

POLICY AS LAW: LESSONS FROM SANITATION INTERVENTIONS IN RURAL INDIA

Philippe Cullet*

Standford Journal of International Law, 54 pp.241-258

I.

INTRODUCTION

Sanitation has over time become an area of increasing intervention in many countries of the Global South. This progressively led states to give more visibility to sanitation policy at the international level leading to the recognition of the joint right to water and sanitation by the UN General Assembly in 2010,¹ and the separate recognition of the right to sanitation in 2015.²

Among the countries that have given sanitation specific attention, India stands out because of the magnitude of the challenge it faced until relatively recently. Thus, as late as 2014 India had the world's highest number of open defecators.³ In a context where ending open defecation has been seen as the first step in ensuring access to sanitation and climbing the 'sanitation ladder', the main emphasis of government interventions has been since the mid-1980s to foster access to individual toilets.

Even though efforts to build toilets, particularly in rural areas, have been structured around a policy framework since at least the mid-1980s,⁴ and have been given legal recognition through the recognition of the fundamental right to sanitation since the early 1990s,⁵ progress had been relatively slow until this decade. The scale of the challenge can be gathered from

* Professor of International and Environmental Law, SOAS University of London and Senior Visiting Fellow, Centre for Policy Research, New Delhi. Contact: pcullet@soas.ac.uk.

¹ UN General Assembly Resolution, The Human Right to Water and Sanitation, U.N. Doc. A/RES/64/292 (28 July 2010).

² UN General Assembly Resolution, The Human Rights to Safe Drinking Water and Sanitation, U.N. Doc. A/RES/70/169 (17 December 2015).

³ WHO/UNICEF, Progress on Drinking Water and Sanitation – 2014 Update (2014), p. 22 noting that India still had 597 million open defecators when the next country in the list, Indonesia, had only 54 million.

⁴ Centrally Sponsored Rural Sanitation Programme, 1986.

⁵ Virendra Gaur v State of Haryana, (1995) 2 SCC 577 (Supreme Court of India, 1994)

the most recent government survey published in 2016, which found that 52.1 per cent of the rural population still practiced open defecation.⁶ In the context of a major push towards making the country open-defecation free, by the end of 2017, household toilets coverage has increased to 75.38 percent.⁷

The understanding of sanitation has been relatively broad for quite some time but in practice the focus has been mostly on individual household toilet construction. This is important but constitutes only one of the various dimensions of sanitation that needs to be addressed. Among these, two can be noted at the outset. Firstly, building toilets must be done in a manner that looks at the consequences of increased toilet coverage. In a context where most toilets built in rural areas are not linked to a sewerage network, this implies developing the necessary septage management framework. This is an additional challenge to the already existing challenge that sees most sewage finding its way into watercourses or the environment without treatment, one consequence of which being that 21 per cent of communicable diseases are water-related.⁸ Secondly, the various social and labor dimensions of sanitation, including gender, manual scavenging and sanitation work are crucial to a broader understanding of sanitation.⁹

The importance given to sanitation is also linked to the fact that addressing the problems it causes will have positive consequences for a number of other fields, ranging from water quality, public health and the environment in general. This can be captured in part through the fact that water and sanitation have been linked for decades. The same is true with regard to health and sanitation given the significance of water-related communicable diseases, as highlighted recently in the case of acute encephalitis syndrome in eastern Uttar Pradesh.¹⁰

⁶ Government of India – National Sample Survey Office, *Swachhta Status Report* (2016).

⁷ Government of India, Swachh Bharat Mission – Gramin, homepage, <http://swachhbharatmission.gov.in/sbmcms/index.htm>.

⁸ Sushmi Dey, *80% of India's Surface Water may be Polluted, Report by International Body Says*, TIMES OF INDIA (28 June 2015) p. 10 and Answer to Lok Sabha Unstarred Question No. 2428 'Contamination of Drinking Water' to be answered on 16.03.2017.

⁹ Manual scavenging is the practice of 'manually carrying human excreta'. See Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, s. 2(j).

¹⁰ Vidya Krishnan, *A Deadly Disease Explained*, THE HINDU (14 August 2017), p. 11.

The law and policy framework has progressively been developed to address different sanitation issues. A whole host of different provisions can be found in a variety of state and central acts that have a bearing on sanitation. Yet, there is no comprehensive sanitation legislation seeking to either address sanitation comprehensively or give an overall direction to the sector. In addition, states who have regulatory competence in this sector were not found to be sufficiently pro-active. As a result, since the mid-1980s, the Central Government has intervened in the sector with administrative directions that guide interventions throughout the sector in rural areas. In addition, the Central Government has invested increasingly important amounts of money as subsidy/incentive and the policy instruments are thus linked to financial incentives.

This increasingly central role of administrative directions has taken place in a context where the courts progressively formally recognized the human right to sanitation from the late 1980s onwards and where different sanitation issues, such as manual scavenging, have come up for adjudication. These different trends are important markers of the direction the sector has taken and explains in part the contradictions arising in the implementation of sanitation interventions on the ground.

