

CHAPTER 3. THE RIGHT TO SANITATION – MULTIPLE DIMENSIONS AND CHALLENGES (PHILIPPE CULLET)

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A. INTRODUCTION

Access to sanitation remains an immense challenge in India. This is true in terms of the huge effort that is required to make the whole country open defecation free, the most common indicator of the realisation of the right to sanitation. Indeed, as recently as 2016, 52.1 per cent of the rural population still practiced open defecation.¹ There is even more to be done in terms of the other dimensions of sanitation, including insufficient sewerage networks and limited capacity to treat wastewater and manage septage. In fact, it has been estimated that only 37 per cent of sewage generated flows through treatment plants.² It is then unsurprising to find that 75-80 per cent of water pollution is caused by domestic sewage and 21 per cent of communicable diseases are water-related.³ There are other crucial sanitation challenges that need to be tackled urgently. Among these, the realisation of the constitutional imperative to eradicate manual scavenging stands out since this should have ensued soon after the Constitution was adopted in 1950 but is yet to be fully achieved.⁴

Sanitation is thus a broad field. This has indeed been the official understanding since at least the beginning of this century with sanitation being seen as ‘a comprehensive concept, which includes liquid and solid waste disposal, food hygiene, personal, domestic as well as environmental hygiene’.⁵ A more recent definition views sanitation as including personal hygiene, home sanitation, safe water, garbage disposal, excreta disposal and wastewater disposal.⁶ These definitions are helpful in linking hygiene and sanitation, and recognising the individual and public dimensions of sanitation as well as the link between liquid and solid waste management and between the environment and sanitation. At the same time, they fail,

¹ Government of India – National Sample Survey Office, Swachhta Status Report (2016).

² Lok Sabha, Unstarred Question No. 1478 to be answered on 8 December 2015, Capacity of Sewage Treatment Plants.

³ 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.

⁴ See Wilson in this volume.

⁵ Total Sanitation Campaign Guidelines, 2001, s 1.

⁶ Nirmal Bharat Abhiyan Guidelines, 2012, s 1(2).

for instance, to specifically include manual scavenging in the ambit of sanitation and does not highlight the particular gender issues that arise.⁷

In the 2017 version of the Swachh Bharat Mission (SBM) (Gramin) guidelines, a definition has been reintroduced but it is surprisingly less comprehensive than earlier, limiting itself to ‘safe disposal of human excreta, right use of toilet and avoiding open defecation as well as management of solid and liquid waste’.⁸ Even this restricted definition remains of limited relevance since there is no definition of sanitation in any law. This lack of definition is problematic from two different perspectives. On the one hand, the scope of what falls under sanitation has reduced in the current framework and the understanding of sanitation is different in rural and urban areas. This is reflected in the fact that both liquid and solid waste are included in the Guidelines for SBM (Gramin), 2017 but the Guidelines for SBM (Urban), 2017 only include solid waste management.⁹ On the other hand, regardless of the broad understanding of sanitation that has held sway for a number of years, sanitation interventions have been centred overwhelmingly on ensuring that toilets are built in each house.¹⁰ This narrow application of the concept of sanitation explains why the measure of access to sanitation or the realisation of the right to sanitation is often limited to access to individual toilets. This unfortunately obscures other issues that are no less crucial to the realisation of the right to sanitation for each individual and the community.

From a legal perspective, the starting point for analysis is the recognition of the right to sanitation by the higher judiciary (the Supreme Court of India and high courts). However, this remains incomplete insofar as its content has not been spelt out in any detail in the case law. Laws addressing sanitation are even less helpful since they fail to provide an overall context for sanitation interventions. There is thus an immense task at hand that requires bringing together the different sanitation-related components of the legal framework, such as access to toilets in schools or the work place, together with the recognition of the right to sanitation.

This chapter starts by analysing the judicial recognition of the right to sanitation and existing sanitation-related laws and administrative directions. It uncovers the fragmented and limited nature of the existing measures and the significant role played by administrative directions in the sanitation sector. The next section goes on to analyse the implementation of the right in practice and critically examines some of the main issues arising in the context of ongoing sanitation interventions. The last section examines some of the issues that are insufficiently addressed in the current implementation framework. This includes the need to move beyond the focus on individual toilets, the need to consider sanitation in the broader context to which it belongs, the need to give more importance to environmental dimensions and the need to focus on issues of dignity and equality, starting with the question of manual scavenging.

⁷ Note that for urban areas, there is no definition of sanitation but eradication of manual scavenging is the second objective of the Guidelines for Swachh Bharat Mission (Urban), 2017, s 2.1.2.

⁸ Guidelines for Swachh Bharat Mission (Gramin), 2017, s 1.

⁹ Guidelines for Swachh Bharat Mission (Urban), 2017, s 2.3.

¹⁰ eg two-thirds of the points given to gram panchayats towards selecting them for the Nirmal Gram Puraskar – an award for PRIs contributing significantly towards ensuring full sanitation coverage in their areas of operation – focus on toilets. The last third includes access to drinking water, IEC activities and solid and liquid waste management. See Nirmal Gram Puraskar Guidelines, 2012, para 4.

B. RIGHT TO SANITATION AND IMPLEMENTATION FRAMEWORK

The right to sanitation is well enshrined in the case law in India. Interestingly, this happened much earlier than the developments at the international level discussed by de Albuquerque in this volume. The recognition of the right by the higher judiciary was conceptually groundbreaking but it is only when the right is enshrined in legislation and delegated instruments that it can become a reality for right-holders. As this section shows, there has been no direct recognition of the right in statutory provisions and the limited extent to which its realisation has been undertaken has been through administrative directions that make no mention of the right.

1. Judicial Recognition of the Right to Sanitation

The Constitution of India like other constitutions drafted before the 1990s includes no specific right to sanitation. It is the higher judiciary that progressively considered issues related to sanitation and recognised its existence as a derivative right. As early as 1980, the Supreme Court addressed the issue of sanitation directly in the Ratlam case triggered by the lack of sufficient investments in public toilets and sewerage facilities.¹¹ Justice Krishna Iyer came down heavily on the municipality for not providing basic facilities and trying to wriggle out of its statutory obligations. He highlighted that the municipality was not able to plead that it was incapable of meeting its obligations because of an absence of financial resources. The judgment established in clear terms that the state is bound to allocate resources in such a way that it fulfils the basic functions for which it has been set up.

