

IFE JURIS REVIEW

Journal of Contemporary Legal and Allied Issues,

IFJR 2016, Part 3 (June – July) ISSN: 0794-1048

6



*Department of Jurisprudence and Private Law, Faculty of Law,
Obafemi Awolowo University, Ile-Ife, Nigeria.*



IFE JURIS REVIEW

*Journal of Contemporary Legal and Allied Issues,
Department of Jurisprudence and Private Law, Faculty of Law,
Obafemi Awolowo University, Ile-Ife, Nigeria.
IFJR 2016, Part 3 (June-July) ISSN: 0794-1048*

ARTICLES

Enforcing Economic, Political and Social Rights: The Nigeria Legal System & Islamic Legal Framework

- *O. Y. Abdul, PhD & A. O. Adelodun, SAN* 422-437

Prospects and Challenges of Plea Bargaining in the Administration of Justice in Nigeria

- *Aderemi Olatubora* 438-476

The Role of Law Enforcement Agencies in Strengthening the Quality of Justice for Women in Nigeria

- *Foluke Dada* 477-504

International Human Right to Water and the Right to Water in Nigeria: Birds of Different Feathers

- *Oluwabunmi Niyi-Gafar* 505-519

Re- Assessing Financial Crimes and Corporate Management in Nigeria

- *Eric Ayemere Okojie & Chinyere Jane Ezeagu* 520-541

Issues on Forced Child Marriages in Nigeria: Ese Oruru as A Case Study

- *Amuda- Kannike Abiodun SAN* 542-555

A Perspective of the Impact of Online Dispute Resolution on E-Commerce

- *Shehu Ahmad Sokoto* 556-570

Unclaimed Dividends - E-dividends to the Rescue? Legal Perspectives	
- <i>M. O. Olatunji</i>	571-596
An Evaluation of the Statutory Role of the Federal Airports Authority of Nigeria in Guaranteeing Aviation Security in the Nigerian Aviation Industry	
- <i>Ademola O. Ojekunle</i>	597-616
Corruption, Plea Bargain and Nigerian Criminal Justice System	
- <i>Nwaechefu Hilary, Alabi Kehinde A & Aboderin, Lawrence O</i>	617-633
Legal Issues on Oil Pipeline Vandalism in the Niger Delta Region of Nigeria	
- <i>Moronkeji Foluke Dorcas</i>	634-652
The Legal Regime of Electronic Transfer of Shares in Nigeria	
- <i>Ibrahim Shehu Sokoto</i>	653-670
Dismissal of an Employee on Grounds of Criminal Allegation	
- <i>Christopher Asiafiti</i>	671-688
A Classical and Positivist Perspective of Understanding Criminal Behaviour	
- <i>Damfebo Kieriseiye Derri & Asiafiti, Christopher</i>	689-709

INTERNATIONAL HUMAN RIGHT TO WATER AND THE RIGHT TO WATER IN NIGERIA: BIRDS OF DIFFERENT FEATHERS

*

Oluwabunmi Niyi-Gafar*

Introduction¹

On 28 July 2010, by a recorded vote of 122 in favour, none against and 41 abstentions the United Nations General Assembly by a resolution, recognised access to clean water and sanitation as a human right.² Although resolutions of the United Nations General Assembly are not binding,³ countries that have resolved to address the challenges of access to water have taken concrete steps by recognising the human right to water in their Constitutions and making efforts to realise access to water 'progressively' through the adoption of a human rights framework.⁴ A human rights framework incorporates the principles of human rights such as participation of the water users, non-discrimination against women, children and persons with disabilities in their access to water, empowerment of the people and transparency on the part of the water providers.⁵ These

* Oluwabunmi Niyi-Gafar, LLB, BL, LLM PhD (*in view*- University of Pretoria) Lecturer, Department of Jurisprudence, Faculty of Law, University of Ilorin. Correspondence email ol.niyigafar@gmail.com