The Indian case study is crucial for a better understanding of sanitation law and policy in comparative perspective. India has not only faced challenges other countries also faced but has had its own idiosyncratic issues making a comprehensive response more complex, starting with the crucial issue of manual scavenging. There has been a significant amount of legal and policy responses to the various sanitation challenges identified but there has been a disconnect between the strictures of the higher judiciary and the situation on the ground, a disconnect between a strong set of binding legal provisions on manual scavenging and slow progress towards its eradication taking decades and an executive-led policy framework that has been progressively strengthened and aggressively implemented to the point of appearing to be more ‘binding’ than the formal legal provisions. This article examines the complexities arising from this partial sidelining of the formal legal framework concerning one of the key social and environmental issues that India faces by focusing on rural areas that have been lagging in access to sanitation.

II. FRAMEWORK FOR RURAL SANITATION INTERVENTIONS

There is no law governing (rural) sanitation in general at the union level or in any state.¹¹ Yet, sanitation interventions on the ground are guided by different parameters. The first guiding element is the recognition of the right to sanitation by the higher judiciary (high courts and Supreme Court) as a derivative right of the right to life. One of the first such cases concerned ‘insanitation’ in Jaipur wherein the High Court of Rajasthan asserted that ‘[m]aintenance of health, preservation of the sanitation and environment falls within the purview of Article 21 of the Constitution [right to life] as it adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked’.¹² The Supreme Court has also derived the right to sanitation from the right to life. In *Virendra Gaur v State of Haryana*, the Supreme Court was debating Haryana’s Town Planning Scheme in a case concerning the Municipal Committee of Thanesar’s proposed land-use change for an area earmarked for open spaces. In this context, the Court asserted that the ‘right to life with human dignity’ encompasses sanitation with pollution-free water and air and the broader protection of the environment.¹³

The courts have also addressed issues that are not always considered as part of the sanitation sector but must be linked. One of the most important constitutional issues in this regard has been the question of the enforcement of the fundamental right guaranteed under Article 17 of the Constitution that abolishes untouchability. In *Safai Karamchari Andolan* the Supreme Court discussed manual scavenging, an inhuman sanitation practice that violates the prohibition of untouchability.¹⁴ It did so in the context of the insufficient implementation of a 1993 legislation seeking to ensure the full eradication of the practice, as called for by the Constitution adopted in 1950. This full eradication is yet to be achieved and thus remains a live legal issue.¹⁵ In addition, manual scavenging highlights the link between caste and

¹¹ SANITATION LAW AND POLICY IN INDIA – AN INTRODUCTION TO BASIC INSTRUMENTS (Philippe Cullet & Lovleen Bhullar eds., 2015).

¹² LK Koolwal v State of Rajasthan, AIR 1988 Raj 2 (High Court of Rajasthan, 19 September 1986), para. 3.

¹³ Virendra Gaur v State of Haryana, (1995) 2 SCC 577 (Supreme Court of India, 1994), para. 7.

¹⁴ Safai Karamchari Andolan and Others v Union of India and Others, Writ Petition (Civil) No. 583 of 2003 (Supreme Court of India, 2014).

¹⁵ Now, also in the context of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

sanitation work. This link is not necessarily broken by the eradication of manual scavenging, as confirmed by the fact that sanitation workers entering the sewers and thus being in direct contact with human excreta are often from the same communities.

The above brief summary of judicial interventions in the sector confirms that they have made a significant contribution to the development of the law in this field. At the same time, this contribution remains limited in practice because of the lack of sanitation legislation taking these strictures forward, with the exception of manual scavenging where the Supreme Court was reacting to an existing legal framework. As a result, the right to sanitation exists, is in principle operative but has little or no impact on the ground as far as people's experience of sanitation interventions is concerned.

The right to sanitation becomes a reality to the extent that it is implemented in practice. This should preferably happen through legislation specifically referring to the right or through subsidiary instruments. In this regard, the situation in India goes against what would be expected of a country that has been progressive in terms of recognizing rights that were not recognized as fundamental rights till relatively recently in most parts of the world. Indeed, there is no legal instrument concerning sanitation that refers to the right to sanitation, save a lone reference in a policy document from Kerala.¹⁶

In the absence of direct reference to the right to sanitation, the legal framework can still provide a context that contributes to its realization without making the link directly. From this point of view, various provisions can be found in the legal framework of different states that are relevant. This includes, for instance, panchayat acts that assign certain sanitation-related duties to panchayats. Thus, in Haryana gram panchayats have a duty to plan for rural sanitation. Under this broad head, the Act includes a variety of functions from the maintenance of 'general sanitation' to the cleaning up of drains, the construction and maintenance of public latrines, the maintenance of cremation and burial grounds as well as the management of washing and bathing ghats.¹⁷ In certain cases, a specific duty to build toilets is included, as in the case of Karnataka where the panchayat is given a duty to build sanitary latrines for not less than ten per cent of the households every year.¹⁸ Panchayats can

¹⁶ Kerala, Malinya Mukta Keralam Action Plan, 2007.

