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Localizing the Human Right to Water in Lagos State, Nigeria

Pedi Obani*

Nigeria's water sector is characterised by abysmal network coverage despite significant natural water resources potential. Most of the water sector reforms across the country encourage private sector participation in service delivery, to improve quality and efficiency. Early attempts at water privatization in Lagos State, a pioneer for water sector reforms in Nigeria, have met with stiff opposition from local water justice advocates, mostly on human rights grounds. Similar opposition has followed water reforms and privatization efforts in other parts of the country as well. Hence, this paper uses Lagos State as a case study to examine the prospects for the localisation of the human right to water within the context of private sector participation in the water sector. The findings suggest that: (a) private sector participation solely cannot account for the failure to localize the human right to water and the legal framework regulating the water sector plays an important role in determining the outcome; (b) the extant water sector law in Lagos State entrenches various forms of inequality in water access for personal and domestic uses; and (c) there is need for further legal reforms to elevate access to safe drinking water services beyond the contractual obligation on consumers to pay for services to a human right.

Keywords: human right to water; Lagos State; SDG 6; privatisation; water sector reform; water sector law

1. Introduction

The issue of the ideal economic model for the delivery of drinking water services is quite often conflated with the States' obligations relating to the localisation of the human right to water. The right has become widely adopted as a critical tool in water justice struggles and local advocacy against the privatization of water resources, to the extent that the human right to water and the anti-privatization discourses have become almost inseparable.¹ The human right to water does not specify any particular economic model for the delivery of water services. An investigation of the localisation of the human right to water is especially important because the right is value laden and the outcome depends on the localised discourses and approaches used for implementation.² The vast literature on the subject matter has evolved in a largely compartmentalized manner, focusing on either the positive impacts or the ills of privatization for vulnerable groups without access to safe drinking water.³ On the one hand, the advocates of privatization and other

* Pedi Obani, PhD Senior Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Benin, NG, email: pedi.obani@uniben.edu.

¹ See for instance: 'About the Campaign' <<https://www.right2water.eu/about>> accessed 28 November 2019; Andreas Harsono, 'Indonesia's Supreme Court Upholds Water Rights: Court Rules Jakarta's Water Privatization Failed the Poor' (*Human Rights Watch*, 12 October 2017) <<https://www.hrw.org/news/2017/10/12/indonesias-supreme-court-upholds-water-rights>> accessed 28 November 2019.

² Pedi Obani and Jyoyeeta Gupta, 'Inclusive Development as an Imperative for Realizing the Human Right to Water and Sanitation' (2017) 8 *Journal of Sustainable Development Law and Policy* 67.

³ Maude Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water* (New Press 2009) chronicles the commodification of water resources across various levels of governance, the resulting rising costs of water and negative impacts on the human right to water.

forms of market environmentalism highlight the inefficiencies of public utilities.⁴ More recently, scholars have been analysing the nexus between economic instruments for water governance, the legal, policy and institutional framework within which the instruments are applied, as well as the associated transactional costs.⁵

Since 2000, there have been at least 835 cases of transfer of the management of water services from the private sector back to public utilities in at least 45 countries around the world, on the grounds of human rights and democratic principles.⁶ Lagos State in Nigeria makes a particularly interesting case study for analysing the prospects for localizing the right to water through privatisation, being a pioneer state for water sector reforms in Nigeria as well as the commercial capital and industrial hub of the country which also puts a demand on the water supply infrastructure. Lagos State is also considered to be the most densely populated state in Nigeria; its 2015 population of 24.6 million inhabitants was projected to grow to 35 million by 2020.⁷

Overall, 44.1% of the population of Lagos State have access to basic drinking water service, defined to include water from an improved source provided either water is on the premises or round-trip collection time is 30 minutes or less,⁸ while 6.2% of the population rely on limited drinking water service, meaning drinking water from an improved source, and round-trip collection time is more than 30 minutes.⁹ Water supply and development of both mini and micro waterworks are listed as core investment areas for Lagos State and private sector participation has been at the heart of water sector reforms in the state. Notwithstanding, previous attempts at the privatization of water services in Lagos State have met with stiff opposition from local and international civil society organization and water justice advocates concerned for the protection of vulnerable groups.¹⁰

In light of the foregoing, this paper addresses the research question: *what are the implications of recent Lagos water sector reforms for the localization of the human right to water?* Section 2 analyses the evolution and legal basis of the human right to water in Nigeria. Section 3 provides the background of water sector reforms in Lagos State. Section 4 analyses the nature of the reforms. The concluding section (Section 5) emphasises that private sector involvement in the water sector is not incompatible with the localization of the human right to water. However, there is a need to balance the emphasis on market efficiency with inclusiveness and sustainability ethos which prioritise the drinking water needs of vulnerable population as a legal obligation of the state and private sector service providers. Without this, the privatisation of water services will remain at odds with the right to water.