In the same year, the High Court of Rajasthan was called upon to respond to a petition from residents of Mandal in Bhilwara district, complaining about the health hazards of domestic wastewater that was accumulating in the common *chowk*.¹² The petitioners specifically prayed ‘for a direction to the Municipal Board for removal and discharge of filthy and dirty water and the construction of proper drainage or sewers for the discharge of such water’.¹³ The Court highlighted that municipal boards have mandatory statutory obligations with regard to the construction and maintenance of drains and sewers, as well as with regard to the cleanliness of public streets. It then pointed out that the Municipal Board had no discretion in the matter and could not refuse to discharge obligations imposed upon it.¹⁴

These early cases did not discuss sanitation in terms of a fundamental right but rather in terms of the duties of the state in respect of sanitation. These judicial pronouncements are particularly important in a context where it is now often the duties of individuals and communities that are emphasised more than those of the state. They also confirm the importance of the continuum between rights of individuals and duties of the state, since the realisation of the former depends in large part on actions taken by the latter. This has become one of the most contentious points in ongoing sanitation interventions that emphasise the need to create ‘demand’ from individuals for toilets rather than emphasising their rights. Further, ongoing interventions seek to restrict the role of the state to that of a facilitator. This unfortunately takes the debate away from

¹¹ *Municipal Council, Ratlam v Vardichan* AIR 1980 SC 1622 (Supreme Court of India, 1980).

¹² *Rampal v State of Rajasthan* AIR 1981 Raj 121 (High Court of Rajasthan, 1980).

¹³ *ibid* para 1.

¹⁴ *ibid* para 5.

questions surrounding the responsibility of the state to build, maintain and operate the public infrastructure necessary to ensure the realisation of access to safe sanitation and hygiene.¹⁵

Following early cases focusing on municipal duties, the judiciary started linking the right to life with sanitation in the late 1980s. In a case concerning ‘insanitation’ in Jaipur, 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 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’.¹⁶ A few years later, the High Court of Madhya Pradesh went a step ahead in *Dr KC Malhotra v State of Madhya Pradesh* wherein it was alleged that the Municipal Corporation of Gwalior and the Public Health Engineering Departments had failed in their duty to avoid the spread of an epidemic of cholera, resulting in the death of 12 children in 1991 and further deaths in 1992.¹⁷ The High Court, rebutting the Municipal Corporation’s assertion that it did as much as it could, made a specific point about the need for the right to be realised for everyone, regardless of class and stated that while ‘inhabitants of the locality may be of backward class or weaker sections of the society or community at large [they] have got a fundamental right under Article 21 of the Constitution entitling them to live as human beings’.¹⁸ This implied in that specific case having a separate sewage line from which filthy water could flow out, covering the *nalla* and the provision of proper lavatories for public conservancy which should be regularly cleaned. The High Court further made the link between Article 21 and Article 47 of the Constitution, thus recognising the intrinsic relationship between Part III (fundamental rights) and Part IV (Directive Principles of State Policy) of the Constitution.¹⁹

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.²⁰

Courts have also addressed various issues that are central to a broad understanding of sanitation but have not necessarily been directly linked to the right recognised in the above-mentioned cases. One of the most central issues that courts have had to address in recent years has been the question of the enforcement of the fundamental right guaranteed under Article 17 of the Constitution. The *Safai Karamchari Andolan* case is discussed in detail by Khanna in this volume,²¹ and the broader campaign around the eradication of manual scavenging is discussed

¹⁵ For further details, see section 3A below.

¹⁶ *LK Koolwal v State of Rajasthan* AIR 1988 Raj 2 (High Court of Rajasthan, 19 September 1986), para 3.

¹⁷ *Dr KC Malhotra v State of Madhya Pradesh* AIR 1994 MP 48 (Madhya Pradesh High Court, 1993).

¹⁸ *ibid* para 14.

¹⁹ The former are enforceable (Constitution of India, art 32) while the latter are not.

²⁰ *Virendra Gaur v State of Haryana* (1995) 2 SCC 577 (Supreme Court of India, 1994), para 7.

²¹ *Safai Karamchari Andolan and Others v Union of India and Others* Writ Petition (Civil) No 583 of 2003 (Supreme Court of India, 2014).

by Wilson in this volume. Courts have also separately addressed the work conditions of sanitation workers even though this has not been done specifically in the context of the right to sanitation. This is explored in more detail by Sakhtivel, Nirmalkumar and Benjamin in this volume.

The cases discussed in this section confirm that the right to sanitation has been recognised for more than two decades. In addition, courts have addressed a variety of sanitation related issues. Yet, the overall picture is one of a limited contribution made by courts. Indeed, they have neither provided a detailed account of the scope of the right to sanitation nor effectively linked the various sanitation-related issues addressed in different cases in a single narrative. As a result, manual scavenging or the rights of sanitation workers are usually considered as distinct and largely self-contained issues rather than as part of broader consideration of all sanitation-related issues. Similarly, gender and environment concerns that abound in the sanitation sector are not given the central place they deserve in the sanitation-related case law. The overall impact of the courts is thus limited to the specific decisions taken and to giving an general framework for understanding sanitation from a rights-based perspective.

2. Limited Legal Framework for Implementing the Right to Sanitation

The adoption of laws to make fundamental rights a reality is necessary to ensure that the state machinery has the requisite specific guidance to work from, something that the judiciary cannot effectively provide. At present, there is no legislation that directly refers to the right to sanitation. This is not to say that the legal framework does not contribute to the realisation of the right to sanitation. In fact, it includes various measures without which the right cannot be realised. Yet, since implementation measures are not formulated in a rights framework, there is a dichotomy between the scheme set out by the higher judiciary and the measures implemented.

There is not only no legislation that directly mentions the right to sanitation but there is also no general sanitation legislation.²² Thus, there is no legislative instrument that sets out a broad framework of principles guiding the sanitation sector overall.²³ Statutory provisions that exist are found in state laws in accordance with the constitutional mandate that makes sanitation a state subject,²⁴ and in accordance with the devolution of powers and responsibilities regarding sanitation to local authorities.²⁵

States have on the whole sought to give effect to the decentralisation mandate through amendments to state legislation. Regarding urban areas, most municipal acts contain a chapter dealing with water supply and sanitation, which makes all sanitation related tasks a

²² For an overall analysis of the statutory framework concerning sanitation, Philippe Cullet & Lovleen Bhullar (eds), *Sanitation Law and Policy in India – An Introduction to Basic Instruments* (OUP 2015).

²³ To date, the only instrument that would have linked sanitation and health and defined the right to sanitation in legislation was the proposed National Health Bill, 2009.

²⁴ Constitution of India, Seventh Schedule, List II, Entry 6.