¹⁷ Haryana Panchayati Raj Act, 1994, s. 21. Ghats are flight of steps leading down to a river.

¹⁸ Karnataka Panchayat Raj Act, 1993, s. 58(1A)i.

also take health-related measures. They have the power to regulate the ‘conditions of sanitation’ to remove and prevent the spread of epidemics.¹⁹ At the Block level, the panchayat samiti (Block panchayat) is tasked with the implementation of rural sanitation schemes, as well as carrying out environmental sanitation, health campaigns and educating the public.²⁰ In some states, rural sanitation is envisioned as having a link to water supply. Thus, in Uttar Pradesh, the zila parishad (District Council) or kshettra samiti (Block committee) has the power to prohibit landowners from keeping toilets or drains within 50 feet from a source of drinking water for public use.²¹

A variety of other legal instruments are relevant and related to sanitation. These include the Water (Prevention and Control of Pollution) Act, 1974 giving powers to state pollution control boards to take appropriate action in respect of sewage treatment and disposal. Various acts consider sanitation from the point of view of access to toilets. These include the Right of Children to Free and Compulsory Education Act, 2009 that makes it a duty of the government to provide separate toilets for boys and girls in every school building.²² Another example is the Rights of Persons with Disabilities Act, 2016 that calls, for instance, for the provision of appropriate and accessible sanitation facilities.²³ There are also various statutes that address sanitation needs in the workplace. For instance, the Factories Act, 1948 makes it mandatory to provide sufficient latrines conveniently situated and accessible at all times.²⁴

The variety of sanitation-related provisions in legislation notwithstanding, there is no legislation that considers sanitation as its main subject matter and seeks to regulate it comprehensively. The gap has been filled through the adoption of administrative directions that have come to be the de facto regulatory framework for sanitation, particularly in rural areas. The latest iteration is the Guidelines for Swachh Bharat Mission (Gramin), 2014 that update the framework known since 2012 as Nirmal Bharat Abhiyan Guidelines, which itself was an update of the Total Sanitation Campaign (TSC) kick-started in 1999. While each

¹⁹ Karnataka, *supra* note at s. 25.

²⁰ Karnataka, *supra* note at s. 75.

²¹ Uttar Pradesh Kshettra Samitis and Zila Parishads Adhiniyam, 1961, s. 195.

²² Right of Children to Free and Compulsory Education Act, 2009, s. 19 and schedule.

²³ Rights of Persons with Disabilities Act, 2016, s. 24(3)e.

²⁴ Factories Act, 1948, s. 19(1).

iteration of the policy framework has brought new elements, the central paradigm has remained unchanged since the late 1990s. The shift from a ‘supply-led’ to a ‘demand-led’ policy paradigm initiated in the late 1990s thus remains the crux of the policy framework that seeks to create ‘demand’ for toilets through motivation that should lead individuals to build and use individual household latrines.

The rationale for shifting to a demand paradigm is that the government should not provide subsidies for building toilets. In this context, the main role of the government is supposed to be of a facilitator whose main role is to foster collective behavioral change through a community led approach brought about by Information, Education and Communication (IEC) support. Yet, in practice, the success or failure of the policy framework has been judged by the number of individual toilets built.²⁵ In a context where many people would not be able to afford the costs involved, erstwhile ‘subsidies’ were replaced by ‘incentives’ that have de facto become the central element of the sanitation interventions of the government. This incentive has not only been maintained over time but its amount has been increased and its coverage extended. The more the scale of the toilet-building challenge became apparent, the more the incentive was increased. Thus, it increased from Rs 1'200/- in 2007 to 3'200/- in 2011, 4'600 in 2012 and Rs 12'000/- in 2015.²⁶ Similarly, while an incentive was offered at the outset only to Below Poverty Line (BPL) households, this was progressively expanded to cover a number of Above Poverty Line (APL) households.²⁷ There has been a corresponding increase in the budgetary allocation for sanitation in rural areas from 2'500 crores in 2012-13 to 9,000 crores in 2016-17.

The Information, Education and Communication effort and incentives have been overwhelmingly directed at the building of individual household latrines, despite the fact that the definitions of sanitation that existed until 2014 were much broader.²⁸ Indeed, the policy

²⁵ See e.g., Ministry of Drinking Water & Sanitation, Annual Report 2014-15 (2015) whose section ‘Annual Progress Report – Physical’ only lists toilets built.

²⁶ Respectively, Total Sanitation Campaign Guidelines, 2007, s. 9(e), Total Sanitation Campaign Guidelines, 2011, s. 5(6)2, Nirmal Bharat Abhiyan Guidelines, 2012, s. 5(4)2 and Guidelines for Swachh Bharat Mission (Gramin), 2014, s. 5(4)3.

