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LAW, WATER AND SUSTAINABLE DEVELOPMENT:
FRAMEWORK OF NIGERIAN LAW

Olawale Ajai

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Country Legislation

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TABLE OF CONTENTS

1.	Introduction	91
1.1	Hydrology and Water Resources of Nigeria	91
2.	Customary Law of Water and Watercourses	93
2.1	Land Tenure and Water Rights	93
2.2	Conservation Techniques	94
2.3	Fishery Resources	94
2.4	Dispute Resolution	95
3.	Water Legislation	95
3.1	Land Tenure Legislation	96
3.2	River Basins Development Legislation	96
3.3	Navigation Rights	96
3.4	Fisheries Legislation	96
3.5	Other Legislation	97
4.	Water Management and Governance Issues	97
4.1	Interface between Customary and Statutory Law	97
4.2	Institutional Structure	98
4.3	Water Policy and Implementation	99
4.4	Governance Model: Responsibilities and Participation	101
5.	Environmental Protection and Sustainable Development	103
5.1	National Environmental Policy	103
5.2	Pollution Control	104
5.3	Situation Report	105
5.4	Biodiversity Conservation	106
5.5	Human Rights and Water Justice	106
5.6	Sovereignty over Natural Resources and the Right to Development	108
5.7	Environmental Management	109
6.	Riparian Law	110
7.	International Riparian Law	113
8.	Overview and Conclusions	113

1

INTRODUCTION

A Nigerian local proverb says: 'Water! It has no enemy'. In folklore and customary law there is a fairly well developed regime of concepts, practices and norms governing water use. Also, there is customary jurisprudence delimiting boundaries in shared watercourses. In essence, practical, pragmatic, equitable and fairly sophisticated concepts, rules and norms exist in customary law and folklore. These would appear to have been largely supplanted in use and prominence by modernity, legislation and case law. Unsustainable use, disputes and underdevelopment are incidences of the lack of integration of non-customary law. This paper seeks to identify and present the salient rules of customary law - in a schematic and conceptual manner, highlight the usefulness of the folkloric notions for sustainable development and evaluate the usefulness of recruiting traditional institutions into the institutional framework for modern sustainable water resources management in Nigeria.

The central issues of economic development and environmental protection in the current social, political and economic environment incidentally relate to water - an overlooked or less glamorous natural resource. For example, topical and sometimes controversial issues such as crude oil and mineral extraction, pollution control, biodiversity protection, energy and power, resource control, revenue allocation and political participation, etc., relate directly or indirectly to water resources management. Unfortunately, water resources management gets less visibility and attention in the economic development discourse, and effort and its currency for solving political conflicts is underrated or insufficiently appreciated in the national conversation on politics and sustainable development.

The non-customary law appears to be inapt and under-developed relative to the importance of water resources in national development and is affected by a skewed political economy. The paper will also discuss the emergent law on water resources and explore how folklore, comparative law and

international law may be adopted and adapted to aid the development and application of law on water resources, and by direct implication sustainable development in Nigeria. The paper begins by discussing the customary law on water; it then sequentially examines water legislation, environmental management and governance issues, riparian law and then closes with an overview and conclusions.

1.1 Hydrology and Water Resources of Nigeria

Nigeria has abundant water resources¹ and is situated in West Africa, lying between longitudes 2° 49'E and 14° 37'E and latitudes 4° 16'N and 13° 52' North of the Equator. The climate is tropical, annual rainfall in the South ranges between 1,500 mm and 4,000 mm and in the extreme North between 500 mm and 1000 mm.²

The hydrology of Nigeria is aptly summarized as follows:

The hydrology of Nigeria is dominated by two great river systems, the Niger-Benue and the Chad systems... (almost all) flowing waters ultimately find their way into the Chad Basin or down the lower Niger to the sea... The rivers flowing into Lake Chad emanate both from the central highland and from the high plateau ...and from the Cameroon mountains... Within Nigeria the River Niger (which flows from the Fouta Djallon mountains of Guinea) is fed by rivers flowing into it from all directions with headwaters originating from the central plateau in the north, from the Yoruba highlands in the south, from Benin Republic to the west and from the eastern highlands... The River Benue is fed by rivers emanating both from the high central plateau

1 'The surface water resources potential of the country is estimated at 267.3 billion cubic metres while the groundwater potential is 51.9 billion metres (NWRMP 1995).' See I.J. Goldface-Irokalibe, 'Water Management in Federal and Federal -Type Countries: Nigerian Perspectives' (2009), at 1, available at http://www.forumfed.org/en/global/thematic/water_papers/Joe%20Goldface_en.pdf.

2 E. Ita, 'Inland Fishery Resources of Nigeria', *CIFA Occasional Paper No. 20* (Rome: Food and Agriculture Organization, 1993), paragraph 2.1, available at <http://www.fao.org/DOCREP/005/T1230E/T1230E09.htm>.

and also from the Cameroon mountains and Ogoja hills...³

Nigeria is watered from North to South and East to West by a network of rivers. Rivers Niger and Benue that form a big ‘Y’ right across the middle of Nigeria originate from outside the country. All other rivers flow across the territory to empty into Lake Chad in the North East corner or the Atlantic Ocean in the South. Many rivers in the North are intermittent and depend on rainfall but those in the South are perennial. The major rivers make up about 11.5 percent and lakes and reservoirs about 1 percent of the total area of Nigeria.⁴ The total water bodies, including deltas, estuaries, etc., make up about 15.9 percent of the total area of the country.⁵

The coastal areas are covered by an extensive mangrove ecosystem. These water resources are fairly abundant and suitable for irrigable agriculture (mainly in the more arid North), fishing, fish culture and farming and for potable water. The groundwater resources are also considerable and are shared; the Iullemeden Aquifer System (IAS) in the North and the Tano and Keta Aquifer System in the South.

Necessarily, therefore, Nigeria’s watercourses are shared internationally and domestically. The three tiers of government, Federal, State and Local, have exclusive legislative powers as well as concurrent responsibility for water resources. Therefore, there is significant potential for conflicts as well as a challenge and need for holistic and sophisticated

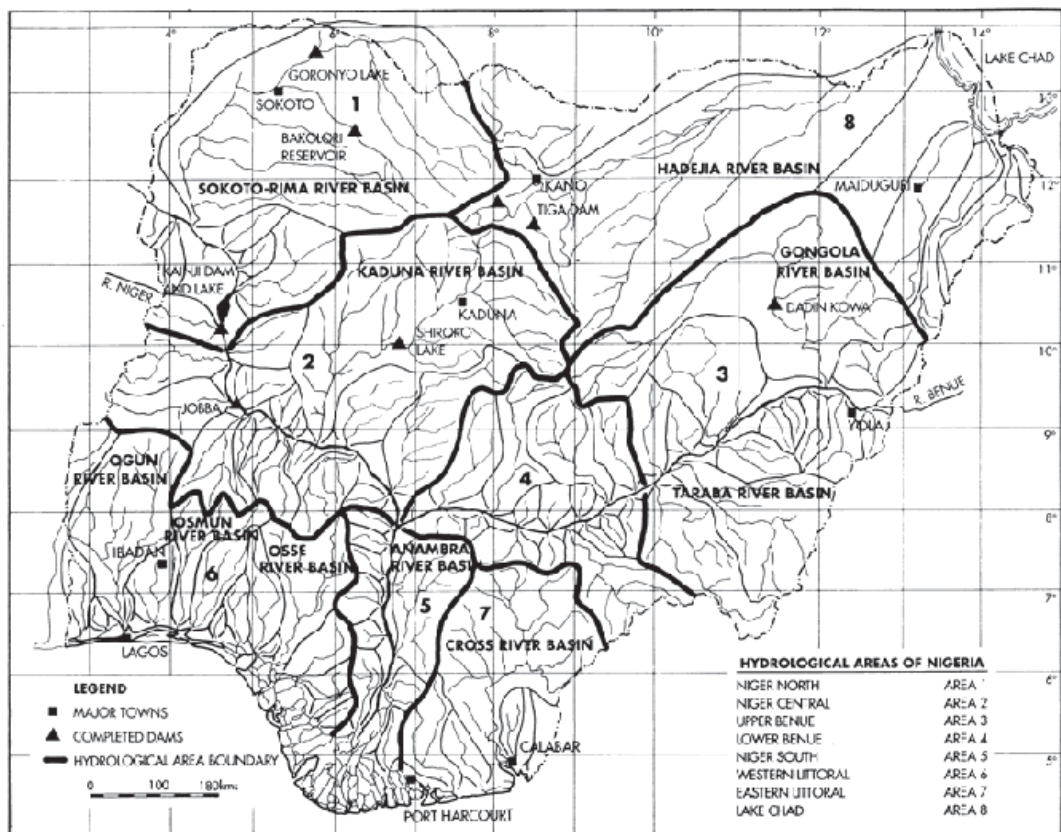


Fig. 1. Hydrological map of Nigeria showing the major inland waters.⁶

3 Id, paragraph 2.2.

4 Id.

5 Id.

6 Id.

techniques and frameworks for managing these inter-linked river basins. With over 250 linguistic groups, Nigeria is a multi-ethnic and multi-cultural entity. These communities are vibrant and committed to their political and economic autonomy, cultures and customs, including customary laws. They demand to be involved in the management of the polity and resources of the country, with a history of a civil war in part fought over access to control and share in the benefits of crude oil resources. The appreciation that water is the most important resource for economic survival and development is yet to percolate into the general consciousness going by the attitudes towards pollution and biodiversity conservation. More importantly, the consciousness of the need to preserve and rationally manage this 'God-given' and apparently inexhaustible resource is low. The political will and capacity to use water resources positively and urgently to promote all round sustainable development is yet insufficient.

2 CUSTOMARY LAW OF WATER AND WATERCOURSES

Nigeria adopted the English 'common law' system and given its multi-cultural and multi-ethnic composition and the adherence of many citizens to their ethno-specific indigenous customs, it practices legal pluralism. Customary law and Islamic law (technically categorised as 'customary law') are additional sources of law, particularly relating to chieftaincy matters and community governance, land tenure and personal laws.⁷ In *Oyewumi v Ogunesan*,⁸ the Nigerian Supreme Court defined customary law as 'the organic and the living law of the indigenous people of Nigeria, regulating their lives and transactions'.

7 Indeed, sections 260, 265, 275 and 280 of the Constitution of the Federal Republic of Nigeria, 1999 make provision for separate Sharia and Customary Courts of Appeal respectively, as an integral part of the National Judicial System.

8 [1988] S. C. 178.