¹ Nigeria has contributed to the current recognition of the international human right to water. Nigeria however does not recognise water as a human right. The current Nigeria laws are not in tandem with the international law meaning of the human right to water. This article highlights what the international human right to water entails vis a vis what the right to water recognised in the Nigerian federal water law details. It is argued in this article that part of the current challenges of access to water for domestic use in Nigeria is the failure of its recognition as a human right. And even though Nigeria supports the human right to water at the international front, the current recognition of the right to water in Nigeria does not create a duty nor give rise to claim over services not rendered. As such the human right to water which the Nigeria government endorsed at the international arena and the current recognition of the right to water in the Water Resources Act are birds of different feathers.

² See <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm> accessed 10 June 2014; See Resolution on the human right to water and sanitation adopted by the United Nations General Assembly at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292 accessed 6 April 2015.

³ Öberg MD "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005) 16 *European Journal of International Law* 879-906.

⁴ Examples of which are South Africa and Kenya.

⁵ Article 14 (h) Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 (CEDAW); Art 24 (1) (2) (c) Convention on the Right of a Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2

are currently lacking in the water reforms in Nigeria. As a result of this billions of naira are been spent by government without a concrete improvement of access to water.⁶

This article begins with a brief overview of the international development and eventual recognition of water as a human right. It then highlights what a human right to water entails. It argues that Nigeria has contributed to the current recognition of the international human right to water. Nigeria however does not recognise water as a human right. The current Nigeria laws are not in tandem with the international law meaning of the human right to water. On this note the article examines the Constitution and the Water Resources Act which has provisions that are inadequate on access to domestic water supply. It is argued in this article that even though Nigeria supports the human right to water at the international front, the current recognition of the right to water in Nigeria does not depict a human right. To this end, the characteristics of a human right to water and a right to water are distinguished. The article concludes that a human right to water under international law and a right to water in Nigeria are birds of different feathers and a recognition and support at international level of the human right to water by Nigeria does not reflect anywhere in Nigeria.

International Human Right to Water

Water has not always been an explicit right under international human rights. The Universal Declaration of 1948 which ushered in the universally acceptable, codified human rights did not include water as a human right.⁷ Even the subsequent twin covenants of 1966 omitted water as a human right.⁸ However by 2002, the Committee on Economic

September 1990 (CRC); Article 28 United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol 2008 adopted by the General Assembly by resolution A/RES/61/106 in 2006 (CRPD).

⁶ Atuanya P & Ojewole C "FG's N293bn Allocation Fails to Dampen Nigeria Water Crises 130 million people lack access to safe sanitation" *Business Day Newspaper* Tuesday Vol 14, No 113 07 June 2016.

⁷ Universal Declaration of Human Rights adopted 10 December 1948 United Nations General Assembly Res 217 A (III) also http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf accessed 13 May 2013.

⁸ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 (ICCPR) and International Covenant on Economic Social and Cultural Rights Adopted and opened for signature, ratification and accession by general Assembly resolution 2200A (XXI) of 16 December 1966 (ICESCR).

Social and Cultural Rights under General Comment 15 interpreted articles 11 and 12 of the ICESCR to include the human right to water.⁹

Article 11 of the ICESCR states that:

*The states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*¹⁰

By the provision above, it is clearly impossible to enjoy “an adequate standard of living” without water as without water no life can exist. As O'Regan J put it ‘Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook to wash and to grow our food. Without it, we will die.’¹¹ According to Sieghart this provision is a perfect picture for living and makes the world a better place if everyone enjoys this.¹² He notes that international human rights law has recognised quite a number of rights to help people all over the world to live a life of peace and comfort.¹³ Water is one of these important rights which every life depends on for their existence. Also the human right to water was interpreted from article 12 of the ICESCR which provides that:

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*¹⁴

⁹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: <http://www.refworld.org/docid/4538838d11.html> (accessed 12 June 2014).

¹⁰ Art 11 (1) ICESCR.

