
EXAMINING GENDER INEQUITIES IN ACCESS TO SANITATION FACILITIES IN INDIA

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ABSTRACT

Sanitary facilities that are private, safe, and culturally acceptable should be a basic need for women's health, education, and economic engagement, but in India, they remain highly inadequate. The national surveys have established that more than 50% of rural households and a substantial number of urban slums force women into using shared toilets or open defecation, thereby compromising their privacy and safety. The complexity is further exacerbated by menstrual hygiene management (MHM), as many women experience infections, anxiety, and social exclusion during their periods in the absence of private washing facilities or safe disposal systems.

The paper is structured to *first* analyze the nature of the right to sanitation as recognized at both international and national levels. The discussion includes a review of India's diverse water laws and policies addressing sanitation, examining their efficacy and the challenges associated with their enforcement. I study India's Swachh Bharat Mission goals for an open-defecation-free state and UN Resolution 64/292, which acknowledges water and sanitation as basic human rights, alongside the 2015 MHM Guidelines by the Ministry of Drinking Water and Sanitation. *Second*, I critically examine landmark judgments by the Supreme Court under Article 21, interpreting the right to life to include menstrual dignity, with particular reference made to this paradox of claims being lawfully entertained and yet not really executed on the ground. *Third*, I shift the emphasis from legal rights to women's real opportunities for managing menstruation hygienically, to accessing safe sanitation free from the fear of harassment, and to full participation in public life, following Amartya Sen's capability approach. This theoretical perspective, emphasizes on reducing human suffering and expanding people's freedoms and opportunities to live lives of dignity. *Lastly*, I suggest a number of changes to close the gap between practice and policy. I suggest that MHM be expressly codified as a stand-alone entitlement by the judiciary in their interpretation of Article 21 and that all public and community sanitation facilities be subject to legally binding design and maintenance requirements. Overall, this paper offers a comprehensive roadmap for transforming India's sanitation sector and securing effective gender justice.

I. INTRODUCTION

Access to basic sanitation is recognized as a fundamental human right, not merely a commodity or service provided on a charitable basis. As a legal entitlement, access to these essential resources is crucial to upholding human dignity and quality of life. Over time, sanitation has emerged as a vital area of intervention in many developing countries, including India, where inadequate access to sanitation is closely tied to systemic poverty and marginalization. Sanitation encompasses not only the provision of toilets and related infrastructure but also the safe management of human excreta from containment to treatment, disposal, or end use.¹ Given the interlinkages between sanitation, water quality, and public health, addressing these challenges is crucial for the realization of the right to sanitation in India, particularly for women and girls, whose health, education, mobility, and dignity are disproportionately undermined by the failures of sanitation systems. The recognition of sanitation as a distinct right has gained increasing visibility at the international level. In 2010, the UN General Assembly (UNGA) formally acknowledged the joint right to water and sanitation. This was followed by the separate recognition of the right to sanitation in 2015 by the UNGA, underscoring the importance of addressing sanitation for human well-being, improving water quality and the environment.

In India, the lack of access to adequate sanitation is perhaps the most passive human rights violation, disproportionately affecting poor and vulnerable populations. The right to sanitation, entitles everyone to physical and affordable access to facilities that are safe and hygienic. These facilities must provide privacy, ensure human dignity, and function effectively in all spheres of life. However, despite its critical importance, 2.3 billion people worldwide, including millions in India, continue to lack access to adequate sanitation.² This paper critically examines the realization of the right to sanitation in India through its legal and policy framework. Using Sen's conception of justice, the paper seeks to define sanitation as a distinct right and entitlement, while highlighting the urgent need for comprehensive policy reform and implementation.

This paper seeks to address the following research questions:

(1) How has the right to sanitation been conceptualized and implemented in India's legal and

¹ World Health Organization, *Sanitation*, 2022. <<https://www.who.int/topics/sanitation/en/>>

² The UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS) 2022 report.

policy framework?

(2) In what ways do current sanitation policies and judicial interpretations account for gendered realities, particularly menstrual hygiene?