2.1 Land Tenure and Water Rights

Customary land title confers rights to all products of the land, including water resources.⁹ Large bodies of water are regarded as common property. People can take water for domestic use from lakes, rivers, wells, and boreholes. Although not vested with technology to exploit deep aquifers, the ownership of land carried rights to resources in the ground on an analogous principle to the common law principle that the owner of land owns all that is in or over it.¹⁰

Ajisafe Moore¹¹ states that among the Yoruba of western Nigeria, wells and streams that run through or near the village is common property but if clearly outside its boundaries belong to the person through whose farmland it runs.¹² There is servitude on land that abuts a stream and others have a right of passage through the land to the stream or river used for drinking purpose by the community.¹³ In essence there is a right of easement to streams or rivers on land that abuts them.¹⁴ He says that the Ibodos also apportion rivers into sections and to each constituent village.¹⁵

Small water bodies within land under family or individual ownership or the improvement of a spring

9 P. Kuruk, 'Customary Water Laws and Practices: Nigeria' 5 (Rome: Food and Agriculture Organization, 2004), available at <http://www.fao.org/legal/advserv/FAOUCNcs/Nigeria.pdf>.

10 The principle is '*Quic quid plantatur solo, solo cedit*'. See the Supreme Court cases of *Okoiko v Esadalue* [1974] 3 S.C. 15 and *Otogbolu v Okeluwa* [1981] 6-8 S. C. 99, at 146. Olawoye critiques the applicability of the principle. See C.O. Olawoye, 'The question of accountability in the customary law of pledge' 22(2) *Journal of African Law* 125 - 132 (1978) and see generally, H. O. Ijaya, 'The Application of the English Common Law Maxim, Quic Quid Plantatur Solo, Solo Cedit to Customary System of Land Holding in Nigeria' *Nigerian Bar Journal* (National) 77-85 (2006).

11 E.A. Ajisafe Moore, *Laws and Customs of the Yoruba People* (Abeokuta, Nigeria: M.A. Ola Fola Bookshops, 1906), available at <http://ia700406.us.archive.org/20/items/lawscustomsofyor00moorrich/lawscustomsofyor00moorrich.pdf>.

12 *Id.*, at 16.

13 *Id.*

14 *Id.*

15 *Id.*, at 17.

or other water source, including impoundment of small pools of water, are regarded as conferring rights on the landowner or the person carrying out the improvement or impoundment from common resource water sources.¹⁶ Third parties must seek permission (which is seldom refused) of owners of land with the water resource in the more arid northern territories. Landowners allow even strangers, such as the nomadic Fulani, to use water bodies on loan for grazing and for other daily necessities but it reverts to the owner when the stranger moves on.¹⁷

2.2 Conservation Techniques

Among the Yoruba, the owner of the land is restricted from clearing his land up to 50 yards to the stream for conservation purposes so that the stream would not dry up.¹⁸ However, he is allowed to plant bamboo up to the waterbed known as *Oju Ipa*.

The Kalabari, Okrika, and Ikwerre tribes of the Niger Delta worship water spirits which have a specific pond or river designated as their holy place.¹⁹ In like manner where a shrine is a part of a watercourse it is usual to restrict ingress or use of it, either during specific seasons, or none at all. Sometimes a particular fish or water animal is regarded as a deity or divine, such as sharks among the Ogbia²⁰ of the Niger Delta and is, therefore, not

harvested.²¹ These rituals and practices served a conservation purpose. In Lake Ndakolowu use of nets is prohibited because of a legend that the local shrine abhors splashing sounds.²² The Osun River Sacred Grove of Osogbo in Yorubaland is partly responsible for the conservation of the last remnants of primary high forest in southern Nigeria.²³

2.3 Fishery Resources

No fishing rights are reserved in streams and rivers within family or individual ownership, but if flood waters completely cover a person's land, the rights over the land belong to him.²⁴ Among the Ibodos and indigenous Yoruba of Lagos State, shrimp fishing is reserved for traditional chiefs who have a right to apportion the lagoon as their property and to license others to fish therein.²⁵ In other parts of Yorubaland and the country, fishing in rivers and streams is generally unrestricted but there may be a right to tribute by the local head fisherman or traditional leader, usually by strangers and in some cases tax is levied on fishing activities and freight traffic.²⁶

In Anambra and Imo States in eastern Nigeria, floodplains are owned by adjacent communities and fishing rights are sold or leased to other communities.²⁷ Conversely, in arid Sokoto, Kano and other northern States, floodplains belong to all and fishing rights including closed seasons, fishing gear and methods are administered by the Sarkin Ruwa (Chief of Fishermen).²⁸ However, if water has been impounded in a pool by means of a dam, the maker exercises the right to allow third parties to fish for a fee or by permission.²⁹ It has been suggested that fish intensification methods such as draining of flood ponds or forming pools by impoundment of parts of water sources are meant to increase exploitation when capture methods are

16 Kuruk, note 9 above, at 5 and M. Ramazzoti, 'Customary water rights and contemporary legislation: Mapping out the interface', FAO Legal Paper Online No. 76, December 2008, at 10, available at www.fao.org/legal/prs-ol/lpo76.pdf.

17 C. Ezeomah, *Land Tenure Constraints Associated with Some Recent Experiments to Bring Formal Education to Nomadic Fulani in Nigeria* (London: Agricultural Administration Unit, Overseas Development Institute, 1985), available at <http://www.odi.org.uk/pdn/papers/20d.pdf>, quoted in B. Fagbayibo, *Nigeria: Constitutional, legislative and administrative provisions concerning indigenous Peoples*, ILO/ACHPR, (2009), at 27 and Ramazzoti, note 16 above.

18 Moore, note 11 above, at 17.

19 *Countries and their culture: Nigeria*, available at <http://www.everyculture.com/Ma-Ni/Nigeria.html>.

20 D. Omoweh, 'The Paradox of Water Crisis and Rural Poverty in the Niger Delta of Nigeria: The Case of Bayelsa State' (unpublished,) at 8, available at <http://www.mpl.ird.fr/ur044/projets/Textes/Omoweh.doc>.

21 C.f., Kuruk, note 9 above, at 6.

22 Ita, note 2 above, at Para. 5.1.

23 *Osun-Osogbo Sacred Grove*, available at <http://whc.unesco.org/uploads/nominations/1118.pdf>

24 *Ibid.*, at 17.

25 *Id.*

26 Kuruk, note 9 above, at 5.

27 *Id.*

28 *Id.*

29 *Id.*

also intensive such as fish fences that trap fishes on their way to spawn.³⁰ On the other hand, in the Anambra and Imo States floodplains, fishermen introduce organic manure into their flood ponds to accelerate growth rate of fish thus practicing conservation.³¹

2.4 Dispute Resolution

‘Water-related disputes tend to be resolved by traditional dispute-resolution processes and procedures, such as through the use of customary leaders and tribunals, mediation, arbitration, and adjudication.’³² In modern times, customary courts³³ established under statute carry out official adjudication of disputes involving customary law.³⁴ A study of conflict management between farmers, pastoralists, hunters and fishermen in the Fadama’s (floodplains) of Northern Nigeria found that:³⁵ ‘... the traditional method of settling the conflict is the most effective of all the methods.’³⁶

3

WATER LEGISLATION

The Constitution of the Federal Republic of Nigeria, 1999 empowers the Federal Government to regulate and make laws for water from sources affecting more than one State as may be declared by the National Assembly.³⁷ It is responsible for fishing and fisheries

other than in inland waters within Nigeria,³⁸ that is, sea fisheries and for maritime shipping and navigation, including on inland waterways designated by the National Assembly as international or inter-State waterways.³⁹ Articles 18 and 20 of the Concurrent Legislative List empowers the House of Assembly of a State to make law on agricultural and fisheries matters, which must mean fisheries in inland waters of a state (water sources that do not affect more than one State). It would appear that fishing in wholly internal waters is properly a residual matter to be regulated by state legislation.⁴⁰

The Water Resources Act⁴¹ vests the right to the use and control of all surface and groundwater and of all water together with the bed and banks in any watercourse affecting more than one state in the Government of the Federation.⁴² However, the Act essentially preserves existing rights, including customary rights, provided they are for domestic use, watering of livestock and personal irrigation schemes.⁴³ A proviso to section 1(1) states that the subsection shall not be deemed to infringe or to constitute a compulsory right over or interest in property. Apparently, the idea is to separate rights over water resources from other rights in property.

An alternative view is that Government has not acquired a right of property in the water but only a right of control over the exercise of that right by existing owners; in other words, the right to supervise the use and management of the resource. That this is correct appears to be borne out by sections 3 and 4(d) of the Act, which make provision for the acquisition of rights to use or take water from any watercourse and to revoke a prior right to use or take water when its exercise would be detrimental to the public interest. Furthermore, other subsections of section 4 and section 5 prescribe wide powers by the Minister of Water Resources to regulate the manner and ambit of rights of use of water and in so doing to have regard to the need to

30 Id.

31 Id.

32 *Country Profile: Nigeria*, available at <http://usaidlandtenure.net/usaidltp/products/country-profiles/nigeria>

33 There are Customary and Area Courts (in the South and North of the country respectively), which are courts of record established to handle causes and matters relating to native customs and Islamic law. Appeals lie from these courts to the Customary and Sharia Courts of Appeal for the state. See note 7 above.

34 See Ramazzoti, note 16 above, at 21.

35 S. Ajuwon, ‘Case Study: Conflict in Fadama Communities’, available at <http://www.sharedpdf.net/CASE-STUDY-ON-FADAMA-CONFLICT-ISSUES-DOC.html>.

36 Ibid, at 16.

37 Second Schedule, Part 1, Exclusive Legislative List, Item 64.

38 Item 64.

39 Item 36.

40 By inference from item 64 of the Exclusive List.

41 Chapter (Cap.) W2, L.F.N. 2004; No. 101 of 1993.

42 Section 1 (1).

43 Section 2(a) (iii).

ensure water security, environmental sanitation and protection, flood control, biodiversity protection, etc. It is incumbent on the Minister to draw up a master plan for the development, use, control, protection, management and administration of all water resources and to review them from time to time in light of changing circumstances.⁴⁴

3.1 Land Tenure Legislation

The Land Use Act⁴⁵ (LUA) is primarily a land titles law and only subsidiarily a land management law. The Governor of a state is empowered to grant a statutory right of occupancy in urban and non-urban areas. Local governments grant customary rights of occupancy in non-urban areas only for residential, agricultural, grazing and other purposes allied to agriculture. The grant by the Governor extinguishes all prior rights in the land. Deemed rights of occupancy can be revoked for overriding public purposes. Such rights can only be transferred to other persons subject to the Governor's consent.

LUA is generally devoid of provisions amenable for strategic management of land – planning, environmental, etc. However, the Act preserves rights of use in deemed rights of occupancy, including water rights. Potentially, such rights are subject to extinguishment by acquisition for overriding public purposes.

3.2 River Basins Development Legislation

The instrument for wide reaching development and management of water resources in the country is the River Basins Development Authorities (RBDA) Act.⁴⁶ There are twelve Authorities corresponding to the main water basins in the country. Their main functions are: comprehensive development of surface and underground water resources for multi-purpose use and provision of infrastructure for irrigation, flood and erosion control and watershed management and to maintain comprehensive up-to-date water resources master plan so as to foster socio-

economic development and environmental conservation.