²⁵ Constitution of India, art 243G & 243W.

responsibility of the concerned local bodies.²⁶ These laws tend to focus on the provision of infrastructure rather than the implementation of the right to sanitation per se. This is the case, for instance, with the Bihar Municipal Act, 2007 that has little to say about individual sanitation but devotes a whole chapter to drainage and sewerage. The emphasis is thus on one important aspect of sanitation, that is, measures to be taken for disposal of sewage. The Act recognises, for instance, that municipalities have a duty to construct and maintain drains and sewers.²⁷ With regard to treatment, storage, disinfection and disposal of sewage, the obligation is less stringent and the Act provides only that municipalities ‘may’ construct, operate, maintain, develop and manage works within or outside the municipal area.²⁸ The Act also provides that the municipality must levy a sewerage charge on the owners of premises for connection of such premises to sewerage mains.²⁹ The measures provided by a municipal act like the Bihar Municipal Act, 2007 are important but on the whole limited in terms of a comprehensive understanding of sanitation.

In the case of rural areas, most panchayat acts assign certain 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*.³⁰ In certain cases, a responsibility 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.³¹ Panchayats can also take health-related measures. They have the power to regulate the ‘conditions of sanitation’ to remove and prevent the spread of epidemics.³² At the Block level, the *panchayat samiti* is tasked with the implementation of rural sanitation schemes, as well as carrying out environmental sanitation, health campaigns and educating the public.³³ In some states, rural sanitation is envisioned as having a link to water supply. Thus, in UP, the *zila parishad* or *kshettra samiti* has the power to prohibit landowners from keeping toilets or drains within 50 feet from a source of drinking water for public use.³⁴

Overall, existing local laws make important contributions to the regulation of sanitation in a general sense. They remain, however, limited in their focus that looks mostly at local bodies’ responsibilities regarding sewage disposal rather than at sanitation as an overall issue. Further, while the right to sanitation is framed around the rights of individuals, local laws tend to focus on trunk infrastructure that may affect individual rights but without directly making the link with individual concerns and rights.

²⁶ eg Himachal Pradesh Municipal Corporation Act, 1994, s 43(a) that concerns obligatory functions of the Corporation.

²⁷ Bihar Municipal Act, 2007, s 193.

²⁸ *ibid* s 194.

²⁹ *ibid* s 216.

³⁰ Haryana Panchayati Raj Act, 1994, s 21.

³¹ Karnataka Panchayat Raj Act, 1993, s 58(1A)i.

³² *ibid* s 25.

³³ *ibid* s 75.

³⁴ Uttar Pradesh Kshettra Samitis and Zila Parishads Adhiniyam, 1961, s 195.

Various 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, and secondary instruments such as the Municipal Solid Wastes (Management and Handling) Rules, 2016 and the Uniform Protocol on Water Quality Monitoring Order, 2005 adopted under the Environment (Protection) Act, 1986.³⁵ The direct link between sanitation and water pollution is not negated but the laws that exist fail to make the link in such a way that they would be considered jointly. The contribution of these laws to the realisation of the right to sanitation thus remains at best fortuitous and the absence of a link does not ensure effective comprehensive thinking around water pollution and sanitation.

There are also various acts whose entry point into sanitation is 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.³⁶ In one case, the Supreme Court found not only that the lack of toilet facilities in schools violates the right to education but also directed all schools, whether state-owned or privately owned, aided or unaided, minority or non-minority, to provide toilet facilities for boys and girls.³⁷ Another example is the Rights of Persons with Disabilities Act, 2016 that calls, for instance, for the provision of appropriate and accessible sanitation facilities.³⁸ 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.³⁹

Other sanitation-related legislation includes the two manual scavenging acts.⁴⁰ They are essentially about sanitation since manual scavenging concerns the removal of human excreta. Yet, they address the topic from a different angle. The essential purpose of these acts is the eradication of a sanitation practice that violates the prohibition of untouchability enshrined in Article 17 of the Constitution. Further, manual scavengers fighting for the eradication of manual scavenging are not looking towards being offered employment elsewhere in the sanitation sector but looking towards other livelihoods allowing them to escape the burden of caste-imposed occupations. At the same time, the broader understanding of manual scavenging in the most recent legislation confirms that we cannot look at its eradication separately from the plight of sanitation workers.⁴¹ Eradicating manual scavenging will not signal the end of sanitation work and lessons learnt from the campaign for the eradication of the former will have to be kept in mind in addressing the latter, whether in terms of basic principles of dignity or in practical terms concerning conditions of work.⁴²

³⁵ This is explored in more detail by Bhullar in this volume.

³⁶ Right of Children to Free and Compulsory Education Act, 2009, s 19 and schedule.

³⁷ *Environment & Consumer Protection Foundation v Delhi Administration and Others* 2012 (9) SCALE 692 (Supreme Court of India, 2012) para 4.

³⁸ Rights of Persons with Disabilities Act, 2016, s 24(3)e.

³⁹ Factories Act, 1948, s 19(1).

⁴⁰ Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

⁴¹ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, s 2(1)g.

⁴² See Wilson in this volume.

3. Role of the Executive in Access to Sanitation

The analysis of the legislative framework shows that there is no statutory instrument directly taking forward the realisation of the right to sanitation and there are significant gaps in terms of the coverage of sanitation's diverse dimensions. In a context where there has been increasing policy emphasis on sanitation over the past few decades, gaps in the legal framework have progressively been filled by the executive. This has taken the form of policies, guidelines and administrative directions. Since 2014, sanitation has been at the very centre of the policy agenda of the Union Government and has therefore acquired increased visibility, as confirmed for instance by the fact that all new bank notes introduced since 2016 include the logo of the SBM.

The Union Government's initiatives in the field of sanitation are particularly significant because sanitation is a state subject. This implies that constitutionally, states would be expected to take the lead in terms of policy and law-making in this sector. Yet, in a context where states have not made full use of their powers, the Union Government has been, for instance, increasingly active in prodding states to end open defecation.⁴³ At present, the sanitation initiatives of the Centre are regrouped under the overall umbrella of the SBM. Yet, as in the past, there are different policy frameworks for rural and urban areas. For rural areas, the Guidelines for SBM (Gramin), 2014 updated 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 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 (IHHLs).

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 primary function is to foster collective behavioural change through a community led approach brought about by Information, Education and Communication (IEC) support. Yet, in practice, the success and failure of the policy framework has been judged by the number of toilets built.⁴⁴ 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.⁴⁵ The more the toilet-building challenge appeared daunting, the more the incentive was increased, from ₹ 1,200 in 2007 to ₹ 4,600 in 2012 and ₹ 12,000 since 2015.⁴⁶ Similarly, while

⁴³ As discussed in more detail by Khanna in this volume, states have not come under similar pressure in terms of ensuring the implementation of the constitutional and statutory provisions seeking the eradication of manual scavenging.

