



THE CONSTITUTIONAL RIGHT TO WATER AND WATER GOVERNANCE IN NIGERIA: AN OVERVIEW

By

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Abstract

Under the 1999 Nigerian Constitution (as amended), the right to clean and accessible water is categorised as an economic and environmental objective of the state. The Constitution further considers the right to clean and accessible water as a socio-economic right, which makes it unenforceable or non-justiciable. Irrespective of this constitutional provision, the Courts in Nigeria are beginning to delve into the justiciability of socio-economic rights and have restated that there can be instances where it can be inferred that the government has expressed its intention to make a socio-economic right justiciable. The findings from case law are that Chapter II of the Nigerian Constitution is justiciable if the National Assembly exercises its constitutional powers to establish bodies to handle matters that are enumerated under the fundamental object and directive principles of state policy and enact laws to regulate these bodies. This position by the Supreme Court trumps other judicial considerations and will be upheld as the true position on the enforcement of socio-economic rights in Nigeria, including the right to water. Considering that the right to water has gained legal, policy and institutional consideration in Nigeria, this paper recommends that this intervention is made perfect.

Keywords: *Socio-economic rights, Right to water, Water governance, Nigerian Constitution.*

1.0 Introduction

One major challenge the Coronavirus Disease (also known as COVID-19) preventive measure posed for Nigerian communities during the outbreak of the pandemic in 2020 was the availability and accessibility to clean water for adequate and constant hand-washing. Considering that COVID-19 was transmitted from one person to another through contact or respiratory droplets, the World Health Organisation (WHO) recommended hand hygiene as an important preventive measure in combating the spread of the virus. This hand hygiene entailed washing both hands with soap and running water or applying alcohol-based hand rubs or sanitisers to the hands regularly.¹ Washing hands with clean running water and soap or the use of alcohol-based hand rubs/sanitiser was an elementary and immediate personal preventive measure identified to control the spread and prevention of COVID-19.² Considering that availability and access to clean running water in both urban and rural settlements had

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¹ World Health Organisation (WHO), 'Interim Recommendation On Obligatory Hand Hygiene Against Transmission of COVID 19' <<https://www.who.int/publications/m/item/interim-recommendations-on-obligatory-hand-hygiene-against-transmission-of-covid-19>,> accessed 1 June 2023; WHO, 'Coronavirus disease (COVID-19) Advice for the Public' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>,> accessed 25 June 2023.

² Nigeria Centre for Disease Control (NCDC) 'How to Protect Yourself' < <https://covid19.ncdc.gov.ng/advisory/> > accessed 24 July 2023. These recommendations were made by the Nigerian Centre for Disease Control (NCDC) to the federal government after cases of infections and its rapid spread within the populace were first recorded in Nigeria.



always been a challenge for many people in Nigeria, there was no provision for constant clean running water by any tier of government.

Chapter II of the 1999 Constitution of the Federal Republic of Nigeria (as amended) recognises the right to water as an economic and environmental objective of the state. The rights in this chapter of the Constitution are generally not unenforceable or justiciable. In recent times, it is observed that the Courts are beginning to make pronouncements on the possibility of enforcing socio-economic rights and by extension, the right to water in Nigeria. With this situation, this paper aims to analyse the legal and institutional framework for the right to water in Nigeria and the remedies if any for failure of the government to provide water. It argues that the idea of non-justiciability of socio-economic rights as enshrined in the Nigerian Constitution is not strict, as long as the federal government has taken legal and policy interventions to address a socio-economic challenge. The basis for this argument is centred on the jurisprudence emanating from the Courts in recent times. To buttress this argument, the paper first discusses the self-standing right to water flowing from the international covenants on which this right is hinged. It considers the recognition and enforcement of socio-economic rights, treaty obligations and the right to water under the Nigerian Constitution. The paper further discusses the legal and institutional framework for water governance in Nigeria and concludes by recommending that the federal government makes good its intervention by taking the right and access to clean water seriously. This is essential for human survival and well-being as it influences the fundamental rights as enshrined in the Constitution.

2.0 The Right to Water as a Socio-Economic Self-Standing Right

The Universal Declaration on Human Rights (Universal Declaration) 1948 by the United Nations (UN) formed the foundation for the existence, recognition and protection of human rights.³ The Universal Declaration has since then remained the starting point for any other right(s) in existence in modern times. It is the generally accepted standard of rights that is inalienable to all human beings and has provided a valid and recognized framework for human rights. The Universal Declaration was subsequently split into two Covenants in 1966, taking it away from being an affirmation to providing a legally binding option. These two Covenants are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants, that is, the ICCPR and ICESCR, elaborate on the rights in the Universal Declaration in detail.⁴ Civil rights are those rights that are related to the right to life and personal liberty while political rights are those rights that allow a person to take part in the government of a state. These are categorised as the first generation of rights associated with the English, American and French Revolutions. They are also classified as negative rights because the government is excluded from engaging in activities that violate these rights.⁵ Economic, social and cultural rights on the other hand are those rights that guarantee the minimum necessities of the life of a human being such as food, clothing, shelter, health and so on. They are also categorised as second-generation rights and positive rights as they require active state intervention and a major commitment to resources.⁶ Thus, the rights

³ Rhona KM Smith, *Textbook on International Human Rights* (Oxford University Press UK, 2014) 46.

