

Nigerian Water Resources Act and its Effect on Domestic Water Supply and more Particularly Domestic Water

By:
Oluwabunmi L Niyi-Gafar^{*}
Oluwatosin B Igbayiloye^{**}

Abstract

The Federal Government of Nigeria began a reform of the water resources sector in 1997. The aim of the reform was to improve water governance at the three levels of government. Although reforms are ongoing in the sector, there still exists a Water Resources Act which was a Decree of 1963. The Water Resources Act of 1990 (which was a Decree of 1963) does not consider the contemporary distribution of water resources and more importantly, the recognition of domestic water supply or access at the Federal level. And although, there exist a water Bill, which when passed is expected to replace the Water Resources Act, this Bill has been said to be controversial and has yet to be passed at the legislative arm. While it may be argued that laws may not necessarily improve access to water, it is argued that an absence of proper laws invariably decreases access to water, and more particularly water for domestic use. Following a descriptive methodology, this article examines the extant laws on water resources particularly provisions that focuses on access to domestic water. It argues that all the various uses of water are expected to be covered by the Water Resources Act and that the proposed Water Bill does not consider in detail all the uses of water. The article concludes that if the controversial proposed water bill is passed into law, more problems are likely to arise in the water sector and this may invariably further heighten the challenges of domestic water supply.

1.0 Introduction

Although water resources in Nigeria are vested in the federal government, the duty of domestic water supply is placed on the various state governments. There are 36 states in Nigeria and a Federal Capital territory (FCT). There are three tiers of government – federal, state and local – that share the responsibility for water resources management and especially domestic water supply. It has been noted that Nigeria has water resources in abundance.¹ Several researchers have also analysed the available waters in Nigeria, such

* +2348033930391

* +2348038076514

¹ National Water Policy 2004 3; Goldface-Irokalibe (2008) ELRI 4; Ajai (2012) 8 LEAD Journal 91-113.

as rainfall² and rivers³ and have come to the conclusion that the majority of water available in Nigeria are polluted, and not fit for human consumption.⁴ It is, however, ironic that in spite of Nigeria being categorised as a nation having water in abundance,⁵ there is a multitude of citizens of Nigeria without access to safe, clean water.⁶ In spite of the abundance of water in all forms, many Nigerians are exposed to polluted water and insufficient water for their domestic use.⁷ In other words, clean drinking water is expensive and more often, not readily available.⁸ The term 'water resources' incorporates all water forms and uses including domestic water. However, domestic water, in Nigeria, occupies a rather redundant seat in the definition of water resources. There are several federal laws on water resources in Nigeria; however, in this article reference is made only to the federal laws that mention water for domestic use.⁹

2.0 Water Resources Conceptualised

Water Partnership has defined water resource management as a "process which promotes the coordinated development and management of water, land and related resources, in order to maximize [sic] the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems."¹⁰

From the above definition, the term 'water resources' is all-encompassing of the various uses of water. Water resources may not be construed to mean water for domestic use; rather it would be construed to mean all uses of water, such as agricultural, irrigation,

- ² Ayoade (1975) 20 *Hydrological Sciences Bulletin* 583-584; Oguntunde et al (2011) 411 *Journal of Hydrology* 207; Ishaku et al (2011) 3 *Journal of Water Resources and Protection* 598-606; Aladenola & Adeboye (2010) 24 *Water Resource Management* 2129-2137.
- ³ Goldface-Irokalibe (2008) *ELRI* 2; Longe et al (2010) 12 *Journal of Sustainable Development in Africa*.
- ⁴ Longe et al (2010) 12 *Journal of Sustainable Development in Africa* 35-44.
- ⁵ Ayoade (1975) 20 *Hydrological Sciences Bulletin* 583.
- ⁶ Ladan (2009) 490.
- ⁷ Ladan (2009) 490-491.
- ⁸ Ayoade (1975) 20 *Hydrological Sciences Bulletin* 588.
- ⁹ Akpabio & Ansa (2013) 4 *Mediterranean Journal of Social Sciences* 305.
- ¹⁰ Global Water Partnerships (2000) 22 No 4 TAC Series at http://www.gwp.org/Global/GWP-CACENA_Files/en/pdf/tec04.pdf accessed 18 June 2014.

recreation, hydro-electrical, industrial and water for domestic use. This is because in most of the legislative documents in Nigeria, water for domestic use is rarely mentioned, and where it does appear, it is found under water resources in general. It would therefore be careless to assume that there is no sufficient provision for domestic water, based on the fact that it is not specifically mentioned.

Water resources is commonly used under the Nigerian legislative documents. This is to show that there is a holistic consideration of all forms of water, and their various uses in Nigeria. However, it argued that water for agricultural purposes is more pronounced under Nigerian legislative documents, while domestic water is not entirely guaranteed under the federal laws. The implication of this is that domestic water is not a priority of the federal government.

3.0 Legal Framework of Water Resources in Nigeria

The Federal Government of Nigeria became involved in the management of water resources in 1976, by creating the Federal Ministry of Water Resources and the River Basins Development Authorities.¹¹ The purpose of the River Basins Development Authority was to provide bulk water for irrigation.¹² The provision of the River Basins Development Act has not changed, as the provisions of the River Basins Development Act are still solely irrigation and agriculture, where there has not been an expansion or development of focus on domestic water supply.