⁴⁴ eg Ministry of Drinking Water & Sanitation, Annual Report 2014-15 (2015) whose section 'Annual Progress Report – Physical' only lists toilets built.

⁴⁵ Note, however, that the revised SBM guidelines advocate that households should be motivated to make 'self-investment for construction'. Guidelines for SBM (Gramin), 2017, s 5.2.8.

⁴⁶ 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 SBM (Gramin), 2017, s 5.2.8.

an incentive was offered at first only to Below Poverty Line (BPL) households, this was progressively expanded to cover a number of Above Poverty Line (APL) households.⁴⁷ There has been a corresponding increase in the budgetary allocation for sanitation in rural areas from ₹2,500 crores in 2012-13 to ₹13,948 crores in 2017-18.⁴⁸

The IEC effort and incentives have been overwhelmingly directed at the building of IHHLs, even though the policy definition of sanitation is broader. Indeed, the policy framework has emphasised community toilets as ‘an important component’ of sanitation interventions for more than a decade.⁴⁹ This has not been implemented effectively, however, and only related activities have been taken up beyond IHHLs, such as ensuring availability of toilets in schools where there has been visible progress in recent years.

As far as urban areas are concerned, two different trends can be noticed. On the one hand, the case law discussed in section I.A is overwhelmingly focused on urban areas and the understanding of sanitation offered by the judiciary is thus relevant mostly to cities. On the other hand, government initiatives have logically focused first on rural areas since it is in these areas that the overwhelming number of open defecators is found. In the context of fast urbanisation and the growing recognition that urban sewage contributes an increasing share of overall water pollution, urban areas have progressively been given more attention.⁵⁰ Appropriately, the National Urban Sanitation Policy (NUSP), 2008 defined sanitation as safe management of human excreta but was also explicit in making the links not only with public health and the environment but also with solid waste management and generation of industrial and other hazardous wastes.⁵¹ This has been taken up further within the context of SBM (Urban) whose first objective is unsurprisingly the elimination of open defecation and its first component IHHLs.⁵² It includes other objectives, such as the eradication of manual scavenging but worryingly does not focus on liquid waste management at all, even though solid waste management is among the objectives. This does not mean that liquid waste management is totally absent since sewerage and septage are two of the main mission components of the Atal Mission for Rejuvenation and Urban Transformation (AMRUT).⁵³

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 urgency in achieving the goal of having the whole country open defecation free. Thus, for rural areas, SBM (Gramin) has sought to give a boost to the campaign by increasing the incentive amount to build IHHL and by bringing forward the date for achieving *Nirmal/Swachh Bharat*

⁴⁷ 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’.

⁴⁸ Accountability Initiative, Swachh Bharat Mission-Gramin (SBM-G) - GoI, 2017-18 (Centre for Policy Research, Budget Briefs 10/3, 2018).

⁴⁹ Total Sanitation Campaign Guidelines, 2004, s 9(e).

⁵⁰ For more details, see John in this volume.

⁵¹ National Urban Sanitation Policy, 2008, s 1.

⁵² Guidelines for SBM (Urban), 2017, s 2.1.1 & 2.3.1.

⁵³ Atal Mission for Rejuvenation and Urban Transformation (AMRUT), Mission Statement & Guidelines, 2015, para 3.1.

from 2022 to 2019.⁵⁴ In urban areas, the different initiatives taken show an increasing awareness of the problems that need to be addressed even if realisation remains largely in the offing. 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 IHHLs and hence individual needs, there has been no effort to frame this in terms of individual rights.⁵⁵

C. THE RIGHT IN PRACTICE – SWACHH BHARAT MISSION AND BEYOND

The previous section highlighted the fact that the right to sanitation is well established at a generic level but that there is neither reference to the right in existing law and policy instruments nor is there legislation addressing the various dimensions of sanitation in a comprehensive manner. The limited coverage of sanitation in legislation is compensated in part by the more extensive administrative directions, particularly for rural areas. Consequently, this section analyses the ways in which the right to sanitation is indirectly and partially implemented through the sanitation interventions based on the administrative directions of the government. This section emphasises five critical issues arising from an assessment of the ongoing implementation of the SBM in rural areas. Yet, the different points highlighted here do not correspond to a specific policy instrument but rather reflect a policy orientation that was initiated in the late 1990s and has been pursued for the better part of the last two decades.

1. Emphasis on Behaviour 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 centred around ‘creating’ demand through behaviour change interventions centred around Information, Education and Communication (IEC). 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.

The practice of behaviour 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,⁵⁶ even though this is conceptualised as a ‘community led’ mechanism. More worrying from a sanitation point of view is the fact that

⁵⁴ Respectively Nirmal Bharat Abhiyan Guidelines, 2012, s 2.1 and Guidelines for SBM (Gramin), 2017, s 4.

⁵⁵ The only exception is Kerala’s Malinya Mukta Keralam Action Plan, 2007.

⁵⁶ eg Ajay T.G., ‘How ‘Swachh Bharat’ is Being Forced Upon Chhattisgarh Villagers’ *The Wire* (15 December 2016).

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 behaviour change is meant to be adapted to local conditions to reflect the specific needs and situations of a given community. However, in practice, whistling squads have been the major tool used by the administration in various parts of the country.⁵⁷ This is unexpected since this strategy is meant to better reflect people's aspirations and needs and be built on 'people participation'.

2. Focus on Open Defecation Free (ODF) and (Individual Household) Toilets

The construction of IHHLs that has been at the centre of attention and serves as a measure of the success of the interventions undertaken. 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 IEC campaign or by neighbours (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 hot, and where population density is low, everyone is not necessarily convinced by the health and/or environmental rationale for ending open defecation. Further, 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 IAS officer's criticism of the way the ODF campaign is being taken forward and the notice served on her by the Government.⁵⁸

The goal of ending open defecation is an important step in the realisation 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 realising the right. At the same time, other elements need to be considered:

Firstly, proposing a single solution to realise the right everywhere seems inappropriate. In some 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 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.

Secondly, the goal of ending open defecation has been pursued mostly through infrastructure building. Progressively, as it became clear that many toilets were either unusable or were not being used, increasing emphasis was put simultaneously on building and using toilets. This is true for IHHLs, as well as for other toilets in other places, such as school toilets. In the latter

⁵⁷ Cf Ministry of Drinking Water and Sanitation, ODF Sustainability Guidelines, 2016, para 11.

⁵⁸ 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.

case, the Supreme Court had an occasion to confirm that ‘a toilet in structure only is not a toilet in reality’.⁵⁹ While this is an accepted position, the focus on use remains largely perfunctory since monitoring of IHHLs is limited to at most a few months.

