

Privatisation and water governance in Africa: implications of a rights-based approach

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Abstract

Early in the post-independence era, the control of water resources in many African states was a task of central planning. Regrettably, water management soon became a miry adventure in most African states largely because of warped planning and implementation. This article examines the phenomenon of private sector involvement in water resources management and seeks to understand the effect of such involvement on the right to water in Africa in the context of the Millennium Development Goals. The article explores the continuing relationship between African governments and non-state actors in the management of water resources in the privatisation age. The article further analyses the role of various national water governance initiatives vis-à-vis the efficient management of water resources and the sharp contradictions in their frameworks from a rights-based perspective. It evaluates the normative frameworks of access to water as a human right in Africa and contends that the human being must be placed at the centre of water discourses in assessing all role actors and their responsibilities. Extrapolating from experiences from various states within and outside Africa, this article advocates a rights-based approach to water issues and its value for the ultimate purpose of human-centred development.

Keywords: Water governance, decentralisation, privatisation, multi-national enterprises (MNEs), Millennium Development Goals (MDGs), rights-based approach, Sub-Saharan Africa.

Disciplines: Human Rights Law, African Political Economy, Development, Social Policy.

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Introduction

In light of the increasing scarcity of fresh water resources, coupled with the weakness of post-independence policy frameworks to ensure the effective management and distribution of water resources, most developing states of the world are now taking steps to exploit their water resources in a more sustainable way and are implementing systemic changes to the use of water resources and water delivery services. There are ongoing major changes in policies and laws in most states. African states are no exception. State policy initiatives now often encourage private investment in water services, and in the case of many African states, particularly in the so-called sub-Saharan region, this is often foreign. Policy changes in developing states have received the backing of most international financial institutions in the development sector such as the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund (IMF).¹ This pattern has become ever more contentious in a number of developing states because the up-and-coming global market for water services strains communal water supply schemes. Moreover, the decision-making process in terms of water sector reforms often takes place without adequate dissemination of information and involvement of the civil society.² As would be seen shortly, the institutional bias towards the private appropriation of water along the lines of neo-liberal free market regimes established for other resources is increasingly being challenged across disciplines.

While one must acknowledge that intensive global legal and policy initiatives to water issues are incipient, what is worrisome is that states, multilateral institutions and the civil society in the African region are generally not responding to the challenges of water governance in a coherent and effective way. The questions presented for researchers and scholars on water affairs in African states are:

¹ See World Bank, *Private Sector Development Strategy – Directions for the World Bank Group* (Washington, DC: World Bank Group, 2002) 3-15; Clare Joy & Peter Hardstaff, *Dirty Aid, Dirty Water: The UK Government’s Push to Privatise Water and Sanitation in Poor Countries* (London: World Development Movement, 2005) 15; Barak D. Hoffman, “Development Despots: Foreign Aid, Domestic Politics, and the Quality of Governance”, *Globalisation Research Centre – Africa*, Paper No. 21, 3 May 2003, <<http://www.globalization-africa.org/papers/21.html>> (last visited 27 July 2008); Sarah Grusky, “IMF Forces Water Privatisation on Poor Countries”, February 2001, <<http://www.ratical.org/co-globalize/waterIMF.html>> (last visited 27 July 2008).

² See Hoffman, *ibid.* See also Emilie Filmer-Wilson, “The Human Rights-Based Approach to Development: The Right to Water” (2005) 23(2) *Netherlands Quarterly of Human Rights* 213, 215.

Where does Africa belong in the regulatory regime of foreign investment and international development activities where such adversely implicate the management of water resources, particularly now that the continent is being talked about increasingly in terms of marginalisation?³ Will the present regime of water privatisation programmes guarantee Africa's attainment of global development aspirations? These questions, from my perspective, form a critical component of the quest for effective, equitable and sustainable water governance in African states. It must be borne in mind that while I recognise the plenitude of water governance challenges confronting Africa and Africans, this article does not propose to answer all the tribulations of Africa. In this article, therefore, focus is on the involvement of states and non-state actors in the water sector reform processes and the implications of their activities for equitable water usage in some African states and the survival of African peoples in the shorter and longer terms. Efforts are made to fashion out alternative trajectories for normative, policy and other strategic action to enable the continent engage the many challenges arising from the prevailing global economic system. Drawing on learned experiences, therefore, this article accentuates the significance of a rights-based approach to the formulation of legal, policy and institutional responses to initiatives implicating water governance in the African region. The parameters of the overarching connection between a rights-based approach and water governance *vis-à-vis* non-state actors are elaborated in subsequent discussions in this article.

As a final preliminary note, we must be careful to note that all references to "Africa" does not indicate any attempt at homogenising geopolitical differences among Africa's 54 states. Rather, it is the commonality in the experiences of African states as duty bearers for the promises of various human rights treaties and their challenges as developing states that must guide our interpretation of the thrust of this paper. While the problematised themes of this paper revolve mainly around Sub-Saharan Africa, I indicate scenarios that implicate the northern states of the continent.

³ For scholarly references on the "marginalisation" discourse, see Yash Tandon, "The World Trade Organisation and Africa's Marginalisation" (1999) 53(1) *Australian Journal of International Affairs* 83; R. J. Hagen, "Marginalisation in the Context of Globalisation. Why Is Africa So Poor?" 28(2) *Nordic Journal of Political Economy* (2002) 148-179; J. Oloka-Onyango, "Reinforcing Marginalised Rights in an Age of Globalisation: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 *American University International Law Review* 851; Sehlare Makgetlaneng, "The Penetrated Political Economy of Africa Countries: Marginalisation or Increased Integration and Dependence", AISA Electronic Monograph, 1 August 2003, <http://www.ai.org.za/electronic_monograph.asp?ID=5> (last visited 27 July 2008).