In 1981, the National Committee of water resources and boards was formed.¹³ Presently in Nigeria, the water supply policy operators are found in four authorities:

¹¹ Federal Ministry of Water Resources at <http://waterresources.gov.ng/about/history-of-the-ministry> accessed 11 August 2015.

¹² Water Supply and Sanitation Policy 2000 1.

¹³ Gbadegesin & Olorunfemi (2007) *ATPS Working Paper Series* no 4920.

The Federal Ministry of Water Resources: charged with the responsibility of policy advice and formulation, data collection, monitoring and coordination of water resources, inclusive of water supply.¹⁴

The River Basins Development Authority: charged with the development, operation and management of reservoirs for the supply of bulk water supply amongst other uses in their jurisdiction.¹⁵

State Water Agencies: responsible for urban, semi-urban and rural water supplies.¹⁶

The Local Government Authorities: responsible for the provision of potable water to rural communities in their areas of jurisdiction.¹⁷

Nigeria is a signatory to the United Nations International Drinking Water Supply and Sanitation Decade, which has, as its main objective, the supply of water to all citizens of the country between 1981 and 1990.¹⁸ The United Nations International Children Emergency Fund (UNICEF) and United Nations Development Programme (UNDP) were also involved in public water supply in Nigeria.¹⁹ These two United Nations agencies, however, did not succeed in their objective. In spite of the efforts of the Nigerian government at all levels, the water supply coverage in the country appears to be decreasing and deteriorating.²⁰

4.0 Extant Laws on Domestic Water Supply at the Federal Level

For a natural resource such as water, on which the very existence of life is contingent, the provisions of the water law at federal level are inadequate to guarantee clean water for

¹⁴ USAID (2010) 2.

¹⁵ USAID (2010) 2.

¹⁶ USAID (2010) 2.

¹⁷ USAID (2010) 2.

¹⁸ National Water Supply Policy 2000.

¹⁹ National Water Supply Policy 2000.

²⁰ Para 9 National Water Supply Policy 2000; Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 498.

domestic use and a life worthy of human dignity.²¹ In this section, some of the extant federal laws which provide for domestic water supply, such as the Constitution and the Water Resources Act are identified and analysed. This is done in order to establish the need for sustainable reform, which would incorporate the principles of a human rights-based approach. The current water situation in Nigeria, amongst other utility services, cannot provide the infrastructure required for social and political development.²² This is because water supply systems are unreliable and underdeveloped.²³ It is emphasised that in spite of the efforts of the federal government on water reforms in Nigeria, domestic water is still not prioritised, as against agricultural or irrigational uses. The inadequate provision and non-prioritisation of domestic water at the federal level has contributed to an inadequate, commodity-focused approach to domestic water at the state level.

Below discussed are some of the Federal laws on water resources:

4.1 Constitution of the Federal Republic of Nigeria (CFRN)

The 1999 CFRN, like many other states' constitutions, is supreme, with its provisions having binding force on all authorities and persons throughout the Federal Republic of Nigeria.²⁴ The CFRN was described in the case of *Kalu v Odili* as

[a]n instrument of government under which laws are made and are not mere Acts or law and the construction which the court will give to a constitutional provision must be such that will serve the interest of the Constitution and best carry out the subject and purpose and give effect to the intention of the framers.²⁵

The CFRN contains a bill of rights²⁶ with the provisions of water (as an environmental objective) under "fundamental objectives and directive principles of state policy".²⁷ The

²¹ See generally National Water Policy 2004.

²² Hall (2006) *PSIRU Reports* 3.

²³ Hall (2006) *PSIRU Reports* 3.

²⁴ Sec 1 (1) CFRN.

²⁵ See (1992) 5 NWLR (Pt.240) 130 at 156.

²⁶ Chap 4 CFRN.

violation of the provision on water in this part of the CFRN makes it non-justiciable, which whittles down the constitutional guarantee of the right to water.²⁸ Socio-economic rights are not justiciable in Nigeria. The debate on socio-economic rights and their non-justiciability is centred on the competency and/or unwillingness of the adjudicating body to entertain cases of violations of the human right to water.²⁹ However, in determining the extent of the application of fundamental objectives and directive principles of state policy on political objectives,³⁰ the presiding Judge in the case of *Attorney General of Ondo State v Attorney General of Federation*³¹ stated that

[I]t has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such person in authority and should not be extended to private persons, companies or private organisations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the constitution.³²

On the issue of water, the CFRN provides that "the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria".³³ The CFRN does not specify what water it shall "safeguard", and as such, it is difficult to

²⁸ See Chap 2 CFRN.

²⁹ Olowu (2006) 69 *Saskatchewan Law Review* 41.

³⁰ For an overview of this debate see Ibe (2007) 7 *African Human rights Law Journal* 225-248; Liebenberg in Eide *et al* (eds) *Economic, Social and Cultural Rights* (2001) 55, 60.

³¹ See Sec 15 of the CFRN, and in particular, (5), which states that "the State shall abolish all corrupt practices and abuse of power". The applicants argument was that the legislature cannot make laws in this regard as the provision was found under Chapter II of the CFRN – directive principles of public policy which are not justiciable

³² (2002) 9 NWLR (pt. 772) 222 (hereafter *AG Ondo v AG Fed*).

³³ See also *Nafiu Rabiu v Kano State* (1980) 8-11 AC 130.