Thirdly, the focus on toilets leads in practice to human excreta being the only focus of sanitation interventions. 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 need to be addressed simultaneously since animal excreta can also affect human health.⁶⁰ Thus, if the realisation 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. This is addressed in part by the SBM guidelines insofar as they recognise that water sources must be clear of human and animal excreta,⁶¹ but this needs to be considered in much broader terms if the health benefits of ending open defecation are to be fully realised.

3. Gender Narratives and Shortcomings

Women must be at the centre 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.⁶²

On the surface, women are indeed at the centre 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.⁶³ 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*) 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

⁵⁹ *JK Raju v State of Andhra Pradesh and Anr* Conmt Pet. (C) No. 532/2013 in Writ Petition (Civil) No. 631/2004 (Supreme Court of India, Order of 27 January 2015).

⁶⁰ eg 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’ [2015] 93/3 Am J Trop Med Hyg 509.

⁶¹ Guidelines for SBM (Gramin), 2017, s 9.2.

⁶² For further details, see Bhullar & Koonan in this volume.

⁶³ eg 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>>.

to achieve the desired sanitation goals,⁶⁴ even though it was recognised that this was not helping the cause of women's rights more broadly, the shortcoming of this approach has been identified in new guidelines that acknowledge that it carries the risk of 'reinforcing of gender stereotypes'.⁶⁵

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 situation where a toilet is built in the part of the compound where men tend to congregate during the day, automatically leading women to refrain from using the toilet during the day.⁶⁶ 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 being a 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 task 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 extensive awareness campaigns. Similarly, in the context of school toilets, there has been significant improvement in the provision of toilets overall but 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 realisation of the right to education, with lifelong implications for the concerned women.

4. 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 a growing commitment to the realisation 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 recognised as such in the administrative directions. This has been the case for a number of years and from the time of the Centrally

⁶⁴ Cf Swagata Yadavar and 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>.

⁶⁵ SBM (Gramin), Guidelines on Gender and Sanitation, 2017, para 4.

⁶⁶ Cf Kathleen O'Reilly, 'Combining Sanitation and Women's Participation in Water Supply: An Example from Rajasthan', 20/1 *Development in Practice* 45, 53 (2010).

Sponsored Rural Sanitation Programme up to the SBM, right holders have been called ‘beneficiaries’.⁶⁷ 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.⁶⁸

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.⁶⁹ This is legally problematic, as confirmed in an 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’.⁷⁰ Indeed, in a case where it was proposed to cut electricity to households without toilets in Bhilwara district, the order was quickly rescinded.⁷¹

Another instance is the case of 2015 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.⁷² 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.⁷³ 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

⁶⁷ eg General Guidelines for Implementation of Centrally Sponsored Rural Sanitation Programme, 1993, s 4.2.2.2 and Guidelines for SBM (Gramin), 2017, s 5.2.9.

⁶⁸ eg Guidelines for SBM (Gramin), 2017, s 6.4.8.

⁶⁹ eg Milind Ghatwai, ‘Sheopur Adm Gives Rations only to Villagers with Toilets’ *Indian Express* (25 January 2017) 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) 11.

⁷⁰ *Premlata w/o Ram Sagar & Ors. v Govt. of NCT Delhi* Writ Petition (Civil) 7687/2010 (High Court of Delhi, Order of 13 May 2011).

⁷¹ Mohammed Iqbal, ‘No Power if you go in the Open, SDO Tells Villagers’, *The Hindu* (22 August 2017) p 1.

⁷² Haryana Panchayati Raj Act, 1994 as amended by the Haryana Panchayati Raj (Amendment) Act, 2015, s 175.

⁷³ *Rajbala v State of Haryana* Writ Petition (Civil) No. 671/2015 (Supreme Court of India, 2015).

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.⁷⁴ 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.⁷⁵ In Delhi, the only services related to water and sanitation are connection, disconnection and mutation of water connections.⁷⁶ There is thus a long way to go before the various components of the right to sanitation are effectively included in services for which the state is held accountable for their delivery.

Finally, in certain contexts, the realisation 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 realising. 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*) that specifically mentioned that one of the criteria for the award was for the panchayat to pass a resolution ‘banning’ open defecation and to introduce of a suitable system of penalty.⁷⁷ There have been few reports of panchayats where this was enforced,⁷⁸ but even where this not the case, the threat is used as a way to put pressure on people.⁷⁹ Further, the updated SBM guidelines specifically suggest that gram panchayats may impose ‘fines on defaulters’.⁸⁰

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 realisation of the right to sanitation. This is particularly problematic because the rights framework calls on focusing sanitation interventions on the poorest and most marginalised while a system of fines and penalty is likely to affect largely the very people who may not have the funds to build their own toilets or even worse, not have a house they call their own. Further, in practice, coercive strategies are not the way to effect long-term behaviour change. As

⁷⁴ see eg Kerala State Right to Service Act, 2012; Uttar Pradesh Janhit Guarantee Adhiniyam, 2011 and Rajasthan Guaranteed Delivery of Public Services Act, 2011.

⁷⁵ Kerala Water Authority, Notification of 8 April 2013, No KWA/JB/E1/9387/2012.

⁷⁶ Government of NCT 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.

⁷⁷ Nirmal Gram Puraskar Guidelines, 2010, p 2.

⁷⁸ Nilika Mehrotra & SM Patnaik, ‘Culture versus Coercion: Other Side of Nirmal Gram Yojana’ [2008] 43/43 Economic & Political Weekly 25, 26.

⁷⁹ PTI, ‘Family Fined Rs 75,000 for Open Defecation in Madhya Pradesh’ *Indian Express* (19 September 2017) <<http://indianexpress.com/article/india/family-fined-rs-75000-for-open-defecation-in-madhya-pradesh-4851102>> and Rakesh Kalshian, ‘The New Gift Economy’ *Down to Earth* (28 February 2018) 29.

⁸⁰ Guidelines for SBM (Gramin), 2017, s 5.3.3.

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.⁸¹

D. RETHINKING THE CONTENT OF THE RIGHT TO SANITATION

The preceding sections show that the right to sanitation is well established judicially, lacks effective translation in the law and policy framework, and sanitation interventions on the ground fail to bridge the gap. This section takes up four issues that need to be addressed: The first is to ensure that the right to sanitation is understood and implemented in terms of its broader connotation rather than essentially focused on toilets. The second is to read the right to sanitation as a separate right that is at the same time intrinsically linked to other fundamental rights. The third is the need to effectively incorporate the liquid and solid waste management dimension and other environmental aspects in the understanding of sanitation. The fourth is that the right should be centred around dignity in such a way that law and policy measures focused on sanitation start by considering impacts on people affected by sanitation interventions, such as manual scavengers, sanitation workers and women.