(3) How can Amartya Sen's capability approach be applied to reconceptualize sanitation as a distinct, enforceable right?

(4) What legal and policy reforms are necessary to close the gap between rights recognition and lived realities? The methodology adopted in this paper is doctrinal in nature, drawing primarily upon legal instruments, judicial decisions, and policy documents at both the international and national levels. It further integrates a review of scholarly literature to embed critical perspectives within the analysis, particularly from feminist legal theory and rights-based approaches to development. This framework enables a normative as well as contextual examination of sanitation, with specific attention to gendered inequities.

II. THE RIGHT TO SANITATION: INTERNATIONAL AND NATIONAL PERSPECTIVES

I. A. Recognition at the International Level

The international recognition of sanitation as a human right has evolved over time, with significant milestones marking its progress. Sanitation, as conceptualized in global assessments such as the WHO and UNICEF Global Water Supply and Sanitation Assessment 2000 report³, includes access to facilities like sewer connections, septic tanks, pour-flush latrines, and ventilated improved pit latrines. These facilities are considered adequate if they are private or shared (but not public) and if they ensure hygienic separation of human excreta from human contact. These definitions have formed the basis for evaluating sanitation in international surveys and have guided the development of sanitation policies worldwide.

The right to water, outlined in the UNs General Comment 15 (2002) on Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), further elaborates that everyone is entitled to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use. While the focus here was initially on water, the

³ World Health Organisation & UNs Children's Fund, Global Water Supply and Sanitation Assessment 2000 Report (WHO and UNICEF 2000).

recognition of sanitation as equally important was implicit. In 2002, the UN Committee on Economic, Social, and Cultural Rights provided a detailed interpretation of these rights in General Comment No. 15⁴, which emphasized the need for states to guarantee access to both water and sanitation. This was followed by the UN Economic and Social Council's Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation (2005),⁵ which provided a framework for assessing these rights and offered guidance to states on their implementation. Sanitation's critical importance became more visible with the declaration of 2008 as the International Year of Sanitation by the UNs. This declaration brought much-needed global attention to sanitation issues.

A major breakthrough came in 2010, when the UNGA adopted Resolution A/RES/64/292, declaring access to safe and clean drinking water and sanitation as a fundamental human right. This recognition was essential to the full enjoyment of life and the realization of all other human rights. The resolution placed the obligation on states to ensure that all people have access to these services, not as a commodity or privilege, but as a legal entitlement. Another step was the inclusion of access to safe water and sanitation in the Millennium Development Goals (MDGs), specifically under Target 7C, which aimed to "halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation."⁶ In 2015, sanitation was finally recognized as a distinct human right, separate from water, through its inclusion in international human rights frameworks.⁷ This recognition meant that the realization of the right to sanitation was now legally binding on all nations that are party to the ICESCR and other human rights treaties.

Although earlier international legal frameworks, such as the UDHR (1948) and the ICESCR (1966), did not explicitly recognize the right to sanitation as a distinct objective, they did link it to the realization of other rights, including the rights to an adequate standard of living, housing, health, education, water, work, life, and protection against inhuman or degrading

⁴ UN Economic and Social Council, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, UN Committee on Economic, Social and Cultural Rights (CESCR), 2003.

⁵ UN. Special Rapporteur on the Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water and Sanitation, Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, E/CN.4/Sub.2/2005/25.

⁶ UNs. Millennium Development Goals.; 2000:75. <[>](https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs))

⁷Office of the High Commissioner, Sanitation recognised as Human Right, UNHRC, 2015 <[>](https://www.ohchr.org/en/stories/2015/12/sanitation-acknowledged-human-right)

treatment. However, these frameworks initially lacked a specific focus on the role of dignity in sanitation.

The recognition of sanitation as a human right marked a turning point, as it now became justiciable and enforceable on an equal footing with other human rights. Public entities were held responsible for ensuring access to sanitation, and governments could be held accountable for failing to realize this right.⁸ The conceptualization of water and sanitation as distinct but interconnected rights further reinforced the need for comprehensive policies and legal frameworks to address the global sanitation crisis.

