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## **WATER JUSTICE IN NIGERIA: CRISIS OR CHALLENGE**

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### **ABSTRACT**

Traditionally, the provision of water supply and services in Nigeria has been regarded as a social responsibility of the Government. Consequently, the costs of water infrastructure have been met from budgetary allocations and donor contributions rather than from water tariffs and charges. This has created the public perception of water as a free good. Currently, Nigeria's annual population growth rate of 2.86% has been projected to result in the doubling of its national population of 118 million within 25 years. Demographic pressures coupled with the rising operational and maintenance costs of water infrastructure have informed the Government's drive to attract private participation in the water sector, for example through privatization of water supply and services. This paper argues that water justice rather than commercial imperatives or economic efficiency must be the paramount consideration in the water privatization programme if poverty eradication is to become a reality. This means that there must be specific pro-poor targets and strategies especially on service coverage (quantity and quality) and tariff settings. This is of crucial importance given the absence of a water pricing strategy in Nigeria and the longstanding practice of fixing water rates either as flat rates or in some case metered but below the full cost of service provision. Adequate protection of both the rural and urban poor also means that participatory decision-making in the water sector and monitoring and evaluation of service provision needs to be embraced.

The paper will therefore present a scorecard of water privatization in Nigeria with a view to determining whether water justice can be achieved. It will assess the adequacy or otherwise of institutional frameworks, water policies, water legislation and framework privatization laws and where gaps or weaknesses are identified, it will advance practical recommendations for achieving water justice.

*Keywords:* Access to Safe Drinking Water; Human Rights; Water Policy and Laws; Privatization; Commercialization

## **I. Introduction**

At a global level, the 1980s witnessed the intensification of efforts to secure the provision of water to the most vulnerable populations especially the poor. This was the period, 1981–1990, which the United Nations declared as the International Drinking Water Supply and Sanitation Decade. Similarly, at the turn of the century in 2000, the Millennium Development Goals (MDGs), signified the global commitment to the provision of adequate water supply and services. Thus, the MDG target of halving by 2015, the proportion of people living in extreme poverty and without sustainable access to safe drinking water.

In Nigeria, the supply of safe drinking water in Nigeria has been traditionally regarded as a social responsibility of the Government. As a result, the costs of water infrastructure and service delivery have been largely met from Government budgetary allocations as well as from bilateral or multilateral aid rather than from water tariffs and charges. This has led to the longstanding practice of fixing water rates at below the full cost of service provision. Nevertheless, the rapid demographic changes in Nigeria brought about by an annual population growth rate of 2.86% has brought with it increased demand for water not just for drinking purposes but also for sanitation, irrigation and for industrial use.<sup>1</sup> The result has been growing water scarcity and shortages despite the fact that Nigeria has considerable water resources of 226 billion cubic metres of surface water and 40 billion cubic metres of ground water.<sup>2</sup> This is deemed sufficient to meet demand but combined with planning lapses and the poor management of existing water infrastructure, the national water supply coverage is currently estimated to be 57%.<sup>3</sup> With further disaggregating by reference to locality, the World Bank estimates that urban water supply may be as low as 30% of the total population while rural water supply is approximately 35%.<sup>4</sup>

In the face of rising operational and maintenance costs for water infrastructure and the competing demands on public funds, the Government's response has been to seek private participation in water supply development and management.

This paper presents a scorecard of water privatization in Nigeria by analyzing to what extent pro-poor concerns have been mainstreamed into its implementation.

## **II. Access to Water as a Human Right**

Unlike the Constitutions of other African countries such as those of Ethiopia, Uganda, Gambia and South Africa,<sup>5</sup> Nigeria's 1999 Constitution does not establish any express entitlement or right to water. Nonetheless, it is noted that in India, which like Nigeria lacks an express Constitutional entitlement or right to water, the Courts have interpreted the Constitutional right to life as including the right to water. Therefore, in the 1990 case of *Attakoya Thangal v Union of India*, the Kerala High Court ruled that:

“...the administrative agency cannot be permitted to function in this manner as to make inroads, into the fundamental right under Art. 21. The right to life is much more than the right to an animal existence and its attributes are many fold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements, which sustain life itself.<sup>6</sup>

At the regional and global levels, the approach adopted in human rights instruments has been to either establish an express entitlement to water or to consider it to be an implicit attribute, that is, in the nature of a derivative right of any of the fundamental rights to life, health or environment. International human rights instruments that enshrine express entitlements to water include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>7</sup> the United Nations Convention on the Rights of the Child;<sup>8</sup> and the African Charter on the Rights and Welfare of Children.<sup>9</sup>