1. Beyond Individual Toilets: Emphasising the Collective Dimensions of the Right

The right to sanitation was first recognised by the courts in terms of its collective dimensions in the urban context but interventions on the ground over the past three decades particularly in rural areas have focused essentially on its individual and private dimension of household latrines. The focus on the individual dimension is not necessarily surprising since this is what liberal rights emphasise. Yet, it is inappropriate because sanitation is one of the rights that cannot be reduced to its individual component alone.

Firstly, the worthy goal of ending open defecation does not have to imply building only individual toilets at home. Community toilets are indeed part of the menu of options proposed by the policy framework but are framed as an exception.⁸² In practice, they are not even an exception but rather simply absent. The reason given is nearly always that community toilets will fail because nobody will be there to clean them. This is indeed an issue with current sanitation interventions that only focus on building infrastructure. Within the home, it is assumed that cleanliness will be ensured by the women of the house or, if wealthy enough, by calling someone to clean the toilet. In a collective context, no provision for paying a sanitation worker is made or for general maintenance and repairs, making it look like an imperfect option at the community level. Yet, in a context where many (no reliable number seems to be available) toilets built earlier became unusable quickly or within a few years, there are good reasons to consider other options. Community toilets can be conceived not only for a whole neighbourhood but could also be facilities shared by two or a few houses. The current overwhelming emphasis on individual toilet construction does not give space enough for the various alternative models that may emerge otherwise.

⁸¹ eg Khyora Katari, Kalyanpur block, Kanpur Nagar district, Uttar Pradesh, as discussed during a visit in April 2016.

⁸² Guidelines for SBM (Gramin), 2017, s 6.8.1 stating that ‘[o]rdinarily, such complexes shall be constructed only when there is lack of land in the village for construction of household toilets’.

Secondly, open defecation can only be eliminated if toilets are provided in all places where they may be needed. This includes access to toilets not only at home but also in various public places, including bus stands and market places, and in all work places.⁸³ This is particularly important for women in a context where it is socially acceptable for men to pee in public but not for women to do the same. Access to toilets in public places remains deficient in most places but the general issue has been noticed and given specific policy attention in some contexts, in particular with regard to schools. Indeed, the lack of toilets leading girls to drop out of school led the government to take this up on a priority basis.⁸⁴ However, here too, building toilets is only a first step towards effective access to sanitation since they need to be regularly cleaned. Where no provision is made for the same, different strategies are used to cope with this gap, including getting school children to clean the toilets or locking them up for use only by selected people, such as teachers. Some states have taken initiatives that should help, such as a minimal monthly provision for cleanliness in schools in Rajasthan (enough, for instance, to buy soap but too little to cover the cost of someone coming to clean regularly). In UP, a *safai karmi* is in principle in place in all villages but this has not led to expected results.⁸⁵ Cleanliness of community or public toilets, as well as cleanliness of common areas is thus clearly a challenge but this is not to say that the goal cannot be progressively achieved.

Thirdly, sanitation interventions need to take into account the fact defecation has not always been associated with being a private individual activity. Indeed, many people in rural areas, particularly women, link defecation with an opportunity to leave their house for a while and have discussions that cannot be overheard by men. This is not to say that open defecation is better than access to toilets but to recognise that there is a collective dimension to the simple act of defecation. As noted above, this is particularly significant and problematic in rural areas where building a toilet at home may end up becoming another reason to stop women from interacting with the outside world.

Overall, the picture that emerges is one that is much more complex than the impression given by the focus of current sanitation interventions on IHHLs. There are unavoidable collective dimensions to the right that must be addressed simultaneously with the individual dimension to ensure realisation of the right. This includes recognising that IHHLs may not necessarily be the preferred solution when all aspects of sanitation are considered, including individual preferences, cost, maintenance, access to water and disposal of septage. This also requires addressing the social dimensions of sanitation and the need to plan transitions with the preferences of right-holders, in particular women, in mind. Further, the public toilet dimension of sanitation needs to be addressed, not only in terms of building the required number of toilets but also in planning this together with septage management or the provision of a sewerage system.

⁸³ In the revised Guidelines for SBM (Gramin), 2017, s 5.3.3.

⁸⁴ eg Government of India – Ministry of Human Resource Development, Swachh Bharat: Swachh Vidyalaya (2015).

⁸⁵ see further section ‘Ensuring Dignity and Equality in Sanitation: Manual Scavengers, Sanitation Workers, and Beyond’ below.

2. Disentangling Sanitation from Water while Ensuring Convergence with other Rights

Sanitation and water are intrinsically linked. This can be traced back many decades ago when the first major sanitation policy initiative was launched in 1954 as the National Water Supply and Sanitation Programme up to the present day where rural sanitation is institutionally linked to water in the Ministry of Drinking Water and Sanitation. The link between water and sanitation is indeed an essential one and will remain so for the foreseeable future. At the same time, it is not possible to collapse the two into one subject matter because each sector, and consequently each right, has its own set of specific characteristics. In India, the need to address both as linked but distinct areas starts from the fact that one of the key sanitation challenges concerns the eradication of manual scavenging that is linked to dry toilets. Yet, even when manual scavenging has been completely eradicated, sanitation will not be concerned only with water. Indeed, solid waste management cannot be separated from liquid waste management, as confirmed by the fact that manual scavengers are also often tasked with the removal of carcasses in villages. Further, while the overwhelming majority of toilets will remain water-based for the foreseeable future, there are an increasing number of new water-less toilets that are not 'dry toilets' and the future of defecation is thus not necessarily only linked to water.

The need to conceive the right to sanitation separately from water is not a call for severing the obvious and strong links with water. Rather, this acts as a starting point for recognising the convergence between sanitation and several other rights in a manner that does not prioritise the links with one over the others. This is also necessary to emphasise that the realisation of the right to sanitation is a pre-condition for the realisation of other rights, such as the right to life, the right to water, the right to health and the right to environment.

The need for convergence is in fact first apparent at the level of the link with water. Indeed, while the rights to water and sanitation have been too closely linked at a macro level, at the implementation level, the same does not necessarily obtain. Thus, where the construction of toilets is taken up without reference to water availability in a given locality, the result may be a drain on the limited water available for domestic uses or an additional burden imposed on women in rural areas who have to fetch more water from the distant sources from where they bring water daily. Lack of convergence can also lead to situations like in the case of Udaipur city where lakes earmarked as sources of drinking water are still used as sewage receptacles or on a larger scale the case of the city of Delhi dumping significant amounts of raw sewage into the Yamuna River that remains a source of drinking water (and irrigation) for downstream communities.

