventh plan, the Provision of Urban Amenities in Rural Areas (PURA) Scheme.³² This scheme proceeds from an idea first mooted in 2003. As the name implies, it seeks to ensure that rural areas get some of the basic amenities enjoyed in urban areas. It is specifically premised on delivering these amenities through public–private partnerships.

The PURA is conceived not only as a way to bring in private sector finance to rural areas but also as a way to rethink the disbursement of existing public sector funding, and in particular to ensure convergence of different schemes such as the NRDWP and the Total Sanitation Campaign. It is particularly significant in the context of this chapter because the first amenity covered is drinking water and sewerage.³³

One of the striking features of PURA is that it includes different categories of amenities. In the first category are amenities falling under the purview of the Ministry of Rural Development. Besides water and sewerage, it includes areas like construction and maintenance of village streets, drainage, and solid waste management. This is supplemented by so-called ‘add-on projects’ that include village related tourism or integrated rural business centres. This scheme calls for at least one add-on activity to be included in every project. The mixing of social service delivery by the private sector with purely commercial activities is a novelty for the rural water supply sector. In principle, the two need not conflict but in practice the likelihood that private sector actors may focus on the commercially viable sectors to the detriment of basic needs provision cannot be excluded.

³⁰ Ministry of Rural Development (2011: 7).

³¹ Ibid.

³² Ministry of Rural Development (2011).

³³ Ibid., p. 7.

The possibility for schemes going awry confirms the need for a regulatory framework that provides general guidance for activities and projects contributing to the realization of the fundamental right to water. Ongoing proposals may generally point towards ways to fulfil the right. Yet, the crux of the matter lies in the finer details. Thus, as witnessed in earlier efforts at turning rural drinking water into an economic good under the Swajal project and the Swajaldhara Guidelines, it is not enough to simply rely on community involvement to ensure equitable results. Indeed, the results of pilot projects showed that the poor were largely excluded from improved water supply infrastructure because they could not pay the capital cost contribution demanded, leading to an increase in inequality in access to water along socio-economic lines rather than to the provision of amenities to people most in need.³⁴

Going Beyond Existing Proposals

The existing regulatory framework for drinking water supply suffers from several weaknesses. First, it has some firm basic legal basis like the fundamental right to water but lacks a concrete binding legal framework setting out the parameters for realizing the right. This means, for instance, that while the fundamental right to water implies that every individual is entitled to the provision of safe and clean water, the water quality standards that exist in the country have not been included in any legislation.

Second, the void left by the absence of legislation has been filled by the government through the adoption of secondary instruments. Some of these instruments such as the ARWSP have contributed in no small measure to progress in drinking water provision in rural areas. The reforms of the past decade have, however, highlighted the limitations of a system relying mostly on the executive to realize fundamental rights. Indeed, the shift from the ARWSP to the NRDWP was effected without having to amend any laws. This implies that the elected representatives in Parliament or state legislative assemblies never got to have the final say in the overhaul of the framework for water supply in rural areas.

The sidelining of the legislature concerning an issue as crucial as drinking water supply is a concern in general.

More specifically, the problem is that the changed framework seems to be moving away from some of the gains made earlier in terms of the realization of the fundamental right to water. This is, for instance, the case with regard to the shift from providing a minimum quantity of water for every individual to the household based measure. The absence of parliamentary oversight in matters of such importance leaves a gap. Indeed, the only other arm of the state that can then be approached is the court, an option that should remain the last recourse. Indeed, as noted earlier, the courts have not engaged with the specific content of the fundamental right to water, an option, which is sensible since this should indeed be the job of the legislature while the executive should undertake the implementation.

The experience with the reforms of the past decades is full of lessons for the future. A number of areas need to be addressed to ensure that the promise of the fundamental right to water does not remain a promise on paper for a certain section of the population:

- Water law remains underdeveloped as far as drinking water supply in rural areas is concerned. This gap can at best be filled on a temporary basis by secondary legal instruments adopted by the executive. Thus, the basic framework complementing the fundamental right to water must be adopted by the legislature.
- There are increasing inconsistencies between the binding legal principles and the secondary instruments adopted by the executive that could turn into conflicts. This is, for instance, the case with regard to the characterization of water as an economic good in secondary instruments of the executive. This is in contrast with two well-established principles of water law: A fundamental right is by definition not the subject of market forces. Further, water is a public trust and the Supreme Court has specifically asserted the fact that a public trust cannot be alienated, thus making it an impossible candidate for the label of 'economic good'.
- There have been significant reforms and further proposals for reforms with regard to the role that different actors involved in rural drinking water

³⁴ Sampat (2007).

supply should play. There is a need for further thinking in this area to ensure that decentralization does not end up implying a withdrawal of the union and state governments from the provision of drinking water supply and that the entry of private sector actors does not undermine the existing institutions of democratic governance at the local level but rather contributes to their strengthening. In keeping with the constitutional framework, the gram sabha and gram panchayats must not only be recognized as having control over drinking water supply at the local level but also be given the necessary regulatory and fiscal powers that will ensure effective implementation of the tasks that they have to perform. The primary role of panchayats should be supplemented by support from block and district authorities. State governments should have a coordinating role and provide the framework for ensuring that every individual's water needs are satisfied.