⁴ *Ibid*, 46; Philip Alston & Ryan Goodman, *International Human Rights Text and Materials, the Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press, UK, 2013) 280-281.

⁵ HO Agarwal, *International Law and Human Rights* (Central Law Publications India, 2010) 732.

⁶ *Ibid*, 733.

contained in the ICESCR are yet to gain substantive recognition by some states because economic and social rights are sometimes considered inferior and of less value when compared to civil and political rights and considering economic and social rights as rights ‘undermines enjoyment of individual freedom,... and provides an excuse to downgrade the importance of civil and political rights’.⁷ In addition, the implementation requirements are different in that civil and political rights are endowed upon every individual, the government does not interfere with them and this category of rights does not require major budgetary or institutional assistance to be enjoyed. The economic and social rights on the other hand require structural and institutional frameworks and financial commitments at all levels of government for such rights to be enforced.⁸ Finally, the terminologies used by the draftmen are such that the realization and enforcement of economic and social rights are subject to available resources making it seem less important than civil and political rights.⁹ These differences have also influenced the Constitution of some states where economic social and cultural rights do not have the same status as civil and political rights. The Nigerian Constitution is an example and this will be discussed later. These differences notwithstanding, both ICCPR and ICESCR are still dependent on one another and a strict distinction between both covenants cannot be made totally because the realization of certain civil and political rights may be conditioned on certain social and economic rights and vice versa.¹⁰

The right to water has no explicit treaty that specially addresses it, but international human rights law has recognized access to clean water as a right through general comment(s) on existing conventions.¹¹ The UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) through its General Comment 15 of 2002 specially recognized and addressed the right to water and emphasised its necessity for the realization of other rights like the right to life, health, and an adequate standard of living. The legal basis for the right to water is hinged on the fact that ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.¹² This right also falls within the purview of the right to an adequate standard of living as contemplated in Article 11 of ICESCR of 1966 and the right to the highest attainable standard of health as contemplated in Article 12 of ICESCR of 1966.¹³ The normative content of the right to water contains freedom and entitlements. The freedoms include the right to maintain access to existing water supplies, and the right to be free from arbitrary disconnections or contamination of water supplies while the right to a system of water supply and management that provides equal opportunity for people to enjoy the right to water is an entitlement.¹⁴ With these in mind, the water supply must be continuously available for personal and domestic uses. It must be free from micro-organisms that could pose a health risk, it must be accessible within the immediate vicinity of each household, educational institution or

⁷ Alston & Goodman (n4) 277.

⁸ AK Biswas and C Tortajada ‘Safe Water for the Developing World: Rhetoric and Reality’ in Anthony SC Teo (ed), ‘Univer-Cities: Strategic Dilemmas of Medical Origins and Selected Modalities’ (2018)(3) *Water, Quantum Leap & New Models*, 134-135.

⁹ Alston & Goodman (n4) 277; International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), art 2 and the International Covenant on Civil and Political Rights 1966 (ICCPR), art 2.

¹⁰ Agarwal (n5) 774-775.

¹¹ The essence of a general comment or recommendation is to give further interpretation and clarity to specific articles in a convention and in some cases have expanded the scope of some articles to accommodate present realities.

¹² UN Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment 15 (2002) on The Right to Water (Arts. 11 & 12 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, para 2.

¹³ *Ibid*, para 3.

¹⁴ UNCESCR, General Comment 15 (2002), para 10.



workplace and the cost of securing water must be affordable. The marginalised sections of the population must also be considered without discrimination.¹⁵ State parties must respect, protect and fulfil this right by adopting adequate measures for the realisation of sufficient water for the present and future generations.¹⁶ Subsequently, the UN General Assembly through its Resolution 64/292 of 2010 also recognised access to clean water and sanitation as a human right and acknowledged its importance as an essential factor in the realisation of all human rights.¹⁷ It has called on states and international organizations to provide financial resources, assistance and cooperation, particularly to developing countries to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation.¹⁸

Successively, the World Health Assembly in 2011 asked member states to ensure that national health strategies contribute to support the progressive realisation of water as a human right.¹⁹ The African regional human rights framework also recognises the right to water. The African Charter on the Rights and Welfare of the Child (ACRWC) urges state parties to ensure the provision of adequate nutrition and safe drinking water.²⁰ The Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) obliges state parties to ensure and take appropriate steps to provide women with access to clean drinking water.²¹

A review of the international framework shows that the right to water should be taken seriously by states, as the realisation of other human rights is dependent on it. Although this right to water falls under the category of economic and social rights and tends to be taken less seriously, particularly in developing countries where resources are scarce, some countries like South Africa, Zimbabwe and the Democratic Republic of Congo among others already recognise access to water as a constitutionally enforceable right. Country-specific campaigns by civil society groups in a country like Uruguay led to Constitutional amendments that now recognise water as an enforceable human right.²²

The importance of having domestic laws on this right is that it shows a consensus on the need to take legal action concerning water resources while making special provisions for the poor and vulnerable. It also shows the state's commitment to live up to its international obligation while acting as a model for other states to emulate.²³ This is also an express commitment to protecting socio-economic rights.

