

RIGHT TO WATER IN INDIA

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ABSTRACT

Water is extremely important for the existence of life forms. Though there is an abundance of water, with 3/4th of the earth's surface covered with it, the world is facing an acute shortage of clean drinking water which is a limited commodity. At this instance, shortage of water is not a global phenomenon but, several countries are struggling and many others would face this situation in the future if nothing is done. Therefore, to control the direction in which the world is currently headed, the governments need to take necessary steps to prevent pollution of clean drinking water. However, as water is a key component in several industries, no effective steps can be taken without affecting their interests. Therefore, in the international sphere, great weightage is placed on incorporating "Water" as a basic human right. Several covenants have also adopted and incorporated water as a human right. However, as these covenants cannot ensure active participation on part of the world governments, there is an immediate need of incorporating this right within the constitution and laws to ensure its active participation as well as realization. South Africa was the first state to incorporate the Right to Water within its "Bill of Rights". In India, there is no definitive and direct mention of the Right to Water. However, through the judicial decisions, the Right to Water does exist and is recognized as a human right within the ambit of Art. 21. Though this recognition is negative in nature i.e., it recognizes a negative right to water as to the safeguarding of water bodies against pollution. There is no positive right to water, as to the right of citizens to have clean water, in India as of now.

Keywords: Water, Human Right, India, Negative Right, Art. 21

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INTRODUCTION

Water is one of the most important natural resource that is required for the existence of any living organism. Even though, earth is almost 3/4th covered with water and water is considered a renewable resource, the quantity of clean water fit for drinking is limited to the water found in the glaciers, lakes, rivers and underneath the ground. Therefore, the judicious use of this water becomes extremely important. However, with the rapid growth of industries and urbanization, these sources of clean water have been contaminated and polluted making them unfit for consumption or use. In this situation, a responsibility lies on the different authorities around the world to conserve and protect this limited resource.

Declaring access and supply of clean water as a fundamental human right is one such step that helps in the conservation of these resources by making the authorities liable for not protecting them.

Declaring right to water as a fundamental human right has been topic of debate at the global sphere for decades. The need of a basic human right to clean water was recognized and accepted by several International covenants such as UDHR, ICCPR etc. However, as these covenants cannot force the states to actively provide for the realization of the right to water, therefore, much debate and discussion has been held to incorporate this right into the laws of the countries, so that not only it has a declaratory recognition, but an obligation is also created on them to fulfil it.

In India, right to water has not been explicitly mentioned in the constitution. But, through the judicial interpretations over the years, it has been considered to be a fundamental right derived from the right to a clean and healthy environment which is further guaranteed under the right to life and personal liberty of the Constitution. Even though India has a fundamental right to water, this right has negative connotation i.e., it's a right to not have water bodies polluted. There is not positive obligation on the state to provide for the access of clean water to its citizens. Therefore, much work still has to be done in this regard.

RIGHT TO WATER: MEANING AND EVOLUTION

Water is an inexhaustible resource that is essential for the survival of all forms of life. While water is a renewable resource, fresh water in rivers, lakes, glaciers, and groundwater is limited and should be used with caution. There have been many instances where these fresh water sources have been found to be contaminated by industries and causing the current water-shortage crisis, prompting us to take measures for their protection.

One of the basic methods of protecting them is by declaring right to fresh water as a basic human right, which makes the authorities responsible for ensuring a safe and clean supply of fresh water for all the people. However, this question of making right to water a basic human right, has become an important and most debatable topic both at the national and the international level. Many national and international organizations have made it a priority, as the resource's vitality and overarching effect on different aspects of life make categorization difficult from a legal standpoint.²⁷¹ Its significance is undeniable and universally acknowledged on a global scale, but the method and methodology for ensuring the 'human right to water for all' has yet to be mastered.²⁷²