2. Legal bases of the human right to water

Nigeria is a federal republic made up of 36 states and the Federal Capital Territory, Abuja. Responsibility for the provision of water services and expansion of coverage is fragmented across government ministries, departments and agencies at the federal and state levels.¹¹ Specifically, the Constitution of the Federal

⁴ See for example, Peter Rogers, Radhika de Silvab and Ramesh Bhatia, 'Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency, and Sustainability' (2002) 4 *Water Policy* 1. The arguments in Karen Bakker, 'The "Commons" versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South' (2007) 39 *Antipode* 430, addressing the compatibility between the human rights approach and the involvement of the private sector in water resources management through various institutional arrangements and corporate governance models.

⁵ For instance, a key argument in Carlos Mario Gómez Gómez, C. D. Pérez-Blanco, David Adamson and Adam Loch, 'Managing Water Scarcity at a River Basin Scale with Economic Instruments' (2018) 4 *Water Economics and Policy* 1750004-1, is that there are high transaction costs, wide institutional changes and collective action at different levels that are associated with effective river basin management mainly through the use of economic instruments and the outcomes depend on the context within which the instruments are designed and implemented. See also Georgina W. Njiraini, Djiby Racine Thiam and Anthea Coggan, 'The Analysis of Transaction Costs in Water Policy Implementation in South Africa: Trends, Determinants and Economic Implications' (2017) 3 *Water Economics Policy* 1650020. <<https://doi.org/10.1142/S2382624X1650020X>>.

⁶ Satoko Kishimoto and Olivier Petitjean, *Reclaiming Public Services: How Cities and Citizens are Turning Back Privatisation* (TNI, Multinationals Observatory, AK, EPSU, ISF, PSI, PSIRU, We Own It, Fagforbundet, MSP and CUPE 2017).

⁷ About Lagos <<https://lagosstate.gov.ng/about-lagos/>> accessed 28 November 2019.

⁸ Piped water, public taps, standpipes, tube wells, boreholes, protected dug wells and springs, rainwater, water delivered via a tanker truck or a cart with a small tank and bottled water.

⁹ National Population Commission (NPC) [Nigeria] and ICF, *Nigeria Demographic and Health Survey 2018* (NPC and ICF 2019).

¹⁰ Abbas Jimoh, 'Nigeria, Others Urged to Reject World Bank Water Scheme' (*Daily Trust*, 1 February 2019) <<https://www.dailytrust.com.ng/nigeria-others-urged-to-reject-w-bank-water-scheme.html>> accessed 28 November 2019; EnviroNews Nigeria, 'Groups Vow to Resist Water Privatisation in Plateau, Bauchi' (*EnviroNews Nigeria*, 11 November 2019) <<https://www.environewsigeria.com/groups-vow-to-resist-water-privatisation-in-plateau-bauchi/>> accessed 28 November, 2019.

¹¹ The discussions of the legal bases of the right to water at the international level and at the regional level, particularly the African Charter on Human and Peoples' Rights 1981, in Michelle Barnard, 'Discovering a Human Right to Water in the Southern

Republic of Nigeria 1999 (the Constitution) empowers the National Assembly to exclusively legislate on '[W]ater from such sources as may be declared by the National Assembly to be sources affecting more than one state' and on the right to construct dams or otherwise interfere with the flow of water from sources in any part of the country. Beyond this, states and local governments have established various agencies for water services provision and network expansions within their respective jurisdictions. State governments often receive funds from the federal government and development partners to execute projects for the provision of water services and network expansions. Local governments also have responsibility for the provision of water and sanitation services within their jurisdictions but are often hampered by low capacity and governance challenges to deliver effectively on their mandate. In most cases, there is a deficit in the infrastructure needed to ensure universal coverage which needs to be addressed through significant capital investments by various stakeholders. The fragmentation of responsibility for water services also poses a significant governance challenge.

The legal basis for the human right to water in Nigeria derives from both international, regional and domestic legal instruments. At the international level, the right is mainly derived from the rights to an adequate standard of living and health, under the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).¹² The right to water comprises core legal content (such as availability, accessibility, safety, acceptability and non-discrimination) which States must adhere to as a minimum,¹³ and cross-cutting human rights principles (including accountability, extra-territorial obligation, participation, sustainability, transparency and access to information).¹⁴ The human rights to water and sanitation gained momentum especially in 2010, with express recognition in the resolutions of the UN General Assembly,¹⁵ and the Human Rights Council,¹⁶ and Nigeria voted alongside other 121 States in favour of the UN General Assembly Resolution. The inclusion of human rights principles such as universal access, affordability, equity and safety in the framing of the UN 2030 Sustainable Development Goals target for water and sanitation (SDG 6) reflects the growing normative force of the human rights approach in the international development discourse.¹⁷ At the regional level, the African Charter on Human and People's Rights 1981 (Banjul Charter) equally protects the right to health, the right to work under equitable and satisfactory conditions and the right to a general satisfactory environment favourable for human development, which support the need for access to safe drinking water for human development.¹⁸