3.3 Navigation Rights

The National Inland Waterways Authority Act⁴⁷ is meant to develop human and material resources and infrastructure and provide for rights of navigation on inland waterways in Nigeria as a means of inter-modal transportation. The Act declares as Federal navigable waterways all the major internal waters, river ports and inland waterways draining the country laterally and influent into the Atlantic sea. All lands within the right-of-way of such waterways are vested in the government of the Federation. Obstructions, sand mining and other activities are prohibited on such lands and within the Federal waterways.

Some constitutional conflict has developed in recent times as the coastal Lagos State passed its own inland waterways management law, claiming to have the constitutional power to do so and in order to develop the internal waters within the State for transportation and other uses. It also passed a sand mining law, which approves sand mining in waters clearly within Federal waterways. The issue of conflicting rights and implications for water management will be discussed later.

3.4 Fisheries Legislation

There is a Sea Fisheries Act⁴⁸ that governs sea fishing, as well as an Inland Fisheries Act⁴⁹ in view of the fact that most of Nigeria's rivers are inter-state and require Federal regulation. Some of the states have fisheries laws, which mainly regulate mesh and gear sizes, fishing methods, seasons, etc. Inland fishing is mostly artisanal and inadequately regulated by the States, owing to paucity of financial and manpower resources. Neither the Sea Fisheries Act nor the State Fisheries Laws provide or require

⁴⁴ Section 6.

⁴⁵ Cap. 202 L.F.N.1990; Cap. L5 L.F.N. 2004.

⁴⁶ Cap. R9, L.F.N. 2004.

⁴⁷ Cap N47, L.F.N., 2004.

⁴⁸ Cap. S4, L.F.N. 2004; No 71 of 1992. *See also* Nigerian Maritime Administration and Safety Agency (NIMASA) Act, 2007 (No. 17 of 2007), especially section 22(5) & (9), which gives NIMASA functions to act against ships involved in unauthorized sea fishing and pollution.

⁴⁹ Cap. I10, L.F.N. 2004.

management plans, data collection, environmental protection and stakeholder participation. They are mainly penal in nature.⁵⁰

3.5 Other Legislation

There is legislation governing provision of potable water, particularly by state water corporations, sanitation, pollution controls and environmental protection measures for rivers and water sources from domestic, industrial, mining and other activities. Other legislation include the Environmental Impact Assessment Act⁵¹ for assessing the impacts of proposed developments on the environment, fragile ecosystems and natural resources, including water resources. The Water Resources Institute Act⁵² provides for the establishment of a research and training institute on water resources.

4

WATER MANAGEMENT AND GOVERNANCE ISSUES

4.1 Interface between Customary and Statutory Law

The strategy of the Water Resources Act (WRA) in recognizing and largely preserving customary water rights for non-commercial use is pragmatic and wise having regard to Nigeria's cultural and political heterogeneity, land mass and federal structure. This not only eases the acceptance of the law as a radical approach may be resented and resisted but is also administratively practical. It is doubtful that there exists a complete record or compilation of the customary law or water rights any way. Moreover, the administrative reach of government in terms of material and human resources to take over and centralize detailed management of water rights is inadequate. It is noteworthy that even in smaller

countries such as Ghana where such an approach was adopted, holders of customary water rights largely ignored it and the administrative authority did not or is unable to implement the law.⁵³

The strategy also accords with the subsidiarity principle whereby authority should be devolved to the lowest responsibility level nearest the subject matter in point. There has been the suggestion that this principle is unsuited to the unsophisticated political, administrative and legal systems of Africa, partly because of the even more pronounced lack of capacity at the sub-national level of government. That argument may be cogent but in a federal structure and in multi-ethnic, multi-cultural environments, over-centralization is not feasible. Moreover, the management of shared natural resources as well as the environment requires multi-stakeholder participation and a sphere of self-regulation or governance by the regulated or governed. This is imperative as 'emphasis needs to be placed more on compliance and cooperation than on punishment'.⁵⁴

In a fairly well-watered country, it is also probably simple common sense to leave domestic and micro-scale commercial use of water resources outside the purview of a complex State regulated water management system. The existing reality of under-delivery of public goods such as water supply is that most Nigerians are responsible for their own domestic supply of water in the form of wells, boreholes, rain harvesting, vendors and the nearby or village stream or other sources of water. State and donor provided boreholes and rural water schemes are slowly, inefficiently (and often not well-maintained) going round villages and rural communities. Sanitary conditions are suspect and apart from lack of potable water the public health implications of this scenario are scary.

⁵⁰ Ita, note 2 above, at Paragraph 5.4.

⁵¹ Cap. E12, L.F.N. 2004.

⁵² Cap. N83 L.F.N. 2004; Cap.284 L.F.N. 1990.

⁵³ W. Laube, 'The Promise and Perils of Water Reforms: Perspectives from Northern Ghana' 42 *Afrika Spectrum* 419, at 425 (2007) and F. A. Armah, D. Oscar Yawson & A. O. Johanna, 'The Gap Between Theory and Practice of Stakeholder Participation: The Case of Management of The Korle Lagoon, Ghana' 5/1 *Law, Environment and Development Journal* 73, at 79 (2009), available at <http://www.lead-journal.org/content/09073.pdf>.

⁵⁴ E. Longe, D.O. Omole, I.K. Adewumi and A.S. Ogbiye, 'Water resources use, abuse and regulation in Nigeria' 12(2) *Journal of Sustainable Development in Africa* 35, at 43 (2010).

Yet it appears that water legislation do not provide for effective participation in water management by holders of customary rights, as indeed ordinary citizens and non-commercial users in the urban areas. The interface is that of autonomy from the statutory system for as long as their use of water is not contrary to the law and not in the way of supervening public purposes as may be determined by the regulatory authorities and rights of preemption in that circumstance. There are no legislated structures and processes for consulting and eliciting the substantive participation of customary holders of water rights and communities in water management and governance on an integrated or regular basis. This is underscored by the Report of a commissioned study on Nigerian water resources by the European Community:

...development is very much a “top down” approach with the FWRM and RBDAs failing to involve the communities who are the ostensible beneficiaries or, in at least one case, developing facilities where there are no communities to benefit from them.⁵⁵

4.2 Institutional Structure

It is a matter of concern, however, that a well-functioning coordinated national water management system is lacking. The WRA as a framework law is devoid of detailed regulations, outdated and not complemented by sufficient administrative structures, processes and institutions for its administration, largely due to lack of resources, weak database and weak law enforcement.

It would appear that the regulatory structure is too centralized in federal agencies, as borne out by the constitutional conflict between Lagos State and the Federal Government on inland navigation and sand mining. The RBDAs are also exclusively federal bodies. In a federal system and with the size and

political complexity of Nigeria, the existing institutional arrangements may well need to be adjusted. Although the Lagos State laws may eventually be ruled by the courts to entrench on federal jurisdiction, yet unless it takes things into its own hands, it is doubtful that the Federal Government would treat internal waterway transportation in the state as a national priority or mobilize the funding and material resources required for its take off. If the present arrangements must be retained in the interest of better regulating shared or inter-state resources, the institutional structure and laws should explicitly provide for and define structures, processes and procedure for co-management or cooperative federalism, either by establishing quasi-decentralized structures that co-opt State government institutions, or by devolving the implementation of common standards to State organs as delegates funded wholly or partly by Federal grants.

More worrisome is the fact that most water resources infrastructure appeared to have been built without: (a) sufficient data and environmental impact assessment, (b) sufficient intra-basin, inter-sectoral, inter-state consultation and consideration of upstream/downstream users of water, (c) any or sufficient consultation with beneficiary communities, and (d) even without the existence of any community to benefit from the assets.⁵⁶ The National Water Resources Policy succinctly captures the situation:

In most cases, stakeholders are not consulted or otherwise involved in planning, development and management of the nation's water resources. The result has been a vicious cycle of unreliable projects that provide services that do not meet consumer needs and for which the consumers are unwilling to pay.⁵⁷

These assets by and large are also insufficiently maintained and are being steadily run down.⁵⁸

⁵⁵ Commission of the European Communities, Nigeria, Support to the Federal Ministry of Water Resources: Water Resources Management and Policy, 2006, at 13, available at http://www.wsssrp.org/document/thematic_reports/Nigeria%20Water%20Resources%20Management%20Policy.pdf.

⁵⁶ Id.

⁵⁷ National Water Policy: Federal Republic of Nigeria, 2004, at 5, available at <http://www.wsssrp.org/document/Draft%20National%20Water%20Resources%20Policy%20%20July%202004.pdf>.

⁵⁸ EU Report, note 55 above.

The legislative overlaps, conflicts and lack of a holistic framework are epitomized by the following excerpt:

In its present form, [the WRA]... would be difficult to administer, because it vests all the powers on the Minister of Water Resources. Meanwhile, the River Basins that were statutorily empowered to comprehensively plan and develop the Nation's water resources are not delegated any such powers. The need for long range planning based on comprehensive and integrative environmental management, informed the water resources decree, but without any reference to Federal Environmental Protection Agency (FEPA) decree of 1988. On the other hand, in 1991, FEPA published water quality standards without reference or consultation with the Federal Department of Water Supply and Quality Control (FDWSQC) in FMWR which also had the statutory responsibility to operate National Water Quality Laboratories and to engage in water quality control. Furthermore, [the WRA]... gives the Minister of Water Resources the powers and responsibility of control, regulation and planning of development of water resources; prevention of pollution and formulation of national policies relating to the control and use of water resources for multipurpose as well as short and long-term provisions of water for various sectoral purposes.⁵⁹

The situation is akin to a tower of Babel and reflects some confusion and lack of sufficient deliberation in design and strategy, as well in administrative framework of water resources management in the country, hence the need for the quick passage of the new Water Resources Bill meant to correct these lapses.

⁵⁹ Water Audit for Komadugu Yobe Basin, viii: FMWR-IUCN-NCF KOMADUGU YOBE BASIN PROJECT 2006, at v, available at http://www.kyb-project.net/_products/200605-com_water_audit_KYB.pdf. Goldface-Irokali, note 1 above, details several conflicting provisions in water resources legislation.

4.3 Water Policy and Implementation⁶⁰

A Water Resources Master Plan initiated in 1984 was concluded in 1995.⁶¹ The entire country was divided into eight Hydrological Areas and six Regions with the aim of maintaining watershed integrity. The strategy was to enforce the Water Resources Act; consolidate the network for observing surface and groundwater conditions and related management systems; properly operate and manage existing projects and assets; and concentrate on small and medium scale projects in the implementation of the plan.

It was only in 2004 that a National Water Policy (NWP) was finalized. It sets out the following principles⁶² for water resources management:

1. All water is a national asset the use of which shall be subject to national control;
2. The management objective shall be to achieve optimum, long term, environmentally sustainable social and economic benefit for society;
3. There shall be no ownership of water but only a right for its use and abstraction fees for raw water shall be charged for its commercial use;
4. Planning and management of Nigeria's water resources shall take place within a framework which facilitates awareness and participation among all users at all levels and in such a manner as to enable all users to have equitable access;
5. The operational management of water resources and services shall be decentralized to the lowest practicable level and shall seek to harmonize human and environmental requirements;

⁶⁰ Id.