²⁷ Introduced by the Nirmal Bharat Abhiyan Guidelines, 2012, s. 5(4)1 for APL households that are ‘SCs/STs, small and marginal farmers, landless labourers with homestead, physically handicapped and women headed households’.

²⁸ Nirmal Bharat Abhiyan Guidelines, 2012, s. 1(2).

framework has emphasized community toilets as ‘an important component’ of sanitation interventions for more than a decade.²⁹ This has however not been implemented on a large scale. Activities that have been taken up include ensuring availability of toilets in schools where there has been visible progress in recent years, even though availability does not always translate into access for every school girl and boy.

Overall, the policy interventions of the Union Government have done a lot to give sanitation more visibility at all levels. This can be identified, for instance, in the increasing sense of policy urgency in achieving the goal of having the whole country open defecation free. Thus, for rural areas, Swachh Bharat Mission (Gramin) [Clean India Mission (Rural)] has sought to give a boost to the campaign by increasing the incentive amount to build individual household latrines and by bringing forward the date for achieving Nirmal Bharat (Clean India) from 2022 to 2019.³⁰ What the repeated iterations of the policy framework have not done is to foster the integration of the judicial recognition of the right to sanitation with the measures implemented on the ground. As a result, while the policy framework has focused mostly on individual household latrines and hence individual needs, there has been no effort to frame this in terms of individual rights.³¹ There is also no accountability framework whereby individuals could hold the government accountable for promises made. This is a lost opportunity given the emphasis given to sanitation on the whole.

III. ACCESS TO SANITATION IN RURAL AREAS: SALIENT FEATURES

Sanitation interventions in rural areas are nearly entirely based on the administrative directions of the central government. This has been true since the mid 1980s when the Centrally Sponsored Rural Sanitation Programme was established and has become increasingly true in recent years in line with the massive increase in funding provided by the Centre. The analysis of sanitation interventions is thus linked to the policy frameworks adopted by the central government. This emphasizes in particular behavior change as the central tool to create demand by people to building individual toilets at home. This is done in large part from the perspective of a patriarchal narrative built around women, whose benefits

²⁹ Total Sanitation Campaign Guidelines, 2004, s. 9(e).

³⁰ Respectively Guidelines for SBM (Gramin), 2014, s. 2 and Nirmal Bharat Abhiyan Guidelines, 2012, s. 2(1).

³¹ The only exception is Kerala’s Malinya Mukta Keralam Action Plan, 2007.

are targeted to specific sections of society, and that seeks to imply that people have a duty to build a toilet rather than having certain entitlements related to sanitation.

A. EMPHASIS ON BEHAVIOR CHANGE AND DEMAND LED PARADIGM

Since the introduction of the Total Sanitation Campaign in the late 1990s, sanitation interventions have been based on a paradigm that sees the state as a facilitator rather than a provider. This was meant to avoid the perceived wastage involved in state provision of infrastructure that may not be used or maintained by people. The shift was thus meant to ensure that sanitation interventions would not result in building toilets where people had not requested them. Rather, the role of the state was to be one of persuading people of the usefulness of building an individual toilet at home and stopping open defecation.

The intervention of the state has since then been centered around ‘creating’ demand through behavior change interventions centered around Information, Education and Communication. This is meant to ‘trigger’ people into understanding that open defecation is to be avoided, thereby leading them to desire a toilet at home and to use it. This framework had to be adopted in a context where, unlike drinking water, ‘demand’ was not forthcoming.³²

The practice of behavior change has been much less neutral than the previous two paragraphs may suggest. One of the most direct ways in which people have been ‘triggered’ to stop going for open defecation has been by getting a group of people (sometimes under the name of *nigrani* or surveillance committee) to whistle people away from their defecation spots early in the morning. The trigger starts with a form of pressure,³³ even though this is conceptualized as a ‘community led’ mechanism. More worrying from a sanitation point of view is the fact that these whistling squads only have their whistles as a device of persuasion. Indeed, no temporary toilets are provided, either to show people how to use them or to persuade them of the positive consequences of using a toilet.

Another issue that has arisen is that behavior change is meant to be adapted to local conditions to reflect the specific needs and situations of a given community. However, in

³² For an analysis of demand-led drinking water policies, Philippe Cullet, *New Policy Framework for Rural Drinking Water Supply – The Swajaldhara Guidelines* 44/50 ECON. & POL. WKLY 47 (2009).

³³ See e.g., Ajay T.G., *How ‘Swachh Bharat’ is Being Forced Upon Chhattisgarh Villagers*, THE WIRE (15 December 2016), <https://thewire.in/86687/open-defecation-swachh-bharat>.

practice, whistling squads have been the major tool used by the administration in various parts of the country.³⁴ This is unexpected since this strategy is meant to better reflect people's aspirations and needs and be built on 'people participation'.