Another example of the need for convergence can be identified in the case of health. The link between health and sanitation was made early on and provided the driving force behind government efforts for at least a century-and-a-half to make massive investments in sewerage in urban areas. In India, this included the physical restructuring of cities, through the introduction of separate civil lines and cantonment areas.⁸⁶ The contribution of sewerage networks and other sanitation interventions has been immense and one of the key reasons behind rapidly falling infant and child mortality, as well as overall reduced exposure to multiple waterborne diseases linked to insanitary conditions. At the same time, poor water quality linked to the absence of basic sanitation and hygiene continues to be a leading cause of hospitalisation

⁸⁶ Susan E Chaplin, *The Politics of Sanitation in India – Cities, Services and the State* (Orient BlackSwan 2011) 37.

in rural areas.⁸⁷ The close links between sanitation and health ensure that the realisation of the two rights is inseparable. Yet, even if the health rationale has been and remains central in sanitation interventions, the law and policy framework is at best vague in linking the two areas. This is, for instance, the case with behaviour change interventions that focus on the honour of the family to stop open defecation rather than the health rationale. In fact, there is an urgent need to discuss the health rationale in much more detail because the deleterious impacts of open defecation are not necessarily accepted by everyone, such as in some arid parts of Rajasthan where the health risks are perceived as minimal and much less important than access to sufficient water.

In the case of the right to environment, the links are obvious in a context where inadequate sanitation has multiple negative impacts on the environment but there is very limited recognition that the realisation of the two rights is intrinsically linked. The link that is usually made is at the level of water pollution that is seen as an environmental issue. This is a first step but an insufficient one since the two rights are largely considered in their own specific silos. The realisation of the right to sanitation needs to be understood much more directly as a condition for the realisation of the right to environment, thereby confirming that the two need to be considered in tandem.

3. Mainstreaming the Environment in Sanitation: Ensuring Liquid and Solid Waste Management

The impacts of insanitary conditions on the environment are direct and severe.⁸⁸ These are well-known and are a core policy-making issue in a context where waterborne diseases are a major burden on most communities. The links between sanitation and the environment encompass, for instance, a large segment of water pollution since most grey and black water is mixed, making it a single issue in terms of environmental contamination. Yet, there is significant disconnect between sanitation and the environment, both at the regulatory level and on the ground. The sanitation framework is still largely silent on the broader environmental consequences of the different sanitation options.

The main consideration of the link between the environment and sanitation is found mostly in environmental law. Water pollution was in fact one of the first aspects of environmental law that was addressed through legislation with the adoption of the Water (Prevention and Control of Pollution) Act, 1974. This act generally provides the legal framework for sewage treatment and the prevention and control of water pollution resulting from disposal of untreated or partly treated sewage. There have also been a number of other initiatives over time towards linking sanitation and the environment. These include legal instruments dealing with water quality, such as the Water Quality Assessment Authority Order, 2001. In urban areas, attempts to separate grey water and ensure its recycling have commenced, such as in the case of Nashik Grey Water Recycling and Water Incentive Byelaws, 2009. Building standards have also

⁸⁷ Santosh Mehrotra, 'Public Health System in UP: What Can Be Done?' [2008] 43/49 Economic & Political Weekly 46, 47 mentioning that at the time of his study, 92% of hospitalisation cases in rural UP were on account of infectious and parasitic diseases, especially for diarrhoea and gastroenteritis.

⁸⁸ For further analysis, see Bhullar in this volume.

moved towards fostering water efficiency use and better wastewater treatment in new constructions and renovation projects.⁸⁹

Overall, various links between the environment and sanitation are enshrined in the legal framework. However, they are limited since they mostly arise in the context of environmental law whose first entry point into the matter is preventing and controlling pollution. This indirectly addresses some sanitation concerns but does not provide the basis for comprehensive regulation of the environmental aspects of sanitation. This fails, for instance, to provide a foundation for addressing the negative consequences on the environment and human health of building crores of toilets in rural areas. These consequences include groundwater contamination when toilets are built with unlined pits and environmental and/or water contamination where septage is simply dumped anywhere. In other words, the focus on toilet construction and the mostly absent liquid waste management framework can be environmentally unfriendly but this is not addressed on the sanitation side.

Another issue arising in the context of the link between sanitation and the environment is the question of solid waste. While only liquid waste is usually associated with sanitation, both solid and liquid waste must be addressed simultaneously. This is acknowledged in part at the policy level since SBM (Gramin) provides a framework for addressing both, though SBM (urban) does not. In a context where the use of bio-composting toilets is likely to become more widespread in the future, it is essential to effectively link the consideration of solid and liquid waste since both are generated here.⁹⁰

4. Ensuring Dignity and Equality in Sanitation: Manual Scavengers, Sanitation Workers and Beyond

The right to sanitation has been realised mostly through a focus on construction, in particular individual household toilet construction. This may be a necessary step towards ending open defecation but it does not address the intricate issues of dignity, equality and equity that should be prioritised. This is not a controversial point from a rights perspective since the Supreme Court has confirmed that the Constitution ‘has its own internal morality based on dignity and equality of all human beings’.⁹¹ Yet, in the context of sanitation, this ideal remains to be realised and needs to be given much more emphasis.

At a general level, sanitation interventions should focus on vulnerable groups and people, including women, children, the elderly, disabled persons, landless people, migrant workers, and scheduled castes and scheduled tribes. At present, for some categories such as the elderly, there is insufficient attention to their specific needs while in the case of women, current sanitation interventions have, as mentioned above, not contributed enough to fostering gender equality.

⁸⁹ eg Green Rating for Integrated Habitat Assessment (GRIHA) Manual, 2010 and Leadership in Energy & Environmental Design – Green Building Rating System for New Constructions and Major Renovations, 2011.

⁹⁰ cf Environment Agency (United Kingdom), Treating Solid Waste from Composting Toilets at the Depot From Where they Have Been Hired Out, Regulatory Position Statement 114 (2015).

⁹¹ *National Legal Services Authority v Union of India and Others* (2014) 5 SCC 438 (Supreme Court of India, 2014) para 123.