Meaning of Right to Water

The right to water has sparked many discussions around the world. There is a lack of clarification about the extent of such a right. Is it all about getting water to anyone who needs it, or is it about something more?²⁷³ As a result, it is critical to comprehend the sense of the term "correct." The South African courts have given some insight in this regard, as the right to water is guaranteed under Article 27(1)(b) of the Bill of Rights in South Africa. They argue that the right to access water imposes on the state two intertwined but distinct responsibilities.²⁷⁴ Which are:

1. Ensuring physical access of water to all population i.e., all the sections of the society especially the marginalised section.²⁷⁵
2. Physical access of water is not particularly helpful if it is not economical. Therefore, cost of water should be at such a level that even the economically weaker section of the society can enjoy this without any constraints.²⁷⁶
3. A mere Right to Water is not advantageous, if it can't be protected against unfair and unjust infringement.²⁷⁷

²⁷¹ Amrisha Pandey, "Discussing the 'Human Right to Water in India': Genesis for Debate?" 37 WIT Press 216 (2017)

²⁷² *Ibid.*

²⁷³ Jayna Kothari, "The Right to Water: A Constitutional Perspective" 1 IELRC 8 (2006)

²⁷⁴ J Visser, E Cottle and J Mettler, "The Free Basic Water Supply Policy: How Effective is it in Realising the Right?", 3 ESR Review (2002)

²⁷⁵ *Supra* note 2 at 8

²⁷⁶ *Supra* note 3

²⁷⁷ *Supra* note 2, 8

Apart from these, the courts have supported the right to water by ruling that an individual has the right to a minimum level of water supply, even if she is unable to pay for it, and that this right cannot be refused by the government.²⁷⁸

From these, it is reasonable to conclude that South Africa advocates for a social right to water, which has both a positive and negative aspect, in that it provides access of water to those who do not have it, as well as a negative aspect, in that it protects water from pollution.²⁷⁹ These can very well be used in Indian perspective to gain an understanding of the right to water.

Evolution of Right to Water

Internationally, the right to water is not explicitly recognised. In 2002, a remarkable achievement was done as the United Nations Committee on Economic, Social, and Cultural Rights approved the General Comment 15 on the right to water, expressed as the “right to water [that] entitles everyone to adequate, clean, appropriate, physically available, and affordable water.”²⁸⁰ As a result, the 2006 Human Development Report of UNDP suggested all the countries to include water as a human right.²⁸¹ However, countries continued to show a reluctance to accept water as a human right in March 2009 at the World Water Forum, with the United States, Canada, and Russia all rejecting a plan to classify water as a human right.²⁸² As inclusion of water as human rights has several political and economic repercussions.²⁸³

In terms of international law, the right to water is recognised both expressly and implicitly in current human rights instruments. “Recent human rights treaties, such as, the Convention on the Elimination of all forms of Discrimination against Women²⁸⁴; the Convention on the Rights of Child²⁸⁵; and the Convention on the Rights of Persons with Disabilities²⁸⁶ have inculcated and approved water as a right. And the tacit recognition of the right to water is primarily argued to derive from the right to life and the right to an acceptable standard of living, both of which are derived from international human rights instruments such as the Universal Declaration of

²⁷⁸ *Id.* at 10

²⁷⁹ *Ibid.*

²⁸⁰ UN Economic & Social Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR (2003)

²⁸¹ U.N. Development Programme, *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, UNDP (2006)

²⁸² Editorial, “Clean Water Should be Recognized as a Human Right”, 6 PLUS MED (2009)

²⁸³ Erik B. Bluemel, “The Implications of Formulating a Human Right to Water” 31 ECOLOGY L.Q. 977 (2004).

²⁸⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted by General Assembly Resolution 34/180 of 18 December 1979, entered force on 3 September 1981), Article 14, para 2.

²⁸⁵ Convention on the Rights of the Child (adopted by General Assembly resolution 44/25 of 20 November 1989, entered force on 2 Sep. 1990), Article 24, para 2.

²⁸⁶ Convention on the rights of persons with disabilities (adopted on 13 Dec. 2006 by General Assembly resolution 61/106, entered force on 3 May 2008), Article 28 (2).