The African Charter on Human and Peoples' Rights (“the African Charter”), which is directly enforceable in Nigeria having been domesticated by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,<sup>10</sup>

lacks an express entitlement to water.<sup>11</sup> However, in a pronouncement of the African Commission on Human and Peoples' Rights in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights and the Federal Republic of Nigeria*,<sup>12</sup> a case, which had been brought in connection with, among other issues, the right to adequate housing, the Commission declared that although the African Charter does not expressly provide for an entitlement to adequate housing, the right to enjoy the best attainable state of physical and mental health under Art. 16(1) of the Charter necessarily implies the right to adequate housing. Equally, based on this decision, the right to water can be read into the African Charter's right to enjoy the best attainable state of physical and mental health. This point is further amplified by the fact that in 2002, the United Nations' Committee on Economic, Social and Cultural Rights, which is charged with monitoring State compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>13</sup> declared in its General Comment 15 (2002) that the right to water should be recognized as an independent human right as it is fundamental to human survival and to achieving an adequate standard of living.<sup>14</sup> Thus, the Committee's position had advanced from that held in 2000, when in General Comment 14 (2000) on the right to health in Art. 12, ICESCR, it declared that the right to health should extend beyond the provision of adequate health care and should cover access to safe drinking water and other requirements essential to achieving good health.

### **III. Water Policies, Institutional and Legal Frameworks in Nigeria**

Although, there is no overall national water policy dealing with the management of water resources,<sup>15</sup> the sub-sectoral policy known as the National Water Supply and Sanitation Policy (NWSSP), which was introduced in January 2000, provides guidelines on urban and rural water supply and defines the institutional and funding responsibilities of the Federal, State and Local Governments. The NWSSP's target is that by 2007, private operators will be responsible for 35% of

urban water supply (UWS), 40% of small towns water supply (SWS) and 25% of rural water supply (RWS). As with the division of institutional and funding responsibilities under the NWSSP, the institutional and legal frameworks for water supply reflect the Federal-State divide. On account of the provisions of the 1999 Constitution<sup>16</sup> and the Water Resources Act,<sup>17</sup> the Federal Government has the right to the use and control of inter-state water resources. In all other cases, the State Governments are empowered to enact laws for the development and management of intra-state water resources.<sup>18</sup> At the Federal level, the apex institution is the Federal Ministry of Water Resources,<sup>19</sup> which is also responsible for the River Basin Development Authorities (RBDAs) established under the River Basin Development Authorities Act.<sup>20</sup> RBDAs are charged with the development of inter-state surface and underground water resources in specified river basin areas and for the supply of water storage schemes to users for a fee. At the State level, it is the norm for State Governments to establish statutory corporations known as State Water Authorities (SWAs) with responsibility for UWS and SWS. These bodies are usually placed under the supervision of a line Ministry.<sup>21</sup> In a few cases, some Local Governments have established Departments for Water and Sanitation involved in RWS activities.<sup>22</sup> Otherwise, it is fair to state that excluding inter-State water resources and specified river basin areas, the SWAs have general responsibility for water supply development and management within the territories of their respective States.

#### **IV. Implementing Water Privatization**

At the policy level, the NWSSP promotes privatization as a viable strategy for sharing the burdens of water infrastructure investments and operational costs and as a solution to incessant water shortages and scarcities. It also emphasizes the need to cover the costs of service provision through revenue collection efficiency and changes to tariff structures. The Policy concedes that despite the onset of privatization, service provision should be maintained for the poor. But what it fails

to elaborate upon is how these social commitments are to be mainstreamed into its implementation.

For the Federal Government, the legal basis for the privatization of Federal Government's enterprises is the Public Enterprises (Privatization and Commercialization) Act.<sup>23</sup> In connection with the water sector, Part I of the Second Schedule to the Act provides for the partial commercialization of the RBDA's. Also, by virtue of the Public Enterprises (Privatization) Order 2001, the Abuja Water Board (AWB) is to be partially privatized.<sup>24</sup> Although, the terms, "privatization" and "commercialization" are not defined in the Act, it is clear from its section 2 that privatization entails that the public enterprise must have a share capital. The implication is that the relevant public enterprise must transform into a limited liability company either through the repeal or substantial modification of its enabling law. With commercialization, it is evident from section 8 of the Act that although transformation into a limited liability company is not contemplated, commercialization will confer upon the public enterprise, autonomy especially in connection with the fixing of the prices, rates and charges for goods or services and the capitalization of assets.