Dignity needs to be given a much more central place in debates concerning the realisation of the right to sanitation. Dignity-related issues arise at various levels, starting with concerns related to privacy in the context of open defecation and the specific problems that women face when they are forced to relieve themselves under the cover of darkness.⁹² Beyond issues arising in daily sanitation routines, some people are particularly affected, such as manual scavengers and sanitation workers. As discussed in the chapters by Khanna and Wilson in this volume, the very occupation of manual scavenging is deeply degrading and dignity can only be recovered by eradicating it. This will hopefully be achieved at a not-too-distant point in the future, after the long and arduous campaigns of the *Safai Karamchari Andolan* and other movements. Yet, the eradication of manual scavenging itself will be no guarantee that the dignity of manual scavengers has been restored. There has been some progress in this area since the 2013 legislation has broadened the definition of manual scavenging to include sanitation workers, thus making a direct link between sanitation workers and manual scavengers.⁹³ This is an important step given the fact that sanitation work is often carried out either by former manual scavengers who have failed to move to other occupations or other people of low caste backgrounds. Indeed, sanitation workers often face conditions of work and social exclusion that are no better than those of manual scavengers.

The need to give more attention to the plight of sanitation workers is highlighted by conditions on the ground, such as frequent deaths inside the sewers.⁹⁴ Over the years, courts have taken up the conditions of work of sanitation workers on some occasions.⁹⁵ Yet, this remains limited in the absence of a statutory framework that specifically ensures that they are treated on par with other workers and work only in conditions of dignity. This requires going beyond the necessity to provide them with appropriate tools and protective clothing to address the broader social and legal consequences of engaging in sanitation work. As a starting point, discriminatory provisions need to be removed from the statute book. This includes the recognition of sanitation workers as a special category of workers on whom special restrictions are imposed. This is found, for instance, in the Delhi Municipal Corporation Act, 1957 that defines sweeping as an ‘essential service’ and introduces specific restrictions on the right of sweepers to resign from employment, including sweepers employed for doing house scavenging.⁹⁶

Another issue that needs to be addressed more effectively is the link between caste and sanitation work. The example of Uttar Pradesh, where the post of *safai karmi* or village sweeper was introduced nearly a decade ago, is instructive. Firstly, this scheme is innovative in opening up the jobs to anyone and thus breaks the vicious cycle of caste-based recruitment.⁹⁷ Secondly, in a context of increasingly limited government job opportunities, people belonging to castes

⁹² Bhullar & Koonan in this volume.

⁹³ On sanitation workers, see Sakthivel, Nirmalkumar & Benjamin in this volume.

⁹⁴ eg Abhishek Angad, ‘Cleaning Lajpat Nagar Sewer, 3 Labourers Die of Suffocation’ *Indian Express* (7 August 2017) p 5.

⁹⁵ eg *Praveen Rashtrapal v Chief Officer, Kadi Municipality* (2006) 3 GLR 1809 (High Court of Gujarat, 2006) and *A Narayanan v The Chief Secretary, Government of Tamil Nadu and Others* Writ Petition No 24403 of 2008 (High Court of Madras, Order of 20 November 2008).

⁹⁶ Delhi Municipal Corporation Act, 1957, ss 387, 388.

⁹⁷ Pradeep S Salve, Dhananjay W Bansod & Hemangi Kadlak, ‘Safai Karamcharis in a Vicious Cycle - A Study in the Perspective of Caste’ [2017] 52/13 Economic and Political Weekly 37.

that would have traditionally never considered such jobs have applied for them, thus contributing to breaking the link between caste and occupation.⁹⁸ Thirdly, there are none or very few people from the *valmiki* community who hold these posts.⁹⁹ The example of this scheme thus seems to confirm that there is scope for evolution. At the same time, visits to different parts of Uttar Pradesh give a different impression on the ground where in village after village, the appointed person is not doing the work they are paid for, something that is reflected, for instance, in the poor condition of open drains. The arrangement that seems to be often found is that the person drawing the salary will pay someone who is from a community traditionally engaged in cleaning work to do essential work at a much-discounted rate. This calls into question both the impact of this scheme in breaking the link with caste and the low number of appointments from the *valmiki* community. Indeed, while rehabilitation of manual scavengers is one of the community's own goals, the capture of available jobs that are then sub-contracted to them is not the appropriate way forward.

Overall, the right to sanitation raises a range of concerns related to dignity. These have been most often discussed in respect of manual scavenging but for many years debated as a distinct issue from sanitation. In the context of sanitation debates centred on access to toilets, there has been increasing focus on different groups that may require special measures, as visible in the recent SBM guidelines on gender issues in sanitation that include specific mention of elderly women and transgenders.¹⁰⁰ Yet, a great deal more needs to be done to ensure the realisation of the right to sanitation for all.

E. CONCLUSION

Significant progress has been made in a few decades in ensuring that sanitation is not the taboo it used to be. It can now be discussed as a separate issue from the village level to the national level. Simultaneously, substantial steps have been taken to foster the realisation of the right to sanitation even though this has generally been done without reference to a rights framework. This indirect implementation of judicial strictures is a positive step even though the right that is implemented in practice is largely limited to equating the right to sanitation with access to individual household toilets.

The launching of the SBM has been a further positive step in giving visibility to sanitation and linking urban and rural issues at least at a broad level. At the same time, a lot remains to be achieved beyond SBM. Firstly, the visibility of SBM has gone more towards the superficial cleaning of inhabited areas and toilet construction than towards the more complex issues involved in realising all aspects of the right to sanitation. Secondly, the limited focus of existing sanitation interventions on individual toilets has not allowed for comprehensive treatment of the collective dimensions of sanitation that are an integral part of the right. Thirdly, convergence remains a distant goal that must be pursued vigorously. This includes the environmental dimensions, health dimensions and sanitation work dimensions that are present but not effectively integrated.

⁹⁸ Tulika Tripathi, 'Safai Karmi Scheme of Uttar Pradesh - Caste Dominance Continues' [2012] 47/37 Economic and Political Weekly 26.

⁹⁹ Tulika Tripathi, 'Safai Karmis of Uttar Pradesh – Caste, Power and Politics' [2015] 50/6 Economic and Political Weekly <www.epw.in/node/130621/pdf>.

¹⁰⁰ SBM (Gramin), Guidelines on Gender Issues in Sanitation, Annexure to Letter S-11018/2/2017-SBM, 3 April 2017.

As long as the social dimensions of sanitation remain at the periphery of a massive effort focused on construction, it is unlikely that the right will be effectively realised for everyone. This is true in terms of the deep caste fault lines that run through the sanitation sector and the insufficient attention given to gender issues. This is also true regarding attempts to impose sanitation-related duties on right-holders, as in the case of exclusion of candidates in panchayat elections not having a functional toilet at home. The right to sanitation is and must be recognised at all levels as a universal right. Achieving this is a challenge that will take time but success will be rewarding. Indeed, realising the right to sanitation is a pre-condition for the realisation of a number of other fundamental rights and is intrinsically linked to them. The steps that may be taken in years to come to ensure full realisation of the right to sanitation for each person will thus reverberate much beyond the sanitation sector.