Human Rights (1948)²⁸⁷; International Covenant on Civil and Political Rights (1966)²⁸⁸; International Covenant on Economic, Social and Cultural Rights²⁸⁹.²⁹⁰

The specific acknowledgement in explicit recognition is primarily for the covenanted individuals, such as women, children, and disabled people. Implicit recognition, on the other hand, is universally applicable to all humans.²⁹¹ While the recognition of both explicit and implied types confirms and grants the legal legitimacy of the right to water, it is only the beginning of its implementation and not its realisation.²⁹²

There is huge debate on whether these rights should be placed in such international covenants, as placing them in there only grants them the recognition whereas, the realisation of these rights lie with the local governing bodies.²⁹³ As a result, even though the rights are covered by law in these international covenants, there is no mechanism to compel the state to implement them by a positive obligation. The realisation of the right necessitates not only a declaration, but also the government's active participation in achieving it. As a result, there is no question over where to put the right in the legal instrument.²⁹⁴ “Furthermore, the resource's physical availability, finite quantity, and critical character all add to the mounting worry. If we examine the situation, we can argue that non-availability of the resource or a lack of confident means and mechanism on the part of the body entrusted with fulfilling such obligations is one of the major reasons for non-realisation of such right or conferring positive obligation that impose strict obligatory duties on the bodies conferring it.”²⁹⁵

RIGHT TO WATER AND THE UNITED NATIONS ORGANIZATION

The UN started its quest to explore the horizons of a right to water as an international human right in response to the global movement and need for such a right. In 1997, the sub-

²⁸⁷ United Nations Universal Declaration of Human Rights, 1948, Article 25 (1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

²⁸⁸ UN's Human Right Office of the High Commissioner, International Covenant on Civil and Political Rights Article (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 Dec. 1966 entry into force 23 Mar. 1976, in accordance with Article 49), Article 6(1).

²⁸⁹ UN's Human Rights Office of the High Commissioner, International Covenant on Economic, Social and Cultural Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 Dec. 1966 entry into force 3 Jan. 1976, in accordance with article 27), Article 11 (2) and Article 12.

²⁹⁰ *Supra* note 1 at 40

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

commission on the prevention of discrimination and the defence of minorities tasked Mr El Hadji Guisse with drafting a working paper on "protection and realisation of the right to drinking water and sanitation for all."²⁹⁶ The impact of the Declaration on the Right to Development, Chapter 18 of Agenda 21, and the International Drinking Water Supply and Sanitation Decade all played a role in the decision.²⁹⁷ Following that, in 2002, a report was carried out in order to explain the content and legal basis of the right to drinking water. "According to the United Nations High Commissioner for Human Rights, now is the moment to recognise access to safe drinking water and sanitation as a human right, also known as the right to equitable and non-discriminatory access to adequate quantities of safe drinking water and sanitation," according to a UNHRC report from 2007.²⁹⁸

Further in 2008, Ms Catarina de Albuquerque was appointed by HRC to study the "right to water" and prepare practices for access of safe drinking water.²⁹⁹ According to the HRC assembly resolution of September 15, 2010, "the right to the highest attainable quality of physical and mental health, as well as the right to life and human dignity" is derived from "the right to the highest attainable quality of physical and mental health, as well as the right to life and human dignity."³⁰⁰ For the last two decades, special attention is given on the advancement of right to water and sanitation. And in December 2017, UN has adopted the resolution recognising the right for the 'human right to safe drinking water and sanitation'³⁰¹. Following that, the Sustainable Development Goals 2030 were adopted on December 25, 2015, with Goal 6 explicitly dedicated to clean water – 'to ensure the availability and sustainability of water and sanitation for all'. Aside from these, the advancement of international literature on freshwater resource regulation and governance in the form of the 1997 United Nations Watercourse Convention and the Berlin Rules for the regulation of freshwater in 2004 provided a detailed database for the regulation and governance of the resource based on customary international law principles.³⁰²

²⁹⁶ L. Sharmila and J.D. Murthy, "The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over-Privatization", 31 Berkeley Journal of International Law 89 (2013)

²⁹⁷ *supra* note 1 at 38

²⁹⁸ UN HRC, Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under International human rights instruments, UN Doc A/HRC/6/3, para 66. (16 Aug. 2007)

²⁹⁹ *Supra* note 1 at 38

³⁰⁰ UN HRC Resolution 15/9 (2010) Resolution adopted by the Human Rights Council 15/9 Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9.