¹⁵ *Ibid*, para 12.

¹⁶ *Ibid*, pt3, para 17-38; SMA Salman and S McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (The World Bank Washington DC, 2004) 67-68; Kristen McGeeney and Melanie Nakagawa, 'The Human Right to Water: Legal and Policy Dimensions by Salman M.A. Salman and Siobhan McInerney-Lankford' (2005) *Sustainable Development Law & Policy*, Winter, 71.

¹⁷ United Nations General Assembly, Resolution adopted by the General Assembly on 28 July 2010 (without reference to a Main Committee [A/64/L.63/Rev.1 and Add.1]) 64/292. The human right to water and sanitation Resolution A/RES/64/292.

¹⁸ *Ibid*, para 2.

¹⁹ World Health Assembly Resolution 64/24 of 2011 'Drinking-Water, Sanitation and Health' < https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_R24-en.pdf > accessed 20 August 2023.

²⁰ African Charter on the Rights and Welfare of the Child 1990 (ACRWC) 1990, art 14(2)(c).

²¹ Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol), art 15(a).

²² Constitution of the Republic of South Africa, 1996, s27(1)(b)&(2); Constitution of the Republic of Zimbabwe, 2013, art 77(a); Constitution of the Democratic Republic of Congo 2005, art 48; R Moshman, 'The Constitutional Right to Water in Uruguay' (2005) *Sustainable Development Law & Policy*, 65.

²³ Salman and McInerney-Lankford (n16) 89; K Bakker, 'The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South' (2007) *Antipode* 438.

Failure to ensure the right to clean and accessible water will one way or another have an adverse impact on several other rights like the right to life. An example was during the outbreak of the life-threatening COVID-19 as many Nigerians resorted to the use of hand sanitisers due to a lack of continuous water supply. This again raised a glaring need for this right to clean and accessible water to be taken seriously for life and health to be protected and sustained.

2.1 Nigeria's Treaty Obligation to Socio-Economic Rights

The position on treaties is clearly stated in section 12 of the Constitution. It provides that, 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.²⁴ Furthermore, 'the National Assembly may make laws for the Federation or any part thereof... for the purpose of implementing a treaty'.²⁵ Lastly, 'a bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted, unless it is ratified by a majority of all the Houses of Assembly [*of States*] in the Federation. (Emphasis mine).'²⁶

Thus, the National Assembly has the exclusive power to legislate on matters relating to the implementation of treaties in Nigeria.²⁷ A combined effect of these provisions of the Constitution is that 'a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be prescribed by the legislature'.²⁸ If an international treaty is incorporated into domestic law, the effect is that such law is now given recognition as part of municipal law. Take for instance the African Charter on Human and Peoples' Rights 1981, which is incorporated into our domestic law as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The position of the law in such situations is that the incorporated law is given the same ranking as other municipal laws.²⁹ On the other hand, where a treaty is not incorporated as part of our domestic law, the Supreme Court in the case of *Abacha & ors v Fawehimi*³⁰ ruled thus:

...unincorporated treaties cannot change any aspect of Nigerian Law, even though Nigeria is a party to those treaties. Indeed, unincorporated treaties have no effect upon the rights and duties of citizens at either common law or statute law. They may however indirectly affect the rightful expectation by the citizen that governmental acts affecting them would observe the terms of the unincorporated treaties.³¹

²⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended), s12(1).

²⁵ *Ibid*, s12(2).

²⁶ *Ibid*, s12(3).

²⁷ The Nigerian National Assembly is known as Parliament. They are responsible for making laws at the federal level. Section 12(1-3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) is instructive on this point; Part I of the second Schedule to the Constitution provides the checklist of the exclusive legislative list.

²⁸ *Abacha v Fawehinmi* (2000) 6 NWLR 228; LPELR-14(SC).

²⁹ (2000) 6 NWLR 228; LPELR-14(SC).

³⁰ *Ibid*.

³¹ *Ibid*.