¹¹ *Lindiwe Mazibuko and Others v. City of Johannesburg and Others*, Case CCT 39/09 (2009) ZACC 28 Para 1

¹² Sieghart P (1985) “The lawful rights of mankind: an introduction to the international legal code of human rights” p 118 Oxford University Press: New York.

¹³ Sieghart (1985) 118.

¹⁴ Art 12 (1) ICESCR.

The human right to water must be safe both to drink in order to sustain health and life. This suggests a dual meaning to safety in the human right water. The water must be safe to drink such that it does not cause ill health and it must be safe in terms of the distance in which the user is going to acquire the water for use. General Comment 15 has stated that water for domestic use must be free from micro-organisms, chemicals and such substances that constitute hazard to a person's health.¹⁵

The human right to water can be linked to several other socio-economic rights such as the right to sanitation and the right to health as well as civil and political rights such as the right to life. This interrelatedness of water to other human rights has no doubt given it a place amongst other rights as a self-standing right.¹⁶ The United Nations General Assembly has since recognised water as a human right agreeing to the interpretation of the Committee on Economic Social and Cultural rights. This means that Nigeria and every other country that are signatories to the ICESCR have obligations to recognise water as a human right and to fulfil this right.

The human right to water is detailed under General Comment 15. General Comment 15 analysed the normative content of the human right to water and highlighted states parties' obligations and the implementation of the human right to water at national levels.¹⁷ In this section an overview of what the human right to water entails under international law and has described by General Comment 15 is analysed.

Normative Content of the Human Right to Water

General Comment 15 states that:

"The human right to water entitles everyone to sufficient, safe, acceptable physically accessible and affordable water for personal domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water related diseases and provide for

¹⁵ General Comment 15 Para 12 (b); see also WHO's guidelines for drinking water quality (2011) found at http://whqlibdoc.who.int/publications/2011/9789241548151_eng.pdf accessed 20 June 2014.

¹⁶ Thielborger P "The right(s) to Water: The Multi-Level Governance of a Unique Human Right" (2014) 95

Springer Hedelber New York.

¹⁷ General Comments No 15.

*consumption, cooking, personal and domestic hygienic requirements.*¹⁸

General Comment 15 identifies entitlement and freedom as key aspects of the right to water.¹⁹ The human right to water contains freedoms, which mean maintaining existing water supply without interference, disconnection or contamination.²⁰ In other words the freedom in a human right to water ensures no interference in the enjoyment of water, no disconnection and no contamination of water supplies.²¹ Entitlement on the other hand means no one should be discriminated against when it comes to access to domestic water supply. General Comment 15 identified the overall application of the human right to water irrespective of the status, age or condition varied amongst persons generally. These factors referred to the availability of the water, the quality of the water and the accessibility of the water at all times.²² In explaining the accessibility of water, General Comment 15 states that water must be accessible physically, economically and without discrimination. It also includes that there must be information accessibility. Five characteristics can be deduced from the above definition of a human right to water which are:

Sufficiency

This characteristic refers to the quantity of water which a person is entitled to. An adequate amount of safe water is necessary to prevent death from dehydration and also to reduce the risk of water related disease.²³ Water supply for each person is also expected to be continuous,²⁴ such that it covers personal and domestic use for drinking, cooking, laundry and for personal and house hygiene.²⁵

In understanding what 'sufficient' means, WHO has stated that between 50 and 100 litres of water per person per day is what is needed to ensure basic needs and give less alarm over health concerns. International guidelines have however put sufficient quantity

¹⁸ General Comment 15 Para 2.

¹⁹ General Comment 15 Para 10.

²⁰ General Comment 15 Para 10.

²¹ *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153 the poisoning of water wells by the Janjaweed constituted a violation of the human right to water. Viljoen F (2012) "International human rights law in Africa" 216 and 328. Oxford University Press: Oxford (on Demand).

²² General Comment 15 para 4-6.

²³ General comment 15 Para 2.