In the case of State Governments, a few such as Lagos State have already signified their intention to commercialize or privatize water supply development and management and indeed commenced their programmes. Unfortunately, unlike the position with the Federal Government-owned or controlled public enterprises, most of these States Government have not presented a legal framework to underpin the privatization process. Consequently, civil society groups have raised their concerns about any act of divestiture, which effectively transfers the entire ownership and control of publicly-owned water enterprises to private interests. It is noted that with regards to the AWB, it is intended to transfer 60% of the shares of the privatized entity to the private sector.<sup>25</sup>

## V. Lessons So Far

Nigeria's Presidential Water Initiative was launched in August 2003 with the main objective of fast-tracking the implementation of the MDG target so that by 2007, water supply access and coverage will be achieved for all State capitals, three-quarters of urban and semi-urban areas and two-thirds of rural communities. The MDGs clearly acknowledge that access to safe drinking water is an integral factor in reducing poverty. The NWSSP professes to do the same albeit in somewhat ambiguous terms. What is clearly in issue is the lack of a rights-based approach, (whether by way of a human rights or contractual or property rights regime) for the provision of water to meet the drinking, cooking and hygiene needs of the poor ("basic needs").<sup>26</sup> At present, the human right to water is neither explicitly enshrined in the national Constitution nor in extant water laws and regulations and the privatization regimes of the Federal and State Governments.<sup>27</sup> Although, section 5 of the Public Enterprises (Privatization and Commercialization) Act, deals with commitments to wider public ownership by requiring that the shares of privatized public enterprises are to be sold on the basis of equality of all States and the FCT, and further that not less than 1% of the shares to be offered for sale are to be reserved for the staff of the public enterprises to be privatized, social equity in the water sector must go beyond commitments on wider public ownership of the shares of privatized public enterprises. Rather what is required are specific water laws, regulations or standards that deal with (i) targets and indicators on service coverage (physical accessibility, quantity and quality) and tariff settings (affordability); (ii) community participation in water management and decision-making; (iii) accountability; and (iv) regulation and monitoring of service provision.

These gaps or weaknesses in the implementation of water privatization cannot be ignored. It is therefore not surprising that civil society groups and local communities have been mobilizing and intensifying their advocacy campaigns against water privatization, as the process has come to be perceived as non-

inclusive without proper regard for the interest, needs and concerns of the most vulnerable populations or their representatives; and with the State authorities seemingly more concerned with economic efficiency and setting water tariffs and charges rather than with enshrining the rights of the poor to have access to water for meeting their basic needs.

## **VI. Conclusion**

Water privatization in Nigeria is not yet in crisis but it certainly presents a formidable challenge. The way forward in integrating pro-poor concerns in the privatization programmes both at the national and State levels must necessarily embrace policy and legal reforms that promote inclusion, accountability, participation and attention to the needs of all vulnerable groups. Also, being a State Party to ICESCR, Governmental authorities in Nigeria are required to utilize “all appropriate means, including particularly the adoption of legislative measures” in the implementation of ICESCR obligations relating to the right to water. This means that water privatization should not undermine compliance with the Covenant obligations. In this regard, General Comment 15 (2002) of the Committee on Economic and Social Rights presents useful guidelines for the components of conforming water laws and regulations. Evidently, there is a need to pass a new Water Act so as to give effect to the draft National Water Policy. This is on account of innovations presented in the draft Policy. These include the introduction of a water pricing policy; the formation of an independent regulatory and monitoring body for the water sector, that is, the National Water Commission, which will have the responsibility of facilitating, in conjunction with civil society groups, the formation of Water User Associations charged with the determination of affordable water tariffs; commitments to public participation in decision-making; and the express recognition of the role of non-governmental organizations (NGOs) “in all aspects of water resources development and management including advocacy, awareness creation, capacity building and mobilization.”

However, every effort must be made to ensure that the operations of the proposed National Water Commission are fully decentralized and that the Water User Associations are not “captured” by political interests for political patronage purposes.

Thank you for listening.

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## Notes

<sup>1</sup> The national population of 118 million is projected to double within 25 years, see further, National Population Commission, *Nigeria Population Census 1991 Analysis: National and State Population Projections*, (National Population Commission, Abuja, 2002), pg. 26.

<sup>2</sup> Federal Ministry of Water Resources, “*National Water Supply and Sanitation Programme*,” a briefing paper prepared for the National Implementation and Partnership Workshop on the Presidential Water Initiative, Abuja, Federal Capital Territory (FCT), 26-29 August 2003.