Within the domestic legal framework, the Constitution of the Federal Republic of Nigeria of 1999 (the Constitution), the right to water is not yet expressly recognized as part of the fundamental rights and freedoms of citizens. Although one of the Fundamental Objectives and Directive Principles of State Policy as stated in Chapter 2 of the Constitution is that: '[T]he State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria',¹⁹ the provision is considered generally non-justiciable by virtue of the restriction in section 6(6)(c) of the Constitution. Nonetheless, the right to life in particular has formed the basis for the recognition of the right to water in other jurisdictions such as India, and is therefore worth considering in detail as a possible legal basis for the right to water in the Nigerian context. This proposition is especially attractive because the fundamental rights guaranteed in the Constitution, mainly political and civil rights, enjoy the highest level of protection to the extent that Section

African Development Community' (this Special Issue) and the related case law from regional courts offer a useful background to understanding the legal basis and evolution of the right to water in Nigeria.

¹² Thorsten Kiefer and Catherine Brölmann, 'Beyond State Sovereignty: The Human Right to Water' (2005) 5 *Non-State Actors and International Law* 183.

¹³ Committee on Economic Social and Cultural Rights, *General Comment 15, Arts. 11 and 12 (Twenty-ninth session, 2003)*, U.N. Doc. E/C.12/2002/11, paras 10–12.

¹⁴ See generally for a discussion of the contents of the human rights to water and sanitation, Kiefer and Brölmann (n 12); Catarina de Albuquerque, *Realizing the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina de Albuquerque* (UN 2014); Daphina Misiedjan and Joyeeta Gupta, 'Indigenous Communities: Analyzing their Right to Water Under Different International Legal Regimes' (2014) 10 *Utrecht Law Review* 77; Pedi Obani and Joyeeta Gupta, 'Human Right to Sanitation in the Legal and Non-legal Literature: The Need for Greater Synergy' (2016) 3 *Wiley Interdisciplinary Reviews: Water* 678.

¹⁵ Resolution adopted by the General Assembly on 28 July 2010 A/RES/64/292.

¹⁶ Resolution adopted by the Human Rights Council 15/9 – Human Rights and access to Safe Drinking Water and Sanitation A/HRC/RES/15/9.

¹⁷ Under the Revised African Convention on the Conservation of Nature and Natural Resources adopted on 7 March 2017, the State Parties undertake to manage their water resources in order to preserve the highest possible levels of water quantity and quality, to protect human health and environmental integrity.

¹⁸ African Commission on Human Peoples' Rights, in 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*.

¹⁹ Constitution of the Federal Republic of Nigeria 1999 (CFRN), s 20.

46(1) of the Constitution clearly states that: '[A]ny person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress'.

The Constitution states that: '[E]very person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria'.²⁰ While water is understood to be essential for human survival and the preservation of life, to fall within the ambit of the right to life provision of the constitution, there needs to be an intentional deprivation that affects human life to fall within the ambit of the section. This does not necessarily mean that the right to life is to be interpreted as imposing only a negative duty on the state to prevent intentional deprivation of life, without any corresponding duty to take positive steps such as providing life saving measures for the citizens – which could presumably include the provision of basic necessities. In relation, at the international level, the Human Rights Committee has observed in connection with Article 6(1) of the ICCPR that '... the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot be properly understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and Epidemics', though it is yet to declare a violation of Article 6(1) on the basis the deprivation of basic necessities.²¹

The Constitution however protects the right of entry into land in order to lay pipes or other structures for the provision of water, sewage and other public services, subject to the prompt payment of compensation for any damage to the land or any property on it.²² Moreover, the right to water is recognised in national regulations such as the National Environmental (Surface and Ground Water Quality Control) Regulations 2011, the National Water Resources Bill 2016,²³ and in the laws of some of the constituent states. For instance, the River State Water Sector Development Law 2012 recognises 'the right of access to basic sanitation and basic water supply necessary to secure sufficient water and an environment not harmful to human health or well-being' as forming part of the general principles and objectives of the regulation. Remarkably, the National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2002) does not expressly recognise the right to water but recognises the right to environment which also requires the protection of water resources and could therefore be regarded as supporting the realisation of the right to water.

3. Background of water sector reforms

Water was recognised as a necessity for European settlement in West Africa, for both navigation and human consumption. Lagos was the main outlet and seat of power of the colonial administration in present day Nigeria. The Lagos Water Corporation (LWC), originally called the Federal Water Supply, was established in 1910 to ensure potable water supply in Lagos, same year the construction of the Iju Waterworks commenced.²⁴ Prior to the construction of Iju Waterworks, Lagos State residents mainly relied of poor quality water from surface water bodies and dug wells but the Lagos Mainland, where Iju is located, proved to have better water quality than the Lagos Island. By the second half of 1915, the Iju Waterworks, costing over £300,000, was commissioned and started operations.²⁵ It was the largest waterworks in West Africa at the time and comprised three massive engine pumps drawing 5,000 gallons of water per minute from the Iju River, two settling tanks with a combined capacity of 10 million gallons and a service reservoir of 6 million gallons connected to hydrants on the streets.²⁶

²⁰ CFRN, s 33(1).