Water governance in Africa: concepts, contexts and concerns

The term “governance” is a hackneyed concept that has since the 1990s been applied by institutions, states, policy-makers, researchers and other commentators to diverse “zones” of human endeavour.⁴ When placed within the water context, the concept is generally defined as encompassing the relations and interplay among governmental and non-governmental entities, processes and normative frameworks, where powers and functions directly or indirectly influence the use, management and control of water.⁵ In this regard, the United Nations Development Programme (UNDP) has defined “water governance” as “the ways in which individuals and societies have assigned value to, made decisions about, and managed the water resources available to them.”⁶ However, the terminology encompasses the entire gamut of laws, policies, regulation, administration, investment, uses and other issues pertaining to water as well as the roles and responsibilities of state and non-state actors in that sphere.⁷ Water governance thus concerns how legal and policy decisions are made, with particular emphasis on participation by human beings who will thereby be directly affected by the outcome of such decisions. What then are the basis, scope and content of water governance? Where lies the linkage between water governance and the language of human rights? What implications do the global water governance discourses portend for Africa and African peoples particularly in the context of the Millennium Development Goals (MDGs)? Based on my premise that the human being must be at the centre of water governance discourses, I make a modest attempt at addressing this plethora of questions.

It must be borne in mind from the onset that the current debates and challenges relating to water supply and management in Africa cannot be properly understood without reference to the historical developments about the subject beginning from the colonial period.⁸

⁴ John Graham, Bruce Amos & Tim Plumptre, *Governance Principles for Protected Areas in the 21st Century* (Ottawa: Institute of Governance, 2003) 5; UK Department for International Development (DFID), *Governance, Development and Democratic Politics: DFID's Work in Building More Effective States* (London: DFID, 2007) 6-13.

⁵ DFID, *ibid.*, 2-7. See also UNESCO, *UN World Water Development Report* (New York, NY: UNDP, 2006) 45-46.

⁶ UNDP, *Water Governance for Poverty Reduction* (New York, NY: UNDP, 2004) 2.

⁷ *Ibid.*, 10. See also Maria Saleth & Ariel Dinar, *Evaluating Water Institutions and Water Sector Performance*, World Bank Technical Paper No. 447 (Washington, DC: World Bank, 1999) 4-5.

⁸ Naren Prasad, “Privatisation of Water: A Historical Perspective” (2007) 3(2) *Law, Environment & Development Journal* 217, 223.

In much of pre-independence Africa, the management of water resources was mainly the responsibility of colonial national governments.⁹ The centralisation model thus remained the dominant approach to water governance in African states even at independence.¹⁰ However, with the ubiquitous failure of various centralised water and other development-oriented project initiatives, governments in African states embarked on the idea of decentralising bureaucracies, social services and governmental planning, with the objective of enhancing efficiency and accountability, among others.¹¹ While the assumption of the vast majority of African states that opted for the decentralisation model was that decentralisation would guarantee better management of public resources for the common good,¹² practical experiences across states of the decentralised model – Democratic Republic of Congo, Ethiopia, Ghana, Kenya, Morocco, Mozambique, Namibia, Niger, Nigeria, Zambia, Senegal, South Africa, Sudan, Tanzania, Uganda, and so on – all showed that decentralisation largely compounded the problems sought to be avoided.¹³

One of the core areas where many African governments felt decentralisation was desirable which however manifested much of the adverse effects of the approach was water management, particularly as related to access and distribution.¹⁴ Although popular scholarship defines decentralisation as “the transfer of authority and responsibility for planning, managements, and resource-raising and

⁹ James S. Wunsch, “Foundations of Centralisation: The Colonial Experience and the African Context”, in James S. Wunsch & Dele Olowu (eds.), *The Failure of the Centralised State: Institutions and Self-Governance in Africa* (San Francisco, CA: Institute for Contemporary Studies, 1995) 23.

¹⁰ Prasad, above note 8, *ibid*.

¹¹ See Dele Olowu, “Bureaucratic Morality in Africa” (1988) 9(3) *International Political Science Review* 215, 222-223.

¹² James S. Wunsch, “Centralisation and Development in Post-Independence Africa”, in James S. Wunsch & Dele Olowu (eds.), *The Failure of the Centralised State: Institutions and Self-Governance in Africa* (San Francisco, CA: Institute for Contemporary Studies, 1995) 43; Dele Olowu, “The Failure of Current Decentralisation Programs in Africa”, in James S. Wunsch & Dele Olowu (eds.), *The Failure of the Centralised State: Institutions and Self-Governance in Africa* (San Francisco, CA: Institute for Contemporary Studies, 1995) 74, 87; George Matovu, “Decentralisation in Africa: A Review of Patterns, Trends and Challenges”, in United Nations, *Decentralised Governance for Democracy, Peace and Development and Effective Service Delivery* (New York: UN, 2004) 34, 39-40.

¹³ See generally Stephen N. Ndegwa, *Decentralisation in Africa: A Stocktaking Survey*, African Region Working Paper Series No. 40 (Washington, DC: World Bank, 2002) 13.