II. B. India's Legal and Policy Frameworks

In India, several policies recognize the right to sanitation primarily as 'access' to sanitation-related infrastructure, rather than as an explicit, legally enforceable right.⁹ The focus has largely remained resource-centric, with an emphasis on infrastructure and investments, rather than addressing sanitation from a rights-based perspective. This approach ignored critical issues of dignity and human rights. Currently, there is no statutory recognition of sanitation as a distinct right at the national level, and its realization is limited to specific administrative efforts like ending open defecation. Thus, India has made significant investments in Water, Sanitation, and Hygiene (WASH) through various national missions, but these often club the right to water and sanitation, treating them as a single right rather than distinct issues requiring separate attention.

In November 2008, during the South Asian Conference on Sanitation held in Delhi, the then Prime Minister of India declared water and sanitation as a human right, further highlighting the country's commitment to improving sanitation. One of the important efforts to assess living conditions in India was the 2012 National Sample Survey (NSS) 69th Round Report No. 556 titled "Drinking Water, Sanitation, Hygiene, and Housing Condition in India". This survey examined various aspects of sanitation necessary for the healthy and dignified living of households. It considered both attached and detached bathrooms to assess access to sanitation

⁸ Catarina de Albuquerque, 'Sanitation: The Last Taboo Becomes a Human Right' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *Right to Sanitation in India: Critical Perspectives* (Oxford University Press, New Delhi 2019) 13–46.

⁹ Philippe Cullet, 'The Right to Sanitation – Multiple Dimensions and Challenges' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *Right to Sanitation in India: Critical Perspectives* (Oxford University Press, New Delhi 2019) 1–10.

facilities. In 2017, India's National Health Policy¹⁰ embraced the SDGs, explicitly including "safe drinking water and sanitation for all" as a cross-sectoral goal. This initiative aimed at achieving Universal Health Coverage and acknowledged the close link between health, water, and sanitation.

India's approach to sanitation saw a significant shift with the launch of the Swachh Bharat Mission in 2014. This mission prioritized basic sanitation to address the dignity of millions of people, especially in rural and urban areas. The WASH 1.0 period from 2014 to 2019, successfully constructed over 100 million household toilets and 230,000 community and public toilets. Following this, the WASH 2.0 period (2019–2024) introduced water as a strategic focus, significantly increasing the budget for sanitation and water-related infrastructure. The Jal Jeevan Mission also made significant progress in providing potable water access, while the Atal Mission for Rejuvenation and Urban Transformation focused on developing urban infrastructure, including WASH services in cities with populations exceeding 100,000. In addition to these policies, the Indian Constitution contains provisions that emphasize the state's responsibility to provide sanitation. Article 47 of the Constitution mandates the state to improve public health, raise the level of nutrition, and enhance the standard of living for its citizens. Water, a state subject under Entry 17 of the State List, places the responsibility for ensuring the availability and access to safe drinking water and sanitation facilities on state governments.

II. C. Judiciary's Response to the Right to Sanitation

In the early 1980s, the Supreme Court of India expanded the interpretation of the right to life under Article 21 of the Constitution to encompass the right to live with human dignity. In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981)¹¹, the Court ruled that the right to life includes essential aspects of human existence, such as access to adequate nutrition, clothing, shelter, and the freedom to express oneself and move freely. This case laid the foundation for broadening the scope of Article 21 to include socio-economic rights necessary for a dignified existence.

Over time, Indian courts have further developed the right to life to include access to clean drinking water. In *Delhi Sainik Cooperation Housing Building Society Ltd. v. Union of India*

¹⁰ Ministry of Health and Family Welfare, National Health Policy, 2017. <https://mohfw.gov.in/sites/default/files/9147562941489753121.pdf>

¹¹ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, 1981 AIR 746.

