ACHIEVING POVERTY ALLEVIATION IN NIGERIA: LEGAL AND REGULATORY CHALLENGES IN WATER MANAGEMENT

INTRODUCTION

Present federal efforts at poverty alleviation seeks to promote effective and equitable development of all sectors of the national population in general and the rural poor in particular in order to attain long term social and economic development. Water sustains life and every developmental effort of mankind will translate into nothing without its availability in the right quality and quantity when and where needed. Indeed, the wants of man in regard to the element of water is natural and absolutely necessary to his existence. To quench thirst, and for household and hydraulic uses, water is absolutely indispensable. In cultured life, water for plants and animals is also necessary for living. These wants must be supplied otherwise man, flora and fauna will all perish. Thus, the challenges posed by water to Nigeria's poverty alleviation drive is essentially how to strike a delicate balance between water as the most important means for livelihood and as a resource.

Households constitute a salient factor for the sustainable use and management of water resources. Majority of the most indigent households especially outside the nation's urban centres depend directly on natural resources for their livelihoods, through subsistence farming, herding, collecting or hunting. If any poverty alleviation strategy is to be successful and sustainable, it is to be based on sustainable livelihoods: a sustainable system of capabilities, material and social resources, and activities required for a means of living.

A well thought-out poverty alleviation strategy anchored on proper integrated water resources management is a key factor in a sustainable livelihood strategy and should focus on the development and implementation of alternatives to unsustainable resource use for that segment whose security is based on access to freshwater ecosystems and whose control over these resources has eroded.

The Lack of an overall water policy in the form of strategies, functional national water master plans, proper mechanisms for inter-sectoral coordination, tariff setting and conflict resolution has meant that the responsibility for water management for each segment of water use remained diverse and diffused. Different agencies at federal, state and local government pursue different water agenda which makes water resources development policy decision such as abstraction, pollution control, and watershed management highly fragmented. This fragmentation is at the core of water resources management. Central to the idea of integrated water resources management (IWRM) is the active participation of civil society, governments and the private sector in water resources planning and management. Empowering community based organisations, local groups and particularly women (as managers of domestic water) to participate actively and effectively in catchment/basin wide and national "water dialogues" is crucial and fundamental. This participatory process requires building the capacity, responsibilities and willingness of people and institutions to relate, think and function in cooperative and integrated ways towards the conservation and sustainable use of water resources. Diverse agencies using water for different purposes need to have their activities properly planned, coordinated, and managed with a view to conserving this scarce but all important resource for future generations. To achieve this, a proper blend of institutional, policy, economic, financial and regulatory framework which recognize the need for inter-sectoral approach to water resource management becomes an urgent need of the hour.

2.0 CUSTOMARY WATER LAW

The origin of enacted legislation and any reference to statute book in Nigeria dates back to the period of British colonial rule. Before the advent of colonial rule, throughout the territory of present day Nigeria, nowhere did the people keep a written or codified account of customary laws relating to water rights, yet, in all communities there are rules and regulations known to, and observed by all and sundry. Broadly speaking, a somewhat identical trend is discernible in customary laws on water resources which to some extent appear uniform within the context of a given geo-cultural area or linguistic group. A universally accepted principle is that all persons belonging to the community have a right to use water passing through the community in a superficial stream or lake or spring. The water right so possessed by all, is, however subject to reasonable use. Reasonable right entail ensuring that the quality of water is preserved.

Any breach of customary water law or practice relating to pollution control, environmental degradation, and/or fishing is enforced by community elders. In the case of taboo or religious customs, the town/village deity may be consulted through its priest or priestess. Vigilantes or youths of particular "age grade" or certain cultural "societies" who are answerable to the community elders or chief-in-command, enforce customary law and practices relating to water use. These laws and practices are appropriate for rural communities where traditional authority is strong but lose relevance in large urban settlements where vast and varied people converge anonymously.

3.0 STATUTORY LAWS TOUCHING ON WATER

Beginning from colonial Nigeria, the Water Works Act, 1915[1] became the first statutory enactment specifically passed as an anti-pollution legislation to control water pollution. It forbids the introduction of any noxious or harmful material into any water course.