²¹ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (1994) U.N. Doc. HRI/GEN/1/Rev.1 at 6 para 5. See further Kiefer and Brölmann (n 12).

²² CFRN (n 19), s 44.

²³ The Bill consolidates the main legislations on water resources management in Nigeria and promotes international standards and best practices for water resources management, toward the realization of universal access. See analysis in Eva Kremere, Edward Morgan and Pedi Obani, *SDG6 – Clean Water and Sanitation: Balancing the Water Cycle for Sustainable Life on Earth* (Emerald 2019).

²⁴ Lagos State Water Corporation, 'Brief History of Lagos Water Corporation' <<http://watercorporation.lagosstate.gov.ng/>> accessed 19 January 2018. The facility was handed over to the state government after Lagos State was created in 1967 and is still administered by the state.

²⁵ Capt. H. Osman Newland, *West Africa: A Handbook of Practical Information for the Official, Planter, Miner, Financier & Trader* (Daniel O'Connor 1922).

²⁶ Ibid.

The Iju Waterworks water supply system included pipes with capacity of supplying 2,500,000 gallons of water daily, 200 hundred fountains installed to improve accessibility of water to the residents and 350 fire hydrants.²⁷ At the time when the population of Lagos was 50,500 residents, the Iju Waterworks capacity was designed to serve 115,000 people daily.²⁸ Subsequent expansion schemes executed by the LWC include additional 3 major waterworks and 51 micro and mini waterworks, as well as treatment plants and equipment.²⁹ As of 2010, with a population of 18 million, total water production in Lagos State stood at 210 million gallons per day (mgd) while water demand was 540 mgd, leaving a demand gap of 330 mgd, calculated at 30 gallons (136.2 litres) per capita per day.³⁰ Nonetheless, water demand is estimated to reach 733 million gallons per day (MGD).³¹ Network coverage stands at around 44%, while non-revenue water is as high as 60% because of weak infrastructure.³² Water metering is being introduced for residents and by the start of 2013, about 32,000 meters had been installed in Ikeja, Lekki, Omole, Surulere and Victoria Island Annex.³³

Historically, public water supply services have been moribund due to multiple social, economic, technological and environmental challenges, such as institutional bottlenecks in the public sector, population growth, corruption, poor maintenance culture, inefficient tariff system, poor funding, non-revenue water due to dilapidated water supply infrastructure, epileptic power supply and climate change.³⁴ Moreover, declining oil prices and the rise of structural adjustment programmes during the 1980s and 1990s resulted in a retraction of public spending on infrastructure for water supply, electricity and other public services to meet the needs of the growing population.³⁵ Water sector governance is also highly fragmented and characterised by incoherence at different levels. There are also competing interests from the diverse stakeholders within the sector, from the government and private businesses, to civil society groups and local communities.³⁶ This has further weakened public supply and inclusive services in the Lagos State water sector.

Metred houses covered by the formal water supply network currently pay ₦200, ₦250, or ₦350 per cubic meter, depending on whether they are located in low density areas, high density areas, or if they are commercial users, respectively.³⁷ In most cases, vulnerable residents have to source their water through private arrangements.³⁸ Most residents of Lagos rely on water from private boreholes (either theirs or a neighbour's) for domestic uses.³⁹ Water quality from the boreholes is poorly regulated and the water is sometimes contaminated due to poor design and drilling, thereby exposing the users to public health risks. People without access to boreholes rely on bottled water,⁴⁰ sachet water, unimproved sources,⁴¹ or informal water vendors and often at very high costs.⁴² Others relying on informal service providers could be charged as much as 500% more for drinking water services.⁴³

²⁷ Ibid.

²⁸ Ibid.

²⁹ Lagos Water Corporation (n 24).

³⁰ Lagos Water Corporation, Lagos Water Supply Master Plan <<https://lagoswater.org/wp-content/uploads/2016/0e/Lagos-Water-Master-Plan.pdf>> accessed 19 January 2018.

³¹ Ibid.

³² Ibid.

³³ PM News, Lagos Water Corporation Urges Residents to Use Water Wisely <<https://www.pmnewsnigeria.com/2018/01/05/lagos-water-corporation-urges-residents-use-water-wisely/>> accessed 19 January 2018.