²⁴ General comment 15 Para 12.

²⁵ Factsheet 35 8.

to be between 40 and 50 litres. It states that at the very minimum, it should not be less than 20 litres.²⁶

Acceptability

This refers to the colour, odour and taste of domestic water which apply to all sources of the water supply, be it piped or from the tankers, vendor providers and protected well.²⁷ Perhaps the reason for this is to ensure that people do not resort to polluted alternatives which may look more attractive.

Accessibility

Accessibility of water considers three forms of accessibility which are physical accessibility, informational accessibility and economical accessibility. Physical accessibility refers to water within safe physical reach²⁸ and there must be no threat to life during access to water facilities and service.²⁹ Informational accessibility includes the right to seek, receive and impart information to people on issues concerning water.³⁰ Economical accessibility means that water must be affordable.

Affordability

The human right to water does not mean that water must be free as believed by many. The term affordable as adopted by the definition in the General Comment 15 suggests that clean water comes at a price and same must be such that the water user can afford which would not deprive his or her enjoyment of other rights.³¹ This has been further explained to mean that no one should be denied access to water because he or she cannot pay for it.³² An affordable price according to the United Nations should not exceed five percent of

²⁶ The human right to water and sanitation *Media Brief* UN Water Decade Programme on Advocacy and communication and water supply and sanitation available at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

²⁷ General Comment 15; Factsheet 35 9.

²⁸ This may be within the household, the immediate vicinity of each household, educational institution and workplace. In describing household General Comment 15 referred to General Comment 4, 13 and 14. See General Comment 15 FN 16.

²⁹ This refers to the assault of women and girls who go in search of water at long distances.

³⁰ General Comment 15 Para 6.

³¹ General Comment 15 Para 12(c) (ii).

³² Factsheet 35 10.

household income.³³ Water is said to be affordable when it does not affect the ability to buy other essential goods.³⁴

Availability

Water for domestic use is also expected to be available at all times. When water is not available or available at a cost it affects the characteristic of sufficiency and affordability as well as accessibility as water users begin to search for water for their domestic use. Furthermore, this may also affect the criterion of acceptability as people would revert to unclean water for their domestic use.

Obligations arising under the human right to water

State parties to the ICESCR are expected to take steps individually and through international assistance and co-operation to the maximum of its available resources.³⁵ General Comment 3 explains further the provision of article 2 of the ICESCR.³⁶ The obligations described in article 2 of the ICESCR have been referred to as 'Obligation of conduct' and 'Obligation of result' by General Comment 3.³⁷ General Comment 3 gives details to the obligations of state parties under article 2 of the ICESCR.³⁸ The obligations of states to make water accessible to the people are general obligations specific legal obligations, international obligations and core obligations.³⁹

Although the ICESCR provides for a progressive realisation and understands that there may be constraints, it also imposes various obligations which are of immediate effect.⁴⁰ Such obligations include that a right be exercised without discrimination and also that deliberate, concrete steps targeted towards a full realisation of the right to water be

³³ The human right to water and sanitation *Media Brief* UN Water Decade Programme on Advocacy and communication and water supply and sanitation p 6 available at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

³⁴ Ibid.

³⁵ Art. 2 (1) ICESCR

³⁶ CESCR General Comment No 3: The Nature of States Parties' Obligations (hereafter General Comment 3) (Adopted at the fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 contained in Document E/199/23) available at <http://www.refworld.org/docid/4538838e10.html> accessed October 15 2014.

³⁷ General Comment 3 Para 1.

³⁸ See generally for details General Comment 3.

³⁹ General Comment 15 Para 8-13.