The next law that sought to control water pollution was the Public Health Act, 1917[2], which by virtue of its section 13 (1), embodies provision against the introduction of injurious substances into the various sources of water supply for human and animal consumption. This law also prohibits the fouling or vitiation of the atmosphere.

The Minerals Act, 1916[3], in its part iv containing sections 46 to 63 has elaborate provisions regarding water. This law specifically addresses water in relation to mining activities. Section 46, enacts that. "No person shall in the course of mining or prospecting operations or in any works connected therewith, pollute or permit to become polluted the water or any water course". The law further vests the Minister charged with mining with power to make regulations for the prevention of pollution, grant licence for water abstraction, impose other fees, rates and charges for water use.

The Oil in Navigable Waters Act, 1968[4], was enacted following the adoption of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as part of a series of United Nations treaties covering the preservation of the sea environment. The law applies to pollution by spillage into a part of the sea designated as "prohibited area" of crude oil, fuel oil and lubricating oil, as well as heavy diesel oil.

The Petroleum Act, 1969[5], extends protection against pollution of inland waters, rivers, water courses, lakes and other water bodies from oil exploration activities. This law has the Petroleum (Drilling and Production) Regulations, 1969 made pursuant thereto. The thrust of this law is the integration of environmental protection into the oil concessions granted thereunder.

The Nigerian Criminal Code Act may also be mentioned as part of statutory enactments touching upon water pollution control. By virtue of section 245; "Any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place, so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable to imprisonment for six months"..

By virtue of section 9 (i) of the National Inland Water ways Authority, (NIWA) Decree[6], the NIWA has power to grant permit and licenses for water intake. This power extends over all federal navigable waterways mentioned in the second schedule of the Decree. It also has power to provide hydraulic structures for rivers and dams, bed and bank stabilization, barrages and groynes.

The River Basin Development Authorities (RBDAs) came into being via the instrumentality of Decree 25 of 1976[7]. They were set up to ensure a pan Nigerian programme of water resources development. The RBDA law spells out diverse functions and objectives for these Authorities from which it may be deduced that they were seen as a solution to the nation's need for efficiency in the development and administration of water resources nationwide.

One key legislation in the list of pan-Nigerian water laws, is the Water Resources Decree, 1993[8]. This Decree vests in the Federal Government Control of all surface and ground water in any water course affecting more than one state of the Federation as described in the Schedule to the Decree. This law is envisaged as the nation's comprehensive water law, with powers vested in the Minister for Water Resources to make Regulations for its implementation.

3.1 EVALUATION OF STATUTORY LAWS ON WATER

A deontic analysis of existing water related laws reveals that Nigeria does not have adequate institutional and legal infrastructure for planning and carrying out integrated water resources management. On the contrary, the legal set up is such that:

There is an uncoordinated approach to water law administration in Nigeria. A visible manifestation of this is provided by the provisions of the Water Resources Decree 101 of 1993, and the Minerals Act, Cap 226 LFN 1990. By the enactment in Section 5 of the Water Resources Decree, the "Secretary" (read minister) charged with responsibility for matters of water resources in empowered to issue water license, order removal of hydraulic work, impose license fee, control pollution, impose any other fees, rates and charges. However, by reason of part iv (sections 46-63) of the Minerals Act, the same powers are also vested in the Minister responsible for Mines. Both ministers wield co-extensive powers under federal legislation, yet no provision was made in either statute for consultation with each other or for conflict resolution in the event of a dispute or disagreement arising from the exercise of powers duly granted under the respective enactments.

Similarly, by virtue of section 9(i) of the National Inland Waterways Decree, the NIWA has power to grant permit and licenses for water intake. This power covers the very same watercourses over which the Minister of Water Resources has jurisdiction.