⁶¹ See generally, J. Okoye & P. Acahkpa, 'Background study on water and energy issues in Nigeria to inform the national consultative conference on dams and development', 32 - 35, (2007), available at http://www.unep.org/dams/files/nigeria_final_report_on_background_study_22_may_07.pdf.

⁶² *Ibid.*, at 9 & 10.

6. Pollution protection measures shall be based on both regulatory and market-based approaches to waste management, applying the “polluter pays” principle. Water quality management options shall include the use of economic incentives and penalties to reduce pollution.

Clearly, without a comprehensive policy and adequate institutions and infrastructure activities in the sector prior to 2004 management of water resources and implementation of relevant laws was largely unplanned, chaotic and sub-optimal in outcome. Indeed development activities were often mistaken for management measures.⁶³ Also lacking was adequate data for planning and management purposes.⁶⁴

The National Water Supply and Sanitation Policy of 2000 is complementary to the NWP. The central objective of that policy is that: ‘... [there] shall be the provision of sufficient potable water and adequate sanitation to all Nigerians in an affordable and sustainable way through participatory investment by the three tiers of government, the private sector and the beneficiary.’⁶⁵ There shall be adequate supply of good quality, affordable water and sanitation services as a basic human need.⁶⁶ Water supply and wastewater services (where feasible) shall be privatized with adequate protection for the poor.⁶⁷ Key strategies shall include: metering of all water supply schemes; recovery of economic rates with welfare service for the poor; protection of traditional water supply sources and promotion of traditional water quality practices; rural communities shall take full ownership of water supply facilities provided by the Government; private sector participation in the water supply industry; and water shall be managed at the lowest appropriate level.

The Water Resources Bill meant to support the implementation of the NWP of 2004 was submitted to the National Assembly in 2005 but is yet to be passed into law; therefore, the situation of haphazard and inadequate implementation of policy has

continued. At the state level complementary laws, policies and action plans are either non-existent or are just being developed.⁶⁸ Water remains almost exclusively a social commodity in the states and local governments contrary to the policy.⁶⁹ In a sense, therefore, the regulatory framework remains inchoate. Low level of funding, poor technical and managerial capability of water resources ministries, departments and agencies (MDAs), poor service delivery orientation and poor data collection and monitoring remain a problem at all levels of government.⁷⁰ Adequate facilities for provision of potable water and sanitation remain a dream and access to water in urban and rural communities, pollution control and sanitation is relatively low.⁷¹ A lot is being done in the roll out and refurbishment of water supply schemes, particularly through boreholes and mini water schemes in the rural areas, but the country is big, needs are huge and notorious issues of poor governance and poor maintenance culture constrain optimal delivery.⁷² Unreliable

68 See, for example, Ekiti State Government Water Supply and Sanitation Policy: First proposal, March 2012, available at <http://www.slideshare.net/EkitiState/ekiti-wss-draft-policy-4>.

69 See Water Sanitation in Nigeria: A Briefing on National Policy Water and Sanitation in NEEDS and National Development Plan (NDP) (2007), at 9, available at http://www.wateraid.org/documents/plugin_documents/water_and_sanitation_in_nigeria_a_briefing_on_national_policy.pdf and D. Odigie & B. Fajemirokun, ‘Water Justice In Nigeria: Crisis Or Challenge’ (unpublished paper), Paper presented at the International Workshop On Water Poverty And Social Crisis, Agadir, Morocco, 12-15 December 2005.

70 See generally, Federal Republic of Nigeria Water Supply & Sanitation Interim Strategy Note, November 2000, at 6 – 11, available at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/wss_1100.pdf, H. O. Nwankwoala, ‘Improving Water Resources Management In Nigeria: Policy Imperatives And Emerging Realities’ 10(1) *Scientia Africana* 46-57, at 48 & 50 (2011) and B. T. Omonona & A. J. Ajiboye, ‘Linking Poverty Incidence to Water Resources Use: Policy Implications and Remedies Using Nigeria as Case Study’ 2(4) *Journal of Economics and Sustainable Development* 154-162, at 158 (2011).

71 The situation in rural communities is worse. See Omonona & Ajiboye, note 70 above, at 157 – 158.

72 There has been a multiplicity of overlapping projects by various national agencies. See Interim Strategy Note, note 70 above, at 10. According to reports, only 60% of the population has access to safe drinking water, and in rural areas less than 50% of the households have access to potable water. See National Millennium Development Goals Report, 2005.

63 EU Report, note 55 above, 13.

64 *Ibid.*, at 14.

65 Paragraph 19.

66 *Id.*

67 *Id.*

electricity, low tariffs and absence of metering constitute a problem for water supply efforts and management.⁷³

4.4 Governance Model: Responsibilities and Participation

There are some apparent overlapping constitutional responsibilities between the three tiers of government and between state governments *inter se*, some of which have not been optimally managed. For example, navigation on internal waters has occasioned conflict leading to court action (still pending) between Lagos State and the Federal government when Lagos State enacted legislation to develop water transportation. Another area relates to the regulation of sand mining in water bodies, ostensibly partly for environmental management purposes in the state, in apparent conflict with federal legislation on internal waterways and mining. Also, there are cases where state governments built dams and other assets without any consultation or coordination with other states that had riparian rights to the water sources or in consonance with the principle of preserving the integrity of the basin by managing it as a region rather than as local sub-units. Underground water resources are also supposedly within the purview of Federal regulation but there is no adequate framework for their inventory and management or coordination of the activities of different water resources organs of the state governments. In the area of potable water supply, responsibility for micro-water projects at local government level and for end-user responsibility to pay reasonable price based on a Public-Private Sector Partnership (PPP) model and efficient use is emphasized policy wise, albeit slow to translate into action on ground.

The suspicion really is that the legislative allocation of responsibilities is probably skewed impractically or politically, and is a hangover of the highly centralized model of governance that was a legacy of about three decades of incursion of the military into Nigerian politics and the centralizing features of a Federal constitution that was meant to constrain centrifugal tendencies. There is need to rethink the

management of natural resources, including water as a national (not local or regional) asset to be managed holistically but not necessarily in a quasi-unitary fashion. The sharing of management responsibilities and benefits need to be more equitable and empowering to the units and citizens.⁷⁴ Emphasis should be placed on good governance by all tiers and not just on benefit sharing or mining activities. Although there exists a National Water Council comprising of all the states and federal government as the coordinating organ for policy making and administration, which operates more on moral-suasion, there is need for a more structured and workable structure and mechanisms for operational and strategic co-management, in other words a 'multi-sectoral and integrated approach'.⁷⁵

One key deficit appears to be the lack of institutional capacity and resources to adequately undertake the task of water management, with the state government bodies being worse off. The lack of professionalism and funding is, therefore, the major culprit for the problems identified with execution of water resources strategy:

...major barriers in the sector are chronic problems with power supply, poorly maintained infrastructure, outdated information systems, weaknesses within state water authorities, and a regulatory framework that does not encourage the public-private partnerships believed necessary for investment in the sector.⁷⁶

The objective of the National Water Policy is to facilitate effective multi-stakeholder participation and to decentralize operational management to the lowest practicable level. This is echoed in the Water and Sanitation Policy. Necessarily, therefore, the old structure of responsibilities and benefit sharing has to be revised as suggested above to bring it in line with those governance objectives. The other element

⁷³ See, Omonona & Ajiboye, note 70 above, at 158.

⁷⁴ Goldface-Irokalibe, note 1 above, at 18 – 19.

⁷⁵ C.f., A. Gbadegesin & F. Olorunfemi, 'Changing trends in water policy formulation in Nigeria: Implications for sustainable water supply provision and management' 11(4) *Journal of Sustainable Development in Africa* 266-285 (2009).

⁷⁶ *Country Profile: Nigeria*, note 32 above.

is that of citizen, community and private sector participation in potable water supply and the deregulation of water supply, albeit with important roles still for the three tiers of Government in providing water supply assets to semi-urban and rural communities. The general principle is that those communities will take charge of the management of the assets. That principle is also enshrined in the Water Resources Policy.⁷⁷

Saliently, the NWP appears to have taken cognizance of the shortcomings of the current arrangements and envisions the future direction and promises:

... a new process of consultation ...in support of the development of a new National Water Law and regulations for its implementation. Participation will include communities through water users, academic institutions, scientific councils, and Government at national, state, and local levels.

[The new Law] will take into account the different physical, social and economic circumstances that exist in different areas of the country. It will ... require a new structure for the management of the nation's water resources... (and) have significant implications for the allocation of water and the recognition of particular rights and uses.⁷⁸

The NWP reflects the new thinking in water resources management that emphasizes the principle of public and private participation in the efficient management and development of water.⁷⁹

There is useful academic debate on what constitutes and how to engender true participation. It suggests that inclusive meetings without an ability to negotiate and bargain fairly on a footing of relative equality will lead to a farce of participation.⁸⁰

⁷⁷ Paragraph 4.3.2.

⁷⁸ Paragraphs 18.1 & 18.2.

⁷⁹ A. Gbadegesin & F. Olorunfemi, note 75 above, at 267.

⁸⁰ See, for example, B. Sithole, 'Participation and stakeholder dynamics in the water reform process in Zimbabwe: The case of the Mazoe Pilot Catchment Board' 5(3) *African Studies Quarterly* 19 – 40 (Fall 2001).

Insufficient recognition of the status of and inapt integration of customary law and traditional governance systems will also sub-optimize attempts to engender meaningful local participation and environmental governance that is capable of realizing sustainable development, as illustrated by the failure of community participation models, particularly in Africa.⁸¹

However, it appears that the real issue is that of lack of genuine participative democracy *ab initio*. The policies and programmes flowing from the Millennium Summit (2000), the 3rd World Water Forum in Tokyo (2003), the Africa Ministerial Council on Water, and the programmes and actions articulated under the New Partnership for African Development (NEPAD) framework and other well-intentioned attempts to jump-start sustainable development are probably, therefore, fundamentally flawed as themselves being top-down approaches attempting to thrive in a strange and hostile environment of 'authoritarian' democracy. The experience of Nigeria is perhaps illustrative and justifies this argument.

It is doubtful that the level of consultation and participation leading to the draft Water Resources Bill lying before the National Assembly since 2005 met the parameters regarding stakeholder and community participation set out in the NWP.⁸² If it did, all sections of the polity, the citizenry and the political class, would have been mobilized to do the right thing urgently. Law reform is good and good implementation better; however, until awareness of the need to treat water as a scarce resource essential for national development and in a manner that is ecologically sound and beneficial to future generations is truly imbibed by the average

⁸¹ J. Mohamed-Katerere, 'Participatory natural resource management in the communal lands of Zimbabwe: What role for customary law?' 5(3) *African Studies Quarterly* 115 -138 (Fall 2001).