⁴⁰ Art 2 ICESCR.

taken.⁴¹ General Comment 15 further states that states parties have a continuing duty to move expeditiously and effectively to do what.⁴² Retrogression is not acceptable under the human right to water.⁴³

General Comment 15 also identifies the types of obligations required by state parties. These obligations are Obligation to respect where states are required to refrain from interfering with the enjoyment of the right to water.⁴⁴ Obligation to protect in which states parties are expected to prevent third parties from interfering in any way with the enjoyment of the right to water and where water services are controlled by third parties, states should prevent them from compromising the characteristics of the human right to water.⁴⁵ Furthermore this obligation encourages states parties to adopt necessary and effective legislative and other measures from polluting water sources.⁴⁶ The obligation to fulfil requires that positive measures to assist individuals to enjoy the right to water by facilitating, promoting and providing water must be taken.⁴⁷ This obligation also includes educating people on hygienic use of water, protecting the water source and methods of minimising wastages.⁴⁸ This obligation also expects states to adopt comprehensive integrated strategies and programmes to ensure sufficient and safe water in the present and the future.⁴⁹ General Comment 15 also expects that states should recognise the role of international cooperation and assistance.⁵⁰

The core obligations of states parties towards the human right to water can also be found in General Comment 3.⁵¹ These core obligations are 'of immediate effect' include ensuring a minimum essential amount of safe water for personal and domestic use to prevent disease; right of access to water is ensured for the disadvantaged and marginalised groups; to provide physically accessible water to prevent too much time spent on water

⁴¹ General Comment 15 para 17.

⁴² General Comment 15 para 18.

⁴³ General Comment 15 para 19; see also General Comment 3.

⁴⁴ General Comment 15 Para 20 (a) 21 & 22.

⁴⁵ General Comment 23 & 24.

⁴⁶ Perhaps if Nigeria had effective laws in this regard, the waters of the people of Ogoniland would not have been polluted. See *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria* (Communication No. 155/96).

⁴⁷ General Comment 15 Para 25.

⁴⁸ General Comment 15 Para 25 & 26.

⁴⁹ General Comment 15 Para 26-28.

⁵⁰ General Comment 15 Para 30-32: Also Art 2, 11 & 23 ICESCR.

⁵¹ HRI/GEN/1/Rev.9 (Vol. I) General Comment 3 adopted in 1981. See also Human Rights Committee, General Comment 31 Nature of the General Legal Obligation on states Parties to the Covenant, (which replaced General comment 3) U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

acquisition,⁵² to adopt and implement a national water strategy and plan of action addressing the whole nation.⁵³

States parties to the ICESCR are expected to take measures both individually and through international assistance and cooperation to the maximum of its available resources with a view to achieving progressively the full rights recognised in the ICESCR by all appropriate means, including particularly the adoption of legislative measures.⁵⁴ In breaking this down, states are expected to take measures and maximise available resources as well as progressively realise access to water by all means possible and also to take legislative measures.

It means the proximity of water to people within their homes or in close proximity to them.⁵⁵ The human right to water means giving priority to drinking water supply.⁵⁶ It means that the state has a duty to protect and promote this right.⁵⁷ The human right to water emphasises the importance of human dignity. It means the universal access to sufficient water for basic needs is an absolute and non-negotiable priority.⁵⁸ It places an obligation on government to be responsible for its availability, quality and affordability. The exposition of what the human right to water entails further places on the government an obligation to respect, protect and fulfill.

Human rights and fundamental freedoms are referred to as the birthright of all human beings and their protection and promotion is the responsibility of the governments.⁵⁹ The human right to water having evolved chiefly from the interpretation of articles 11 and 12 of the ICESCR and having being related to some human rights provisions simply emphasises the tripartite relationship of human rights in general.

⁵² This also includes that personal security is not threatened.

⁵³ This should also be reviewed on the basis of a participatory and transparent process so that progress can be monitored.

⁵⁴ Article 2 (1); See also Coomans F "Application of the International Covenant on Economic, Social and Cultural rights in the framework of International Organisations" (2007) 11 *Max Planck UNYB* 359-360. *Max Planck Yearbook of United Nations Law* 11 (2007): 359-390.

⁵⁵ Langford M "The United Nations concept of water as a human right: a new paradigm for old problems?" (2005) 21 *International Journal of Water Resources Development* 273 at 276.