Furthermore, it may be noted that under section 9(o) of the NIWA Decree, the Authority has power to provide hydraulic structures for rivers and dams, bed and bank stabilization, barrages and groynes. These same powers are by virtue of section 4 of the River Basin Development Authorities (RBDA) Act, vested in the RBDAS. Besides, under section 13(b) of the Water Resources Decree, the Minister of Water Resources is further empowered to impose fees on any person or "public authority" seeking to construct, operate, maintain, repair or alter any hydraulic works in or adjacent to any water source. "Public Authority" as interpreted under section 20 includes: "Any commission, authority or statutory corporation established by the Government of the Federation." A proper construction of this provision leads to the conclusion that notwithstanding all the powers vested in it, NIWA is obliged to execute its mandate subject to the payment of fees determined by the Water Resources Minister who has the power to also order the removal of any hydraulic works. All this clearly represent another instance of conflicting statutory powers, and further demonstrates the incidence of lack of inter-sectoral coordination, as well as the absence of conflict resolution mechanisms in Nigeria's water sector.

- Water supply and regulatory functions are often combined in a single institution. This is especially true of all RBDAs, as well as all states water agencies.

- Under present laws, different agencies at all tiers of government pursue different agenda (e.g. State Water Agencies, Rural Water Supply and Sanitation Agencies.) This approach has led to the fragmentation of water resources development policy issues including abstraction, pollution control, and watershed management.
- The Regulatory and Monitoring machinery within the water sector in Nigeria is diverse, diffused and weak. Enforceability in such circumstances becomes lax.
- Virtually all laws touching on water (both federal and state) are rule oriented and fail to recognize the management approach to water resources.
- Present laws touching do not recognize the place and role of the private sector and communities as important stakeholders in the management of water resources.
- Present laws also lack proper provisions and mechanisms for inter-sectoral coordination, tariff setting and conflict resolution.

All in all, it may be concluded that at a point, various state laws on water will have to synchronize with federal law on water because ownership of most of the nation's major water courses are by virtue of section 1, of the Water Resources Decree, vested in the Federal Government. This means that since watercourses do not recognize state boundaries, any system of regulation developed by a state cannot stand in isolation.

In the light of the above analysis, the questions that must be answered in the present circumstances especially against the background of the campaign for poverty alleviation are; How best can the nation manage its water resources to attain sustainable livelihood for its teeming population dependent on water resources and the ecosystem without destroying the resources base? How can the nation re-engineer its legal and regulatory framework in the water sector to take cognizance of private sector involvement, private and community ownership of water supplies and the issue of regulatory responsibilities? A further additional question that follows is how to make water supply and sanitation sector attractive for private sector investment. These questions will naturally lead to the consideration of broader issues that hinge on the evolution of a comprehensive national water resources management strategy for Nigeria. Nevertheless, it is hoped that the salient points put forward in this paper would be seen as significant pointers towards the proper direction of all future efforts at enplacing a durable legal and regulatory framework for water supply and sanitation as components of poverty alleviation efforts in Nigeria.

LEGAL FRAMEWORK: NEED FOR NEW APPROACH

National progress at poverty alleviation from the standpoint of water sector contribution is tied inextricably to the enactment, establishment and enforcement of standards, legislation, regulations and control criteria on water abstraction, pollution control, watershed management and environmental preservation. The task of proper implementation of water resources protection and enhancement laws in Nigeria must commence with the appreciation of the linkage between daily human activities and other dynamics of the natural ecosystem.

When ceaseless exploitation and use overstretch the sustaining or regenerating capabilities of the natural system of water sources, then, the only option beside artificially redesigning nature is for mankind to alter the pattern of human behaviour responsible for damage and degradation through the instrumentality of an effective and efficient legal framework. Thus, water laws and regulations have become a global tool for the management of water supply and sanitation within the overall context of water resources management. The obligation of attaining sustainable livelihood as well as halting water quality degradation and reversing pollution trends hinges on the promulgation of action centred methodologies backed by appropriate legislation that are rightly enforced.

The growing incidence of poverty and urban squalor allied with inadequate government funding raises fresh challenges of how to evolve new guidelines that will accommodate the continued expectations of Nigeria's expanding post independence cities, towns and human population hitherto used to considering water supply as a social service solely within the purview of governmental responsibility. In addition, there is the challenge of private sector participation and the beneficial integration of rural and semi urban communities through a recognition of traditional customary water law and practices.