³⁴ Federal Republic of Nigeria, Water Supply & Sanitation Interim Strategy Note (2000) <http://siteresources.worldbank.org/NIGERIAEXTN/Resources/wss_1100.pdf> accessed 19 January 2018; Akinbode Oluwafemi and others, *Lagos Water Crisis: Alternative Roadmap for Water Sector* (ERA/FoEN 2016); Kremere, Morgan and Obani (n 23).

³⁵ World Bank, *From Oil to Cities: Nigeria's Next Transformation. Directions in Development* (World Bank 2016).

³⁶ Pedi Obani and Joyeeta Gupta, 'Inclusive Development as an Imperative for Realizing the Human Right to Water and Sanitation' (2017) 8 *Journal of Sustainable Development Law and Policy* 67.

³⁷ PM News (n 33).

³⁸ Such as the poor and others that are left without access to water supply services.

³⁹ Domestic supply is defined in the Lagos State Environmental Management and Protection Law 2017, s 213, as "water from any waterworks used in any tenement for drinking, washing, cooking, or for baths or any other purpose of domestic life".

⁴⁰ Recently in the United States, Michigan's second highest court ruled that Nestlé's commercial water bottling operations in Osceola did not qualify as an 'essential public service' or public water supply to warrant exemptions from zoning requirements. Tom Perkins, 'Nestlé cannot Claim Bottled Water is 'Essential Public Service'', Court Rules (The Guardian 5 Dec 2019) <<https://www.theguardian.com/business/2019/dec/05/nestle-bottled-water-michigan-osceola-private-public>> accessed 28 November 2019.

⁴¹ These include streams, rainwater collection, rivers, dug wells, springs and boreholes that are not free from contamination.

⁴² Lagos currently generates the highest amount of plastic waste in Nigeria, amounting to around 148,000 metric tonnes annually. Lagos Business School, 'Campaign against Plastic Pollution at LBS CEO Roundtable on Sustainability' <<https://www.lbs.edu.ng/campaign-against-plastic-pollution-at-lbs-ceo-roundtable-on-sustainability/>> accessed 28 November 2019.

⁴³ Oluwafemi and others (n 34).

It is against this background of poor public water supply services that water sector reforms in Lagos State have occurred. Overall, the purpose of the Lagos State water sector reforms is stated as being to safeguard the long term interests of water users, in relation to the price, quality and reliability of water services that are provided by both the public utilities and private sector service providers, *inter alia*.⁴⁴ Recent reforms have focused on developing an appropriate legislative framework to support the liberalisation of the water sector and rehabilitation of infrastructure, in order to attract private investors. The rationale is that the private sector involvement would increase investment and technical capacity, reduce water loss and generally improve the efficiency of the sector. Notwithstanding, these efforts have met with fierce opposition from environmental justice and human rights advocates and trade unions among others,⁴⁵ concerned that the involvement of the private sector is against the best interest and human rights of the public, as the private sector is mainly profit-oriented whereas water holds inherent social, cultural, spiritual and historical value for local communities.⁴⁶ An alternative discourse calls for a clear distinction between diverse forms of neo-liberalization on the basis that privatization, being mainly focused on the organization of water resources management is not opposed to regulation or the enforcement of human rights standards.⁴⁷

Privatisation of water services is still at bay for now in Lagos State as a result of the opposition. A 2018 report by Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights warns of the need to: 'reverse the presumption, now fully embraced by actors such as the World Bank, that privatization is the default setting and that the role of the public sector is that of a last-resort actor that does what no one else can or wants to do'.⁴⁸ Opponents of privatisation argue that public water services can be more efficient than privatized services.⁴⁹ However, as many residents continue to source basic water services from various private providers and the public networks continue to deteriorate over time, it is most likely that the private sector will continue to play an important role in the delivery of water services in Lagos. The next section expounds on the correlation between the extant legal framework for private sector participation in the Lagos State water sector on the one hand and the localization of the human right to water on the other hand.

4. Nature of reforms and the human right implications

The main law underpinning water sector reforms in Lagos State is the Lagos State Environmental Management and Protection Law 2017.⁵⁰ This Law was passed following significant milestones in the recognition of the international human rights to water, sanitation and hygiene, including menstrual health and hygiene especially since 2010, and the entry into force of the 2030 Agenda including the Sustainable Development Goals target for universal access to water, sanitation and hygiene (SDG 6) and related goals under the AU Agenda 2063. It repealed the Lagos State Water Sector Law 2004 *inter alia* which among other objectives was designed to enable water services operators to secure reasonable returns on their capital investments. Although the Lagos State Environmental Management and Protection Law 2017 (the Law) does not directly mention the human right to water, it can be safely assumed that its stated purposes support the government's obligations to progressively achieve the universal access to safe drinking water domestically, in line with treaty obligations, domestic laws and the international sustainable development agenda. Of relevance to water services are the provisions of the Law pertaining to the establishment and mode of operation of the Lagos State Water Corporation, the Wastewater Management Office and the Lagos State Water Regulatory Commission, the Office of Drainage Services. This section mainly focuses on the sections directly relevant to domestic water supply and the implications for the localisation of the human right to water in Lagos.