³⁰¹ UN General Assembly, adopted by the General Assembly on 17 December 2015, 70/169. The human rights to safe drinking water and sanitation A/RES/70/169.

³⁰² *Supra* note 1 at 39

The legal theory's position in controlling the resource and realising the right, as well as its acceptance, had a far-reaching effect. As a result, ideas about how to manage and advance these rights and responsibilities have been created.

RIGHT TO WATER IN INDIA

The right to water is not directly recognised in India, but it is implicitly recognised in the right to food, the right to a clean environment, and the right to health, all of which are guaranteed by the constitution's Art. 21: Right to Life and Personal Liberty.³⁰³ The derivation of the fundamental right: Right to life-Article 21 in India, does not only confine to mere existence but also guarantees 'right to life with human dignity'³⁰⁴. This term (the right to life with human dignity) has been extensively defined by the higher judiciary in various case laws, and the extensive elaboration and interpretation provided to the word dignity attached to the right to life is one of the most important factors for a broader interpretation of the right to life in national jurisdiction.³⁰⁵ The judiciary has explained that the right to a dignified life does not only apply to mere animal existence, but also to the provision of basic necessities for a dignified life for humans, such as food, shelter, water, education, and freedom of movement.³⁰⁶ Apart from Art. 21, Art. 39(b) of Directive Principle of State Policy³⁰⁷ also recognises equal access of community to material resources and directs states to make such policies by which the control of material resources of the community are managed effectively and distributed for the common good. Even though, DPSP is non-justiciable, they still act as important guidance for policy making.

Despite the fact that it is negatively specified in the constitution, Art. 21 has come to include many aspects due to judicial interpretation by the Supreme and High Courts in different cases. The article undoubtedly has both negative and affirmative aspects, implying that certain fundamental rights are the source of positive rights or obligations.³⁰⁸

³⁰³ The Constitution of India, art. 21.

³⁰⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

³⁰⁵ *Peoples' Union for Democratic Republic v. Union of India and Others*, 1983 SCR (1) 456

³⁰⁶ *Francis Coralie v. Union Territory of Delhi*, AIR 1981 (1) SCC 608

³⁰⁷ The Constitution of India, art. 36-51.

³⁰⁸ M.P. Jain, *The Constitutional Law of India* 230 (Kamal Law House, Calcutta, 45th ed. 2008)

PROTECTING THE NEGATIVE RIGHT TO WATER AS PART OF RIGHT TO CLEAN ENVIRONMENT

The right to water, which stems from the right to a safe and healthy environment, is fundamentally a negative right because it safeguards water bodies against contamination. The right to a "healthy atmosphere" is guaranteed under Article 21 of the constitution, which was interpreted by the Supreme Court in the case of *Bandhua Mukti Morcha v. Union of India*³⁰⁹. Following water contamination cases in the 1990s, the Supreme Court interpreted the right to clean water as part of the right to a clean and safe atmosphere.

The Supreme Court in the case of *Subash Kumar v. State of Bihar*³¹⁰, where the main contention that whether right to pollution free water qualify as one of the parameters of right to life under Art. 21 was raised and it was held that, "The right to enjoy pollution-free water and air for the full enjoyment of life is enshrined in Article 21 of the Constitution. If something endangers or damages that quality of life in violation of the law, a person has the right to use Art. 32 of the Constitution to have the pollution of water or air removed, which may be harmful to the quality of life". The Supreme Court recognised the right to water as a constitutional right in this case, but it did so from a negative protectionism perspective, which only applied to negative third-party intervention.³¹¹