Sec 20 CFRN.

imply a human right to water. Section 20 of the CFRN is curtailed by Section 6 of the CFRN, which sets out the powers of the judiciary. Section 6 lists the judicial powers, and sets limits on the powers of the judiciary in adjudicating upon issues or questions related to the fundamental objectives and directive principles of state policy, which is found in Chapter II of the CFRN. It provides that the powers vested in the judiciary

shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and Directive principles of state policy set out in Chapter II of this Constitution.³⁴

A provision for the protection of the environment shows that the state has positive objectives towards ensuring an improvement of the environment in general, but places a caveat in the form of Section 6(6)(c). Olowu describes this as a marginalisation of human rights.³⁵ Placing such an important provision under Chapter II of the CFRN nullifies the intention of government in this regard, particularly when it specifies that the judiciary cannot adjudicate on such matters.

Furthermore, Chapter 4 of the CFRN houses the Bill of Rights, but does not make any provision for the right to water. In other words, water, as used in the CFRN, may or may not refer to domestic water. However, on the other hand, if Section 20 of the CFRN refers to water resources generally (and as such inclusive of domestic water), such provision does not adequately address the issue of access to potable water. Section 16 seems to address the issue of food, albeit inadequately, when it states that “the state shall direct its policy towards ensuring suitable and adequate food for all citizens”.³⁶ It however cannot be enforced, as it also falls under Chapter II of the CFRN, which is not justiciable. The Supreme Court (which is the apex court in Nigeria), in the case of *Attorney General of*

³⁴ See (6) (c) CFRN.

³⁵ Olowu (2006) 69 *Saskatchewan Law Review* 60-61.

³⁶ Sec 16 (2) (d) CFRN.

Abdo v Attorney General of the Federation, held that "directive principles can be made justiciable by legislation".³⁷ In other words, if there are no federal laws guaranteeing the provisions of "directive principles" under the CFRN, then those laws, including the right to water, cannot be justiciable. Water as a socio-economic right or as a human right is not extant in Nigeria, and access to water as a human right has never been adjudicated upon by any court of law in Nigeria, except in cases where water in the form of rivers or wells are being polluted, wherein such matters, clean water is mentioned as a requirement of a healthy environment.³⁸

In the case of *Gbemre v SPDC*, the applicants applied for the enforcement of their fundamental right to life and dignity of the human person as guaranteed in Section 33 and 34 of the CFRN as well as Articles 4 (right to life and human dignity), 16 (right to physical and mental health) and 24 (right to environment) of the African Charter.³⁹ The Federal High Court explained that the burning of gas by flaring contributes adversely to the environment, by emitting carbon dioxide and methane, which causes warming of the environment, and which pollutes the people's food and water.⁴⁰ The court further ruled that gas flaring causes acid rain, and that this rain acidifies the lakes and streams and damages vegetation.⁴¹ Although the court did not in particular mention the right to water, perhaps because the right to water had not been recognised then, it however understood the importance of water to life and health when it mentioned that the pollution of water was a violation of the human right to the environment.⁴² The Federal High Court in this case found for the applicants a violation of their constitutional right to life and human dignity, which includes a clean, poison-free, pollution-free healthy environment.⁴³ There

³⁷ (2002) 9 NWLR (pt. 772) 222.

³⁸ *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) Suit FHC/B/CS/53/05, 14 November 2005; (2005) AHRLR 151 (NgHC 2005) (hereafter *Gbemre v SPDC*).

³⁹ African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9 Vol 1 Laws of the Federation of Nigeria 2004.

⁴⁰ *Gbemre v SPDC* Para [4] 7 (c).

⁴¹ *Gbemre v SPDC* Para [4] 7 (f).

⁴² *Gbemre v SPDC* Para [4] 7 (c) Par 9 & 14.

⁴³ *Gbemre v SPDC* Para [5] 2 & 3.

was no mention of the right to water. In the ruling of the case, the court referred to the right to life and the right to dignity guaranteed by the CFRN,⁴⁴ as well as the African Charter on Human and Peoples Rights (Ratification and Enforcement), which reinforces these rights.⁴⁵ The African Charter was incorporated into the Nigerian domestic law in 1983 through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.⁴⁶ As such, the provisions in the African Charter formed part of the Nigerian laws. There was no mention of section 20 of the CFRN, which provides for the environmental objective of the state. This perhaps may be as a result of the provision of section 6(6)(c), which precludes the judiciary from making any decision arising from the fundamental objective in Chapter Two of the CFRN. Arising from the facts of *Gbemre v SDPC* on environmental pollution, was the regional case of *SERAP v Nigeria* at the ECOWAS Court.⁴⁷ The plaintiff in this case sought an order of court declaring that everyone in Niger Delta has the right to an adequate standard of living, including adequate access to food, healthcare, clean water, clean and healthy environment; to social and economic development; and the right to life and human security and dignity.⁴⁸ The defendant argued in this case that only Nigerian domestic courts have the jurisdiction to entertain rights contained in the ICCPR and ICESCR, and as far as the CFRN is concerned, the issue before the ECOWAS Court was not justiciable.⁴⁹ The court ruled in response to this that invoking lack of justiciability to justify non-accountability was baseless,⁵⁰ and that Nigeria has a responsibility to protect its citizens within the framework of the African Charter, and that it has jurisdictions to examine matters in

⁴⁴ Sec 33(1) & Sec 34(1) CFRN.