¹⁴ Matovu, *Decentralisation in Africa*, above note 12, 54.

allocation from the central government to (a) field units of central government ministries or agencies; (b) subordinate units or levels of government; (c) semi-autonomous public authorities or corporations; (d) area-wide regional or functional authorities; or (e) NGOs/PVOs”,¹⁵ the manifestation of the decentralisation phenomenon in Africa supports the view that it is not to be conceived only as a vertical transfer of responsibilities and resources but also encompasses horizontal transfer between governments and non-state entities.¹⁶ This is where the concept of privatisation makes its entry into this discussion.¹⁷

The privatisation of public infrastructure and social services had become the dominant approach of many African governments since the late 1980s, as solution to all the shortcomings and challenges of public service delivery and management.¹⁸ The management of water resources was no exception, manifesting in diverse forms of private sector participation (PSP) in the water sector. Notwithstanding upward indication of failures and increasing public pressures against it, privatisation remains the prevalent approach to water supply and management in much of Africa, albeit constantly repackaged under new nomenclatures and frameworks, e.g., “Public-Private Partnerships” (PPPs), “Water Operator Partnerships” (WOPs), “Integrated Water Resources Management” (IWRM), and so on.¹⁹ While privatisation as a concept has received considerable scholarly

¹⁵ *Ibid.*,38.

¹⁶ George Matovu, “Capacity Building Approaches and Strategies: Human Resources Development for Effective Local Government Performance in Africa”, in United Nations, *Decentralised Governance for Democracy, Peace and Development and Effective Service Delivery* (New York: UN, 2004) 103, 110.

¹⁷ For a scholarly background discussion of “privatisation” in Africa, see Samuel Adams & Berhanu Mengistu, “The Political Economy of Privatisation in Sub-Saharan Africa” (2008) 89 (1) *Social Science Quarterly* 78–94.

¹⁸ *Ibid.*; Kate Bayliss, “Privatisation and Poverty: The Distributional Impact of Utility Privatisation” (2002) 73(4) *Annals of Public & Cooperative Economics* 603, 605.

¹⁹ See Peter H. Gleick et al, *The New Economy of Water: The Risks and Benefits of Globalisation and Privatisation of Fresh Water* (Oakland, CA: Pacific Institute for Studies in Development, Environment, and Security, 2002) 26-28. For a discussion about “Water Operator Partnerships” (WOPs), see Silver Mugisha, *Developing Water Operator Partnerships: A Case of NWSC-Uganda* March 2006. For a discussion of “Public-Private Partnerships” (PPPs), see David Hall & Emanuele Lobina, “Private and Public Interests in Water and Energy” (2004) 28 *Natural Resources Forum* 268–277. For a discussion of “Integrated Water Resources Management” (IWRM), see Emmanuel M. Akpabio, Nigel M. Watson, Uwem E. Ite & Imoh E. Ukpong , “Integrated Water Resources Management in the Cross River Basin, Nigeria” (2007) 23(4) *International Journal of Water Resources Development* 691 – 708.

attention *vis-à-vis* discourses on the effect of globalisation in Africa,²⁰ what appears negligible is the interjection of African water privatisation discourses by international human rights ethos. It will serve the ends of this article, at this point, to analyse the role and influence of privatisation on water governance in African states in order to accentuate how this implicates human rights considerations.

Water sector reforms and the privatisation paradigm in Africa

No doubt, infrastructure services such as electricity, telecommunications, transportation, and water and sanitation play a critical role in a country's development and are directly and indirectly linked to living standards and economic growth. Until the 1990s, most developing states relied on public sector monopolies to finance and operate their infrastructure, albeit with disappointing results.²¹ Beginning in the late 1980s, therefore, most of these states began turning to the private sector to take over the operation of existing infrastructure and to finance new infrastructure development. Private sector participation in infrastructure was expected to expand and improve services, create incentives for efficiency, and reduce the burden on strained public resources.²²

²⁰ Some of the notable literature on the subject include: Roger G. Noll, "Reforming Urban Water Systems in Developing Countries", Stanford Institute for Economic Policy Research (SIEPR) Discussion Paper No. 99-32 (Stanford, CA: SIEPR, 2000); Colin Kirkpatrick, "Regulatory Impact Assessment in Developing Countries: Research Issues", Centre on Regulation and Competition, Working Paper Series No. 5, University of Manchester, Manchester, October 2001; John Craig, "Privatisation and Indigenous Ownership: Evidence from Africa", Centre on Regulation and Competition, Working Paper Series No. 13, University of Manchester, Manchester, 2002; David Parker & Colin Kirkpatrick, "Privatisation in Developing Countries: A Review of the Evidence and Policy Lessons", Working Paper Series No. 55, Centre on Regulation and Competition, University of Manchester, Manchester, July 2003; Ademola Ariyo & Afeikhena Jerome, "Utility Privatisation and the Poor: Nigeria in Focus", Global Issues Papers 12. Heinrich Böll Foundation, Berlin, July 2004. See also Matthew Ryan Graham, "African Water and Sanitation Bibliography", Globalisation Research Centre – Africa, Paper No. 55, 11 July 2005, <<http://www.globalization-africa.org/papers/69.pdf>> (last visited 27 July 2008).

²¹ Prasad, above note 8, 224; *UN World Water Development Report* above note 5, 44. See also Wunsch, *Centralisation and Development*, above note 12, 51-69.

²² See the resources in note 20 above particularly John Craig, at 2, as well as Clive Harris, *Private Participation in Infrastructure in Developing Countries: Trends, Impacts and Policy Lessons*, Working Paper No. 5 (Washington, DC: , World Bank, 2003).