In the case of *A.P. Pollution Control Board II v. Prof. M.V. Nayudu*³¹², Where the government of Andhra Pradesh, in violation of the Environment Protection Act of 1986, has granted exemptions to some industries that were polluting the state's two major reservoirs. The Supreme Court held that, "The Environment Protection Act and the Water (Prevention and Control of Pollution) Act of 1974 did not allow the state to offer an exemption to a specific industry within an area where polluting enterprises were prohibited. The use of such power in favour of a particular enterprise must be considered as arbitrary, adverse to the public interest, and in violation of Article 21 of India's constitution, which guarantees the right to clean water.... The government could not grant such risky exemption orders, oblivious to the destiny of lakhs of inhabitants in the twin cities who rely on these lakes for drinking water. As ignoring the precautionary principle and passing such an order can be problematic."³¹³ The Court held that the right to drinking water is a fundamental right, and that the state is required under Art. 21 to provide safe drinking water to its people, based on India's participation in the UN water

³⁰⁹ AIR 1984 SC 802

³¹⁰ 1991 SCR (1) 5

³¹¹ *Supra* note 1 at 41

³¹² (2001) 2 SCC 62

³¹³ *Ibid.*

conference.³¹⁴ Taking in consideration the judgement of *Narmada Bachao Andolan v. Union of India*³¹⁵, court held that, “Water is a vital requirement for human survival and is established in Article 21 of the Indian Constitution as part of the right to life and human rights. ...and the right to a healthy environment and sustainable development is enshrined in the right to “life” as a fundamental human right.”³¹⁶

The Supreme Court has also, to an extent, conceptualized the common law remedial measures of awarding compensation to the victim of a tortious action in water pollution case, in the case of *Vellore Citizens’ Welfare Forum v. Union of India*³¹⁷, where the effluents emitted by tanneries and other factories polluted the wetlands, agricultural fields, and open lands along the Palar river, prompting a legal action. In this case, the Supreme Court recognised the people’s common law right to a safe and healthy atmosphere and granted compensation to pollution victims based on the “precautionary principle” and the “polluter pays principle.”^{318, 319} The Court also held that, “The right to fresh air, clean water, and a pollution-free environment is protected by constitutional and legislative provisions, but the source of the right is the inalienable common law right to a clean environment.”³²⁰

The Courts, with regards to water pollution, has issued several mandates for cleaning of coastlines³²¹, rivers³²², well³²³ and tanks and also directed the polluters to clean up and for restitution of soil and ground water.³²⁴ The Court has also applied ‘precautionary principle’ to prevent pollution of drinking water sources by the neighbouring industries and in the case of *M.C. Mehta v. Kamal Nath*³²⁵. The state is a public trust holder of the community supply, which includes water, and has a responsibility to uphold the standards of inter-generational justice, according to the court. “The public trust doctrine is part of the jurisprudence of our legal framework, which is founded on English common law. The state is the custodian of all-

³¹⁴ *Supra* note 2 at 3

³¹⁵ (2000) 10 SCC 664

³¹⁶ *Id* at para 248

³¹⁷ (1996) 5 SCC 647

³¹⁸ Polluter Pays Principle, as applied by Indian Courts means that:

- I. that environmental measures taken by the state and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation;
- II. that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and
- III. that the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.

³¹⁹ *Supra* note 2 at 4

³²⁰ *Vellore Citizens Welfare Forum*, (2001) 2 SCC 62, 661

³²¹ *S. Jagannath v. Union of India*, (1997) 2 SCC 87

³²² *M.C. Mehta v. Union of India*, AIR 1988 SC 1037

³²³ *Hinch Lal Tiwari v. Kamala Devi*, (2001) 6 SCC 335

³²⁴ *Indian Council for Enviro-Legal Action v. Union of India*, (1995) 3 SCC 77

³²⁵ (1997) 1 SCC 388

natural resources, which are intended for public use and enjoyment by their very existence. The seashore, flowing waters, air, trees, and ecologically endangered lands all benefit the general public. The state has a legal obligation to conserve natural resources as a trustee. These services, which are intended for public use, cannot be turned into private property.”³²⁶

From the discussion above, it is clear that the right to water is a constitutional right that flows from the right to a safe and healthy environment, which is guaranteed under the constitution's right to life.