& Ors.,¹² the Delhi High Court recognized that access to clean drinking water is fundamental to life. Similarly, in *A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.) & Ors.* (2001)¹³, the Supreme Court reiterated that access to clean water is an integral part of the right to life. These judgments progressively established a legal foundation for water as a fundamental human right under the right to life framework, imposing a duty on the state to fulfill this basic need. The judiciary's stance on sanitation, however, has not evolved as explicitly as its approach to water rights. In the landmark case of the *Municipal Council, Ratlam v. Shri Vardhichand & Others*¹⁴ (1980), the Supreme Court ruled that municipalities have a duty to provide adequate public sanitation, such as public toilets and sewerage systems, to ensure the health and dignity of residents. While this case recognized the state's responsibility in providing sanitation infrastructure, the judiciary framed sanitation more as a governmental obligation rather than as a standalone fundamental right. Despite this ruling, the courts did not offer a clear, substantive acknowledgment of sanitation as a fundamental right, and little progress has been made toward establishing a robust, rights-based framework for sanitation in India. Thus, while the judiciary has gradually extended the right to life to include essential aspects of human dignity—such as access to clean water—it has not fully recognized sanitation as a distinct fundamental right. Instead, the courts have focused on the duties of the state in addressing sanitation needs, leaving gaps in the legal recognition of sanitation as an enforceable right.¹⁵

III. LIMITATIONS OF THE CURRENT SANITATION POLICIES IN INDIA

There are significant gaps in the legal framework concerning the right to sanitation.¹⁶ Sanitation interventions in India are *theoretically* grounded in the recognition of the right to sanitation, which positions individuals as rights holders and the state as the duty-bearer. However, in practice, this distinction between rights and duties has become increasingly blurred. One of the key issues is that individuals are not recognized as rights holders but are referred to as "beneficiaries" in government programs.¹⁷ From the Centrally Sponsored Rural Sanitation Programme to the Swachh Bharat Mission, this terminology implies that sanitation is not an

¹² *Delhi Sainik Cooperation Housing Building Society Ltd. v. Union of India & Ors.*, AIRONLINE 2021 DEL 39

¹³ *A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.) & Ors.*, AIR 1999 SC 812

¹⁴ *Municipal Council, Ratlam v. Shri Vardhichand & Others*, 1980 AIR 1622

¹⁵ Philippe Cullet, 'Right to Water in India: Plugging Conceptual and Practical Gaps' (2013) 17(1) International Journal of Human Rights 56, 56–57.

¹⁶ *Ibid*

¹⁷ RAJIV GANDHI NATIONAL DRINKING WATER MISSION, § 4.2.2.2; GUIDELINES FOR SWACHH BHARAT MISSION (GRAMIN), § 6.4.8 (referring to rights holders as beneficiaries)

entitlement but a benefit, undermining the idea of rights. In some cases, the state even imposes duties on these individuals related to sanitation, further distorting the rights framework.¹⁸ Additionally, this approach weakens accountability mechanisms. If individuals are beneficiaries rather than rights holders, it becomes more difficult to hold the state accountable for failing to provide adequate sanitation. The lack of a rights-based framework means that when local bodies fail in their responsibilities, citizens have limited avenues for recourse, often resorting to litigation based on fundamental rights violations. This situation reflects the state's failure to acknowledge its duties regarding sanitation, as its interventions are not designed around fulfilling a legal obligation to provide access to sanitation.¹⁹ The state's perception of its role as a facilitator, rather than a guarantor, is further complicated by its tendency to place responsibility on individuals. In many sanitation programs, particularly in rural areas, the focus has been on incentivizing the construction of toilets and raising awareness rather than creating an enabling environment.

For instance, the use of the term "incentive" instead of "subsidy" and the adoption of decentralized, community-led sanitation approaches shift the burden onto individuals, assuming that *ignorance* is the primary barrier to sanitation rather than the state's failure to create proper infrastructure. This demand-led approach reduces the state's responsibility to a mere facilitator of sanitation. The legal and policy frameworks governing sanitation in India are fragmented, making the realization of the right incomplete. The National Urban Sanitation Policy (2008) and the National Water Policy (2012) aim for universal access but do not explicitly recognize sanitation as a human right.²⁰ These policies focus more on efficiency and accountability rather than on entitlements. As a result, they do not address the structural issues that prevent marginalized communities from accessing adequate sanitation. Issues such as manual scavenging, the rights of sanitation workers, caste and gender disparities, environmental concerns, and solid-liquid waste management remain disconnected from a