⁸² Okoye & Achakpa, note 61 above, at 1, stated that: 'The bill was however submitted without input from dam-affected communities and Non-Governmental Organizations (NGOs).' See also, O. Eneh, 'Managing Nigeria's environment: The unresolved issues' 4 (3) *Journal of Environmental Science and Technology* 250, at 261 (2011).

citizen, haste with policy reform and other consequential processes may amount to 'putting the cart before the horse'. The desultory manner in which reform of water resources law and structures is being undertaken belies the prescient analysis contained in the closing paragraphs of the NWP:

The new approach to water management outlined in this Policy is crucial for the long-term economic development of Nigeria. It considers water as an instrument of social justice, of economic development and of peace. It will ensure growth without compromising the requirements of the environment and future generations.⁸³

The situation suggests that the level of consultation and participation in the policy review was, in spite of best efforts, inadequate. This is underscored by the following agitated comment in a newspaper article:

Ten years with the emergence of the controversial (sic) Fourth Republic, Nigerian (sic) is yet to have water policy that could guide and ensure the sustainable development and provide a solid foundation for a prosperous nation. Experts have attributed the current failure of government programmers in food security, provision of access to water and sanitation, Power generation and protection of ecosystem to the absence of a National water Policy. The Federal Government has adopted a decentralised top-down approach that rendered many stakeholders including states, NGOs and CSO too insignificant to determine the do and dones (sic) in the water business in the country.⁸⁴

Even Lagos State, generally applauded as being dynamic in the provision of public goods, was criticized by a NGO, the Pan African Vision for

Environment (PAVE), for not involving the grassroots in its proposed water sector reform.⁸⁵

This 'top-down' approach identified in the NWP remains the bane of governance in developing countries with nascent democracies, especially where representation and elective democracy is yet to be institutionalized. The consequent lack of legitimacy of government, poor governance, and lack of a minimum level of public service and goods for the generality of citizens cannot serve to elicit adequate stakeholder participation in sustainable resources policy development and management which are predicated on the willing participation of each citizen in the operational process of sustainable governance of natural resources and environmental conservation. Without participative governance or democracy or ingrained cultural norms it will be difficult to implement sustainable water resources management.⁸⁶ With recent elections in the country installing popular mandates in executive and legislative offices there is hope that the right environment for genuine and effective stakeholder participation that is imperative for sustainable water resources governance and management will be developed apace.

5

ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT

5.1 National Environmental Policy⁸⁷

The goal of the National Policy on the Environment is to achieve sustainable development in Nigeria, through the following policy initiatives:

⁸³ Paragraph 18.2.

⁸⁴ A. Abdul, 'A nation without a water policy', *Leadership Newspapers*, 5 January 2010, available at http://www.leadershipeditors.com/ns/index.php?option=com_content&view=article&id=10467:nation-without-water-policy&catid=34:features&Itemid=152.

⁸⁵ See 'Nigeria: Bill on water bill underway', available at <http://www.source.irc.nl/page/24202>

⁸⁶ Gbadegehin & Olorunfemi, note 75 above.

⁸⁷ National Environmental Policy, at 2, available at <http://www.nesrea.org/images/National%20Policy%20on%20Environment.pdf>.

- a. preventive activities directed at the social, economic and political origins of the environmental problems;
- b. abatement, remedial and restorative activities directed at the specific problems identified, and in particular:
 - problems arising from industrial production processes;
 - problems caused by excessive pressure of the population on the land and other resources; and
 - problems due to rapid growth of urban centres;
- c. design and application of broad strategies for sustainable environmental protection and management at systemic or sub-systemic levels;
- d. enactment of necessary legal instruments designed to strengthen the activities and strategies recommended by [the National] Policy ;
- e. establishment/emplacement of management organs, institutions and structures designed to achieve the policy objectives.

The following principles are contained in the National Environmental Policy:

- precautionary principle;
- Pollution Prevention Pays Principle (3p+);
- polluter pays principle (PPP);
- user pays principle (UPP);
- principle of intergenerational equity;
- principle of intra-generational equity; and
- subsidiary principle.

5.2 Pollution Control

It is an offence to discharge any hazardous substance into the air or upon land and the waters of Nigeria without permission or authorization.⁸⁸ Section 2 of the Harmful Waste (Special Criminal Provisions) Act⁸⁹ prohibits the carrying, depositing, dumping, transporting, importing, sale, offer for sale, purchase or dealing in any harmful waste.

The National Environmental (Sanitation and Wastes Control) Regulations, 2009, the National Environmental (Pollution Abatement in Chemicals, Pharmaceuticals, Soaps and Detergent Manufacturing Industries) Regulations, 2009, the National Environmental (Pollution Abatement in Mining and Processing of Coal, Ores and Industrial Minerals) Regulations, 2009, the National Environmental (Pollution Abatement in Food, Beverages and Tobacco Sector) Regulations, 2009, and the National Environmental (Pollution Abatement in Textiles, Wearing Apparel, Leather and Footwear Industry) Regulations, 2009 also prescribe measures to prevent indiscriminate effluent discharge, waste disposal, etc.⁹⁰ Generally, these regulations set limitations and guidelines for the discharge of polluting substances into the environment, prohibit any such discharge without designated permits, require mitigating facilities (such as waste treatment plants, surface impoundments), and monitoring and self-reporting of discharge of pollutants, including periodic audits by accredited environmental experts.

The Criminal Code (which is identical at federal and state level) creates the offences of causing a public nuisance (section 183, Penal Code); and corrupting or fouling the water of any spring, stream, well, reservoir or place (section 245, Criminal Code; section 191, Penal Code). Environmental sanitation laws of the State government and local government

⁸⁸ National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, No. 25 of 2007. NESREA has no jurisdiction over oil and gas related pollution or environmental degradation.

⁸⁹ Cap. H1, L.F.N. 2004; Cap. 165, L.F. N. 1990.

⁹⁰ See Federal Republic of Nigeria, Abuja, Official Gazette, Vol. 96, Nos. 58-68, 2-20 October 2009.

also require persons generating liquid waste to provide a holding tank and waste treatment facilities; and prohibit discharge of sewage, effluent, oil and grease or liquid waste into any drain or drainage systems, road gorges and water courses. They also prohibit the depositing of obnoxious, toxic or poisonous waste in a waste receptacle, or burying them in the ground.⁹¹

Should there be a discharge of polluting substances, the polluter is obligated to bear the cost of removal of the discharge, retribute and restore the environment to its pre-pollution state, as well as compensate any injured third parties apart from any other legal liabilities applicable under law. The Minister of the Environment is empowered to prescribe specific removal methods and a financial responsibility level for polluters.⁹² NESREA shall cooperate with other agencies for the removal of pollutants excluding oil and gas related spills and shall enforce that application of the best clean technology and management practices currently available.⁹³

The National Oil Spill Detection and Response Agency (NOSDRA)⁹⁴ is responsible for coordinating and implementing emergency response for oil spills.⁹⁵

5.3 Situation Report

Pollution of water sources by urban domestic and industrial waste is a major problem.⁹⁶ By far the heavier impact is that of industry, which appears to lack an adequate sense of responsibility for environmental protection and public health.⁹⁷

Public infrastructural deficits, such as inadequate or non-existent landfills, sewage facilities, effluent treatment plants, effective waste disposal, etc., are legion yet industries tend to discharge polluted effluent without adhering to standards and regulations.⁹⁸ The major polluters are 'petroleum, mining (for gold, tin and coal) wood and pulp, pharmaceuticals, textiles, plastics, iron and steel, brewing, distillery fermentation, paint and food.'⁹⁹ It is aptly stated that:

...industrial pollution was regarded by FEPA as a priority environmental problem and hence the first ever and only "National Guidelines and Standards for Environmental Pollution Control" was more of an industrial pollution control guidelines and standards with few notes as guidelines for surface impoundments, land treatments, waste piles, landfills, incineration and hazardous/toxic wastes. Moreover, even the available industrial pollution control guidelines and standards are not sound enough and far from been enforced in the country as it were presently.¹⁰⁰

In Lagos State, which houses most of the nation's industries, pollution abatement consists mostly in revenue raising pollution levy.¹⁰¹

Petroleum mining pollution is the heaviest culprit¹⁰² and the Niger Delta the worst polluted in Nigeria¹⁰³. The following summation of the environmental conditions of pollution of water sources from oil

91 Under Section 25(9) of the Environmental Pollution Control Law of Lagos State, it shall not be a defense for an owner of land to plead ignorance in respect of any waste buried or dumped on his land.

92 Section 28.

93 Section 29.

94 Established by Act. No. 15 of 2006.

95 See generally, O. Fagboun, *The Law of Oil Pollution and Environmental Restoration - A Comparative Review* (Lagos: Odade Publishers, 2010).

96 See generally, J. Adelegan, 'The history of environmental policy and pollution of water sources in Nigeria (1960-2004): The way forward', at 3, available at http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/adelegan_f.pdf.

97 *Ibid*, at 4.

98 *Id*.

99 L. Anukam, 'Case Study iv: Nigeria', in R. Helmer & I. Hespanhol (eds), *Water Pollution Control - A Guide to the Use of Water Quality Management Principles*, United Nations Environment Programme, the Water Supply & Sanitation Collaborative Council and the World Health Organization, 1997, at 4, available at http://www.who.int/water_sanitation_health/resourcesquality/wppcasestudy4.pdf.

100 Adelegan, note 96 above.

101 *Id*.

102 Anukam, note 99 above.

103 P. Levy, *Nigeria* (New York, Marshall Cavendish, 2nd ed. 2004), at 48 - 49, Amnesty International, *Nigeria: Petroleum Pollution and Poverty in the Niger Delta* (Amnesty International Publication, 2009), at 14 and Eneh, note 82 above, at 262.

exploration activity in the Niger Delta is also instructive:

Environmental pollution from the oil industry has had far-reaching effects on the organization of peasant life and production. In addition to the effects of spills on mangroves...spills of crude, dumping of by-products from exploration, exploitation and refining operations (often in freshwater environments) and, overflowing of oily wastes in burrow pits during heavy rains has had deleterious effects on bodies of surface water used for drinking, fishing and other household and industrial purposes. The percolation of industrial wastes (drilling and production fluids, buried solid wastes, as well as spills of crude) into the soil contaminates ground water aquifers.¹⁰⁴

In the rural areas where most domestic users depend on streams, rivers and shallow wells, the chief sources of pollution are organic run-off from agriculture by upstream users, heavy volume of soil particles and sedimentation by erosion of soil into streams.¹⁰⁵

5.4 Biodiversity Conservation

The mangrove swamps of the Niger Delta contain the third largest mangrove forest,¹⁰⁶ and one of the ten most important wetland and coastal marine ecosystems¹⁰⁷ in the world but are being degraded by severe pollution from oil spills. In coastal cities, coastal ecosystems and wetlands are rapidly disappearing due to dredging, sand mining, industrial

and residential development and are often contaminated by agricultural, industrial and domestic waste.¹⁰⁸

In most parts of the country, the forest and vegetation cover that protect many rivers and watercourses are being cut down for logging, agricultural and housing development. Indiscriminate construction of dams and lack of integrated basin management leads to biodiversity loss. For example, in the Komadougou-Yobe basin, 'competitive unilateral development and operation of the two River Basin Development Authorities (RBDA's)'¹⁰⁹ has resulted in the starving of upstream or downstream watercourses and tributaries, leading to major vegetation changes, including the shrinkage of Lake Chad, rapid desertification and conflicts between different users.¹¹⁰

5.5 Human Rights and Water Justice

Access to sufficient, safe water resources is imperative, not only for daily physiological survival but also for income generation. The Constitution provides that the 'state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.'¹¹¹ This provision is non-justiciable and there is no fundamental right to water or explicit economic rights in the Constitution. There is, however, a right to life and the Kerala High Court in India did derive a right to 'sweet water' from the right to life as a basic element which sustains life.¹¹² The Supreme Court of Israel also ruled that 'reasonable access to

104 Kaniya S.A. Ebeku, 'Oil and the Niger Delta People: The injustice of the Land Use Act' 9 *CEPLMP Journal* (18 November 2001), available at <http://www.dundee.ac.uk/cepmlp/journal/html/vol19/article9-14.html>.