The establishment of an effective poverty alleviation programme that hinges on integrated water resources management requires at least two prerequisites: firstly, an effective and efficient legal system that protects citizens against injustice and arbitrariness, and secondly, an institutional set-up that provides equal opportunities for all parties to participate in the planning and consultation process.

Poverty alleviation based on integrated water resources management requires the ability to establish effective linkages between departments and economic sectors to enable integrated planning and management to develop. For instance, the need for pollution control cannot be restricted to water pollution alone since the pollution of land, air and water is closely connected as part of man's diurnal activity in search for livelihood. Control of water pollution in isolation will be less effective than integrated pollution control, which reckons with land and air pollution.

Given the fact that majority of our population still engage in subsistence agriculture for their livelihood, there is an incontestable inter-relationship between land and water. It becomes clear, thus, that water resource management without any influence on land use policy and development is very restricted in its effectiveness. Land reclamation programmes, restriction on watershed area activities and forest reserves are systems that evoke questions regarding mechanisms for other forms of land use. Certainly, if poverty alleviation programme based on integrated water resource management is to succeed in Nigeria, there has to be consistent land use and water management policy.

Water experts drawn from various water related professions cannot claim competence in formulating laws and legislation to enhance water resources management and its application to poverty alleviation. Nor can lawyers and legal experts appreciate and understand the scientific and professional terminology in vogue for the protection and the enhancement of the quality of water, and environmental sanitation. Accordingly, it is submitted that water laws, environmental legislation and sanitation regulations geared towards poverty alleviation should reckon with the interests of all stakeholders. Whereas rule oriented legislation emphasize prohibitions and penalties as consequence for infringement and sanctions against violations of the law, water law and sanitation laws as well as environmental legislation must be founded on practical incentives for the rational use and protection of water resources, for the observance of sanitary regulations, for the prevention of environmental damage and for the promotion of sound water and environmentally friendly policy that will foster sustainable development.

These are goals which our present system of water laws, regulatory institutions, and environmental jurisprudence may not permit because they are all based on the rule oriented approach which ignore the interest of stakeholders, private investors and communities. Clearly, the need of the present and the future lay, thus, in the establishment of new frontiers in water resources management anchored in law.

The new methodology advocated as the basis for arriving at an alternative legal framework for integrated water resources management with water supply and sanitation as a component of Nigeria's poverty alleviation programme may be described as similar to the empirical approach of science and technology. Under both a problem has to be identified, the relevant data collected and analysed for the development of hypothesis, following which scientific principle or theory is advanced as a prelude to the development, or selection of technology applicable to the solution of the identified problem. In formulating the legal and regulatory framework for water resources management, the problem definition phase should ask relevant practical questions for data collection, and recommend a mode of data synthesis. The hypothesis stage becomes manifest by the development of policy options in respect of the possibility of what actions could be taken to resolve the problem. Against this background, a decision should be taken on the policy options to be selected for the making of an effective legislation which accommodates consultation between the decision maker, planners, government officials, stakeholders, investors and managers for the selection of the best policy. In this manner, a conceptual policy model crystallizes with recommendations, options, and strategies on the nature and contents of the law.

ATTRACTING PRIVATE SECTOR INVESTMENT IN WATER

The basis of any investment undertaken by an investor is the profitability of the venture i.e, the profit which he expects to realise from his investment. Using this philosophy as the starting point, the question as to what incentives would be needed to make water supply and sanitation attractive for private investment has to be considered from the point of view of those factors that are likely to inhibit good returns on water sector investment, and those that are likely to promote good returns on investment.

Experience reveals that government meddlesomeness and bureaucratic red tapism, when they become excessive tend to frustrate the smooth flow of administration in the context of the relationship between government regulatory and/or supervisory agencies, and individual or corporate investors wishing to do business in Nigeria.