¹⁸ Milind Ghatwai, Sheopur Administration Gives Rations only to Villagers with Toilets, INDIAN EXPRESS, Jan. 25, 2017, at 2. For Ajmer district, see Kum Kum Dasgupta, With Stiff Target for Building Toilets under Swachh Bharat Abhiyan, States are Flouting Citizens' Rights, HINDUSTAN TIMES (INDIA), Apr. 4, 2017, at 11; 2015 amendment to the Haryana Panchayati Raj Act, 1994, which introduced a new provision on disqualification for election to the three tiers of panchayats that now includes declaration to the effect of having a functional toilet at her/his place of residence.

¹⁹ Cullet, Philippe. "Policy as Law: Lessons from Sanitation Interventions in Rural India." Stanford Journal of International Law, 54 (2018): 241.

²⁰ Ministry of Urban Development, Government of India, National Urban Sanitation Policy (Government of India 2008); Ministry of Water Resources, Government of India, National Water Policy (Government of India 2012)

rights-based approach. The failure to integrate these concerns into a unified framework prevents the full realization of sanitation as a legal entitlement.

IV. SANITATION AND GENDERED REALITIES

Indian sanitation policy has been successful in infrastructural development, particularly through the Swachh Bharat Mission (SBM), when resources and political will were put together to declare villages and towns “Open Defecation Free” (ODF). But as many scholars and practitioners argue, the model suffers seriously, placing the values of infrastructure and target achievement above lived experience and rights. It obfuscates questions of usability, fairness, and sustainability by obsessing about the number of toilets and reduces the broad and complex notion of sanitation as a delivery-centered technocratic project.

As Philippe Cullet warns, executive directives disguising themselves as policy statements provide visibility and not enforceable entitlements and consequently gut the architecture for accountability.²¹ The omission of gendered aspects of sanitation stands out particularly clearly. Sujith Koonan frames this as a kind of “gender myopia,” whereby the policies for sanitation view women as undifferentiated beneficiaries and not as right-holders who have particular requirements for the protection of privacy, security, and menstrual hygiene.²²

The toilets constructed through SBM are routinely hailed as icons of the dignity of women, while in practice, very few provide for the needs of water supply, security lock, or systems for handling menstrual waste. The recent report by CREA highlights how this omission cannot be coincidental and is grounded in the absence of prescriptive standards for service delivery, budgetary responsibility, and gender-sensitive indicators at the level of sanitation governance. The rights of women are paid lip service while the substantive needs are not met.²³

The invisibilization of menstrual hygiene management (MHM) is one of the most egregious failings of sanitation policy. Menstrual hygiene continues to be de facto regarded as an optional welfare scheme and not as a right. The Menstrual Hygiene Scheme (MHS) illustrates such failings. Bhattacharya and Singh’s survey shows how mass awareness created through publicity

²¹Cullet (n 19).

²²Sujith Koonan, ‘Sanitation Interventions in India: Gender Myopia and Implications for Gender Equality’ (2019) 15(1) *Law, Environment and Development Journal* 1.

²³ CREA, *Right to Sanitation: A Gender Perspective* (CREA 2024) <<https://creaworld.org>> accessed 6 September 2025.

did not lead to mass adoption of sanitary napkins because supply chains remained weak, supply irregular, and the mobilization of stakeholders was poor.²⁴ Similarly, Pankaj Shreyaskar's discussion on the right to water and sanitation as part of human dignity highlights how the failure to achieve inter-sectoral convergence among health and sanitation efforts ensures that reproductive needs—least of all those connected to menstruation—are purposively sidestepped.²⁵ Further, the emphasis on patriarchal tropes in the messages on sanitation, such that the dignity of the woman depends on the honour of the household or men, again shows how policy reinforces and not disrupts gender hierarchies.²⁶ Urban sanitation, often assumed to be more advanced, also reveals critical gaps. The shared toilet facilities in low-income settlements lack reliable water supply, privacy, and disposal bins, rendering them practically unusable for menstruation. For women using reusable cloth, the absence of water makes hygienic management nearly impossible, showing the indivisibility of sanitation and water in practice, even if delinked in normative debates.²⁷