Where the state decides to legislate a law inconsistent with its treaty obligations, the Courts are bound to follow the promulgated law and not the treaty.³²

Nigeria is a member state of the ECOWAS and the African Union. It has ratified both the ECOWAS Revised Treaty and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. With this step, people in Nigeria are at liberty to institute actions concerning violation of human rights against the government or persons at the regional Courts. Where a judgement is given in favour of the applicant at these regional Courts, as we have seen in some cases, there is generally no record or means of enforcement. Litigants are stripped off the fruits of successful litigation at these Courts.³³

3.0 Recognition and Enforcement of Socio-Economic Rights Under the Nigerian Constitution

As earlier mentioned, the Nigerian Constitution adopts the split in rights as seen in Chapters II and IV of the Constitution.³⁴ Chapter II of the Nigerian Constitution provides for Fundamental Objectives and Directive Principles of State Policy, while Chapter IV provides for fundamental rights.³⁵ Fundamental rights as provided in the 1999 Nigerian Constitution is similar to the Universal Declaration and ICCPR as discussed above while Fundamental Objectives and Directive Principle of State Policy lean towards the ICESCR. Fundamental objectives are “the identification of the ultimate objectives of the nation” while the directive principles of state policy are policies to be pursued by the government to achieve fundamental objectives.³⁶ The directive principles of state policy as seen in the Nigerian Constitution contains political objective, economic objectives, social objectives, educational objectives and environmental objectives.³⁷ These are socio-economic rights. However, the socio-economic rights, which are reflected in the social and economic objectives as per Chapter II of the Nigerian Constitution, are non-justiciable.³⁸

Upon initial drafting of the 1999 Constitution, it was suggested by the sub-committee of the Constitution Drafting Committee (CDC) that Chapter II of the Constitution be made justiciable to the extent that the Courts were allowed to make declarations on the conformity with the provisions of this part of the Constitution, the CDC rejected this suggestion. The reason is that the provisions in Chapter II did not relate to the existence of legal rights vested in persons or groups of persons but to policy directions.³⁹ Giving the Courts the power to make declarations on the extent of conformity would lead to constant

³² *Abacha v Fawehinmi* (2000) LPELR-14(SC); Collins Okeke and Kikelomo Lamidi, Olisa Agbakoba Legal (OAL), ‘Nigeria: Enforcement of the Judgments Of The ECOWAS Court’ 20 November 2018 < <https://www.mondaq.com/nigeria/human-rights/755842/enforcement-of-the-judgments-of-the-ecowas-Court>,> accessed 6 September 2023; ES Nwauche, ‘Enforcing ECOWAS Law in West African National Courts’ (2011)(55)(2), *Journal of African Law*, 181–202; Enyinna Nwauche, ‘The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?’ (2010)(10) *African Human Rights Law Journal*, 502-514.

³³ *Martha Adamu & 7 Ors v. Federal Republic of Nigeria*, suit no.: ECW/CCJ/APP/18/18, Judgment No.: ECW/CCJ/JUD/33/19; *The Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria*, Application No.: ECW/CCJ/APP/15/16, Judgment No.: ECW/CCJ/JUD/08/21.

³⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN).

³⁵ The Fundamental Objectives and Directive Principles of State Policy as provided for in Chapter II of the 1999 CFRN spans from sec 13-20 while Fundamental Rights as provided for in Chapter IV of the 1999 CFRN spans from sec 33-46.

³⁶ Kehinde M Mowoe, *Constitutional law in Nigeria* (Malthouse Press, 2008) 273.

³⁷ CFRN, s13-20.

³⁸ *Ibid*, s6(6)(c).

³⁹ Mowoe (n36) 273.



confrontation between the three arms of government.⁴⁰ This position taken by the CDC is presently reflected in section 6(6)(c) of the Nigerian Constitution which appears to clamp the powers of the judiciary to question or make judicial decisions concerning conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.⁴¹

However, the Second Schedule of the Constitution which focuses on Legislative Powers and the Exclusive legislative list in Part 1, Item no. 60 (a), gives the federal government the exclusive legislative powers to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.⁴² The Constitution goes further to grant the National Assembly the exclusive legislative power to make laws for the regulation of matters in the exclusive legislative list. For the Concurrent legislative list, the state houses of assembly (at the state level) and the National Assembly (at the federal level) can make such laws.⁴³

In previous times, the Courts have ruled that item 60(a) of the Exclusive Legislative List of the Nigerian Constitution does not make Chapter II of the Constitution justiciable but, reinforces the provisions of the Exclusive Legislative List thereby creating an obligation for the government, which cannot be enforced by the Courts.⁴⁴ In 2019, the Court of Appeal in *Idowu v. AG and Commissioner for Justice, Lagos State & ors*⁴⁵ aligned itself with earlier judgments and ruled that this chapter of the Constitution is non-justiciable. This was without regard to the Supreme Court's position in 2002 in *AG Ondo v AG Federation & ors*. On the extent of the application of Chapter II of the Constitution.⁴⁶ The Supreme Court in this case observed that 'Chapter II of the Constitution is usually misconstrued and it advised that 'any narrow interpretation of its provisions [*constitutional provisions*] will do violence to it and will fail to achieve the goal set by the Constitution'. (Emphasis mine).⁴⁷