⁴⁴ Lagos Water Supply Master Plan (n 30).

⁴⁵ Edu Abade, 'Nigeria: Again, AUPCTRE Rejects Water Privatisation, Seeks Viable Public Sector Options' (The Guardian 26 April 2018) <<https://allafrica.com/stories/201804260435.html>> accessed 28 November 2019.

⁴⁶ Oluwafemi and others (n 34).

⁴⁷ Bakker (n 4).

⁴⁸ Report of the Special Rapporteur on Extreme Poverty and Human Rights A/73/39 (26 September 2018) 22/25 <<https://undocs.org/A/73/396>> accessed 28 November 2019.

⁴⁹ Barlow (n 3).

⁵⁰ Sections of the law vesting authority for waste management have been challenged in court as a contravention of the constitutional provisions assigning refuse, sewage and waste management to the local governments. See Abel Ejikeme, Lawyer Drags Lagos Govt to Court Over New Environmental Law Premium Times 4 May 2017 <<https://www.premiumtimesng.com/regional/ssouth-west/230384-lawyer-drags-lagos-govt-court-new-environmental-law.html>> accessed 28 November 2019.

4.1. Water services management organisation

Section 215 of the Law establishes the Lagos State Water Corporation (LWC) as a corporate body, with all the attendant powers for the purpose of carrying out its functions. The mission of the LWC is to 'provide safe drinking water in sufficient and regular quantity, maintain good quality service through revenue generation to sustain operations, meet customer expectation by planning sustainable growth and promote community health by good potable water'.⁵¹ The LWC is governed by a Board of Directors (including a Chief Executive Officer and a Chairman appointed by the core investor, and three additional officers and seven other members appointed by the Governor of Lagos State).⁵²

In the absence of a Board of Directors, the core investor has the power to execute documents and exercise any power of the Board of Directors, excluding the power to make Regulations pursuant to the Water Sector Law.⁵³ In principle, the extensive power granted to the core investor can be considered as a way of minimising extraneous political influence and improving the efficiency of operations of the LWC as an autonomous institution. The core investor could be any individual or government entity that holds a controlling interest in the capital base of the LWC, through money assets, shares, debentures, or some form of public securities. This exposes the operations of the LWC to the whims and caprices of the core investor without any guarantees for the protection of the right of vulnerable populations to access lifeline services.

4.2. Water services regulation

The Law establishes the Lagos State Water Regulatory Commission (the Commission) to perform its functions and exercise its powers 'to protect the long term interests of consumers with regard to the price, quality and reliability of services in the water sector'.⁵⁴ The powers of the Commission relate to regulating water and wastewater provision and the operations of both public and private sector players, including: standards and conditions of services; licensing, permits and authorisations for operations; tariffs, fees and market conduct; adjudication and settlement of disputes involving providers of water services, consumers and the LWC; and other economic regulatory matters.⁵⁵ The stated objectives of the Commission prioritise the establishment of a competitive market, financial viability and efficient long term investment in order to protect the interest of consumers, including low-income or vulnerable customers. In practice, without safeguards to ensure that service providers do not discriminate against vulnerable consumers, the latter will likely continue to suffer inequities in accessing water services due to competing neo-liberal principles such as full cost recovery.

4.2.1. Water services availability and physical accessibility

The Law obliges the LWC to supply water to every private user within the network coverage area, upon terms and conditions which it deems fit, with the proviso that first time connections can be made without any harm to existing users in the area.⁵⁶ There is no further protection for users who are not satisfied with the terms and conditions imposed by the LWC, or those who as first time connections would adversely affect the existing network system. However, individuals may construct wells or boreholes within residential premises, for their domestic water needs, subject to relevant regulation.⁵⁷ Although the Law obliges the LWC to ensure continuous water supply, it also provides that the LWC has the right to: (a) suspend water for such periods as may be necessary for carrying out inspections, tests, or repairs and for the making of new connections; and (b) discontinue supply for non-payment.⁵⁸ This is akin to arbitrary disconnections which is widely acknowledged as a human rights violation.⁵⁹ Further, the LWC is absolved of any responsibility for 'loss, damages or

⁵¹ Lagos Water Corporation (n 24).

⁵² Lagos State Environmental Management and Protection Law 2017 (LEMPL), s 216.

⁵³ LEMPL, s 242.

⁵⁴ LEMPL, s 311(1).

⁵⁵ LEMPL, s 313.

⁵⁶ LEMPL, s 250.

⁵⁷ Water Sector Law 2004, s 253. People are now expected to pay a charge for water abstraction in Lagos and some other parts of the country, like parts of Delta State; the levy is being frowned upon by most residents who do not think that government should charge them for their private boreholes and wells, as the government does not make any contribution to the construction or maintenance of the infrastructure.

⁵⁸ LEMPL, s 252(1).