Water sector reforms basically seek to redefine the role that governments play in the management and distribution of water resources. In much of Africa, these include both measures restricting the role that the government is playing as well as measures seeking to increase governmental control.²³ On the one hand, the main thrust of water sector reforms is to transform the role of the government by transferring part of existing governmental prerogatives to users and private actors. This includes, for instance, the transfer of operation, maintenance, management and collection of water charges to user groups.²⁴ This is meant to promote a sense of ownership at the user level that the overbearing presence of the government in the water sector had not been able to cultivate. A second thrust of the reforms is to set up new bodies at the local level to take over part of the functions of the government. The reduction of the role of the state in the water sector is also linked to the promotion of the use of incentives to ensure that water is more efficiently and productively used. The main consequence which is derived from this is the call for private sector involvement in all aspects of water control and use from planning to development and administration of water resources projects.²⁵

On the other hand, some of the ongoing reforms seek to foster increased state involvement in the water sector. At the global level, an increasing number of states are seeking to control and regulate groundwater whose use has been largely linked to land ownership until now.²⁶ The reference to groundwater and land ownership here is neither abstract nor superfluous. As society becomes more settled, or as water becomes scarcer, there is an increased focus on the issue of who owns the water under the land. Three approaches to groundwater ownership have developed. First, the oldest and least rigorous rule is the common law rule or the absolute ownership rule. It grants to property owners the unrestricted right to remove water beneath their properties, even if this results in depleting the water table beneath adjacent property or causing subsidence in the adjacent land. The common law rule was based on the reasoning that ownership of property extended *ab infernis ad celos* – “from hell to

²³ See Afeikhena Jerome & Ademola Ariyo, “Infrastructure Reform and Poverty Reform in Africa”, African Development and Poverty Reduction, Forum Paper, October 2004, 3-4.

²⁴ *Ibid.*

²⁵ Patrick Bond, “Uneven Urban Development, Water and Finance during Africa’s Global Economic Integration”, Globalisation Research Centre – Africa, Paper No. 55, 18 May 2005, <http://www.globalization-africa.org/papers_detail.php?Paper_ID=55> (last visited 27 July 2008).

²⁶ See generally Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge: Cambridge University Press, 2006) 169-171.

heaven” – the owner of a parcel of land owns that land, the air rights, the ground rights and any other rights all the way through to the heart of the earth.²⁷ This creates a nice imaginative picture of ownership, but it also raises a number of questions about the complexities of the land tenure/water rights interface. In a number of areas, therefore, the state seeks to either maintain its *de facto* prerogatives or extend them. In the national policies of many African states, a clear statement is made to the effect that the government should be able to provide for the transfer of water from one river basin to another.²⁸

Overall, recent reforms in the water sector in African states are based on the need to promote decentralisation and participation that involves water users, in accordance with international principles.²⁹ This is meant to provide a framework for decentralising decision-making to the lowest level and to allow the beneficiaries (end-users) and other stakeholders to be involved from the project planning stage. The rationale for decentralisation is the perceived inability of the state to deliver appropriate benefits.³⁰ The state is thus called upon to change its role from that of a service provider to that of a regulator. In the case of agricultural irrigation, for example, this implies partial or full transfer of the control of irrigation systems to users by permitting and inducing the users to become responsible for the upkeep of the irrigation systems as well as for sharing the water allocated among them.

In theory, *participation* is conceived as an omnibus expression that covers participation in policy planning and project design to the management of water infrastructure. In practice, however, the word “participation” is some sort of anomaly. On the one hand, what is envisaged is not so much the opportunity for users to participate in taking decisions affecting them but the blanket imposition of a new system of local water use and control scheme based on commercial

²⁷ See Joshua Getzler, *A History of Water Rights at Common Law* (Oxford, Oxford University Press, 2004) 49-52; S. Hodgson, *Land and Water: The Rights Interface* (Rome: Food and Agriculture Organization).

²⁸ Bond, above note 25, *ibid.*; UN World Water Development Report, above note 5, 54.

²⁹ See Yuliya Mitrofanskaya, “Privatisation as an International Phenomenon” (1999) 14 *American University International Law Review* 1399, 1410; John N. Drobak, “A Comment on Privatisation and Democratisation” (2006) 50 *Saint Louis University Law Journal* 783, 787-790; Philippe Cullet, “Water Law Reforms Analysis of Recent Developments” (2006) 48(2) *Journal of the Indian Law Institute* 206.

³⁰ Edward Mugabi, “Decentralisation for Good Governance: Policies, Legal Frameworks and Implementation Strategies”, in United Nations, *Decentralised Governance for Democracy, Peace and Development and Effective Service Delivery* (New York, NY: United Nations, 2004) 22, 27-28.

principles even where there may be successful systems of water governance already in place.³¹ In other words, a government could choose to have less participation in economic affairs by authorizing regulated private firms to provide water to consumers as a monopoly product and by subsidizing market supply of the service.

Although privatisation and participation had become catchphrases in current water sector reforms in Africa, particularly in the context of the involvement of development agencies, the central operational paradigm has been the radical restructuring of the delivery of water in African states, with varying degrees of consequences. One notable aspect relates to the so-called *water markets*.³²

Throughout the 1990s, many African governments awarded water resource management contracts to multi-national enterprises (MNEs). By 2004, there were 20 ongoing water service contracts in Sub-Saharan Africa.³³ Swyngedouw projects that whereas only three per cent of all water services in Africa were privatised as of 1997, the figure will grow to 33 per cent in 2010, at the net value of US\$3 billion.³⁴ It should be remembered that following the gale of water privatisation programmes across the continent, there were various protests and public outrage; and water service contracts have been terminated in the Gambia, Ghana, Guinea, Kenya, Mozambique, South Africa and Zimbabwe, among others.³⁵ The privatisation of the water sector was introduced into African states based on the assumption that privatisation will benefit the poor and rural

³¹ See generally R. Alence, "Sources of Successful Cost Recovery for Water: Evidence from a National Survey of South African Municipalities" (2002) 19(9) *Development Southern Africa* 699-717; A. G. Kyessi, "Community-Based Urban Water Management under Scarcity in Dar-es-Salaam, Tanzania" (2001) 8(1-3) *Journal of Building and Land Development* 28-41.