The first step towards realising any meaningful private sector participation in the water and sanitation sectors will have to begin with assurances demonstrable in practical terms of regulatory and/or supervisory mechanism free of pressure and undue influence of vested interest, lobby groups, government or host communities. What the current drive towards "due process" would mean in this regard is rather a matter of conjecture. Nevertheless, it necessarily follows that sound and effective regulatory mechanisms that guarantee investors freedom to operate their concessions is a sine qua non to private sector participation.

The Second factor that has to be reckoned with is the availability of raw water which is an important raw material in the water supply industry. At present, virtually all the states of the federation have state Water Agencies with regulatory power and functions. The significance of this lies in the fundamental question of how state laws will synchronize with federal water law especially against the background of the adoption of a national water resources management strategy. The challenge posed by this will become better appreciated when more Nigerian states subscribe to private sector participation in the water supply industry. A somewhat visible manifestation of this problem may be illustrated by reference to the current friction between upstream riparian states and downstream riparian states in the Komadugu-Yobe River basin over their respective share of the waters of the basin. Similarly, it may be noted that the main raw water source for Lagos (such as Ogun and Osun Rivers), are shared by Ogun, Osun and Lagos states. Lagos state in placed at the end of the supply chain and any dispute over water rights must affect private sector investors not only in Lagos state but in the other states as well. None of these states is in a position to give assurances of raw water supply since the ownership of water courses affecting more than one state is vested in the federal government.

The Third factor in pushing for private investment in the water sector is that government (federal and state) must be ready and willing to shoulder some responsibilities that will meet investors concern about financial risks, as well as cushion the effect of economic cost of water supply that must necessarily attend private participation. In other words, government should be ready to provide a measure of subsidy for water costs to certain segments of consumers until stability is achieved. Events ongoing in the country in connection with the removal of oil subsidy and deregulation of downstream oil sector operations must hold out a lesson for the nation. In the context of private sector participation in the water sector, the expression "financial risk" as used above refers to such guarantees and inducements which they expect as incentive. The extenuation of these risks ought to be borne by government during the early stages of private participation.

The fourth, is the question of what kind of arrangement government wishes to enter into with private investors in the water supply sector. This is crucial to private participation. It is submitted that in the light of water right lessons learnt from other countries such as Mexico and Australia, that a concession should be pursued as the first choice option.

Fifthly, as in other sectors of the economy where the government has tried to encourage investment by the private sector, it may not be out of place to call for initial tax reductions and waiver of import duty on water supply equipments and chemicals employed in the treatment of water to be extended to private investors in water supply as well as to have such gesture extended to the sanitation arena. This view is taken bearing in mind that private sector participation in the nation's water supply sector will tend to enhance unit cost of water in the short run because of high cost of investment funds, and the additional fact that investors will seek to make profits out of their investment.

Finally, a partnership of progress can be forged between government, private sector financial institutions, and private sector water companies to ensure the success of any privatisation scheme in the water supply and sanitation sector. This can be achieved through Government support or backing by way of guarantorship of soft loans directed by these financial institutions to viable private sector water operators and sanitation managers in exchange for an amortization arrangement. The support of regional and/ or international organisations like the African Development Bank, and the World Bank may be sought in this regard.

BUILDING A FAIR REGULATORY FRAMEWORK

The concept of regulation as it is known in those nations of the developed democracies with functional Integrated Water Resources Management (IWRM) in relatively new to Nigeria. However, the necessity for proper regulation increases as more public utilities are privatised. The regulatory and monitoring machinery within the water sector in Nigeria is diverse, diffused and weak, and enforceability in those circumstances becomes lax. The absence of an effective and full-fledged Water Resources Management Strategy in Nigeria has left the various states and the Federal Government pursuing their respective water agenda. States lack both the expertise and facility to mount an effective regulation system independent of the Federal Government. Since water courses do not recognise state boundaries, any system of regulation developed by a state cannot stand in isolation. At a point, state laws will have to synchronize with federal law on water hence any state government wishing to put in place appropriate, regulatory mechanisms must do so in cooperation with the federal Government within the ambit of a national Integrated Water Resources Management Strategy.