<sup>3</sup> M.A.K. Abubakar, “*National Water Supply and Sanitation Programme Strategy*” a paper delivered at the National Implementation and Partnership Workshop on the Presidential Water Initiative, Abuja, Federal Capital Territory (FCT), 26-29 August 2003.

<sup>4</sup> From the World Bank’s, Project Information Document (PID) for the Second National Urban Water Sector Reform Project (Date prepared: 23/3/2005).

<sup>5</sup> Centre for Economic and Social Rights, Right to Water Factsheet No. 3. Also, “*Legal Redress-Enforcing the Right to Water: South Africa*,” for full text, see, [http://www.righttowater.org.uk/code/legal 2.asp](http://www.righttowater.org.uk/code/legal%202.asp).

<sup>6</sup> For full text of decision, see, <http://www.elaw.org/resources/text.asp>. Similarly, in *Subhash Kumar v State of Bihar*, in which the Court ruled that the right to life includes the right to enjoy pollution-free water, for full text, see, <http://www.elaw.org/resources/text.asp>.

<sup>7</sup> Art. 14(2). CEDAW entered into force on 3/9/81 and was ratified by Nigeria on 13/7/85.

<sup>8</sup> Art. 24. The Convention entered into force on 2/9/90 and the Bill of Rights, which it established for children, has been incorporated into Nigeria’s Child’s Rights Act, No. 26 of 2003.

<sup>9</sup> Art. 14. The Charter entered into force on 29/1/99.

<sup>10</sup> Act No. 2 of 1983.

<sup>11</sup> On the direct enforceability of the African Charter in Nigeria, see, the Supreme Court decision in *Abacha v Fawehinmi* (2000) 4 S.C. (Part II) 1.

<sup>12</sup> Communication 155/96.

<sup>13</sup> ICESCR entered into force on 3/1/76 and was ratified by Nigeria on 29/10/93.

<sup>14</sup> For the full text of General Comment 15 (2002), see, United Nations Economic and Social Council, “*Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*,” E/C.12/2002/11 of 26/11/2002.

<sup>15</sup> A National Water Policy also known as the National Water Resources Management Policy is currently being prepared.

<sup>16</sup> Item 64 , Part I of the Second Schedule.

<sup>17</sup> No. 101 of 1993.

<sup>18</sup> There are 36 States in the Federation.

<sup>19</sup> Basically, institutional frameworks in the water sector have been transformed within the last two decades in order to emphasize the importance of water supply and services. At the federal level there has been the emergence of a Ministry for the management of water resources. This is distinct from the previous situation when management of water resources was the responsibility of a department within the Federal Ministry of Agriculture, Water Resources and Rural Development.

<sup>20</sup> No. 35 of 1987. The current RBDAs are Anambra-Imo, Benin-Owena, Chad Basin, Cross River, Hadejia-Jama’are, Lower Benue, Niger Delta Basin, Niger, Ogun-Oshun, Upper Benue and Sokoto-Rima.

<sup>21</sup> The emergence of dedicated State Ministries of Water Resources mirrors the experience at the federal level.

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<sup>22</sup> There are 774 Local Governments in the Federation. It is further noted that the municipalities, that is, the Local Government Area Councils, usually appoint supervisory councillors in respect of water supply and services. Nevertheless, most RWS schemes in Nigeria have invariably fallen into various states of disrepair and disuse mainly on account of the lack of adequate maintenance.

<sup>23</sup> No. 28 of 1999.

<sup>24</sup> The AWB has been operating as non-statutory agency of the Federal Capital Development Authority (FCDA) since its establishment in 1989. To this extent, it differs from SWAs as it does not have an enabling law, which provides for its establishment. Consequently, the corporatization of the Board has been easier to carry out because unlike a statutory body, the amendment or repeal of an enabling law is not required. In October 1998, the Board ceased to receive subventions from the FCDA and the Federal Government.

<sup>25</sup> See, Public Enterprises (Privatization) Order 2001.

<sup>26</sup> On the classification of the right to water as a human right or a contractual or property right, see further, Overseas Development Institute (ODI) Briefing Paper, *“Right to Water: Legal Forms, Political Channels,”* July 2004.

<sup>27</sup> *Cf.*, s. 13(3)(c), Child’s Rights Act 2003, which provides that “every Government in Nigeria shall ensure the provision of adequate nutrition and safe drinking water” to every child in Nigeria.