³² See Ndegwa, above note 13, 7-8, 14. For some scholarly background discussions on "water markets" in Africa, see Rokeya Ahmed, *DSK: A Model for Securing Access to Water for the Poor* (London: Water Aid, 2003); Matthew Ryan Graham, *Water Services Delivery and Its Typologies in Africa* (MA Urban Planning Dissertation, University of California, 2005) 89-91. Ariyo & Jerome, *Utility Privatisation and the Poor*, above note 20, 25.

³³ Colin Kirkpatrick & David Parker, "Regulation and Privatisation of Water Services in Developing Countries: Assessing the Impact of the General Agreements on Trade in Service", Centre on Regulation and Competition, Working Paper Series No. 67, University of Manchester, Manchester, 2004, 5-6.

³⁴ Erik Swyngedouw, "Private Sector Participation in the Water Sector and the MDGs: Turning Local Waters into Global Money?", Fourth World Water Forum, Mexico City, 19 March 2006 (on file with author).

³⁵ See Bernard Collignon & Marc Vezina, "Independent Water and Sanitation Providers in African Cities", Washington, DC: World Bank, April 2000; Ariyo & Jerome, *Utility Privatisation and the Poor*, above note 20, 14. See also Bond, above note 25, *ibid.*

consumers and improve access to sanitation and clean water. However, this obviously has not been the overall outcome and while there have been pockets of relative success, the privatisation of the water sector has failed in many other cases.³⁶

One of the main grounds of criticism was that the tariff hikes following water privatisation were not affordable to low-income consumers. In some South African townships, where unemployment is close to 70 per cent, for example, high reconnection fees and volumetric charges were followed by cholera outbreaks.³⁷ In the KwaZulu-Natal Province, the death toll rose to 250 with more than 100 000 cases of illness because of using water from rivers and stagnant ponds, as most poor people could not afford higher tariffs.³⁸ In Zimbabwe, a UK company (Biwater) terminated its water provision contract claiming that the customers are too poor to pay tariff rates that would have enabled the firm to make a decent profit.³⁹ In Guinea, the privatisation of water maintenance, billing and payment collection resulted in a tariff increase from US\$0.02 per cubic metre in 1989 to US\$0.83 per cubic metre in 1996.⁴⁰ Indeed, more customers were connected in one year reaching 23 000 from 12 000 in 1995. The number of metered private customers therefore went up from five to 93 per cent. Nearly all government institutions were also connected to piped water. In the end, only 24 per cent of the new water connections were working.⁴¹ Empirical data show that 50 percent of Ghanaians earn less than US\$1

³⁶ Colin Kirkpatrick et al, "State Versus Private Sector Provision of Water Services in Africa: A Statistical DEA and Stochastic Cost Frontier Analysis", Centre on Regulation and Competition, Working Paper Series No. 70, University of Manchester, Manchester, 2004, 3. See also Bond, above note 25, *ibid*.

³⁷ See generally Laura Russ, *The Right to Water and Sanitation: A Useful Tool for Universal Service Delivery?* (MA Urban Planning Dissertation, University of California, Los Angeles, 2005) 35-37; Sonkita Conteh, *Inhibiting 'Progressive Realisation'? The Effect of Privatisation on the Right to Water in Senegal and South Africa* (LLM Dissertation, University of Pretoria, 2006) 39-43.

³⁸ *Ibid*. See also Edward Cottle & Hamed Deedat, *The Cholera Outbreak: A 2000-2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority Areas, Uthungulu Region, Kwazulu-Natal* (Cape Town: ILRIG, 2002); M. Scrace, "Cholera in the Mdletsheni Tribal Authority" (2006) 5 *Journal of Rural & Tropical Public Health* 70-78.

³⁹ Janelle Plummer et al, *Preparing a Concession: Working Towards Private Sector Participation in Water and Sanitation Services in Gweru, Zimbabwe* (London: GHK International, 2001) 442; Graham, *Water Services Delivery*, above note 32, 70-71.

⁴⁰ George R.G. Clarke, Claude Menard & Ana Maria Zuluaga, "Measuring the Welfare Effects of Reform: Urban Water Supply in Guinea" (2002) 30(9) *World Development* 1517-1537; Graham, *Water Services Delivery*, above note 32, 18-19.

⁴¹ Clarke et al, *ibid.*, 1523. See also Ariyo & Jerome, *Utility Privatisation and the Poor*, above note 20, 14.

per day and 40 per cent live below the national poverty line.⁴² In addition, 35 percent of Ghanaians lack access to safe drinking water, yet poor households in several communities in Ghana spend up to 25 percent of their earnings on drinking water.⁴³ Water privatisation manifests its problematic edges in many other areas as far as Africans are concerned.⁴⁴

It is worth mentioning that way, back in 1994, the World Bank had vehemently posited that the use of prepaid water meters by which end-users pay upfront for the water consumed, and invariably, the privatisation of water services, was the most cost-efficient way of ensuring the delivery of water services to large populations.⁴⁵ While the World Bank's contention sounded plausible, it had later been proven as missing a number of collateral issues. For one, this method of delivery was essentially detrimental to the poorest individuals with low and irregular income and who therefore were often unable to pay upfront for water services to which access must be guaranteed on a daily basis.⁴⁶ Furthermore, the individualisation of the provision

⁴² See Gyekye Tanoh & Kathy Cusack, "The Struggle Over Water", <http://www.socialwatch.org/en/informeImpreso/pdfs/ghana2003_eng.pdf> (last visited 27 July 2008); Public Citizen, "Water for All Campaign", <<http://www.citizen.org/documents/ghanawbalert.pdf>> (last visited 27 July 2008).

⁴³ Tanoh & Cusack, *ibid.* See also Erin Webreck, "Access to Water: The Challenge of Battling Privatisation: A Case Study of Swedish Water Companies" (2005) 5 *American University/Sustainable Development Law & Policy* 30; Stephen Adei, "Governance, State-Ownership and Divestiture: The Ghanaian Experience" (unpublished, on file with author) 24.