⁴⁵ Art 4, 16 & 4; see also Para [2] 1 *Gbemre v SPDC*.

⁴⁶ See Oba (2004) 4 AHRLJ 277 & 280.

⁴⁷ *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors (hereafter SERAP v Nigeria)* Suit No ECW/CCJ/APP/08/09; Rul No; ECW/CCJ/APP/07/10 Judgment No ECW/CCJ/JUD/18/12 Para 3 (hereafter *SERAP v Nigeria*).

⁴⁸ *SERAP v Nigeria* Para 19 (a).

⁴⁹ *SERAP v Nigeria* Para 24.

⁵⁰ *SERAP v Nigeria* Para 38.

which the applicants invoke ICCPR and ICESCR.⁵¹ The African Charter does not recognise the human right to water; however it recognises the right to life and human dignity,⁵² the right to environment,⁵³ and the right to health,⁵⁴ which, it has been argued in this study, are not achievable without a considerable amount of clean water.⁵⁵ The right to water was realised as a derivate of the right to "a general satisfactory environment favourable to their development", as guaranteed under the African Charter,⁵⁶ and provided for (as a directive principle) under the Nigerian CFRN. However, the court only ruled on this right because water was polluted, which meant the right to water was indirectly and partially realised through an environmental perspective.

4.2 Water Resources Act (WRA)

The WRA is a federal law, and should ordinarily contain comprehensive provisions on water resources, and all the uses of water. This Act was originally a decree of the military government, but is now deemed to be an Act by the CFRN. By virtue of section 315 of the CFRN, all existing decrees are deemed to be an Act of the National Assembly.⁵⁷ The present 1993 WRA falls under this category of laws, which was formerly a military decree. The importance of this is that the Water Resources Decree, which had insufficient provisions for domestic water supply without modification, alteration or total repeal, was upgraded as the current WRA of 1993. The Act thus brought forward all the provisions of the Decree without amendments to sections of the Act recognising water as a human right. This of course contributed to the problems of access to domestic water, carrying forward the legal problems of omission of an adequate supply of water for domestic use.

Although the CFRN does not mention water resources, it does however makes it clear that the water sources that affect more than one state is a legislative of the federal

⁵¹ SPDC v Nigeria Para 39 & 40.
⁵² Art 4 & 5 African Charter.
⁵³ Art 24 African Charter.
⁵⁴ Art 16 African Charter.
⁵⁵ See Sec 2.3 herein.
⁵⁶ Art 24 African Charter.
⁵⁷ Sec 315 (1) (a) & (b) CFRN.

government,⁵⁸ and any matter with respect to which the National Assembly has power to make law.⁵⁹ The WRA is an enactment of the National Assembly, and as such, all water rights and control is vested in the Federal Government.⁶⁰ This means that the Federal Government is responsible for all water resources, including, indirectly, domestic water supply. Although not expressly mentioned, the responsibility of domestic water also falls under the concurrent legislative list, wherein the House of Assembly of a state is saddled with making laws on any matter not included under the exclusive legislative list, or any matter included in the concurrent list.⁶¹ Domestic water is neither included in the legislative list, nor the concurrent list, and because it is not included in the exclusive list, matters concerning it, such as sourcing, supply and distribution, are the duty of the various states. Where citizens do not have access to water from the states, the provision of the WRA, which vests all water in the Federal Government, allows anyone to take water from the rivers and streams, without charge for his or her domestic use.⁶² It also recognises the customary usage of water, and states that anyone with customary right of occupancy or a statutory right of occupancy may take water from underground, without charge.⁶³ This has further encouraged land owners to source for their own water without waiting for public water supply, as the provisions only buttresses the government's lack of eagerness to lay new pipes for water supply or "progressively realise" access to potable water. In terms of Section 4, the groundwater use is expected to be monitored by the Minister.⁶⁴ The WRA does not, however, provide indication for how it sets out to monitor underground water usage. As such, the provision of Section 4 of the WRA seems irrelevant, since a majority of Nigerians depend on groundwater, and considering the inadequate law in this regard, and the increased population, it is near impossible to monitor underground water use, especially at federal level. The fact that Section 2 allows

⁵⁸ Nos 64 Second schedule CFRN.

⁵⁹ Nos 67 Second Schedule CFRN.

⁶⁰ Sec 1 (1) WRA.

⁶¹ Sec 4 (7) CFRN.

⁶² Sec 2 (1) WRA.

⁶³ Sec 2 (3) WRA.

⁶⁴ Sec 4 WRA.

a landowner to source water within his compound without charge, contributes to the impossibility of monitoring ground water usage. In essence, not many of the water acquisition through wells and boreholes are recorded, or known to the Minister. It is safe to assume that since many Nigerians do not have access to public water supply, which is not provided for by the Federal government and scarcely provided for by the various state governments, Nigerian citizens are bound to find an alternative means of realising access to water for domestic use.