GUARANTEEING POSITIVE RIGHT TO WATER AS PART OF RIGHT TO FOOD, HEALTH AND LIFE: AN ANALOGY AND EXTENSION

Right to food, cloth and shelter³²⁷ has been termed by the Supreme Court as fundamental rights guaranteed under right to life in several cases. When a major drought struck India in 2001, especially in the states of Orissa, Madhya Pradesh, and Rajasthan, there was a shortage of food grains in the state, and people died of starvation. However, the centre had food in its warehouse that was not being delivered efficiently. This sparked a nationwide movement for the right to food, culminating in the filing of a Public Interest Litigation (PIL) by the Peoples' Union for Civil Liberties (PUCL). The Court ordered the states to ensure proper distribution of food grains and recognised the right to food and held that, “What is most important, in our opinion, is to ensure that food is provided to the elderly, infirm, disabled, destitute women, destitute men in danger of starvation, pregnant and lactating women, and destitute children, particularly in cases where they or members of their family do not have sufficient funds to do so. There may be a food shortage in a famine, but there is scarcity in this condition. There is plenty of food, but it is scarce and non-existent among the poor and needy, resulting in malnutrition, famine, and other difficulties.”³²⁸

From this decision, the Supreme Court established a positive right to food for all people, with special consideration for women, children, and the elderly. Many jurists conclude that, since the Supreme Court expanded the right to food to a constructive obligation, the right to water should be extended in the same way. “Despite the fact that the Supreme Court has recognised the right to water as a fundamental right under Article 21, the right to clean water has only been stated as part of the guarantee of the right to the environment. Such articulation overlooks

³²⁶ *Supra* note 2 at 5

³²⁷ *Chameli Singh v. State of UP*, 1996 (2) SCC 549

³²⁸ *Peoples Union for Civil Liberties (PUCL) v. Union of India & Ors*, W.P. (Civil) No. 196/2001

issues like water access — what if a city, village, or urban slum has no water at all? Is it possible to claim it as a state-granted positive justiciable right?”³²⁹

CONCLUSION

Right to water, its recognition and realization as a fundamental human right has become the need of hour, because of the ongoing water-shortage crisis. Internationally, through the different covenants like UDHR, ICCPR etc. and the efforts of the United Nations that realized the need of the basic human right to water and worked for it endlessly, that the right has obtained a declaratory recognition. However, as these covenants cannot actively make the members to perform their obligations in the realization of the right. Therefore, the right has to be incorporated into the local laws of the members, so that the local authorities feel positively obligated towards safeguarding and providing the right to its citizens. As, there is still a big difference in recognizing a right and in its active realization. South Africa is one such country where right to water is incorporated in its Bill of Rights and as a result of this, coupled with the rulings of the Supreme Court, right to water in South Africa is considered a social right that puts an active obligation, both positive and negative, on the State.

In India, there is no direct recognition of Right to Water and the only recognition it has is implied through the right to clean and healthy environment that is guaranteed by the Right to Life under Art. 21 of the Constitution. Right to Water, so realized, has only negative connotation i.e., right not to have the water bodies polluted. There is no positive obligation on the state such as to provide the people with access of clean drinking water etc. and this is partly because of the large population of India coupled with the poor water management policy.

In India there is a need of interpretation of the right in its positive aspect, so that everyone can have access to clean and safe drinking water and the State is made responsible for providing them with the clean water. The judiciary in 2001 has recognized and affirmed the positive aspect of the Right to Food, and in a similar way judiciary can further recognize and affirm the positive aspect of the Right to Water. However, this would not yield much result, unless the legislature takes over it and makes laws to ensure access of water to everyone. The judiciary already accepts the notion of the state acting as a public trust of all the natural resources including water and has already placed the responsibility on them of keeping the water resources clean and free from getting polluted. The judiciary can also place the responsibility on the state to provide the citizens access to safe drinking water.

³²⁹ *Supra* note 2 at 8