In addition, the Supreme Court in 2004 had extensively ruled on the justiciability of Chapter II of the Constitution in *Olafisoye v. FRN*.⁴⁸ This was in relation to section 15(5) of the Constitution bothering on the political objective of the state to abolish corrupt practices and abuse of power, and the power of the state to establish the Independent Corrupt Practices Commission (ICPC) as a government agency while enacting laws to regulate this agency.⁴⁹ The Court in this regard held that:

a community reading of Item 60(a) and Section 15(5) results in quite a different package, a package which no more leaves Chapter 2 a toothless dog which

⁴⁰ C Orwin and T Pangle, *The Philosophical Federation of Human Rights- Human Rights in Our Time* in Mowoe (n36) 274.

⁴¹ CFRN, s6, s6(6)(C).

⁴² *Ibid*, s4(1)-(3); Item 60(a) of the Exclusive Legislative list contained in the Part 1 of the Second Schedule of the 1999 CFRN.

⁴³ *Ibid*, s4.

⁴⁴ *Archibong Okogie v. Attorney General of Lagos State* (1981) 2 NCLR 625 HC; *Adewale v. Jakaunde* (1981) 1 NCLR 262 HC; *Senate of the National Assembly v. Momoh* (1982) 2 FNR 307 CA Lagos.

⁴⁵ *Idowu v. AG and Commissioner for Justice, Lagos State & Ors* (2019) LPELR-49859(CA)

⁴⁶ *AG Ondo v. AG Federation & Ors* (2002) LPELR-623 (SC) Per Muhammadu Lawal Uwais, JSC (Pp 53 - 53 Paras C - G).

⁴⁷ *Ibid*.

⁴⁸ *Olafisoye v. FRN* (2004) LPELR-2553(SC) Per Niki Tobi, JSC (Pp 67 - 72 Paras C - D).

⁴⁹ *Ibid*.

could only bark but cannot bite. In my view, by the joint reading of the two provisions, Chapter 2 becomes clearly and obviously justiciable.⁵⁰

The Court further held that ‘as soon as the National Assembly exercises its power under Section 4 of the Constitution concerning Item 60(a) of the Exclusive Legislative List, the provisions of Section 15(5) of the Constitution becomes justiciable’.⁵¹ Presently, the Supreme Court has not overturned its decision in subsequent cases. It is suggested that this position by the Court will generally apply to the economic and social objectives of the state if adjudicated upon as these objectives fall under Chapter II of the 1999 Constitution (as amended).

From *Olufisayo’s* case, two inferences could be drawn. First, it is inferred that a joint reading of section 60(a) and section 16 of the Constitution empowers the National Assembly to establish and regulate bodies or agencies to oversee the realisation of the government’s policy objectives. Secondly, these bodies or agencies are regulated effectively through the enactment of specific laws that spell out their duties, powers and limitations. In construing item 60(a) of the second schedule of the 1999 Constitution, the Court noted that ‘Item 60 of the Exclusive Legislative List of the CFRN specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst other powers’.⁵² The Court further held that:

the utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected in our society. It would also provide a unique and potent opportunity for our legislators to monitor and regulate the functions of these bodies, where the Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of Chapter II, and by extension, the welfare of all Nigerians.⁵³

The Court also relied on the Indian case of *Mangru v. Commissioner of Budge Bude Municipality*⁵⁴ where it was held that ‘the Directive Principles require to be implemented by legislation, and so long as there is law carrying out the policy laid down in a directive neither the State nor an individual can violate any existing law or legal right under colour of following a directive’.⁵⁵ Thus, Chapter II of the Nigerian Constitution may be justiciable if the National Assembly exercises its Constitutional powers to establish bodies to handle matters that are enumerated under the fundamental object and directive principles of state policy and enact laws to regulate these bodies.

In relation to the right to water, the right to clean water is not expressly provided for as a self-standing right. It is gleaned from the economic and environmental objective of the government as enshrined in Chapter II, section 16 and 20 of the Constitution respectively. Chapter 16(1)(a) encourages States within

⁵⁰ *Olafisoye v. FRN* (n48).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Olafisoye v. FRN* (n48).

⁵⁴ *Mangru v. Commissioner of Budge Bude Municipality* (1951) 87 CLJ 369.

⁵⁵ *Ibid.*



the context of the ideals and objectives of the Constitution to harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy. It emphasises in section 16(2) that the State shall direct its policy towards ensuring that the material resources of the Nation are harnessed and distributed as best as possible to serve the common good. By virtue of section 20, safeguarding water resources is paramount to the state. From these provisions, the right to water is considered as forming part of the economic and environmental objective of the state thereby placing it under the category of socio-economic rights. This means that the issue of justiciability and enforcement of this right as discussed above will affect the free enforcement of the right to clean water as an economic and environmental good if the National Assembly has not set up an institution to manage water resources and made appropriate laws for the regulating of this body.