105 Anukam, note 88 above, at 3-4.

106 Nigeria-Planet.com, 'Oil and Nigeria 2', available at <http://www.nigeria-planet.com/Oil-And-Nigeria2.html>.

107 N. Tago, 'Nigeria: Oil Pollution, Human Rights Violations Still Rampant in Niger Delta', *News from Africa*, 19 November 2010, available at http://www.newsfromafrica.org/newsfromafrica/articles/art_12120.html.

108 N. Jamabo & A. Ibim, 'Utilization and protection of the brackish water ecosystem of the Niger Delta for sustainable fisheries development' 2(2) *World Journal of Fish and Marine Sciences* 140, at 141 (2010), available at [http://www.idosi.org/wjfm/wjfm2\(2\)10/12.pdf](http://www.idosi.org/wjfm/wjfm2(2)10/12.pdf).

109 Report of the Water Audit for Komadugu Yobe Basin, note 59 above.

110 N. Alfa, C. Adeofun & O. Ologunorisa, 'Assessment of changes in Aerial Extent of Lake Chad using Satellite Remote Sensing' 12(1) *Journal of Applied Science and Environmental Management* 101, at 105 (2008), available at <http://www.bioline.org.br/pdf?ja08015>.

111 Section 20.

112 *Attakoya Thangal v Union of India*, (1990) KLT 580.

water sources at a minimal level' was fundamental to the right to dignity.¹¹³

The African Charter on Human and Peoples Rights Act¹¹⁴ does not expressly delimit water rights. However, it provides for a right to health, a right to economic development and development and to a general satisfactory environment.¹¹⁵ In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*,¹¹⁶ the African Commission on Human and Peoples Rights reiterated that the Charter was justiciable before Nigerian courts and obligates government to 'prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'¹¹⁷ In essence peoples and private individuals can legitimately approach the courts to enforce their rights to a balanced environment and development. The pith of that ruling is that the right of peoples and the individual to social, economic and cultural rights that will facilitate their development should be promoted. It is obvious, therefore, that the right to a safe environment could very easily be stretched to a right to sufficient or minimal access to water resources.¹¹⁸

As we have seen, the policy and strategy for water resources management adopts the principles of

utilization of market mechanisms and economic instruments to promote efficiency, albeit recognizing the need for adequate protection of the poor. That is the new but controversial orthodoxy, broadly in line with the Dublin Principles, 1992. Does this conflict with the jurisprudence of water rights? Civil society groups and pro-poor scholars have advanced trenchant views on the inequity of privatization of water supply.¹¹⁹ Vandana Shiva argues that:¹²⁰

Privatization arguments have been based largely on the poor performance of public-sector utilities... The fact that poor public-sector performance is most often due to the utilities' lack of accountability is hardly taken into account. As it turns out, there is no indication that private companies are any more accountable. In fact, the opposite tends to be the case. While privatization does not have a track record of success, it does have a track record of risks and failures. Private companies most often violate operation standards and engage in price gouging without much consequence.

It is a fact that privatization has been a disaster and been reversed in several places.¹²¹ However, on a critical study of those cases it may well be that predatory capitalism and cronyism and inadequate regulation¹²² are major causes. Of course, there has also been a shift in global sentiments on the need to

113 T. Zarchin, 'Court rules water a basic human right', *Haaretz.com*, Monday, 6 June 2011, available at <http://www.haaretz.com/print-edition/news/court-rules-water-a-basic-human-right-1.366194>.

114 Cap. 10 Laws of the Federation of Nigeria, 1990.

115 Article 16, 22 and 24 respectively.

116 Fifteenth Annual activity report of the African Commission on Human and Peoples Rights 2001 – 2002. Communication 155/96, Decision of the African Commission on Human and Peoples' Rights, 30th Ordinary Session, held in Banjul, Gambia, 13-27 October 2001 (interpreting this right under the African Charter), available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>.

117 Id., at 939.

118 The Commission has ruled that the Nigerian State must provide free education to every Nigerian child. Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP), Suit No. ECW/CCJ/APP/12/7 delivered on 19 November, 2010. See also 'Ecowas Court orders Nigeria to provide free education for every child' *Vanguard Newspapers Online*, 30 November 2010, available at <http://allafrica.com/stories/201012010612.html>.

119 C.f., Odigie & Fajemirokun, note 69 above, at 6-7.

120 Excerpt from the book, *Water Wars* (2002), available at http://www.thirdworldtraveler.com/Vandana_Shiva/Water_Wars_VShiva.html.

121 See M. Barlow, 'Water as Commodity—The Wrong Prescription' 7(3) *Institute for Food and Development Policy*, Background (2001), available at <http://www.foodfirst.org/en/node/57> and M. Pigeon, D. A. McDonald, O. Hoedeman and S. Kishimoto (eds) *Remunicipalisation: Putting Water Back into Public Hands* (Transnational Institute, Amsterdam, 2012), available at http://www.tni.org/sites/www.tni.org/files/download/remunicipalisation_book_final_for_web.pdf.

122 C.f., I. Eguavoen and D. Spalthoff, 'Getting Access Right: Human rights and household water rights in Ghana', Paper delivered at the 13th World Water Congress, Montpellier, 1 - 4 September, 2008, at 10, available at http://www.iwra.org/congress/2008/resource/authors/abs271_article.pdf.

avoid a wholly profit-driven approach and human rights considerations in order to help the poor. However, efficiency and productivity of supply are imperative, and may not be optimally achieved by doctrinaire approaches focusing on subsidisation and public or private monopolies. Some experimentation is warranted given the need to engender better governance models. State owned enterprises have been a notorious and irredeemable failure in Nigeria so far and no good purpose will be served romantically wishing that they would suddenly become accountable and effective in current circumstances in line with the public choice theory. Second, the need to ensure individual responsibility to avoid waste and to ensure sustainable delivery of water resources suggests that the way forward is to allow Public-Private Sector Partnerships, competition and to reflect appropriate prices.¹²³ Pro-poor access to water will have to be made available, however. It is as much an imperative for protecting the right to water resources by ensuring sustainable delivery and management of water resources, as it is to make adequate provision for protection of the poor through targeted schemes. Besides, the right to participate in sustainable resources management also includes a corresponding duty by individuals to bear appropriate responsibility and direct cost for the overall coordinated effort by all.

5.6 Sovereignty over Natural Resources and the Right to Development

The right to development of communities and individuals with respect to natural resources has been touched upon in the *SERAC case*. To what extent can communities claim an exclusive right to manage natural resources lying within their territory or a sovereign right over those resources without making a bid for self-determination? This matter was indirectly pronounced upon in *Attorney General of the Federation v Attorney General of Abia State &*

others.¹²⁴ In that case eight oil producing littoral states argued that their territories continued beyond the landward side of the sea, extended to the low water mark on to the territorial water and as far as to the continental shelf. Therefore, they argued that they were entitled to 13 per cent (as prescribed by section 162(2) of the Constitution) of the revenues derivable from offshore oil production. The Supreme Court held that the seaward boundary of the territories of each of the littoral states ends at the low water mark. Natural resources located within the continental shelf are, therefore, property of the Nigerian State and revenues therefrom accrue to the Federation Account and do not derive from the territory of the littoral states.

International waters could only fall within the purview of the jurisdiction and power of sovereign nations under international law; consequently constituent units could not claim a right to property in resources of the sea under international law.¹²⁵ They could only participate in the benefits of the resources of the sea on a politico-legal basis as arranged under domestic laws.

The more important point that the case raised was as to whether the oil producing states received a fair share of the revenues derived from resources, especially non-renewable resources taken from their territories. In the interest of intra- and inter-generational equity, that is a cogent matter for consideration. There is no doubt that the issue of the Niger Delta and the struggle for more equitable participation in power and benefit sharing is a notorious one. The political arrangements that have seen an indigene of the Niger Delta assume the position of the President of the Federal Republic of Nigeria in 2010 are a testimony to the fact that the concept of zoning, whereby the different constituent units are divided into six broad political zones for the purposes of power sharing and rotation of high political office, may be an implicit step to a constitutional convention meant to elicit a sense of belonging and equity in political participation and sharing of economic and other benefits of the Nigerian State. Zoning and rotation are essentially an informal political party arrangement.

¹²³ See generally, K. O. Nyangena, 'Privatization of Water and Sanitation Services in Kenya: Challenges and Prospects' XXXIII(4) *Africa Development* 117-131 (2008). Nyangena acknowledges the challenges and argues that privatization is likely to improve efficiency in water and sanitation services only if a collaborative effort is embraced in tackling public sector reform in Kenya.

¹²⁴ (2002) 6 NWLR (Pt. 764) 542.

¹²⁵ Id.

Nevertheless, zoning and power sharing cannot fully address the issue of intra- and inter-generational equity in the use and sharing of benefits of water and natural resources in a polity as it is a symptom of a deeper malaise of lack of equitable political representation, genuine participation and good governance – genuine democracy and rule of law. Socio-economic segmentation is a precursor of political marginalization of weaker segments. With the high incidence of poverty in the country, power sharing without rapid economic development meant to lift majority of the citizens out of the trap of poverty will still sub-optimize attempts to engender stakeholder participation and sustainable development.