⁵⁶ Miroso O & Harris LM "Human right to water: Contemporary Challenges and contours of a Global Debate" (2011) 44 *Antipode* 932 at 936.

⁵⁷ Gleick PH "The human right to water" 9 *Water Nepal* (2003) 117 at 118.

⁵⁸ Langford (2005) 21 *Water resources Development* 276.

⁵⁹ Vienna Declaration 1 para 3 <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> accessed 21 June 2014.

National Recognition of the Human Right to Water

Many African countries before the publication of General Comment 15 in 2002 recognised the right to water in their various constitutions and water laws. Worthy of note is South Africa, applauded to have a laudable legislative framework on water.⁶⁰ Kenya has also constitutionalised the human right to water. Although it is not clear whether the interpretation of the Commission motivated Kenya to also recognise the human right to water or the improvement of access to water coverage in South Africa or better still, a sheer determination to improve the lives of its people. Either way, access to water is a human right in Kenya with constitutional guarantee. Mauritania also affirms that water is a fundamental right to which government must provide.⁶¹ In addition, their Water Code law of 2005 recognises that the state policy should guarantee access to potable water for its populace.⁶² Angola's Water Act states that it is the obligations of government to provide the people with potable water for domestic use and hygiene.⁶³

In comparison, Nigeria has neither recognised the human right to water nor prioritised access to water in spite of the abundance of water resources and despite being a signatory to the International human rights instruments that recognise the human right to water. In fact, the provision of water for domestic use in Nigeria is contrary to the international human rights meaning of the right to water.

The Right to Water in Nigeria

The right to water in Nigeria as contained in the Constitution⁶⁴ and the Water Resources Act⁶⁵ does not connote a human right to water. The difference between the human rights to water as conceptualised by General Comment 15 does not synchronise with the recognition of the right to water in Nigeria. The human right to water refers to water of good quality and sufficient quantity that is also accessible and affordable to which the Nigeria government has obligations to fulfil.⁶⁶ Various national laws provide for

⁶⁰ Dugard J "Urban Basic Services: Rights Reality Resistance" 275-309 in Langford M Cousins B Dugard J and Madlingozi T (Eds) (2014) *Socio-Economic Rights in South Africa Symbols or Substance?* Cambridge University Press: New York.

⁶¹ Art 57 of the Mauritania Constitution.

⁶² See art 2 of the Water Code Law 2005.

⁶³ Art 10 Water Act 2002.

⁶⁴ Constitution of the Federal Republic of Nigeria 1999

⁶⁵ Act No 101 of 1993.

⁶⁶ See General Comment 15.

the right to water not phrased in human rights terms thus suggesting a mere 'legislative approach to water 'inclusive of a 'commodity approach' to water.⁶⁷

The only mention of water in the Nigerian Constitution provides that:

'The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.⁶⁸

The Constitution does not specify what water it shall 'safeguard', as such it is difficult to imply a human right to water since section 6 of the Constitution restrains the court from adjudicating on fundamental objectives and directive principles of state policy.⁶⁹ Section 20 which provides for the safeguard of Nigerian water falls under this provision. Since the powers vested in the court does not include section 20 which provides for the safeguard of water whatever intention of government to make water available to everyone is nullified and same cannot be implied as a human right to water. Chapter 4 of the constitution also houses the bill of rights but does not make any provision for the right to water.

The Nigerian Water Resources Act on the other hand stipulates that all water rights and control is vested in the Federal Government.⁷⁰ This means that the Federal Government is responsible for all water resources including domestic water supply. In spite of the provision which vests all water in the Federal Government, the Act provides under section 2 that anyone may take water from the rivers and streams without charge for his or her domestic use.⁷¹ The provision in the Act states that everyone:

*(i) May take water without charge for his domestic purpose
or for watering his livestock from any watercourse to which
the public has free access;
or*

⁶⁷ A legislative approach in this regards would simply refer to the provisions exhibited in national water laws that may or may not be comprehensive in its provision. A clear distinction is in the French water laws, which adequately provides for access to water though not in human rights terms, and the Nigerian water laws, which does not make adequate legislative provision on access to water. France however, has recently recognised the human right to water.