The challenge of regulation may be viewed from a tri-dimensional perspective;

At the federal planning level, for the conservation, preservation and sharing of limited water resources as well as facilitating settlement of disputes

At the consumer level, for tariff setting, water quality control and nature and extent of service as well as the protection of consumers from monopoly abuses.

At the state and local levels, to control the private sector investors as well as protect them from arbitrary political action.

How then can the nation establish a regulatory framework that will be fair to both private and public sector water suppliers and sanitation managers? The answer to this poser may not be too hard to find, except that it will require courage to implement solutions. The analysis reveals that both political and social factors are primarily responsible for the limitations hampering the enforcement of water and sanitation laws in particular, and environmental laws in general. The availability of water and the regularity of supply are products of state apparatus that are biased in favour of the interests of the rich and powerful elements in society. The policies responsible for this state of affairs hardly contain social equity at their root, and are reflective of the distribution of power in society.

In order that we may establish a fair and acceptable regulatory framework, it will be necessary for the new dispensation to be transformed in a manner that shifts focus away from the topmost strata as presently constituted to the people. In terms of the political considerations it will be necessary to allow the regulatory and monitoring mechanisms to operate without pressure or influence from government or lobbyists so as to pave the way for a better enforcement process that would instill confidence in both private and public sector investors.

Secondly, the linkages between political/bureaucratic power, corruption and economic power should be broken. It is possible to achieve this through the separation of responsibility for building water infrastructure from responsibility for production and distribution. The separation will also enhance the termination of institutional conflicts and politics which has resulted in certain government agencies and highly placed citizens refusing to pay for their water consumption e.g. the Kano state government till date refuses to pay for raw water abstracted from the Tiga and Challawa gorge dam facilities managed by the Hadejia-Jema'are River Basin Development Authority. Similarly, the Borno State Water Board also refuses to pay for raw water abstracted from the Alau Dam facility managed by the Chad Basin Development Authority.

Thirdly, a regulatory framework based on participatory management will be fair to all. Participatory water resources management will have the people as its focus, and uphold the reality of their own priorities. The populace when properly educated on the need for proper water use and management, and when made subjects of policies and laws within the framework of a people oriented water resources management will accordingly cooperate willingly with regulatory authorities to the satisfaction of both private and public sector investors.

Fourthly, the process of enforcement must itself be fair and just. It must not be seen to tilt in favour of the high and mighty in society. The balance of approach in regulatory practices would improve the process of sustainable enforcement, which would in turn elicit social responsiveness and acceptance to both private and public investors. This would in the final analysis, help preserve present resources, without extenuating sustainable development goals for the use of future generations.

CONCLUSION

The general welfare of the nation demands that the water resources of the country be put to beneficial use to the optimum level of which they are capable; that wastage or unreasonable use or unreasonable method of use of water be prevented. The conservation of water and the preservation of quality of such water should be exercised with the objective of attaining the reasonable and beneficial use thereof in the larger interest of the people, and that funds – public and private- for the promotion and expansion of the beneficial use of water resources should be invested to the end that serves the best interest and welfare of the people, this is the true meaning of poverty alleviation. All in all, the integrated management of water resources through legal provisions should facilitate the implementation of better water policies, especially those that improve coherence between different water sectors. Mainstreaming environmental and conservation issues and actions into both sectoral and integrated water policies should be a key element of legal direction. The legal component also entail establishing synergies between policies derived from various environmental conventions and their relationship with national water management policies.

ENDNOTES ANDREFRENCES

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1. Cap 213 of the Ordinances of the Colony and Protectorate of Nigeria.

Ibid, Cap 165 of 1958, now a state law- (Lagos state).

2. The original law of 1916 was repealed by Cap 55 of 1945 and listed as cap 3.121 of the Ordinances of the Colony and Protectorate of Nigeria, now Cap 226 LFN, 1990

3.Cap 337 LFN, 1990

4.Originally Decree 51 of 1969, now Cap 350 LFN, 1990

5.Decree No. 13 of 1997

6.Decree 25 of 1976 (as amended) now Cap 396 LFN, 1990

7.Decree 101 of 1993