B. FOCUS ON OPEN DEFECATION FREE AND (INDIVIDUAL HOUSEHOLD) TOILETS

While the focus of the policy interventions has been on behavior change, in practice, it is the construction of individual household latrines that has been at the center of attention and that serves as a measure of the success of the interventions undertaken. Construction of individual household latrines is seen as the central tool to end open defecation. Nearly everyone seems to share the idea that open defecation through the building of toilets is a positive step. This may be because individuals have been influenced by the Information, Education and Communication campaign or by neighbors (for instance, richer people, people having lived for some years in urban environments) or because open defecation is an inconvenience to them, for instance, because of the distance involved, the difficulties in going out during the day or personal infirmity. Yet, in some parts of western Rajasthan, for instance, where the climate is mostly dry and where population density is low, everyone is not necessarily convinced by the health and/or environmental rationale for ending open defecation. In different districts of different states, women do not necessarily resent open defecation where it does not put them at risk because this provides them an opportunity to go for a walk - with other women - away from the men. Such reservations are shared by some officials, as witnessed by the controversy created by a senior Government of India officer's criticism of the way the open defecation free target is being taken forward.³⁵

The goal of ending open defecation is an important step in the realization of the right to sanitation. The crores of toilets built over the past couple of decades are thus relevant in an assessment of the progress towards access to sanitation. At the same time, proposing a single solution seems inappropriate. It may well be that in some specific places, building toilets for all may not be the best short-term solution, for instance, where there is insufficient water to cater to a more water-intensive sanitation practice than open defecation. Further, where the

³⁴ Cf. Ministry of Drinking Water and Sanitation, ODF Sustainability Guidelines, 2016, para. 11.

³⁵ Deepali Rastogi, *Some Washroom Wisdom*, THE HINDU (1 April 2017), www.thehindu.com/opinion/open-page/some-washroom-wisdom/article17759025.ece and Anonymous, *MP Govt Issues Notice to IAS Officer over Article*, INDIAN EXPRESS (12 April 2017) 10.

success of policy interventions is measured by the number of toilets built, this indicates that sanitation has been essentially reduced to a target-driven single factor issue. This does not provide the basis for addressing the multiple overlapping dimensions of sanitation.

Infrastructure building has dominated the sanitation sector for years. Progressively, as it became clear that many toilets were either unusable or were not being used, increasing emphasis has been put simultaneously on building and using toilets. This is true for individual household latrines, as well as for other toilets in other places, such as school toilets. In the latter case, the Supreme Court had an occasion to confirm that ‘a toilet in structure only is not a toilet in reality’.³⁶ While this is an accepted position, the focus on use remains largely perfunctory since monitoring is limited to at most a few months.

Another central concern with the current approach to ending open defecation is that it focuses nearly exclusively on individual household latrines, despite the recognition that sanitation cannot be limited to individual toilets. As a result, community toilets that are in principle part of the menu of options available are hardly ever built, in part because funding is only available for building the infrastructure but not for paying the salary of people who would be employed to maintain them.

Beyond the question of whether individual household latrines are the only type of toilet that should be proposed around the country, the broader issue is the focus on access to individual toilets as the ultimate marker of access to sanitation. This sidelines other crucial dimensions of sanitation, such as hygiene, menstrual hygiene management and solid and liquid waste management.

Another problematic dimension of the focus on toilets is that this ends up seeing human excreta as the only issue that needs to be addressed. In many parts of the country, one noticeable aspect of the external appearance of villages is the significant number of buffaloes and cows in and around villages and the significant amount of dung found on the ground. While there are good reasons to separate the consideration of human and animal excreta, for instance because the issue of manual scavenging only relates to human excreta, the two also

³⁶ JK Raju v State of Andhra Pradesh, Writ Petition (Civil) No. 631/2004 (Supreme Court of India, Order of 27 January 2015).

need to be addressed simultaneously since animal excreta can also affect human health.³⁷ Thus, if the realization of the rights to sanitation and health is the ultimate goal to be pursued, an exclusive focus on human excreta will not lead to the desired results.

C. GENDER NARRATIVES AND SHORTCOMINGS

Women must be at the center of sanitation interventions because they disproportionately suffer from insufficient access to sanitation and they have specific sanitation needs. This is necessary to foster gender equity and equality together with the right to sanitation. The reality of sanitation interventions has been until now in part at odds with these ideals.³⁸

On the surface, women are indeed at the center of sanitation interventions, as witnessed in their visibility in the radio and audio-visual campaign materials, such as in a long-running advertisement featuring the actor Vidya Balan as the national brand ambassador advising women not to marry into families that do not have a toilet at home.³⁹ This is linked to the broader message of the campaign that has used the dignity of women as a way to create ‘demand’ among men for toilets at home. In other words, the patriarchal framework that sees women enjoined to avoid the gaze of the outsider by covering themselves (*purdah* – veil) is used to convince men that it is not appropriate to let women go out in the open to defecate. Women thus become the object of the campaign rather than the holders of sanitation-related entitlements. While this strategy was seen for a number of years as being a necessary evil meant to achieve the desired sanitation goals,⁴⁰ even though it was recognized that this was not helping the cause of women’s rights more broadly, the shortcoming of this approach has

³⁷ See e.g., Alexander Schriewer et al, *Human and Animal Fecal Contamination of Community Water Sources, Stored Drinking Water and Hands in Rural India Measured with Validated Microbial Source Tracking Assays* 93/3 AM. J. TROP. MED. HYG. 509 (2015).