⁵⁹ See for instance *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* [2002] High Court (Transvaal Provincial Division) 28521, (2002) (6) SA; *Quevedo, Miguel Angel y Otros c/Agua Cordobesas SA* [2002] Juez Sustituta de Primera Instancia Civil y Comercial (Ciudad de Córdoba) <<http://www.cedha.org.ar/docs/doc220-spa.doc>> accessed 28 November 2019.

inconveniences' due to their failure or suspension, discontinuance or interruption of water supply.⁶⁰ In addition to this, the LWC is empowered to disconnect supply to prevent contamination, damage or waste, and is required to contact the affected consumers with details of the required action to be taken before services can be restored.⁶¹ This further erodes the accountability of the LWC to the water users, and could expose the latter to the risk of human rights violations through the exercise of the unfettered discretionary powers of the LWC.

Additionally, the tenor of the Law presents the provision of water services as mainly a contractual obligation between the LWC and its 'customers'. However, based on human right standards, the duty to provide water services cannot be strictly construed as a contractual obligation which is extinguished by non-payment for instance. In the South African case of *City of Cape Town v Strümpher*,⁶² the Supreme Court of Appeal declared that the fact that a contract must be concluded neither relegates a consumer's right to water to a mere personal right which flows from the contractual relationship fact, nor does it relieve the authorities of the constitutional and statutory obligation to provide water to users. Nonetheless, the right to water and the responsibility of the government for the provision of water services is clearly outlined in South African law. In the case of the LWC, in the absence of clear human rights obligations in the enabling Water Sector Law, different considerations may apply where the core investor is a private company with full cost recovery or profit targets and there are no provisions for lifeline services or other (pro-poor) instruments to benefit the poor.

4.2.2. Quality and safety

The human right to water requires that water supplied for personal or domestic use must be safe, therefore free from contaminants or chemical substances that constitute a threat to human health. The water must also be an acceptable colour, odour and taste. Under the Law, all public sewers, sewerage and disposal works in the State are vested in the LWC, and the LWC has a duty to ensure that the quality of water services is safe conforms to municipal environmental laws,⁶³ and World Health Organization (WHO) standards for potable water.⁶⁴ The LWC also has a duty to ensure that every borehole is hygienically sited and free from contamination,⁶⁵ and to ensure that while surface water abstraction is permissible, this does not compromise water quality or the aquatic life.⁶⁶ Where water quality is affected, the Law requires that the polluter should restore the environment to its original state to the extent possible.⁶⁷ The Law further prescribes fines for various offences such as contamination, waste or misuse of water,⁶⁸ vandalization of waterworks, illegal connections or illegal packaging or resell⁶⁹ of water supplied by the LWC and other forms of interference with the operations of the LWC. Notwithstanding, the LWC does not bear any responsibility for the efficiency or safety of the installations which it may have inspected or tested, except where problems arise directly from the misuse of an apparatus by an employee of the Corporation.⁷⁰ This contradicts the human rights normative requirement for safety of water services.

4.2.3. Affordability

The Law empowers the LWC to fix scales of charges and the rates for water services, with the approval of the Commission, to meet its financial objectives.⁷¹ The LWC can charge local governments for water services supplied within their jurisdictions, including supply to primary schools and water fountains in each local government area.⁷² The LWRC is also to ensure that *where possible*, the costs of regulation do not outweigh the benefits and its decisions balance costs with service standards.⁷³ The LWC also has the power to levy Local

⁶⁰ LEMPL, s 252(2).

⁶¹ LEMPL, s 262.

⁶² [2012] ZASCA 54 (SCA).

⁶³ LEMPL, s 257.

⁶⁴ LEMPL, s 258.

⁶⁵ LEMPL, s 259.

⁶⁶ LEMPL, s 260.

⁶⁷ LEMPL, s 261.

⁶⁸ LEMPL, s 266.

⁶⁹ LEMPL, s 247.

⁷⁰ LEMPL, s 249.

⁷¹ LEMPL, s 244.

⁷² LEMPL, s 245.

⁷³ LEMPL, s 332.

Government Councils a general water rate for supply to primary schools, water fountains, etc. within each local government area;⁷⁴ and purchase bulk water for resale to individual consumers.⁷⁵ Beyond this, there are no safeguards in the Law to ensure accessibility by the poor, whereas the human right to water requires that the direct and indirect costs and charges for water, including water facilities and services, must be affordable for all users and must not compromise the realization of other human rights.⁷⁶

Overall, the provisions reflect an inordinate focus on return on investments rather than economic accessibility for vulnerable groups as envisaged by the human rights approach. For instance, the provision of water services in schools and public spaces through water fountains should ordinarily be protected as a basic human right obligation not subject to disconnections for non-payment and other arbitrary violations. While the LWC is to ensure the supply of adequate and potable water at reasonable charges, it may however refuse to supply to premises without preinstalled meters that are supplied and maintained by the Corporation.⁷⁷ This raises a pertinent question about whether the power of the LWC to deny services to premises that do not have preinstalled LWC meters does not automatically violate the human right of residents who are either unable able to afford the cost of meters and water service charges or who have not been supplied meters by the LWC.