⁴⁴ For various publications on different national contexts depicting warped outcomes of the water privatisation process across Africa, see Kenyan Social Watch Coalition, "The Stark Realities of an Ideological Orthodoxy", <http://www.socialwatch.org/en/informeImpreso/pdfs/kenya2003_eng.pdf> (last visited 27 July 2008); Abould Souleye Sow, "Less State, Fewer Benefits", <http://www.socialwatch.org/en/informeImpreso/pdfs/senegal2003_eng.pdf> (last visited 27 July 2008); Hassan A. Ati & Galal El Tayeb, "The Damage of Declining Public Investment on Services", <http://www.socialwatch.org/en/informeImpreso/pdfs/sudan2003_eng.pdf> (last visited 27 July 2008); David Obot, "Privatisation Versus the Poor", <http://www.socialwatch.org/en/informeImpreso/pdfs/uganda2003_eng.pdf> (last visited 27 July 2008); and Michelo Hansungule, "Poverty in the Midst of the Market", <http://www.socialwatch.org/en/informeImpreso/pdfs/zambia2003_eng.pdf> (last visited 27 July 2008).

⁴⁵ World Bank, *World Development Report 1994: Infrastructure for Development* (Washington, DC: World Bank, 1994) 8-11. See also Jan Vandemoortele, "Access to Basic Social Services: Access to Basic Social Services, Human Rights that Make Excellent Economic Sense", Carnegie Council on Ethics and International Affairs, Workshop on Social Policy Principles and the Social Development Agenda, Pocantico Conference Centre, New York, 3-5 December 1999.

⁴⁶ See John Scanlon, Angela Cassar & Noemi Nemes, *Water as a Human Right?* (Gland: IUCN, 2004) 1; Erik B. Bluemel, "The Implications of Formulating a Human Right to Water" (2004) *Ecology Law Quarterly* 957, 962.

of this traditionally communal commodity has had the side effect of eroding social cohesion as neighbours suddenly start competing for a good that they previously shared.⁴⁷ Finally, it has been observed that, in the long run, private water supply companies have tended to favour investment in rich neighbourhoods to the detriment of poorer areas, where the quality of services consequently declined, and in some cases disappeared altogether.⁴⁸ So much has been written on the negative consequences of privatisation in Africa as most of the resources already cited in this article would show and it serves no purpose to revisit this wealth of literature.

The privatisation model, which is prevalent in much of Africa, comes under critical review bearing in mind the contextual global challenges that reflect the continent's particularly precarious position on the issue of human access to safe and adequate water.⁴⁹ It should be remembered that more than 30 years ago, precisely in 1977, delegates from most of the world's governments had expressed their commitment to ensuring that everyone would have adequate water and sanitation by 1990.⁵⁰ Since this goal failed to materialise, another target was set in 1990 to achieve universal access to safe water by 2000.⁵¹ By 2000, it was obvious that this goal was not achievable sequel to which the goal date was shifted to 2015, this time, relabelled as a Millennium Development Goal (MDG) targeted at halving the proportion of people without sustainable access to safe drinking water all over the world by this future date.⁵²

Having laid the premise for the interjection of the global water agenda by the water governance crisis in Africa, the inevitable question to ask is whether African states are on a progressive path towards the realisation of the above-mentioned goal. The next segment therefore evaluates the significance of the MDG on water for Africa and Africans and accentuates the need for a re-conceptualisation of current African water governance reforms.

⁴⁷ See Bluemel, *ibid.*

⁴⁸ Kate Bayliss, "Utility Privatisation in Sub-Saharan Africa: A Case Study of Water" (2003) 41 *Journal of Modern African Studies* 507-531. See also Scanlon et al, above note 46, 2; Adams & Mengistu, above note 17, 85; Legal and Human Rights Centre et al, "Benefit of an Elite at the Expense of the Poor Majority", <http://www.socialwatch.org/en/informeImpreso/pdfs/tanzania2003_eng.pdf> (last visited 27 July 2008).

⁴⁹ See the graphic description of Africa's overall standing on global water target in DFID, "Water and Sanitation: Are We on Track to Meet the Target?", DFID Factsheet, November 2007 (London: DFID, 2007) 1-2.

⁵⁰ See UN-Habitat, *Water and Sanitation in the World's Cities* (London: Earthscan, 2003) 5-6; Joy & Hardstaff, *Dirty Aid, Dirty Water*, above note 1, 7.

⁵¹ Jan Vandemoortele, *Are the MDGs Feasible?* (New York, NY: UNDP, 2003) 1.

⁵² Water Aid, "Women's Problems", <http://www.wateraid.org.uk/what_we_do/the_need/241.asp> (last visited 27 July 2008).

Water governance in Africa: challenges and dilemmas in the context of the Millennium Development Goals (MDG)

At the United Nations (UN) Millennium Summit of 6-8 September 2000, 189 sovereign states adopted a document known as the *Millennium Declaration*, from which emerged a set of eight fundamental global development goals, 18 numerical targets and 48 quantifiable indicators to be achieved by 2015.⁵³ The Millennium Development Goals (MDGs) commit the international community to an expanded vision of poverty reduction and pro-poor growth and vigorously place human development at the centre of social and economic progress in all states. The MDGs also seek to reduce the number of poor in the world and specifically target the worst aspects of poverty, including lack of access to water.⁵⁴ Throughout the developing world, there are significant social, economic, ecological, and capacity obstacles to meeting the MDG for water and sanitation.⁵⁵ It is conceivable that overcoming them will require more effective and *participatory* water governance, improved water management, enhanced capacity at all levels, and greater empowerment of the poor. Yet, as the world strives towards achieving these development targets, Africa stagnates. It is becoming evident that Africa will miss the MDGs by wide margins. According to the Global Monitoring Report (GMR) for 2008,⁵⁶ the annual report that assesses how the world is faring in implementing the policies and actions required to achieve the MDGs, jointly produced by the World Bank and the IMF in collaboration with other international partners, because of high economic growth in the last five years, the world is generally on course to achieve the first MDG, that is, halving extreme poverty by 2015 with the number of people living on less than US\$1 per day declining by 278 million between 1990 and 2004.⁵⁷ Based on the same trends, however, most MDGs