- The institutional reforms that will be adopted are unlikely to be sufficient by themselves because giving stronger fiscal and regulatory powers to panchayats is likely to take time. Yet, even if this cannot be achieved immediately, a limited reform of governance can already provide a much clearer mandate for panchayats. This should include setting out of legally binding water quality standards and ensuring that key advances of the decentralization framework such as reservation are not undermined by the setting up of separate user bodies.

Overall, the regulatory framework for rural drinking water supply must move away from simply thinking in terms of a transfer of responsibility from the state to the private sector. Indeed, there are much bigger systemic challenges that need to be addressed. Among these, it is imperative to understand that water being a fundamental right, its realization must be the same for every single individual throughout the country regardless of location. In principle, the ARWSP model achieved this by seeking a minimum level of supply

of 40 lpcd for all rural residents. Yet, the ARWSP was not the norm for all residents of the country since the regulatory framework provided much higher allocations for urban residents.³⁵ The NRDWP, by moving away from a quantified basis, has removed any point of comparison and further undermined the position of rural residents. The strategic plan takes a step forward in putting the minimum supply quantity at 70 lpcd, a quantity that is the same as the minimum for urban areas. This would seem to imply that the strategic plan recognizes the need to treat everyone similarly. Yet, as indicated above, this is not what the plan does since it qualifies its 70 lpcd measure by providing different levels of service that, in effect, will depend on the amount that individuals can pay. This not only implies that, like under Swajaldhara, there is the risk that wealthier people will get better service but also that richer areas of the country or richer panchayats in a given district will get better amenities than others. The principle of equity that is increasingly touted as a key principle for all reforms must be brought back into the picture. Equity in the case of a fundamental right must imply not only that the poor should not be further impoverished by any reform process but also that the poorer areas—that may also be the ones facing the most severe water supply challenges—should not be further disadvantaged in a framework that seeks to reform the regulatory framework in its entirety.

The lessons of the past forty-odd years are that the Government of India, together with state governments, has done a commendable though far from perfect job. The legal framework has evolved in the past few decades, partly in reaction to actions or inaction of the government, and has recognized the need for stronger control over drinking water supply at the local level and also confirmed the existence of the fundamental right of every single individual. These are key changes that need to be effectively implemented. In this sense, the government has a mandate to take things forward. This must start by giving legislatures the primary control over such a key issue.

³⁵ Government of India (1988: 294) and Ministry of Water Resources (1999: 63).

REFERENCES

- Brundtland Commission (1987), *Our Common Future*, Report of the World Commission on Environment and Development, UN Doc. No. A/42/427, United Nations, New York.
- Cullet, P. (2009), 'New Policy Framework for Rural Drinking Water Supply—The Swajaldhara Guidelines', Vol. 44, No.50, *Economic and Political Weekly*, p. 47.
- Department of Drinking Water Supply (2007), Draft Guidelines for Preparation of Legislation for Framing Drinking Water Regulations, available at ielrc.org/content/e0714.pdf.
- Government of India (1988), *Report of the National Commission on Urbanisation—Volume II*.
- Ministry of Rural Development (2002), *Guidelines on Swajaldhara 2002*, available at www.ielrc.org/content/e0212.pdf
- (2011), 'Strategic Plan 2011–22, Ensuring Drinking Water Security in Rural India, Government of India, New Delhi.
- (2011), Provision of Urban Amenities in Rural Areas (PURA)—A Public Private Partnership (PPP) Scheme Guidelines, Government of India.
- Ministry of Urban Development (1999), *Manual on Water Supply and Treatment*, Central Public Health and Environmental Engineering Organization, New Delhi, 3rd edn.
- Ministry of Water Resources (1999), Report of National Commission for Integrated Water Resource Development Plan, New Delhi.
- NRDWP (2010), National Rural Drinking Water Programme—Movement Towards Ensuring People's Drinking Water Security in Rural India—Framework for Implementation, Department of Drinking Water Supply, available at www.ielrc.org/content/e1002.pdf
- Phansalkar, S. and V. Kher (2006), 'A Decade of the Maharashtra Groundwater Legislation', 2/1 *Law Environment and Development Journal*, 67, available at www.lead-journal.org/content/06067.pdf
- Sampat, P. (2007), 'Swa-jal-dhara or Pay-jal-dhara—Sector Reform and the Right to Drinking Water in Rajasthan and Maharashtra' *Law Environment & Development Journal*, Vol. 3, No. 2, p. 101, available at www.lead-journal.org/content/07101.pdf