³⁸ Sujith Koonan & Lovleen Bhullar, *Sanitation, Gender Inequality and Implications for Rights*, In RIGHT TO SANITATION IN INDIA – CRITICAL PERSPECTIVES (P. Cullet, L. Bhullar & S. Koonan eds., forthcoming 2018)

³⁹ See e.g., IANS, *Vidya Balan Campaigns for Sanitation in UP, Bihar*, INDIAN EXPRESS (26 August 2015), <http://indianexpress.com/article/entertainment/bollywood/vidya-balan-campaigns-for-sanitation-in-up-bihar>.

⁴⁰ Cf. Swagata Yadavar & Shritama Bose, *Not so Poopular*, THE WEEK (5 June 2016), www.theweek.in/theweek/cover/swachh-bharat-mission-fails-to-live-up-to-its-promo-campaign.html.

recently been recognized in new guidelines that recognize that it carries the risk of ‘reinforcing of gender stereotypes’.⁴¹

Another issue that has become increasingly apparent is that toilet construction and use cannot be assumed to be gender neutral. As long as construction is planned and undertaken by men, the likelihood is that the sanitation needs of women will not be (fully) considered. This can lead, for instance, to the not infrequent situation where a toilet is built in the part of the compound where men tend to congregate during the day, leading women to refrain from using the toilet during the day. This goes against the very idea of building toilets that are supposed to ensure that women do not have to wait for the cover of darkness to step out of the house for their sanitation needs.

A related point is that toilets built at home may end up significantly increasing the burden on women. This is particularly the case regarding water in all situations where water is fetched from outside of the house. Since this is nearly always a task undertaken by women and since water-based sanitation at home requires more water than open defecation, the additional burden falls on women.

Finally, ongoing sanitation interventions fail to give priority to women’s sanitation needs. There has been much progress in terms of making menstrual hygiene visible in policy debates and on the ground. Yet, a comprehensive approach towards menstrual hygiene management remains lacking, such as one that ensures widespread availability of sanitary products to all women, the provision of environment-friendly disposal facilities and widespread awareness campaigns. Similarly, in the context of school toilets, there has been significant improvement in the provision of toilets overall. Yet, the link between availability of toilets and girl education is not always made sufficiently directly. Indeed, in a number of cases, the absence of functional toilets is a factor contributing to girls dropping out of school, something that is not known to happen for boys. There are thus special issues that need to be addressed more vigorously since the absence of sanitation facilities may end up affecting also the realization of the right to education, with lifelong implications for the concerned women.

⁴¹ Swachh Bharat Mission (Gramin), Guidelines on Gender and Sanitation, 2017, para. 4.

D. FROM RIGHT HOLDERS TO DUTY BEARING BENEFICIARIES

Sanitation interventions are in principle based on the recognition of the right to sanitation that opposes the entitlements of right holders against the duties of the state as the duty bearer. The state has indeed shown an increasing commitment to the realization of at least one component of the right by becoming increasingly involved in the building of toilets, particularly in rural areas.

Yet, the clear distinction between rights and duties has become increasingly blurred. Firstly, the individuals who are the rights holders are not recognized as such in the administrative directions. This has been the case for a number of years and from the time of the Centrally Sponsored Rural Sanitation Programme up to the Swachh Bharat Mission, right holders have been called ‘beneficiaries’.⁴² This did not change with the shift to a demand-led policy paradigm. Right holders were seen as beneficiaries of the state’s largesse when the state conceived itself as a welfare state, and they are still seen as beneficiaries when the state consciously withdraws from provision and seeks to promote ‘ownership’ of infrastructure by people/local communities.⁴³

Secondly, where right holders are called beneficiaries, their rights are not necessarily seen as entitlements. In the worst-case scenario, there is not only no entitlement but also the introduction of duties related to sanitation. In the current context where the emphasis is on building toilets, the duty imposed is often to have a toilet. One instance is districts where BPL card-holders are denied their ration unless they can show that they have built a toilet at home.⁴⁴ This is legally problematic, as confirmed in a High Court order stating that ‘[d]enial of a ration card to a BPL person is virtually a denial of his or her right to food and thereby the right to life under Article 21 of the Constitution’.⁴⁵ Another instance is the case of 2015

⁴² See e.g., General Guidelines for Implementation of Centrally Sponsored Rural Sanitation Programme, 1993, s. 4.2.2.2 and Guidelines for Swachh Bharat Mission (Gramin), 2014, s. 4(6).

⁴³ See e.g., Guidelines for Swachh Bharat Mission (Gramin), 2014, s. 5(4)3.