⁶⁸ Section 20 Nigerian Constitution.

⁶⁹ See in particular section 6 (6) (c) of the Nigerian Constitution.

⁷⁰ Section 1 (1) Water Resources Act.

⁷¹ Section 2 (1) Water Resources Act.

*(ii) may use water for the purpose of fishing or for navigation to the extent that such use is not inconsistent with any other law for the time being in force; or
(iii) who has a statutory or customary right of occupancy to any land, may take and use water from the underground water source or if abutting on the bank of any watercourse, from that watercourse, without charge for domestic purposes, for watering livestock and for personal irrigation schemes.⁷²*

Such a provision in the Water Act clearly neglects all the characteristics of human rights to water above discussed. The water from a river is termed raw and cannot be fit for direct human use because of pollution. Accessibility becomes an issue as not all homes are situated beside a river. A provision such as that of Section 2 above quoted shows government distancing itself from the obligations to fulfil the human right to water by encouraging people to take from streams or abstract from personal boreholes and wells. It is therefore guaranteeing access to water is not a priority of the Federal government of Nigeria.

Human Right to Water versus Right to Water

The human right to water guarantees more than a 'right to take water from a river' or the permission to make boreholes for domestic water. A human right to water considers the accessibility (the distance of the water) as well as the quality of the water. Water for domestic use is of an improved quality and surface waters in their forms are not 'improved quality.'

Nigeria recognise the right to water but not the human right to water which requires more expectations and sets limitations and gives responsibilities on state government to promote, protect, respect and fulfil the right. The right to water as understood and interpreted under the Nigerian legislation does not place any obligation on the Nigerian government.

The human right to water as interpreted by the Committee on social and economic rights dictates certain requirements for water for domestic use. Domestic water apart from being of an improved source is expected to be of a high quality and within a defined distance. Not every community have rivers and the opportunity to take water from them.

The human right to water appends a responsibility on the state government which calls for such a state to be accountable with domestic water supply. The right to water as

⁷² Section 2 Water Resources Act.

under the Nigerian law does not place any responsibility on the Nigerian government thus the right to take water cannot be understood to mean the human right to water.

Finally, the human right to water should be sufficiently addressed by the water laws of a nation. This position is found in South Africa, where the provisions of the Water Services Act⁷³ and the National Water Act⁷⁴ give a voice to the 1996 Constitution which provides for the human right to water.⁷⁵ Neither the provision of the Water Resources Act nor the 1999 Constitution in Nigeria suggests a human right to water.

An overview of public water systems in Nigeria show the laws governing access to water have evolved over time in the provision of domestic water for the Nigerian people without solution. The Nigerian legal system is a combination of customary laws, Islamic law and received English laws.⁷⁶ Customary laws in Nigeria are largely unwritten⁷⁷ and water for domestic use was retrieved individually from rivers and streams.⁷⁸ However the unwritten customary law on access to water reflects in the Water Resources Act which provides for the continuous use of river and stream waters for domestic use by people living in rural areas in Nigeria.⁷⁹ Although a critical examination of the provision of section 2 of the Water Resources Act may be argued to be necessary, because people cannot be completely torn from their tradition and beliefs (and it is important that such beliefs if not repugnant to natural justice equity and good conscience be promoted), such a provision however creates a reason for neglect on the need to improve access to water sufficiently in rural areas in Nigeria. The argument here is that since people living in rural areas can continue to harness the rivers and streams for their use there is no urgent need on the part of government to increase access to sustainable improved water sources except where these waters are grossly polluted or there is a target to be met such as the Millennium Development Goal. In such instances when government installs hand operated boreholes, there are usually no mechanisms set up for the management of same. In other words there is no proper planning to accommodate rural communities under a sustainable improved access to water, hence the need to provide that they continue to use such unimproved sources for their domestic use.