The Court of Appeal in the case of *Mobil Producing (Nig) Unlimited v. Ajanaku & anor*⁵⁶ has now aligned itself with the decision of the Supreme Court in a 2021 decision emanating from the Court. It has recognised that both civil and political rights and economic, social and cultural rights share a symbiotic relationship, as one is dependent on the other for any to be achieved.⁵⁷ The Court stated that:

a person's inalienable fundamental right to life, which is entrenched in Section 33 of the Constitution, as amended, the *fons et origo* of our laws, cannot be properly harnessed in the absence of his rights to hospitable environment, water, air, land, forest and wildlife which are also rights guaranteed under Section 20 of the selfsame Constitution. The two species of rights share symbiotic relationship and, *ipso facto*, should run *pari passu* in enforcement. It is impossible for any person to actualise his right to life when his socio-economic rights have fallen into eclipse.⁵⁸

The Supreme Court has not overturned this decision in subsequent cases. It is suggested that this position by the Court will generally apply to the economic and social objectives of the state if adjudicated upon as these objectives fall under Chapter II of the 1999 Constitution (as amended). There is a recognised obligation for the government to provide water as part of its directive principles of state policy in achieving fundamental objectives for positive development and good governance. The position of the Supreme Court trumps other judicial considerations and is upheld as the true position on the enforcement of socio-economic rights in Nigeria.

4.0 Legal and Institutional Framework for Water Governance

Although the right to water falls under the category of socio-economic rights as earlier discussed, where the federal government and states have enacted laws and further established regulatory bodies to cater for socio-economic needs, it is assumed that there is an intention to make such needs justiciable. The Water Resources Act (Water Act)⁵⁹ and the Water Use and License Regulation (Water Regulation)⁶⁰ are federal legislation whose objectives are to promote the optimum planning, development and use of

⁵⁶ *Mobil Producing (Nig) Unlimited v. Ajanaku & anor* (2021) LPELR-52566(CA).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, Per Obande Festus Ogbuinya, JCA (Pp 61 - 65 Paras D - E).

⁵⁹ Water Resources Act, Cap W2 LFN 2004 hereinafter referred to as Water Act 2004.

⁶⁰ Water Use and License Regulations, 2016 hereinafter referred to as Water Regulation 2016.



Nigeria's water resources and other connected matters and to protect, conserve and control water resources for development and environmental integrity while granting licences to water service providers to promote the well-being of citizens.⁶¹ The Water Act vest the right to control water in the federal government.⁶² It further provides that any person or public authority may acquire the right to use and take water from any watercourse or underground for purposes under the Act or any regulation.⁶³ It defines public authority to include state governments and local governments or any authority or statutory corporation established by the government of the federation, state or local government.⁶⁴ Thus, apart from the federal government, the states and the local governments can also use and take water from watercourses for any non-domestic or agricultural use for storage, conveyance, supply, measurement or regulation of water.

Under the Water Act and the Water Regulation, a person may without a license take water from a water source to which the public has access for personal and domestic use. Where the individual has a statutory or customary right of occupancy over land, such a person can take or use water without any charge from underground sources for domestic and personal use but not for commercial use.⁶⁵ This provision of the law is what gives impetus to private persons and households to provide their source of water through boreholes as seen in urban areas or water wells, which are common in rural areas. This is limited to domestic use only. Based on the Water Regulation, if water is to be tapped from the designated government 'water sources' and used for agricultural, commercial, electric power generation, environmental, industrial, municipal, recreational and water transportation purposes, a license must be obtained from the Minister for Water Resources.⁶⁶ In considering an application and issuing, the Minister is usually guided by prevailing water policies, domestic water use and any other water use, which fulfils the goals of national socio-economic development.⁶⁷ The Act gives the Minister the power to impose fees, rates and charges on the use of water.⁶⁸ Penalties for contravention of the Water Act or Regulation are a fine, imprisonment or both.⁶⁹

To provide safe, adequate and affordable water supply services in the federal capital, the federal government established the Federal Capital Territory (FCT) Water Board as a water regulatory body and the Federal Capital Territory Water Board (Establishment) Act was enacted to regulate the activities of the water board.⁷⁰ The objective of the board apart from providing a safe water supply to the residents of the FCT is to collaborate with other authorities that are responsible for water resource management to secure efficient water use in ways that protect the water resources of the nation.⁷¹ The water board has a duty to supply treated water to residents of the FCT at a fee.⁷² The water charge is fixed at different

⁶¹ Preamble to the Water Act 2004; Regulation 1 of the Water Regulation 2016.

⁶² Water Act 2004, s1.

⁶³ *Ibid*, s3.

⁶⁴ *Ibid*, s20.