The powers of the Minister, as laid out in the WRA, are all-encompassing, too broadly described, and overlapping with the duties of the Minister for Agriculture. For example, the Minister is in charge of water for animals, irrigation and agricultural purposes, as well as domestic and non-domestic purposes.⁶⁵ The Minister also has the duty to make provision for adequate water for hydro-electric generation, fisheries and recreation.⁶⁶ The duties of the Minister, as spelt out in the WRA, are too varied, and as mentioned, some are found to overlap with the duties of other Ministers in other agencies, such as the Minister for Agriculture, or the Minister for Environment. Therefore, it can be observed that guaranteeing access to water is not a specific priority of the Federal government. The functions of the Minister of Water Resources need to be properly detailed and reduced, for the effective monitoring of all water contingencies. As the WRA currently stands, the powers of the Minister are too many, and not properly detailed.⁶⁷

4.3 Rivers Basins Development Authorities Act

The River Basins Development Authorities Act was established after the promulgation of Decree 25 of 1979.⁶⁸ This 1979 Act was repealed by a 1987 Act and established eleven authorities listed in the first schedule of the Act.⁶⁹ By a proposed amendment in 2008, the

⁶⁵ Sec 5 (a) (i) WRA.

⁶⁶ Sec 5 (a) (ii) WRA.

⁶⁷ Sec 5 6 8 11-17 WRA. Virtually every section of the WRA is riddled with the powers and functions of the Minister.

⁶⁸ Hereafter RBDA Act.

⁶⁹ See sec 1 RBDA Act No 35 of 1987.

River Basins Development Authorities Act increases the number of river basins authorities to thirteen.⁷⁰ However, there are currently eleven river basins by virtue of the extant River Basins Development Act, and twelve currently functioning river basins, with the twelfth and thirteenth not covered by law.⁷¹ The functions of these authorities were to develop both surface and underground water resources, for multipurpose use with particular emphasis on irrigation, flood control and watershed management.⁷² These authorities also have the duty of supplying water from the authority's completed storage schemes, to all users, for a fee which is usually determined by the authority, but with the approval of the Minister for Water Resources.⁷³ Although the functions of the authorities include water resources, which infer all water uses, it does not make mention of domestic water supply, and does not lay an emphasis on it, as it has stipulated for water for irrigation purposes.⁷⁴

Contrary to the belief that the Federal Government has made no concrete contribution to the realisation of access to domestic water, it is gathered that, although the duty of domestic water supply is the sole function of the various state governments, the Federal government plays an 'interventionist role' in rural communities, through the various River Basins in the country.⁷⁵ These interventionist roles are channelled towards ameliorating the pains that inadequate access to water may have caused or the access to and use of polluted waters by such communities that may have resulted in cholera and diarrhoea. The interventionist roles include the provision of small dams, the drilling of boreholes, or the provision of funds to the state government to address these problems. Usually, such interventions do not arise, except where there is a community outbreak of cholera, or waterborne diseases, which reaches the media.

⁷⁰ See Par 4 of the Bill to amend the provisions of RBDA Act Cap R9 no C 4073 of 2008.

⁷¹ Imo River Basin development authority and Lower Niger River Basin Development authority are not covered by the extant RBDA. See First Schedule of RBDA Act 1987.

⁷² Sec 4 (1) (a) RBDA Act.

⁷³ Sec 4 (1) (c) RBDA Act.

⁷⁴ See Sec 4 RBDA Act.

⁷⁵ Academic research visit to Lower Niger River Basin, Kwara State.

4.4 Domestic Water Supply in Nigeria and the Proposed Water Bill

There are national water policies, which identified the defects of the water law and sought to address domestic water issues. These policies – the National Water Policy, National Policy on the environment and the Water Bill – are examined here so as to establish how much reform has been considered in the water resources sector. It is argued that the yet to be passed Water Bill still has a lot of defects such as not considering domestic water as a human right.⁷⁶ I provide an overview of the identified policies, and how they would have or not have positive influences on domestic water supply if they became law.

4.4.1 National Policy on the Environment 2004

The National Policy on the Environment of 2004 addresses specific aspects of water management, including the institutional frameworks necessary to implement the policy.⁷⁷

The aim of this policy is to achieve sustainable development in Nigeria, with specific regard to improving the environment for human well-being, conserving natural resources, maintaining a balance of the ecosystem, creating public awareness on the link between the environment, natural resources and development, and preventing trans-boundary environmental degradation.⁷⁸ The policy identifies environmental problems, the effects and how it can be addressed.⁷⁹ On strategies for implementation, the policy notes that there is the need to develop environmental friendly settlement structures under the national housing policy to ensure Nigerians have access or own decent accommodation.⁸⁰

To this end housing mechanisms are expected to be put in place to "reduce urban pollution resulting from inadequate water supply".⁸¹ The policy on water resources management notes that water is vital in providing the basis for socio-economic development.⁸² The policy states that to ensure a sustainable water resource management,

⁷⁶ Para 2.2.6 National Water Policy 2004.

⁷⁷ National Water Policy 6.

⁷⁸ (Para 2) National Policy on the Environment.

⁷⁹ Para 3 National Policy on the Environment.

⁸⁰ Para 4.3 National Policy on the Environment.

⁸¹ Para 4.3 (L) National Policy on the Environment.