Qualitative research provides deeper insights. Women's sanitation practices are often shaped by concerns over safety, with open defecation leaving them vulnerable to harassment and violence. Data from NFHS-5 (2022) demonstrate substantial but uneven progress: while nearly 78% of adolescent women reported using hygienic menstrual products nationally, sharp disparities persist by caste, education, and wealth. Rural adolescents, particularly from Scheduled Castes, Scheduled Tribes, and poorer households, remain far less likely to access hygienic products, underscoring the persistence of inequality despite improved averages.²⁸

Even where toilets are available, their inability to meet menstrual hygiene needs undermines women's sense of empowerment.²⁹ Inadequate sanitation restricts education, fuels gender-

²⁴Sudip Bhattacharya and Amarjeet Singh, 'Appraisal of the Menstrual Hygiene Scheme: A Study in Rural India' (2016) 4(2) *International Journal of Community Medicine and Public Health* 428.

²⁵Pankaj P Shreyaskar, 'Contours of Access to Water and Sanitation in India: Drawing on the Right to Live with Human Dignity' (2016) 58(3) *Journal of the Indian Law Institute* 331.

²⁶Ibid.

²⁷Amita Bhakta, Aasim Mansuri, Jigisha Jaiswal and Mona Iyer, 'The Need of the Hour: Providing Water in Shared Toilet Facilities for Menstrual Hygiene Management in Urban India' (2024) 14(1) *Journal of Water, Sanitation and Hygiene for Development* 113.

²⁸ International Institute for Population Sciences (IIPS) and ICF, *National Family Health Survey (NFHS-5), 2019–21: India* (IIPS 2021) <<https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf>> accessed 7 September 2025.

²⁹Sanitation Learning Hub, *Women's Experiences and Empowerment through Sanitation in Rural India* (2020); International Water Association, *How Improved Sanitation Can Enhance the Life of Women and Girls Worldwide* (2021).

based violence, and limits women's participation in public life.³⁰ UNICEF and WHO's global monitoring reports emphasize that progress in sanitation should not be judged solely by coverage but also by safety, privacy, and dignity—factors that matter most to women and girls, who are disproportionately affected by inadequate facilities.³¹ The neglect of menstrual hygiene management—whether in the form of absent water supply, unsafe disposal, weak supply chains, or patriarchal messaging—exposes a structural blind spot in policy design. Despite improvements in aggregate indicators such as NFHS-5's rise in hygienic product use, persistent inequalities along caste, class, and rural–urban lines show that rights have not translated into substantive access.

Therefore, sanitation must be re-envisioned not merely as an infrastructure-driven initiative but as a rights-based entitlement rooted in dignity, privacy, and gender justice. This calls for embedding menstrual hygiene at the heart of sanitation policy, setting enforceable service standards, and fostering coordination across health, water, and waste management sectors. Without such structural reforms, India's sanitation efforts will remain incomplete—statistically impressive yet substantively unjust—delivering only a partial realization of the constitutional promise of equality and dignity for women.

V. SEN'S CONCEPTION OF JUSTICE AND THE RIGHT TO SANITATION

Amartya Sen's conception of justice, with its focus on realization-based justice, offers a compelling framework for understanding the right to sanitation.³² The language of rights in sanitation inherently demands a contextualization within the broader concept of justice. Traditional theories like Bentham's utilitarianism, which emphasizes maximizing pleasure from resource distribution, and Rawls' notion of a fair distribution of goods under the “veil of ignorance”, play a significant role in discussions of justice, especially in the context of resource equity. These theories prioritize the fair allocation and access to resources. However, to truly understand sanitation as the realization of a right, it is necessary to move beyond mere resource distribution.

Sen's realization-focused approach to justice addresses this need and aligns well with the rights

³⁰International Water Association, *How Improved Sanitation Can Enhance the Life of Women and Girls Worldwide* (IWA 2021) <<https://iwa-network.org>> accessed 6 September 2025.