⁶⁵ Water Act, s2; Regulation 2(1) of the Water Regulation 2016.

⁶⁶ Regulation 5 of the Water Regulation 2016.

⁶⁷ Water Act 2004, s11; Regulation 13(1) of the Water Regulation 2016.

⁶⁸ Water Act 2004, s14; Regulation 25 of the Water Regulation 2016.

⁶⁹ The Water Resources (Amendment) Act, 2016 has amended section 18(1) of Water Act with regard to penalties. N2000 is now N500,000, N100 is now N2000 and six months imprisonment is now one year.

⁷⁰ Federal Capital Territory Water Board (Establishment) Act 2017 hereinafter referred to as FCT Water Board Act 2017.

⁷¹ FCT Water Board Act 2017, s17.

⁷² *Ibid* s29.

rates for different locations as the board deems fit. The board can suspend the supply of water for a period as may be necessary to carry out inspections, tests and repairs and make new connections or alterations to existing pipelines. The board can also suspend or discontinue the water supply if rates are not paid.⁷³ This notwithstanding, the board is not under obligation to pay for damages or compensation for loss, damage or inconveniences caused to any person for suspension, failure or discontinuance of interrupted water supply whether it be partial or total.⁷⁴ It criminalises activities relating to water diversion, wilful damage to water supply, pollution, wastage, fraudulent measurement, nuisance, incitement, impersonation of water board officers and conspiracy.⁷⁵ This law contains harsh provisions and does not appear to uphold the right to water. It absolves the water board of any liability thereby discouraging persons from suing the board for not providing water. This again is another factor that has given individuals the impetus to provide their water as this has become an easier private option.

At the state level, the State Water Boards (SWBs) were created as a step towards water reform for urban, semi-urban and rural water distribution and sanitation services in collaboration with the Federal Ministry of Water Resources (FMWR).⁷⁶ These bodies were set up to ensure the provision, management and distribution of the water resources in the various states and local governments.⁷⁷ Thus, different states, through the SWBs initiated their processes for billing which eventually posed a challenge. For instance, in states like Bayelsa and Benue State, water was free for domestic, commercial, industrial, and public entities while Zamfara State provided free water for domestic and public entities only. The state government bore the costs of water supply and sanitation.⁷⁸ In States like Ogun and Borno, water was billed by the utility but the state tax authorities collected payments.⁷⁹ The SWBs in other states like Kaduna, Katsina, Benue, Niger, Adamawa, Taraba, Bauchi, Yobe, Ekiti, Ondo, Osun, Lagos, Oyo, Akwa Ibom, Rivers, and Enugu State issued and collected the water bills directly.⁸⁰ Between 2011 and 2012, SWAs began to face various challenges leading to a shortage in water supply and rationing of available water.⁸¹ These challenges included poor maintenance of pipelines; pipeline breaks the high cost of treating water facilities and high water rates. In addition, rural-urban migration for economic opportunities leading to the rise in urban population made it difficult for the SWBs to continuously supply water to every part of the state.⁸² This led to the collapse of the SWBs in many states, leaving the population to seek alternative methods for water provision. Presently, some states like Rivers and Cross River State now focus on the provision of water for sanitation services by the government and not water distribution for personal, public or commercial uses.

⁷³ *Ibid*, s28(1).

⁷⁴ *Ibid*, s28(2).

⁷⁵ *Ibid*, pt 7.

⁷⁶ B Macheve and others, *State Water Agencies in Nigeria, A Performance Assessment* (2015), 2 < <https://openknowledge.worldbank.org/bitstream/handle/10986/22581/9781464806575.pdf> > accessed 24 September 2023.

⁷⁷ EO Longe and others 'Water Resources Use, Abuse and Regulations in Nigeria' (2010) (12)(2) *Journal of Sustainable Development in Africa*, 37.

⁷⁸ Macheve (n76) 39.

⁷⁹ *Ibid*, 40.

⁸⁰ *Ibid*, 40-41.

⁸¹ *Ibid*, 35.

⁸² Macheve (n76) 35.



In July 2004, the Federal Ministry of Water Resources (FMWR) introduced the National Water Policy. The policy recognised that water is life and is central to life and development.⁸³ It recognised that a large percentage of the country's population of about one hundred and twenty million people did not have access to potable water.⁸⁴ The water policy recognised the factors limiting the constant supply of clean water to the population such as high population growth rate and increasing urbanisation, competing water uses in urban and rural areas, degrading watersheds and watercourses and uncoordinated water resource development amongst others and it set out a framework for addressing these challenges.⁸⁵ One solution was active private sector partnership. This call for private-sector collaboration was necessary because of the financial cost of funding the SWBs by the government.⁸⁶

The 2004 water policy set up a model to enhance the possibility of private sector participation in management and distribution. The strategy was for the government to change its role to that of a regulator, facilitator and co-coordinator to avoid the misuse of monopolies by the private sector and protect the users.⁸⁷ It was also expected that the creation of an independent regulatory body (irrespective of already existing regulatory bodies and agencies) would mediate between the government and their private contract partners to protect the beneficiaries of the service to be delivered. The contracts between government and private partners were to lay special emphasis on improving the service delivery to the poor.⁸⁸ A new National Water Law was recommended which will take into account the different physical, social and economic circumstances that exist in different areas of the country and the implementation of this new National Water Law will be the responsibility of the FMWR.⁸⁹ The problem with the 2004 water policy was that it did not take into consideration the complex billing system and the amount of water to be distributed in the urban and rural areas of the country.