⁸² Para 4.8 National Policy on the Environment.

there is the need to provide water in adequate quantity and quality to meet domestic, industrial and other water needs.⁸³

On issues of water resources, the policy addresses water pollution.⁸⁴ Pollution is known to reduce access to clean water, as it touches on the quality of water and the quantity of water available for domestic use. This also directly affects other features of the human right to water, such as affordability and accessibility. This policy addresses a nascent human rights-based approach, where it states that the goal of the policy is to create 'public awareness' and encourage individual and community participation in environmental development,⁸⁵ active participation of the three tiers of government,⁸⁶ and participation in decision making, which would include both formal education and non-formal education.⁸⁷ The policy recognises that public participation is vital to ensuring commitment, and to enlighten every stakeholder.⁸⁸ On the principle of accountability, the policy provides that monitoring mechanisms would be created to enhance accountability when there are disasters arising from environmental issues (natural or man-made), such as hazardous waste dumping, and 'water accidents', amongst other disasters.⁸⁹ In other words, the principle of accountability is only addressed where there are disasters. The policy also identifies the need to enact legal instruments, and an institutional framework, which can help in achieving the objectives of the policy.⁹⁰

4.4.2 National Water Policy 2004

The National Water Policy considered a series of international events, such as the world conference on water and the environment (1992), and the UN conference on the

⁸³ Para 4.8 (A) National Policy on the Environment.

⁸⁴ Para 4.8 National Policy on the Environment.

⁸⁵ Para 2 (d) National Policy on the Environment.

⁸⁶ Para 4.3 National Policy on the Environment.

⁸⁷ Para 4.17 National Policy on the Environment.

⁸⁸ Para 6.6 National Policy on the Environment.

⁸⁹ Para 5.1 National Policy on the Environment.

⁹⁰ Para 3.0 & 8.0 National Policy on the Environment.

environment and development (Earth Summit).⁹¹ national documents, laws and programmes such as the provisions of the Water Act of 1993, the National Water Resources Plan of 1995 and the Water Resources Management Reform Programme, which commenced in 1997 to review water resources matters. These resulted in the current 2004 National Water Policy, where Policy provisions incorporate some of the current discourse on access to water and exhibit a nascent human rights-based approach to water. On the whole, however, the water policy examines water resources management from an environmental perspective. To a large extent, this is beneficial, as it considers international instruments and developments, such as the conferences on environment and water.⁹² The challenge, however, with looking at access to domestic water from an environmental perspective, is that protection of water from pollution, and the provision of stringent punishments for pollutants, would be the focus of domestic water access. Addressing access to water in this policy from a rights-based approach, on the other hand would not particularly focus on the economic aspect of water, as this water policy proposes.⁹³ Although the policy understands that there is the need to strike a balance between the social and economic development of the water sector,⁹⁴ where the fear in not recognising water first as a basic human right is that it may rob citizens of the affordability of water, which is key in accessing clean water, especially as it has been agreed that water is also a source of economic good.⁹⁵

The policy mentions participation among all water users and stakeholders in the planning and management of Nigeria's water resources. This is a key principle of a human rights-based approach to water. Private sector participation is also encouraged in this policy. It is, however, imperative that monitoring mechanisms be put in place so as to avoid arbitrary increments in water tariffs. In this respect, the policy provides that one of its

⁹¹ Para 2.1.1. National Water Policy.
⁹² Para 2.1.1 National Water Policy.
⁹³ Para 2.1.2 National Water Policy.
⁹⁴ Para 2.1.3 National Water Policy.
⁹⁵ Para 2.2.6 National Water Policy.

objectives is to improve transparency and accountability in the water sector, by providing a framework by means of which to address the challenges of "financial discipline and accountability for performance".⁹⁶

On the principle of legality, the policy mentions the need to review the current water laws, as it notes specifically that the WRA of 1993 does not address current water resource issues, and that as such, there is need for it to be reviewed. The policy sets out visions addressing specific water uses, and outlines the institutional frameworks necessary to implement the policy.⁹⁷ It also sets out the plan for developing new legislation.⁹⁸ Overall, there is no specific consideration of other principles of the human rights-based approach, such as non-discrimination, wherein access to water is expected to address - specifically and quite importantly - water supply for vulnerable persons in society such as women, children, persons with disabilities, and the poor.

4.4.3 Water Bill of 2008

The current Water Bill awaiting passage into law addresses the issue of access to potable water.⁹⁹ If this bill is passed into law, it would address some of the current challenges of access to water, and it would include some of the principles of a human rights-based approach to water, such as participation¹⁰⁰ and accountability,¹⁰¹ although from an environmental perspective.¹⁰²

The provision of Section 2 of the WRA of 1993, which states that water for domestic use can be abstracted from rivers or any water source available to the public, is retained in the proposed Water Bill. It also states that where there is a statutory or customary right of

⁹⁶ Paras. 1.2, 2.3.3 National Water Policy.

⁹⁷ Para 1.4 National Water Policy.

⁹⁸ Para 1.4 National Water Policy.

⁹⁹ Sec 1 Water Bill.

¹⁰⁰ Sec 2(a) Water Bill 9.

¹⁰¹ Sec 2 (e) Water Bill 5.

¹⁰² Several provisions in the Water Bill refer to environmental protection of water resources generally, as well as pollution prevention. See Sec 1 (d), 2(f); Sec 3 pollution of the proposed Water Bill.

UNIVERSITY LAW JOURNAL, VOL. 5 NO 1, 2024

occupancy, water can be taken without charge from the underground water source. What the provisions of the WRA and the proposed Water Bill have promoted, is the on-going individual and privately sourced water for domestic use. Government does not commit itself to making provisions in this regard or to creating an enabling environment under which people might be able to access clean water for domestic use. In this regard, government's genuine commitment to access to water for domestic use is absent.