4.2.4. Information and access to justice

The LWC has a duty to inform its consumers about the standards of overall performance and the Corporation's level of performance in relation to these standards.⁷⁸ The frequency of reporting is to be determined and enforced by the Commission; minimum frequency should be once every year.⁷⁹ Access to information is an important human rights principle which improves the ability of the rightsholders to monitor and demand quality services and enforcement of their rights. The LWC has a duty to maintain records of the location of its mains, discharge pipes and any other underground works; the information is to be made freely available in the form of a map, upon a written request for inspection by the public, at all reasonable times, at any office of the Corporation.⁸⁰ The LWC is also required to make any necessary modifications to its records within a reasonable time after the completion of the works necessitating the modification and is required to include in the records the date of completion of the relevant work and the date the modification was made. In relation to access to justice, action can be instituted against the LWC for supplying water that is unfit for human consumption and the Court (Lagos State Environment Court) may award damages against the LWC where negligence is successfully established against the Corporation. In such proceedings, the LWC may however put up a defence on the grounds that it could not reasonably have suspected contamination or where it took all reasonable steps and exercised all due diligence to ensure that the water supplied was fit for human consumption.⁸¹

5. Conclusion

The Lagos State water sector is a classic example of a multidimensional neoliberal reform, targeting the resource management organisation, governance structure and regulatory framework, simultaneously through the provisions of the Law. The regulatory provisions and safeguards apparently for consumers' interests suggests that the approach of pitting the human right to water against private sector participation in the water sector is mainly theoretical and of little practical relevance in localising the human right to water. It is further necessary to examine the contents of the enabling law and the practices of the regulators and service providers in order to properly access the human rights implications.

As demonstrated in this paper in relation to Lagos State, although the human right to water is not clearly recognised in the Law, a cursory reading of the Law shows provisions relevant to the normative content of the right as analysed in the preceding section (availability, quality and safety, affordability, information and access to justice). Nonetheless, an analysis of the salient provisions shows that the duties of the LWC to provide water services to Lagosians is couched as a contractual duty, with a predominant emphasis on

⁷⁴ LEMPL, s 245.

⁷⁵ LEMPL, s 36.

⁷⁶ Committee on Economic Social and Cultural Rights, *General Comment 15, Arts. 11 and 12 (Twenty-ninth session, 2003)*, U.N. Doc. E/C.12/2002/11.

⁷⁷ LEMPL, s 248.

⁷⁸ LEMPL, s 264.

⁷⁹ Ibid.

⁸⁰ LEMPL, s 254.

⁸¹ LEMPL, s 265.

cost recovery and economic gains, even at the risk of discontinuing lifeline services to users including those without meters or who are unable to pay their water services bills. Under the Law, there is no significant protection of basic access as required by the human right to water. The wide discretionary powers granted to the LWC *prima facie* minimise the possibility of redress for users through the complaints mechanism. Similarly, the provisions on access to justice for aggrieved users only apply under limited circumstances.

Based on an assessment of the balance of convenience, the pecuniary losses which the LWC and the private service providers may suffer by extenuating some of their powers in the Law, akin to arbitrary disconnection, cannot outweigh the State's obligation to fully localise and fulfil the right to water for citizens. It is therefore necessary to explore the intersects of the human right to water, the incentives of the LWC and core investor, as well as the government's human rights obligations, and elevate respect for the right beyond commercial considerations as a necessary first step towards localising the right to water. Such analysis would offer indications of contextually relevant options for pursuing practical changes such as elevating access to safe drinking water services, beyond the contractual obligation on consumers to pay for services, and respecting the users primarily as rightsholders with protection against the violation of their rights either by the LWC or other licensed private sector service providers.

The overall aim of subsequent water sector reforms should be to elevate access to safe drinking water services beyond the contractual obligation on consumers to pay for services to a human right. The provisions of the Law that are incoherent with human rights norms, as demonstrated in the previous section, ought to be revised to promote synergy between the progressive realisation of the human right to water and increasing private sector involvement in the delivery of water services. One practical step would be for the law to protect access to safe lifeline water services for all as a legal obligation of water services providers, while paying special attention to vulnerable users and adopting cross-subsidies and other instruments that reduce the inequalities in access sustainably. The role of informal services in bridging the access gap for a majority of the population should also be recognised and investments made in the development and deployment of low-cost technology for water quality testing and improvements at the household level. Finally, there should be institutionalisation of accountability mechanisms among both public and private actors within the water sector and other strategies for strengthening the capacity of the vulnerable populations to enforce their right to water.

Competing Interests

The author has no competing interests to declare.

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