5.7 Environmental Management

The environmental policies are in line with modern orthodoxy. Environmental laws are also fairly modern. However, the overarching features of environmental management include overlapping responsibilities and lack of cross-sectoral and integrated management of ecosystems, inadequate public participation and capture by regulated entities. Implementation failure also occurs from inadequate funding and resourcing of relevant agencies, corruption and inadequate enforcement of laws.¹²⁶ The various levels of Governments are often the worst culprit, as they routinely fail to observe the very same laws they enact.¹²⁷

There is some debate about the practicality and effectiveness of decentralization and subsidiarity as a workable process of environmental management in developing countries, not least because of the weakness of unit governments to manage environmental responsibilities.¹²⁸ Professor Faure's concern is more about the centralization of standards

rather than decentralized implementation of harmonized standards.¹²⁹ The author would agree with his reservations but note that he nowhere considers the possibility of the latter, which is what the water and sanitation policy advocates. The Nigerian federal allocation of constitutional responsibility dictates that approach, although there is considerable overhang of a more centralized framework bequeathed by the past military regimes based on centralization of the military command structure. The national water policies recognize that stakeholder participation and differentiated responsibility for sustainable resources management require a decentralized approach. For example, the National Water Supply and Sanitation Policy states that:

...the sustainability of rural water and sanitation investments is dependent on the degree to which communities are involved in the decision making, funding and operation of the facilities... [this] prompted the Federal Government to commence a decentralization programme... intended to end dependency on the central government and "top down" planning...by giving the country's 774 LGAs primary responsibility for planning and administration of their own development programmes, increasing their budget allocations, and requiring communities to take the lead in decision making and implementing development projects based on their particular needs.¹³⁰

The strictures passed by the anti-centralizing school are partly valid as very little actual activity and few meaningful water projects have been undertaken by Local Governments because of their institutional weaknesses, inadequate revenue allocation and corruption.

Another problem has been the design strategy of Nigerian water resources law. An incentive based management approach may be preferable as eloquently argued by Goldface-Irokalibe.¹³¹ A representative view on the other side is that of

126 C.f., Goldface-Irokalibe, note 1 above, Gbadegesin & Olorunfemi, note 75 above, at 281 and E. Ebiare & L. Zejiao, 'Water quality monitoring in Nigeria: case study of Nigeria's industrial cities' 6(4) *Journal of American Science* 22, at 26 & 27 (2010).

127 Eneh, note 82 above, at 258.

128 See, for example, M. Faure, 'Balancing of interests: Some preliminary (economic) remarks', Paper delivered at a Conference on The Balancing of Interests in Environmental Law in Africa, Faculty of Law, University of Pretoria, South Africa, 8 – 9 December 2010, at 24 – 27.

129 Id.

130 Paragraph 12 (a) & (b).

131 Id, at 23.

Professor Faure who compared quality standards based (management) approach to the rule based approach, and concluded that in light of poor administrative structures and capacity, the latter was a more practicable strategy for environmental law in developing countries.¹³² One can hardly argue with him based on the facts on the ground, as most commentators agree that the environmental laws are poorly enforced because of conflicting legal provisions,¹³³ inadequate organizational capacity, poor funding and resourcing, corruption and regulatory capture. The credible answer of course is to build a better track record of public governance and technocratic capacity by implementing on-going reforms. The corporate sector remains the worst environmental offender. This suggests that a particular emphasis must be to reach out to businesses to encourage better corporate governance and internalization of sustainability management in their organizations and industry groups.

6 RIPARIAN LAW

In *Amachree v Kalio*,¹³⁴ the plaintiffs sought to restrain the defendants from fishing in the New Calabar River, a tidal river and the main river way leading to other towns and to the Atlantic Ocean from Calabar. They argued that as occupants of the land abutting the small tributaries of the New Calabar River they had exclusive fishing rights and were entitled to admit the defendants to fish in the waters under customary law. There was evidence that the defendants paid tribute to the plaintiffs for fishing in the waters, although the Court opined that it was not clear whether that related to the creeks or to the River itself, but it felt that they had not made a strong case to prove that they were the first occupiers and users of the New Calabar River. The trial court upheld the arguments. On appeal, the Full

Court held that by the common law of England and natural law all persons were entitled to use tidal and navigable rivers for ordinary purposes, including fishing and that the customary law was to similar effect as no strong contrary proof had been made out. The plaintiffs were entitled to exclusive rights of fishing in the creeks and ponds running out of the River.

In *Braide v Adoki*,¹³⁵ which was decided a few years later, on similar facts, the Divisional Court took notice of the enactment of the Minerals Act in 1916, that is, after *Amachree's case* was decided. The Act vested: 'The entire property in and control of ...all rivers, streams and watercourses throughout Nigeria ...in the Crown.' It held that the people of New Calabar no longer owned the beds of the creeks and tributaries of New Calabar River; therefore, fishing in the waters sources had become a common right to all. The riverbanks remained theirs, however. The Full Court upheld the ruling. *Braide* was followed in *Sowa v Amachree*.¹³⁶ In *Bassey v Ekanem*,¹³⁷ the Court held that there must be proof that the watercourses were tidal waters in order to claim the relief laid down in *Braide*.

In *Attorney General v John Holt & Co & Ors and The Att.- Gen. v W.B. McIver & Co. & Ors*,¹³⁸ evidence had been led that the owner of land in Lagos colony had a right to the foreshore (called 'Etisha' in vernacular) and to exclude other persons from landing or mooring boats on such land. However, if there is a passage along the Etisha, 'anybody can pass there.'¹³⁹ Apparently, Chief Ojora, who led that evidence of customary law, had also asserted that there was a public right of fishing in the Lagoon in the earlier case of *Kasumu Giwa v Amodu Akola*.¹⁴⁰ Although the Court eventually held that the lands of Lagos were ceded to the British Crown and that the foreshore, therefore, inhered in the Crown, it remarked that the English rights of riparian or littoral owners and the rights under customary law were practically identical.¹⁴¹

¹³² *Ibid*, 21 – 26.

¹³³ Goldface-Irokali, note 1 above, details several instances at 20 – 21.

¹³⁴ 2 N.L.R. 108.

¹³⁵ 10 N.L.R. 15.

¹³⁶ 11 N.L.R. 82.

¹³⁷ 14 W.A.C.A. 364.

¹³⁸ 2 N. L. R. 1.

¹³⁹ *Ibid*, at 6 & 7.

¹⁴⁰ 11, February 1909, referred to in *A.G. v John Holt*, at 7.

¹⁴¹ *Ibid*, at 22.

In the much later case of *Adeshina v Lemomu*,¹⁴² the Supreme Court upheld the ruling in *Amachree* and *Braide* in rejecting claims by Onisiwo Chieftaincy family of Lagos to ownership and fishing rights to certain creeks and the lagoon around the entrance to the mouth of Lagos harbor. The Lower Court had found that the waters were tidal and had simply followed *Braide* on the issue of the effect of the Minerals Act. The Court also restated the ruling in *Braide* that the Minerals Act did not extinguish the common right of fishing declared in *Amachree*. It is interesting that the Onisiwo family had claimed a right much larger than had been adduced as the relevant customary law regarding the extent of the rights to waters off the foreshore in *Attorney General v John Holt*. However, Ajisafe Moore reported about the practice of Chiefs in Lagos to claim rights in shrimp fisheries and to apportion parts of the lagoon thereto.

The provisions of the Minerals Act cited in the *Braide* case purportedly extinguished customary radical title to water rights in surface water sources and vested them in the State. The Water Resources Act, however, implicitly recognizes and protects those rights but subjects their exercise to regulatory control by Government. The question is: what is the current effect of the provision in the Minerals Act? The truth appears to be that the Minerals Act, 1916 vested rights in minerals and not watercourses as such. So it was surprising that the Courts interpreted that provision to cover radical title to watercourses as such. The original formulation read as follows:

The entire property in and control of all minerals, and mineral oils, in, under, or upon any lands in Nigeria, and of all rivers, streams and water courses throughout Nigeria, is and shall be vested in the Crown...¹⁴³

The current formulation of that provision reads thus:

The entire property in and control of all Mineral Resources in, under, or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses throughout Nigeria, any area covered by its

territorial waters or constituency and the exclusive economic zone in the Federal Government of Nigeria.¹⁴⁴

The subject or operative words are 'property in and control of all minerals'. It is clear that sub-clause 1 related to minerals on land and sub-clause 2 relates to minerals in watercourses. The words 'and of' were taken to be a separate sub-clause to qualify 'property'. However, the main subject of the Act was 'minerals', not 'property'. The colonial courts apparently conflated things and magnanimously 'appropriated' property rights for the Crown contrary to the legislative intention of the Crown. Those cases were perhaps, therefore, wrongly decided in their apparent whittling down of customary water rights. However, what is significant is that no uncontroverted evidence of extensive customary rights in tidal rivers and lagoons seemed to have been cogently established in those cases. Another perspective could be that the court in *Braide*, *Sowa* and *Att-Gen v John Holt* made light of the evidence adduced in a bid to fit the facts to the common law of England, 'working to the answer', as it were.

In *Attorney General of the Federation v Attorney General of Abia State & others*,¹⁴⁵ the Supreme Court held that the common law of riparian rights applied in the country; therefore, the sea shore or foreshore belonged to the British Crown and by succession to the Federal Government. With respect, that conclusion appears to be too wide and is perhaps, *obiter*. The Court had itemized various colonial statutes and instruments stating that the southern boundary of Nigeria was the Atlantic Ocean or the sea. That was sufficient and cogent ground to decide the point; the statements on the common law were, therefore, probably unnecessary or not really well considered, in fact it appeared to be following what it regarded as precedent following from *Amachree's case*. Customary law could only be overridden if it was held to be repugnant to natural justice, equity and good conscience. Nothing suggests that all customary laws of riparian owners were inherently repugnant; the ruling in *Amachree's case* being limited to the customary law of the New Calabar and only as regards tidal waters. It is difficult to agree with

142 [1965] All N.L.R. 245.

143 Quoted by Bairaimian J.S.C in *Adeshina v Lemomu*, Id, at 246.

144 Section 1(1)

145 Cited in note 124 above.

the statement of law by the Supreme Court, as it would then follow, for example, that the foreshore of all inland or non-tidal waters as well inheres in the Federal Government, or more absurdly, that the common law on primogeniture, say, applied by equal logic on the introduction of common law to colonial Nigeria by 1900.¹⁴⁶

What these cases and the accounts contained in the discussion on customary laws earlier demonstrate is that the right of navigation and resource use in shared watercourses is nearly identical or at least broadly analogous to the principles of freedom of navigation, limited territorial sovereignty and broad notions of equity in the use of shared watercourses recognized in international and comparative law.¹⁴⁷ This demonstrated the sophistication of the customary law concepts and establishes the jurisprudence in regard to water rights in modern law as following the essential international practice and law. However, as argued, the Courts may have conflated the principles to foist the common law of riparian rights on the country wholesale.