⁴⁴ See e.g., Milind Ghatwai, *Sheopur Adm Gives Rations only to Villagers with Toilets*, INDIAN EXPRESS (25 January 2017), p. 2. For the disputed case of Ajmer district see KumKum Dasgupta, *With Stiff Target for Building Toilets under Swachh Bharat Abhiyan, States are Flouting Citizens’ Rights*, HINDUSTAN TIMES (4 April 2017), p. 11.

⁴⁵ Premlata w/o Ram Sagar v Govt. of NCT Delhi, Writ Petition (Civil) 7687/2010 (High Court of Delhi, Order of 13 May 2011).

amendment to the Haryana Panchayati Raj Act, 1994 that introduced a new provision on disqualification for election to the three tiers of panchayats that now include a minimum educational qualification requirement and the need to submit a declaration to the effect of having a functional toilet at their place of residence.⁴⁶ This was challenged but the Supreme Court dismissed the challenge by indicating among other things that it is the duty of a candidate to set an example.⁴⁷ There was no reference to the right to sanitation in this decision and as a result, the building of a toilet is simply seen as a duty of the would-be candidate in the context of their political rights. Here, lack of access to sanitation becomes a ground for denying other fundamental rights rather than being an entitlement flowing from a fundamental right.

Thirdly, where rights holders are considered as beneficiaries, this makes it difficult to hold the state accountable for non-performance of its duties. In fact, the problem is that the state does not understand itself as having duties linked to a right since its interventions are not framed around a rights based framework. In practice, this means, for instance, that if a local body fails to fulfil its responsibilities with regard to the provision of sanitation as envisaged in the legislation there is usually no specific avenue for recourse, besides approaching courts on grounds of violation of fundamental rights. This shortcoming has been the object of various campaigns and some progress has been made in recent years, for instance, with the adoption of laws guaranteeing the delivery of public services.⁴⁸ Yet, this positive step can only make a material difference to the extent that sanitation is considered as a public service. In Kerala, this is limited to connection to sewerage and its change of ownership.⁴⁹ In Delhi, the only services related to water and sanitation are connection, disconnection and mutation of water connections.⁵⁰ There is thus a long way to go before the various dimensions of sanitation are effectively included in services for which the state is held accountable for their delivery.

⁴⁶ Haryana Panchayati Raj Act, 1994 as amended by the Haryana Panchayati Raj (Amendment) Act, 2015, s. 175.

⁴⁷ *Rajbala v State of Haryana*, Writ Petition (Civil) No. 671/2015 (Supreme Court of India, 2015).

⁴⁸ See e.g., Kerala State Right to Service Act, 2012; Uttar Pradesh Janhit Guarantee Adhiniyam, 2011 and Rajasthan Guaranteed Delivery of Public Services Act, 2011.

⁴⁹ Kerala Water Authority, Notification of 8 April 2013, No. KWA/JB/E1/9387/2012.

⁵⁰ Government of National Capital Territory of Delhi, Circular No. 6(39)/IT /2011/2319-2388 – Delhi (Right of Citizen to Time Bound Delivery of Services) Act, 2011 (5 April 2016).

Finally, in certain contexts, the realization of the right is undertaken through putting pressure on the right-holders. This goes against the idea of ‘demand’ wherein people request something additional, such as a toilet and the idea that a fundamental right is an entitlement that individuals hold and that the state is enjoined to contribute to realizing. This is particularly visible in situations where people are fined for defecating in the open, something that was called for in the context of a village-level award for achieving open defecation free status (nirmal gram puraskar or Clean Village Award) that specifically mentioned that one of the criteria for the award was for the panchayat to pass a resolution ‘banning’ open defecation and the introduction of a suitable system of penalty.⁵¹ In practice, this is not yet a major concern since penalties attached to this prohibition do not seem to be enforced in rural areas as people in charge at the local level feel either that the ‘threat’ is sufficient or that it is impractical to impose a fine for open defecation on the poor. Yet, there have been reports of panchayats where this has been enforced.⁵²

Overall, fining people for defecating in the open goes against the idea that people have entitlements linked to sanitation. In fact, such interventions may have the effect of undermining the realization of the right to sanitation. This is particularly problematic because the rights framework calls on focusing sanitation interventions on the poorest and most marginalized while a system of fines and penalty is likely to affect mostly the very people who are the most likely not to have the funds to build their own toilets or even worse not to have a house they call their own. Further, in practice, coercive strategies are not the way to effect long-term behavior change. As mentioned by villagers having been ‘triggered’, they had gone to another spot to defecate during the whistling campaign and went back to their usual spots afterwards.⁵³

IV. POLICY AS LAW: EMERGING CONTRADICTIONS

The analysis of sanitation interventions in practice shows that a web of practice has developed around administrative directions concerning sanitation. This is despite the absence

⁵¹ Nirmal Gram Puraskar Guidelines, 2010, p. 2.

⁵² Nilika Mehrotra & SM Patnaik, *Culture versus Coercion: Other Side of Nirmal Gram Yojana*, 43/43 ECON. & POL. WKLY 25, 26 (2008).