The method of individually sourcing for water has continued up to date, to a large extent with people sourcing for their water individually through drilling wells and

⁷³ South African Water Services Act 108 of 1997.

⁷⁴ Act 36 of 1998.

⁷⁵ Section 27 Constitution of the Republic of South Africa of 1996.

⁷⁶ For an overview of this see Tobi (1996) *Sources of Nigerian Law*.

⁷⁷ Tobi (1996) 108.

⁷⁸ Nkwocha EE "Water supply deficiency and implications for rural development in the Niger-Delta region of Nigeria." (2009) 90 *Social Indicators Research* 409-418 at 410.

⁷⁹ See section 2 of the Nigerian Water Resources Act 1993.

boreholes or buying from water tankers and fetching from streams and rivers. These sources of water do not constitute a human right to water as water for domestic use should be of an improved source. Furthermore the inadequate legal provisions and the absence of an institutional framework has further contributed to the right to water contained in the Nigerian Water Resources Act to be referred to as a mere right without guarantee or entitlements or claims. This clearly is not a human right.

Conclusion

Although Nigeria is a signatory to virtually all the international covenants which guarantee a human right to water⁸⁰ and in spite of the international and regional roles Nigeria has played in ensuring access to water within and outside of Nigeria,⁸¹ the challenges of access to water remain the same in Nigeria with a deterioration in the percentage of people with access to potable water as seen in Hall and Ajiboye *et al.*⁸² In view of the fact that water is a human right which the Nigerian government has a duty to provide, it is imperative that an operative human right to water be recognised in Nigeria.⁸³ The Nigerian government favours water for agricultural use and encourages, albeit unsatisfactorily, the legal protection of water from pollution.⁸⁴ Prioritising water for agricultural use negates the international meaning of the human right to water.⁸⁵ Although the various uses of water need to be adequately covered by law especially domestic water supply which in comparison with the quantity of water needed for irrigation or agriculture is insignificant.

⁸⁰ Such as the ICESCR ratified in 29 July 1993; CEDAW was ratified 23 April 1984 and CRC ratified 19 April 1991. For a list of other human rights instrument ratified by Nigeria see http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/NHRC_NGA_UPR_S4_2009anx_RatifiedHumanRightsInstruments.pdf accessed 10 November 2015.

⁸¹ Nigeria hosted the first Africa-South America Summit which was held in Abuja. One of the consensuses at the meeting was to promote the right of citizens to have access to clean water. For general overview see <http://asasummit.itamaraty.gov.br/asa-ingles/summit-of-south-american-africa> accessed 1 October 2014.

⁸² In 2010, Hall estimated that 72% of people living in urban areas in Nigeria had access to improved water see Hall (2010) *PSIRU* 4; Ajiboye *et al* estimated that only 60% of people living in urban areas had access to water Ajiboye AJ, Olaniyi AO, Adegbite BA, "A review of the challenges of sustainable water resources management in Nigeria" (2012) 1 *International Journal of Life Sciences Biotechnology and Pharm Research* 1.

⁸³ See General Comment 15 Para 17-29.

⁸⁴ See generally the Water Resources Act 2003. Sec 18 provides a penalty fee not exceeding #2,000 (about 100 Rands) for any violations of the provisions of the Act.

⁸⁵ General comment 15 Para 6 makes it clear that water resources required to stay alive and keep healthy should be prioritised including water required to meet core human rights.

There is the need for an overhaul of the Nigerian water laws for a sustainable realisation of access to water for domestic use in Nigeria. A constitutional guarantee of a human right to water and an institutional framework with monitoring mechanisms would perhaps be the best way of ensuring access to water as the right to water contained in the federal law cannot flock with the human right to water understood under international law and as such cannot guarantee access to water in Nigeria.