The review of the Nigerian water laws currently found in the Water Bill commenced in 2006. It is stated that once this Water Bill had been enacted, it would replace the current WRA of 1993.¹⁰³ A critique of this bill is done to deduce whether and how its proposed enactment may address the issues of domestic water supply and access to water, through examining applicable provisions *vis-à-vis* the principles of a human rights.

The purpose of the Bill stated in Section 1 to a large extent covers the purpose of recognising water as a human right as the Bill provides:

1. The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into account, amongst other factors:

- a. Citizens right of access to clean water and sanitation;
- b. Meeting the basic human needs of present and future generations;
- c. Promoting equitable and affordable access to water and reducing poverty;
- L. Encouraging comprehensive and equitable coverage of water supply and sanitation and promoting public private sector partnership in delivery of water services;
- N. Meeting international obligations;

¹⁰³ Water Bill 3.

O. Recognizing [sic] and implementing the principle of water as an economic good and social good, taking into consideration the socio-economic status of the users, particularly affordability.¹⁰⁴

On the principle of participation, the Water Bill provides in Section 2 that institutions would be established to achieve the purpose set out in subsection one of the bill, by considering the participation and consultation of all stakeholders particularly, the states (as the various states are responsible for domestic water supply), and women. Institutions to be established are also expected to be guided by the principle of transparency and accountability.¹⁰⁵

The federal policies also show that extant laws do not address current issues raised at international level, nor do they meet the challenges of water supply and protection in Nigeria, necessitating the proposal for a review of the extant laws. Although these policies cover, to a large extent, the current discourse and challenges of access to potable water, these policies are not law, and are not enforceable. Furthermore, the provisions of the policies address a nascent human rights-based approach; however, it bears the shadow of an economic approach, and leans towards an environmental perspective, rather than a rights perspective.

5.0 Institutional Framework of Water Resources at the Federal Level

The Ministry of Water Resources, which is an agency of the Federal Government, is assigned the responsibility of applying the WRA. The River Basins Development Authority, is also a branch of the Ministry of Water Resources. There are thirteen River Basins Development Authorities in Nigeria. These development authorities are a body corporate, which can both sue and be sued.¹⁰⁶ It is responsible for water resources generally in Nigeria, and especially water for agriculture and irrigation.

¹⁰⁴ Sec 1 (a-c) (l) (n-o) Water Bill

¹⁰⁵ Sec 2 (d) & (e) Water Bill.

¹⁰⁶ Sec 1 (3) River Basin Development Authority Act.

5.1 Federal Ministry of Water Resources

In Nigeria, the Federal Ministry of Water Resources (FMWR) is responsible for their management and control.¹⁰⁷ The Federal Ministry of Water Resources was created in 1976 to formulate national water resource policies.¹⁰⁸ The following year, 1977, it was merged with the Federal Ministry of Agriculture. Two years after this, it was recreated, and had only the department of water resources as the operational department. It was again merged with the ministry of agriculture in 1984. This on and off merger continued two more times, before it obtained its current status in 2010, as the Federal Ministry of Water Resources.¹⁰⁹ The reason for this 'on and off' merger may seem unclear, however it appears to be due to a lack of proper analysis and definition of the functions of the respective ministries.

The Federal Ministry of Water Resources has 11 departments to handle different aspects of water use. The department of Water Supply is one of these. The function of this department is to create water supply policies and formulate guidelines and implementation strategies.¹¹⁰ It also implements the intervention of water supply at state level under three segments: urban water supply, small town water supply, and rural water supply. Under the rural water supply segment, the department of water supply under the Federal Ministry of Water Resources addresses the challenges of accelerating access to safe drinking water to rural communities and small population in Nigeria. The programmes to improve access to domestic water are done with international agencies

¹⁰⁷ Akpabio & Ansa (2013) 4 *MJSS* 306.
¹⁰⁸ FMWR (2015) at <http://www.waterresources.gov.ng/about/history-of-the-ministry> accessed 19 November 2015.
¹⁰⁹ FMWR (2015) at <http://www.waterresources.gov.ng/about/history-of-the-ministry> accessed 19 November 2015.
¹¹⁰ FMWR (2015) 'core functions' at <http://www.waterresources.gov.ng/about/core-functions> accessed 19 November 2015.

and development partners, such as the African Development Bank, and the Japan International Cooperation Agency (JICA).¹¹¹

5.2 River Basin Development Authorities

Considering the fact that the river basin is the "most appropriate geographical unit for planning and management of water resources",¹¹² Nigerian river basins do not have any involvement in drinking water provisions.¹¹³ There are 13 river basin development authorities in Nigeria. The functions of these basin authorities are the same. The recorded activities of the river basins are mainly agriculture and irrigation.¹¹⁴ The lower Niger River Basin contracts the digging of wells in rural communities (in Kogi and Kwara States) for both agricultural and domestic use.¹¹⁵ This is how Federal government becomes involved in rural water supply through the basins.