In 2016, the FMWR initiated a draft water policy.⁹⁰ Although it was a draft policy, it adopted a wider approach to addressing the challenges of water resource management in Nigeria and provided solutions but it did not recognise access to water as a right.⁹¹ The policy prioritised water for domestic use first without degrading the environment. The second was for irrigation purposes to promote food security. The policy recognised water as a social and economic good by encouraging water charges at a favourable cost while guaranteeing access to the poor through cross-subsidies and cost-sharing between users and the government. Water pricing was also encouraged and placing a price on water was to be uniformly regulated by the government in consultation with other stakeholders including the private sector.⁹² Unlike the 2004 policy, the 2016 draft policy stated clearly the role of the private sector in providing water. One of which was to finance water resource activities while the government created an enabling environment for public-private partnership and cooperation.⁹³ The 2016 draft policy also

⁸³ National Water Policy, Federal Republic of Nigeria (Federal Ministry of Water Resources, July 2004) 1.

⁸⁴ *Ibid*, 4.

⁸⁵ *Ibid*, 5-6.

⁸⁶ *Ibid*.

⁸⁷ National Water Policy 2004, 17.

⁸⁸ *Ibid*, 17-18.

⁸⁹ *Ibid*, 26.

⁹⁰ Draft National Water Policy 2016, Final draft of the FMWR In-house Policy Review Committee (Federal Ministry of Water Resources, February 2016).

⁹¹ *Ibid*, 5-8.

⁹² Draft National Water Policy 2016, 16-24.

⁹³ *Ibid*, 24-25.



adopted the water distribution strategy in the National Water Supply and Sanitation Policy 2000. The provision of water to settlements with a population of 5,000 (which is typical of the rural population) was to be capped at 30 litres per day, within 250 metres of the community to serve 250 - 500 people per water point. In settlements with a population between 5,000 - 20,000, a fair measure of social infrastructure and some level of economic activity, 60 litres/cap/day was to be provided while urban areas will be provided with 120 litres/cap/day with full reticulation and consumer connections.⁹⁴

Irrespective of these responses by the government, the provision and access to water are informally regulated in almost every part of Nigeria. Water supply on average in the urban and rural areas is 32 litres and 10 litres per capita per day respectively.⁹⁵ Individuals and institutions in both urban and rural settlements have resorted to providing their own source of water as a means of coping with the deprivation.

5.0 Conclusion

Under the Nigerian Constitution, the right to water falls under the category of non-justiciable rights. The Courts have in some instances adjudicated on the justifiability of this chapter of the Constitution but there is yet to be a consensus on its position. This notwithstanding, it is seen that provision and access to water has been given some consideration by law and policy. The government in fulfilling its state policy objectives have set up water boards and agencies in various states of the federation and have enacted laws to regulate these agencies. This clearly shows an intention by the government to provide water to the population but the challenges associated with the constant provision of water still exist. The water agencies at the state level are not properly funded to tackle these challenges and residents are left to seek alternative means of providing their source of water. The water law also absolves the agencies from any liability arising from failure to supply water. Considering the legal constraints, individuals are not willing to seek redress in the Courts for failure of the government to provide water in the face of glaring deprivation. It is suggested that total reliance on Chapter II of the Constitution in the world we presently live in is dangerous as it seeks to deprive persons of certain rights necessary for decent living. Civil and political rights and socio-economic rights are not mutually exclusive as the realisation of one group of rights is necessary for the realisation of the other group of rights. It is proposed that if the government has already taken steps to regulate and provide water as a matter of state policy to ensure that people enjoy a certain level of economic, social and environmental security, the government needs to make perfect its intervention. Equipping the existing regulatory bodies and agencies at the federal and state level and amending laws for the benefit of the population is the way forward.

⁹⁴ *Ibid*, 36.

⁹⁵ FO Ajibade and others 'Issues, Challenges and Management of Water Supply and Sanitation in Nigeria: An Overview', Proceeding of the National Civil Engineering Conference/AGM, Nigerian Institution of Civil Engineers (2015) 19-34 cited in D Enyidi Uchekukwu 'Potable Water and National Water Policy in Nigeria (A Historical Synthesis, Pitfalls And The Way Forward)' (2017) (3)(2) *Journal of Agricultural Economics and Rural Development*, 107.