⁵³ For the text of the Declaration and related reports, see Kofi Annan, "We the Peoples: The Role of the United Nations in the Twenty-First Century", <<http://www.un.org/millennium/sg/report/full.htm>> (last visited 27 July 2008). See also Salil Shetty, "Millennium Declaration and Development Goals: Opportunities for Human Rights" (2005) 2(2) *SUR – International Journal of Human Rights* 7, 8.

⁵⁴ MDG Number 7 (Ensure Environmental Sustainability) declares Target Number 10 as "Reduce by half the proportion of people without sustainable access to safe drinking water." See UNDP, "About the MDGs: Basics", <<http://www.undp.org/mdg/basics.shtml>> (last visited 27 July 2008). See also Shetty, *ibid.*; UNDP, *Water: A Key to Meeting the Millennium Development Goals* (New York, NY: UNDP, 2004) 2.

⁵⁵ UNDP, *Water: A Key*, *ibid.*, 5-7. See also Bluemel, above note 46, 961; Scanlon et al, above note 46, *ibid.*

⁵⁶ World Bank, *Global Monitoring Report: MDGs and the Environment* (Washington, DC: World Bank 2008).

⁵⁷ *Ibid.*, 33.

are unlikely to be met in Africa.⁵⁸ With regard to Goal Number 7 Target 10, the GMR paints a dismal picture for Africa:

While wide agreement exists on the need for adequate water and sanitation, progress has been slow, particularly compared with progress on other MDGs...for 32 countries in Africa, the distribution of access to clean water and proper sanitation is highly unequal: while less than 10 percent of the bottom expenditure quintile has access to improved water supply, nearly 70 percent of the top quintile has such access. Similarly, over half of the bottom quintile has no access to sanitation of any kind, while only 6 percent of the top quintile has no access to sanitation. Given the fundamental nature and cost of water and sanitation services...as incomes increase, many families will invest in these basic services, and they are willing and able to pay at least for water.⁵⁹

Suffice to say that the litany of Africa's turbulent experience with warped outcomes from water privatisation leads to inevitable questions: what should be the focal point in assessing the water privatisation paradigm in Africa? Next, in the context of the MDGs, will privatisation guarantee that MDG Number 7 Goal 10 is achieved as scheduled? Furthermore, are there operational models or platforms for pursuing and achieving the MDG goal on water in a sustainable way? This is where the rights-based approach to water governance canvassed in this article makes its entry point and to this we now turn.

The Millennium Development Goals and water governance in Africa: a rights-based critique

As shown in the preceding segment, the MDGs call for change, but not for creating the conditions to make real change possible. To address the root causes of the problems that the goals are supposed to rectify, there is a need to engage those phenomena that the MDGs take for granted. These include policies that have increased poverty and inequality around the world. One way of doing this is by exploring the phenomenon of privatisation as I have done earlier in this article.

Another way of gaining insight into any policy model is to look at its authors. The MDGs are sponsored jointly by the UN, the World Bank, and the IMF. While the United Nations operates within a human rights framework, the objectives of the World Bank and IMF are to advance

⁵⁸ *Ibid.*, 2-3, 21-22. See also Ebenezer Hanson, "Privatisation of Water, Health Renders MDGs Unattainable, Says Civil Society", *Public Agenda* (Accra), 21 April 2008, <<http://allafrica.com/stories/200804211721.html>> (last visited 27 July 2008).

⁵⁹ *Ibid.*, 83-84.

a set of economic policies that are often contrary to human rights considerations.⁶⁰ In essence, the MDGs infuse neoliberal priorities into development policy, merely employing the language of human rights. They seek to “eradicate extreme poverty and hunger” (Goal 1), for instance, but rely on the discredited notion that economic growth at the national level can eliminate poverty, and they assume that privatisation of basic social services will promote rather than impede economic development.⁶¹ Latent in the MDGs is a deep-seated incongruity: poor states are expected to meet the MDGs by implementing the very neoliberal economic policies that have, in large measure, caused the crises that the goals are intended to address in much of the developing world. These policies include cutting government spending, privatising basic services including water, liberalising trade, and producing goods primarily for export.⁶²

From the above, the methodology and assumptions of neoliberal economics inform the MDGs, which rely heavily on the indicator of “absolute poverty” (i.e. measurement of the proportion of the population surviving on less than a certain amount of income each day).⁶³ The MDGs therefore utilise the World Bank’s index of an income of US\$1 per day to indicate extreme poverty. This earning-based measurement of poverty blurs the experience of millions of people, for whom poverty may not be a question of income, but of their alienation from sustainable patterns of livelihood. Someone can enjoy good health and live quite long but be illiterate and thus cut off from learning, from communication and from interactions with others. Another person may be literate and quite well educated but prone to premature death because of epidemiological characteristics or physical disposition. Yet a third may be excluded from participating in the important decision-making processes affecting her life. The deprivation of none of them can be fully captured by the level of their income. Furthermore, indigenous people, for instance, assert that

⁶⁰ See Dejo Olowu, *Conceptualising a Rights-Based Approach to Human Development in Africa: Reflections on the Roles and Responsibilities of Non-State Actors*, Research Partnership Programme 2/2004 (Copenhagen: Danish Institute for Human Rights, 2005) 52-56; J. Paul Martin, “Development and Rights Revisited: Lessons from Africa” (2006) 4(3) *SUR - International Journal on Human Rights* 91, 96.