⁵³ See e.g., Khyora Katari, Kalyanpur block, Kanpur Nagar district, Uttar Pradesh.

of legislative provisions in the field and notwithstanding the guidance given in the case law. The absence of reference to the right to sanitation in administrative directions ensures that there is no direct link between the two. The absence of legislation concerned with the central elements taken up in the policy framework such as behavior change and individual toilet construction leads to a second dichotomy whereby legislation has little to contribute to the field.

The result is that the policy framework is essentially a self-standing framework that is not articulated around the case law or legislation. This can be easily explained as an attempt by the executive to fill gaps and an attempt by the central government to tread where states have been shy to act, despite having the constitutional prerogative to do so.⁵⁴ Yet, such a simple explanation hides much more complex issues arising.

Firstly, the prohibition of manual scavenging has been the object of two central acts and a Supreme Court judgment, all linked to the constitutional prohibition of untouchability found in the Constitution since its adoption in 1950. In this context, there is thus no dearth of binding law, rather there is more law than should have been necessary. This was called for by the fact that the original constitutional provision was found to be followed in breach more than in the observance. The real issue here has been the insufficient implementation and enforcement of the law, as sadly confirmed again recently with a spate of death of workers entering the sewers or pits without any protective gear in July/August 2017 in Delhi.⁵⁵

Secondly, taking one step forward in the direction of providing access to sanitation and therefore contributing to the realization of the right to sanitation does not justify undermining the realization of other rights. The focus of the behavior change campaign on dignity whose shortcut is women having to expose themselves in public places even in communities where they are otherwise asked to cover themselves in front of all strangers is regressive from a gender equality perspective. This has in fact been acknowledged by the government and change is now expected but a lot more needs to be done since the whole campaign is centered around men taking decisions, men persuading women to abandon open defecation (*nigrani* committees whose membership can be entirely male) and men deciding on their own terms whether to use or not use toilets made to protect the dignity of ‘their’ women.

⁵⁴ Sanitation is a state subject.

⁵⁵ See e.g., Manish Raj, *Court Notice to Civic Bodies, Govt and DJB*, INDIAN EXPRESS (22 August 2017), p. 5.

Thirdly, the lack of reference to the right to sanitation in the policy framework indirectly contributes to the outcomes seen in the Supreme Court decision concerning the challenge to the Haryana panchayat act. In a context where access to sanitation is implemented as something that is granted to ‘beneficiaries’ by the state, it becomes easier for the Court to prioritize political rights over the right to sanitation and to go even one step further in opposing political rights to a duty to build a toilet for someone wanting to exercise their political rights. Yet, this ends up negating the existence of the right to sanitation as a universal right, something that is particularly problematic in a context where the continued existence of manual scavenging is a reminder that the realization of the right to sanitation for some comes at the cost of the denial of other fundamental rights and the most fundamental elements of human dignity of others.

Fourthly, the denial of welfare rights, such as access to ration on which millions of people depend for their survival, to people who are unable to prove that they have a toilet at home seems to indicate that what is to be conceived as an entitlement is in fact an obligation. The progressive shift from right to duty is problematic because it calls into question the whole structure of fundamental rights. Further, since this is done through administrative orders (or sometimes without a written order), the hierarchy of the legal framework seems to be challenged with individual fundamental rights being made subsidiary to administrative fiat.

Finally, the lack of integration of the toilet building effort with the other components of the sanitation sector leads to undesirable outcomes. This is well exemplified by the case of septage whose management is currently essentially not organized in rural areas. As a result, some people plan to simply abandon toilets once pits are full while in other cases informal enterprises will be called to empty pits. They do so without any regulation or in a context of lack of enforcement of existing regulations and unsurprisingly often end up disposing of the fecal matter in common fields away from the village or in a neighboring water body or stream. This environmental issue comes loaded with additional problems like the fact that it is again mostly people from the lowest castes who end up being in charge of septage management and blamed for any environmental harm.

V. CONCLUSION

There has been much progress with regard to access to toilets over the past few decades with a major push being initiated after 2014 with the launch of the Swachh Bharat Mission. This

emphasis is welcome in terms of addressing a serious and real issue, the lack of access to sanitation and the lack of realization of the right to sanitation. Yet, the framework within which these initiatives are taken does not match up to the ideals of the right to sanitation. The porosity of administrative directions that are not subject to the scrutiny of democratically elected legislatures and the negative impacts of certain sanitation interventions on the realization of other rights, as well as the lack of the overall coordination, for instance with the measures to eradicate manual scavenging, lead to a situation where the successes of the campaign in terms of toilet construction may not extend to success in terms of a broader reading of access to sanitation and the right to sanitation. Unfortunately, this scenario needs to be considered because the campaign to foster toilet building in rural areas has been ongoing in an overall similar fashion since 1999 and the lessons from earlier phases should be integrated more effectively in today's interventions. This includes the lessons from the many villages that were declared open defecation free a decade ago but whose infrastructure quickly deteriorated leading most villagers to go back to open defecation within a few years.