In spite of the federal nature of the Nigerian constitution and the fact that water sources straddle the territorial boundaries of state and local governments, there has been very little recourse to the courts in recent times over water resources conflicts. A notable case is that of Komadugu Yobe river system, which has been handled administratively and politically, rather than by judicial means, perhaps unwisely and a major reason for the severe negative environmental impact.¹⁴⁸ An illustrative account states that:

...the middle and downstream States of Jigawa, Yobe and Borno complain more and more virulently about the lack of fairness in the sharing of the river water between Kano (the upstream State) and other riparian States. The Federal Government of Nigeria had to establish in 1999 an inter-ministerial coordinating committee to find responses to these conflicting water demands and the resulting growing tensions in the basin...farmers from middle and downstream States are engaged in a kind of “water warfare” by digging channels in order to deviate as much water as possible to their farms, which has deeply disorganised the natural drainage network of the basin.¹⁴⁹

Although, negotiation is a useful first step in international and domestic water law dispute resolution, judicial resolution would probably best lead to a determination on merits and remedial orders that would heal or palliate the breach of rights and environmental quality. For example, although it appears that Kano State has breached the rights of other riparian states, none of the parties, including the Federal Government, appear willing to take the painful steps to correct the mistakes of indiscriminate dams and other abstraction practices in the Basin. Downstream users, the climate and Lake Chad continue to suffer and deteriorate. The danger of open and violent skirmishes and deeper environmental damage also continues to increase.

The aid of NGOs and communities in mounting appropriate litigation may usefully serve to eliminate the unnecessary administrative delays, obfuscations, dereliction of duty, cover-up and compromises that have characterized the situation for so long. The example of the far-reaching and groundbreaking judicial pronouncements in the *SERAC* cases suggests that the sustainable development campaign may be best served by that strategy.

¹⁴⁶ By virtue of the Supreme Court Ordinance of 1914. See D. Dafinone, ‘Supreme Court’s Verdict On Resource Control: The Political Imperatives’, *Guardian Newspaper*, 5 May 2002, available at <http://www.dawodu.com/dafin.htm>.

¹⁴⁷ See generally, S. Salman, ‘The Helsinki Rules, The UN Watercourses Convention and the Berlin Rules: Perspectives on the International Water Law’ 23(4) *Water Resources Development* 625 - 640 (December 2007).

¹⁴⁸ M. Niasse, ‘Climate-induced water conflict risks in West Africa: Recognizing and coping with increasing climate impacts on shared watercourses’, Paper delivered at an International Workshop on ‘Human Security and Climate Change’, held at Holmen Fjord Hotel, Asker, near Oslo, Norway, 21–23 June 2005, at 6, available at <http://www.gechs.org/downloads/holmen/Niasse.pdf>.

¹⁴⁹ Id.

7

INTERNATIONAL RIPARIAN LAW

The River Niger Basin (RNB), which Nigeria shares with seven other West African states, is served by the Niger Basin Authority, a Commission subscribed to by all those countries. The Convention¹⁵⁰ establishing the Basin authority provides for cooperation, integrated basin management and ecosystem protection. It requires member States to notify others of their intentions to undertake developments on the River¹⁵¹ and to subject disputes to bilateral negotiation and in event of failure final ruling by the Commission. The Parties evince an intention to subscribe to the principle of equitable utilisation as borne out by Article 4(1) of the Convention, as well as integrated management of the Basin. However, the Commission has not functioned as dynamically as envisaged owing to lack of interest and adequate funding.¹⁵² There has been notable ecosystem loss in the Niger Basin arising from drought, climate change, desertification and pollution by industrial and domestic waste in particular. The Lake Chad Basin Commission is similarly structured.

A suggestion has been made that one of the shortcomings of the RNB is that it comprises of too many riparian states and that three River Basin Organizations would probably result in better management outcomes.¹⁵³ That would, however, negate the principle of integrated management of river basins. The salient point is that the RNB Authority is failing because of inadequate shared political will, poverty and lack of expertise of most members to undertake the obligations agreed. This emphasizes

150 Concluded in Faranah, Guinea on 21 November 1980.

151 Article 4(4).

152 See generally, D. Adenle, 'Groundwater resources and environmental management in Niger Basin Authority and Lake Chad Basin Commission agreements', Paper presented at the International conference 'Network of International Commissions and Transboundary Basin Organizations & African Network of Basin Organizations', Dakar, Senegal, 3-6 November 2004, available at http://www.riob.org/IMG/pdf/NIBO_nov_2004_conf.pdf.

153 Id, at 2.

the point earlier made that it is difficult for countries with insufficient levels of culture of good political governance to pull their weight in sustainable management of resources and global sustainable development *ab initio*. Of course, it does not follow that possession of the right levels of these elements will necessarily translate into sustainability practices.

8

OVERVIEW AND CONCLUSIONS

This paper has reviewed the framework of the Nigerian water law by way of a survey of customary law, statutory provisions and institutional framework of water resources law and riparian law as elucidated in judicial decisions. Nigeria is a country with significant issues of water and sustainability, including:

1. Desertification, mainly climatic but also exacerbated by improper construction of dams and general failure to deploy available water resources to support green belt activities to minimise the advance of the desert.
2. Rapid depletion of critical wetlands, forests and vegetation cover for rivers and other water sources arising from agricultural, housing, mineral extraction and other developmental activity.
3. Point source pollution of water sources mainly from industrial effluent and urban domestic waste, as well as organic run-off and sand erosion in rural areas.
4. Free-for-all utilization of groundwater for domestic use and inadequately managed exploitation of water resources for potable water supply.
5. Lack of potable water for the vast majority of citizens, particularly in rural areas.
6. Lack of management of fishery resources and their unsustainable exploitation.

7. Inadequate exploitation of water resources for sustainable economic activity, for example in inland transportation, fish farming, etc.

Four major issues of note stand out for emphasis and recapitulation before concluding this discussion. The first is that customary law is fairly sophisticated and is perhaps more widely observed by the greater majority in rural communities and fisheries. It is, however, inadequately interfaced and integrated with statutory law, especially by a lack of restatement of the norms for wider publicity. Conversely, there is insufficient formal recognition and recruitment of traditional authorities in the implementation of this law as such, not only in the area of water law but in other areas as well. There is evidence that water resources management and conflict settlement using traditional authorities is quite effective, as reported above. In view of the fact that the Water Resources Act is insufficiently supported by management structures, processes and activity, at present the traditional authorities probably carry the brunt of conflict settlement and indirect management activities in the country. Their formal incorporation and integration into the modern structure, as an interim measure, could be truly cost saving and a boost to the stakeholder participation principle endorsed by the water resources policies and by scholars and practitioners.¹⁵⁴

The second major issue is that the modern framework appears to be fairly comprehensive on paper, particularly with the principles of the new water resources policies. All the right issues are covered: stakeholder participation, privatization, public-private partnerships, management plans, environmental impact assessments, integrated basin management, etc. Yet these are mostly 'paper tigers'

because of the inability or unwillingness to fund the establishment of an effective management infrastructure and processes, as well as lack of political will to treat the issue of sustainable water management with deserving seriousness. This is the consequence of lack of democracy, political legitimacy and true grassroots participation in political governance. Unless and until the culture of poor governance and corruption ends it is dubious to expect sustainable natural resources management of any sort in developing countries. Thankfully, the tide has recently turned with credible elections in the country, thus paving the way for an enabling environment to institute sustainable water and natural resources management.

Care must be taken not to attempt to replicate complex management frameworks from 'wealthy Westernized countries'¹⁵⁵ with different attitudes and priorities. An over-engineered, complex licensing and intricate system of trading of water rights may be a recipe for failure, not only because of administrative incapacity and different cultural attitudes, but also because the first set of priorities may be to secure resources in arid areas and to protect critical wetlands and watersheds, for example, rather than installing a comprehensive system that relegates traditional systems and self-governance nationwide.

Third, the proposal to introduce privatization and market based arrangements remains ideologically and perhaps also culturally controversial and would need to be more effectively 'sold' to people who regard water as God-given and its use, without much commercial or mercenary gloss, a natural right, almost. In reality, what obtains is a virtual 'privatization' of water supplies any way, as a result of the inability of public water supply schemes to provide sufficient potable and irrigable water. This is often overlooked as citizens anxiously look forward to and expect free or cheap public supply of water as a critical social and physical infrastructure, as public goods, or the so-called dividend of democracy and national development. Transforming water, in the public mind, as a tradable commodity or economic good as presaged by the

154 C.f., B. Bruns & R. Meinzen-Dick, 'Frameworks for water right; An overview of institutional options', in B. Bruns, C. Ringler & R. Meinzen-Dick (eds), *Water Rights Reform: Lessons for Institutional Design* (Washington, DC: International Food Policy Research Institute, 2005), at 8, available at <http://www.ifpri.org/sites/default/files/pubs/pubs/books/oc49/oc49ch01.pdf>. See generally, S. Burchi, 'The interface between customary and statutory water rights – a statutory perspective', Paper presented at International Workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water management in Africa', 26 – 28 January 2005, Johannesburg, South Africa.

155 Id, at 21.

NWP is a challenge that has not as yet been effectively discharged by governments and civil society.¹⁵⁶ However, if the experience of deregulation of the telecommunications sector of Nigeria is anything to go by then deregulation should more efficiently provide and democratize access to sufficient water resources in the country, in spite of the fact that the record of water privatization in various countries is a mixed one and that water is not telecommunications.¹⁵⁷ However, with its fairly patchy record of public sector achievement in running anything, that would be a more practical alternative. The mistakes of failed privatisation schemes alluded to earlier must be avoided, however.

Complementarily, there is the need to get the private sector to appreciate the opportunities that lie inherent in the water resources sector and the policy of privatization and private sector participation, so as to position businesses to enter that field and to begin the process of innovation that can spread services and lower costs. In view of the central place of water in daily life, it is a potentially profitable field of business. Secondly, and more importantly, the private sector must evince an autonomous ability to imbibe good corporate governance and resile from the current scenario of egregious point source pollution of water sources in the country. Effective regulatory frameworks are also required to regulate a partly or wholly market based water management system, and management and technical capacity will need to be built up as well. In particular, the tendency to profiteer and to under-invest in capital assets by privatized entities will have to be combated.

Fourth, water resources represent a cheap and vital building block for sustainable economic activity, from inland transportation to rain-fed or irrigation

agriculture, to micro or mini water works, commercial boreholes, to fish farming, tourism, community forestry, etc. Unless water resources, customary institutions, etc., are inventoried, management plans formulated, institutions for management innovated, adapted, strengthened and adequate, safe and good quality water made available for sustainable exploitation and use, widespread poverty may persist. Succeeding generations will also lose out because of unplanned and unsustainable use and management. The sooner the nation gets serious about harnessing and properly managing this most abundant and fairly well distributed resource the sooner will it engage the creative abilities of its citizens leading to better living standards, wealth creation and the much sought after sustainable development. A proper harnessing of water resources and balancing of development and environment is the most cost-effective and efficient route to national development and, therefore, needs to be reprioritized as the key driver of the economy and sustainable development initiatives.

¹⁵⁶In Ghana, a well-coordinated resistance led by civil society was able to force a review of the preferred PSP model of a 20 year concession to a five-year management contract. See Eguavoen and Spalthoff, note 122 above, at 7.

¹⁵⁷Telephone lines increased from less than 1 million lines supplied by the chronically inefficient national operator to about 90 million lines in less than a decade as a consequence of deregulation. For an account of the failure of water privatization and apparent increasing trend to remunicipalise water supply, *see generally*, Pigeon, note 121 above.

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