³¹Marni Sommer and Murat Sahin, 'Overcoming the Taboo: Advancing the Global Agenda for Menstrual Hygiene Management for Schoolgirls' (2013) 103 *American Journal of Public Health* 1556.

³²Amartya K Sen, *The Idea of Justice* (Belknap Press of Harvard University Press, Cambridge 2009).

framework. Sen critiques the conventional theories of justice, particularly Rawls' vision of a well-ordered society, where individuals, under ideal conditions, act in compliance with just institutions. This transcendental approach assumes that such a society will produce perfect justice. Sen argues that this perspective is flawed because it envisions ideal conditions before justice is achieved, focusing on creating perfect institutions and an equitable distribution of resources. However, it overlooks the many injustices that already exist in society, which are shaped by human interactions and the world as it is, not as it should be. Instead, Sen advocates for a comparative approach to justice that focuses on what is "less" or "more" unjust. This approach emphasizes identifying and addressing manifest injustices in society, rather than striving for an unattainable ideal of perfect justice. He emphasizes the need to eliminate visible injustices rather than achieving a perfectly just society.³³

According to Sen, advancing justice should aim to expand individual opportunities and freedoms, allowing people to live dignified lives. Justice should be evaluated in terms of how individual lives are affected and how suffering is reduced through development efforts. In the context of sanitation, this approach must be used to address the needs of marginalized groups whose right to sanitation has been curtailed. To achieve sanitation justice, action must be taken for affected people that require immediate attention first i.e are most disproportionate in terms of their realization to the right to sanitation. For instance, the persistent neglect of menstrual hygiene in policy and practice reflects a profound and intolerable injustice, borne disproportionately by women and girls. Ensuring access to safe, dignified, and sustainable menstrual hygiene would not by itself create a perfectly just society, but it would represent a crucial step toward reducing gendered inequities and advancing substantive justice.

VI. TOWARDS A DISTINCT RIGHT TO SANITATION

VI. A. The need for the right to sanitation be separated from the right to water

While water often plays a crucial role in sanitation practices, it is not always necessary for effective sanitation. Linking sanitation solely with water risks undermining the universality of the right to sanitation.³⁴ The treatment of excreta, for instance, is essential for health and

³³ Martha C Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2–3) *Feminist Economics* 33, 33–59; Charles W Mills, 'Re-theorizing Justice: Some Comments on Amartya Sen's The Idea of Justice' (2011) 5(1) *Indian Journal of Human Development* 145, 145–152.

³⁴ Keri Ellis and Loretta Feris, 'The Right to Sanitation: Time to Delink from the Right to Water' (2014) 36 *Hum Rts Q* 607, 608.

environmental reasons, but not all sanitation methods rely on water. When the right to sanitation is conceptualized as dependent on water use, it excludes people who use non-water-based sanitation methods. This reduces the right to sanitation to a right to water for sanitation purposes, limiting its applicability and effectiveness for many individuals across diverse contexts.³⁵

Although separating water and sanitation carries the risk of sidelining sanitation, international experiences, particularly with the MDGs, highlight the positive outcomes that can arise when sanitation is addressed independently. The MDG target for water access was achieved before the 2015 deadline, but the sanitation target remained unmet despite progress. This demonstrates that addressing sanitation as a distinct issue can bring attention and action, though more concerted efforts are needed to fully realize the right to sanitation.³⁶

To make the right to sanitation truly universal, it should not always be framed in terms of water. Sanitation should be understood as part of a healthy standard of living, which involves promoting “cleanliness and precautions against infection and other harmful influences”. While improper excreta containment is a major cause of disease—responsible for around fifty types of infections and contributing to the deaths of 2 million people annually—other forms of waste also impact health. For example, rotting organic waste can pose serious health risks, as seen in the outbreak of pneumonic plague in Surat, India, in 1994, caused by uncollected waste.³⁷ A narrow view of sanitation, especially one centered on water use, would exclude such scenarios, despite their clear implications for public health and living standards. Thus, the right to sanitation should encompass a broader range of practices beyond water-based systems to truly promote a healthy living environment.