5.3 National Waters Resources Institute

The functions of this Institute are to advise the federal and state government on all aspects of hydrology.¹¹⁶ This would include all water sources, uses, data collation and challenges.¹¹⁷ The Act states that the institute has the duty of enforcing compliance with policies and guidelines on water quality including pollution abatement.¹¹⁸ The hydrological services of NWRI include giving information on river and stream flow, groundwater fluctuation surface, and ground water level and quality.¹¹⁹ The services of NWRI in this regard can go a long way in addressing some of the challenges of water

¹¹¹ Ahmad *et al* (2009) Proceedings of the 34th WEDC International Conference, United Nations Conference Centre, Addis Ababa, Ethiopia, 18-22 May 2009 (32-39). Water Engineering and Development Centre (WEDC) Loughborough University of Technology (internet page 1) also at http://www.sswm.info/sites/default/files/reference_attachments/AHMAD%20et%20al%202009%20Water%20and%20Sanitation%20Sector%20Reform%20in%20Nigeria.pdf accessed 12 October 2015.

¹¹² Dublin Statement at <http://www.wmo.int/pages/prog/hwrp/documents/english/icwedece.html> accessed 16 July 2015.

¹¹³ Adeoti (2010) 1 *Research Journal of Soil and Water Management* 91.

¹¹⁴ LNRBDA (2005) 6-13.

¹¹⁵ LNRBDA (2005) 13.

¹¹⁶ Sec 7 (1) National Water Resources Institute (hereafter NWRI).

¹¹⁷ See Sec 7 NWRI Act.

¹¹⁸ Sec 7 NWRI Act.

¹¹⁹ Sec 25 (1) NWRI Act.

resources in Nigeria and especially domestic water. In order to improve general knowledge of water issues beyond Nigeria having water in abundance, or the rainfall pattern in the Northern and Southern parts of Nigeria, a regular publication of hydrological 'issues' and services ought constantly to be made public. The only periods of such publication or notices are when there is a disaster, such as water flooding.

Furthermore, the general recourse to groundwater extraction by Nigerians in the form of wells and boreholes is certainly not a threat to the nation, for if it was, there would be a legal and institutional framework to monitor the arbitral and constant drilling of the ground for water for domestic use.

5.4 National Environmental Standards and Regulations Enforcement Agency

The National Environmental Standards and Regulations Enforcement Agency (NESREA) is responsible for the protection and development of the environment and in retrospect water.¹²⁰ with liaison with relevant agencies, such as the Federal Ministry of Water Resources.¹²¹ It is this agency that enforces environmental standards, regulations, rules, laws, policies and guidelines.¹²² To protect public health, the agency is expected to liaise with other relevant agencies in order to enhance water quality.¹²³ The function of NESREA overlaps with that of the Ministry of water resources when it provides that it should draw a proposal for the value of water supply, recreation, agriculture industrial and other legitimate use of water.¹²⁴

At the federal level, there are various institutes and agencies saddled with overlapping duties to address the challenges of water resources in Nigeria. Many of the duties of these institutes or agencies are tilted towards environmental issues. Although water is part of the environment, access to water would only be addressed with regards to pollution or the

¹²⁰ Sec 37 NESREA Act explains that water is inclusive of the term environment.

¹²¹ Sec 2 & 3 NESREA Act.

¹²² Sec 7 (d), Sec 8 (k) (vi) NESREA Act.

¹²³ Sec 23 (1) NESREA Act.

¹²⁴ Sec 23 (2) NESREA Act.

quality of water available.¹²⁵ Overlapping duties sometimes lead to non-performance, or a conflict in performance.

In the year 2000, the National Water Supply and Sanitation Policy was launched by the Federal Ministry of Water Resources. This policy encouraged private-sector participation, and the expansion of rural water supply systems. However, perhaps due to the wide failures of the PPP in the water sector in African countries,¹²⁶ not many states in Nigeria have incorporated this system in their water sector, except for states like Lagos State that has incorporated the PPP into its water law.¹²⁷

In spite of the recorded failures of the PPP, there exists effective application of the concept in the infrastructural provision and maintenance of roads, bridges, and health sector.¹²⁸ Perhaps a positive realisation in Lagos State may encourage other states to also adopt the PPP in their water sector.

6.0 Conclusion

There is a dearth of academic writing and research on water law in Nigeria and especially domestic water. Scholarship on domestic water supply in Nigeria usually emanates from environmentalist, engineers and geographers, where there is a need for legal writings on access to water and an analysis of laws and policies in this field. Such scholarship would inform law and policy makers on the areas that need to be focused on in water resources.

The Federal Government considers water from an environmental perspective, wherein the quality of water is the focus. However availability, sufficiency and affordability are also important aspects necessary to guarantee water for domestic use. The current focus of the Nigerian laws at federal level does not adequately make provision for domestic water supply. The various states focusing on domestic water supply are skewed towards a

¹²⁵ Sec 37 NESREA Act.

¹²⁶ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 68-69.

¹²⁷ Lagos State Water Laws (2004).

¹²⁸ Soyaju (2013) 46 *De Jure* 831.

community approach. This approach does not guarantee consistency in supply, or availability, as water is still rationed. Access to water under this approach in Nigeria is limited to homes that are reticulated.¹²⁹ Some of the challenges range from inadequate supply machineries put in place, as well as electricity, which makes water pumping difficult or impossible. Although domestic water supply by the state government may be affordable to people living in certain urban areas, and the quality is also guaranteed, these elements are not sufficient to address domestic water supply. Before the Water Bill is passed, it is important that same is reviewed to comprehensively and adequately address all the branches of Water Resources and more particularly, domes.

¹²⁹ Information gathered during research visit to Nigeria.