VI. B. Recommendations to achieve the distinct right to sanitation

The articulation of a right to sanitation in India must necessarily consider the following:

- The recognition of the right to sanitation in India must adopt a human rights-based approach, with governments bearing the responsibility of providing sanitation services. States, as duty-bearers, must ensure that people, as rights-holders, can claim their right

³⁵ Ibid

³⁶ UNICEF and World Health Organization, *Progress on Drinking Water and Sanitation: 2012 Update* 15 (2012)

³⁷ UN Water, *Tackling a global crisis: International Year of Sanitation, 2008* <<https://www.unwater.org/publications/tackling-global-crisis-international-year-sanitation-2008>>

to sanitation. This right must be guaranteed without discrimination, and the government has an obligation to provide equal access to water and sanitation services for all (Committee on Economic, Social and Cultural Rights, 2002).

- Sanitation, as a public good, cannot be strictly confined to the dichotomy of public versus private goods. It has societal implications that transcend its inherent properties. For instance, while constructing a toilet is a private utility, the management of waste—both solid and liquid—requires state regulation. Effective sanitation is based on common resources like open drainage systems and groundwater, which demand collective action for efficient management. Mismanagement of these resources leads to collective action dilemmas. Sanitation is also considered a merit good, as additional households gaining access benefits not only individuals but the wider community through the creation of contamination-free environments.³⁸
- The state's responsibilities under the right to sanitation fall into two categories: negative and positive obligations. Negative duties involve not interfering with the enjoyment of sanitation rights, while positive duties require affirmative action by the state to ensure their realization. The principle of "progressive realization" mandates the state to make continual improvements in sanitation access, while avoiding retrogressive steps. Importantly, the state must extend sanitation services to vulnerable and marginalized groups, ensuring that no one is excluded from accessing basic sanitation. The state is also required to utilize the "maximum available resources" for this purpose and to justify the steps taken toward realizing this right (Committee on Economic, Social and Cultural Rights, 2002).
- Furthermore, the right to sanitation demands that individuals have access to mechanisms through which they can claim their rights. Establishing competent institutions is crucial for ensuring the accountability of duty-bearers and the proper implementation of sanitation services. In India, despite the existence of constitutional norms and laws, the sanitation sector has been largely governed by programmes and schemes, which often take precedence over legal frameworks. In the current context, the role of these schemes remains essential for the effective implementation and

³⁸ Peter Mader, 'Attempting the Production of Public Goods through Microfinance: The Case of Water and Sanitation' (2011) 3(2) Journal of Infrastructure Development 153, 153–170.

regulation of sanitation initiatives. However, a more robust institutional framework is needed to ensure accountability and remedy violations of the right to sanitation.

VII. CONCLUSION

In conclusion, while India has made notable strides in improving access to drinking water and sanitation over the past two decades, significant gaps remain in ensuring these essential services reach every citizen. The inability to guarantee universal access to safe drinking water and sanitation to women highlights the persistence of systemic inequities. The right to water and sanitation is not merely a moral imperative; it is a matter of justice, enshrined in human rights law and supported by the state's duty to provide equitable access to these vital resources. Therefore, a fundamental re-evaluation of India's development goals is necessary.

Sen's theory of realization-based justice provides a powerful lens through which to view the right to sanitation. It calls for an approach that recognizes and addresses the specific needs of vulnerable communities, with active state intervention to progressively realize these rights. The right to sanitation in India requires more than just resource allocation or infrastructure development; it demands a comprehensive, rights-based approach that ensures accountability, inclusivity, and sustainability. The state must fulfill its dual obligations—both negative and positive—by not only refraining from actions that hinder the enjoyment of this right but also taking proactive steps to extend sanitation services to all, especially those most in need. Ultimately, the realization of the right to water and sanitation is integral to achieving broader goals of human dignity, health, and social justice. Through informed policy and strong legal frameworks, the right to sanitation must satisfy the objectives of equity and social justice.

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