⁶¹ Vandemoortele, *Are the MDGs Feasible?*, above note 51, 3.

⁶² See Sanjay Reddy & Antoine Heuty, “Achieving the Millennium Development Goals: What’s Wrong with Existing Analytical Models?”, <<http://www.millenniumdevelopmentgoals.org>> (last visited 27 July 2008). See generally Ban Ki-Moon, “Millennium Development Goals Report 2007”, <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2007/UNSD_MDG_Report_2007e.pdf> (last visited 27 July 2008).

⁶³ Vandemoortele, *Are the MDGs Feasible?*, above note 61, *ibid*.

their poverty and wealth are determined primarily by access to, and control of, their natural resources and traditional knowledge, which are the sources of indigenous culture and livelihoods.⁶⁴ In indigenous communities, therefore, human rights, particularly collective indigenous rights over land, natural resources including water, are critical to fighting poverty.⁶⁵ However, the MDGs fail to recognise that poverty is a function of human rights violations; such as the lack of access, discrimination and inequality.

For the purpose of this article, the MDGs conceive of access to water not as a non-negotiable and universal right, but as a “need” to be met.⁶⁶ By extension, therefore, the poor are not seen as autonomous subjects demanding that governments meet their legal obligations, but as a passive target group in policymaking.⁶⁷ Sustainable development – which depends on broad civic participation, social justice, and a fundamental shift in the balance of power – is consequently sidelined by this failure of the MDGs to operate within a human rights framework.⁶⁸

I submit that human rights standards are a useful yardstick for evaluating the MDGs. They will reveal that the MDGs are not a spontaneous expression of governmental goodwill at the dawn of our present millennium. Rather, the MDGs constitute pre-existing international obligations, some dating back to 1948.

Where, then, lies the normative framework for a human rights-based approach to water governance in Africa, in the context of the MDGs?

⁶⁴ See Russel Lawrence Barsh, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” (1994) 7 *Harvard Human Rights Journal* 33. See also Ike Okonta & Oronto Douglas, *Where Vultures Feast: 40 Years of Shell in the Niger-Delta* (Benin-City: Environmental Rights Action, 2001).

⁶⁵ *Ibid.* see also Sidsel Saugestad, “The Indigenous People of Southern Africa: An Overview”, in Robert Hitchcock & Diana Vinding (eds.), *Indigenous Peoples’ Rights in Southern Africa* (Copenhagen: IWGIA, 2004) 22, 38-40; African Commission on Human and Peoples’ Rights, *Indigenous peoples in Africa: The Forgotten Peoples?* (Copenhagen: IWGIA, 2006) 17-19; Sille Stidsen, *The Indigenous World 2007* (Copenhagen: IWGIA, 2007) 12-13.

⁶⁶ See UN *World Water Development Report* above note 5, 62.

⁶⁷ See World Bank, *Global Monitoring Report*, above note 56, 19, 38, 60, for references supporting this line of thought.

⁶⁸ See Prasad, above note 8, 231-232; Verena Fritz & Alina Rocha Menocal, “Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda” (2007) 25(5) *Development Policy Review* 531-552. See also Amy Hardberger, “Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates” (2005) 4(2) *Northwestern Journal of International Human Rights* 331, 341.

Basis for a Rights-Based Approach to Water Governance in Africa

With the formal commitment of a range of international institutions, intergovernmental agencies and international non-governmental organisations (INGOs) towards integrating human rights ethos into their development work, the prevalent thinking in contemporary development discourses is the *rights-based approach*.⁶⁹ Although there is divergence in the outlook of what each agency or institution perceives as representing the “rights-based approach”,⁷⁰ certain elements have crystallised over the years as representing the central dynamics of the concept. In a definition that encapsulates some of the more fundamental elements of the rights-based approach, the Overseas Development Institute (ODI) proclaims that:

A rights-based approach to development sets the achievement of human rights as an objective of development. It uses thinking about human rights as the scaffolding of development policy. It invokes the international apparatus of human rights accountability in support of development action. In all of these, it is concerned not just with civil and political rights, but also with economic, social and cultural rights.⁷¹

In another comprehensive definition, the United Nations Development Programme (UNDP) posits that:

A rights-based approach is based on the values, standards and principles captured in the UN Charter, the Universal Declaration of Human Rights and subsequent legally binding human rights conventions and treaties...Civil and political rights and social,

⁶⁹ For in-depth scholarly insight into the emergence of human rights themes in development theory, see Hans-Otto Sano, “Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development” (2000) 22(3) *Human Rights Quarterly* 734-742. See also Peter Uvin, “On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise” (2002) 17 *Praxis: Fletcher Journal of Development Studies* 1, 3 (for a historical view on the “rhetorical-formulaic incorporation” of human rights into development theory). Cf Tone Bleie et al, *A Rights-Based Approach to (Norwegian) Development Assistance*, A Discussion Paper Commissioned by the Royal Norwegian Ministry of Foreign Affairs, November 2002, 2-3.

⁷⁰ See generally “Definitions of Rights-Based Approach to Development: By Perspective”, August 2003, <http://www.crin.org/docs/resources/publications/hrbap/Interaction_analysis_RBA_definitions.pdf> (last visited 27 July 2008). For a detailed analysis of the variants and features of the “rights-based” approach to development, see Florence Nguyen, “Emerging Features of a Rights-Based Development Policy of UN, Development Cooperation & NGO Agencies”, Discussion Paper, OHCHR Asia-Pacific Regional Office, September 2002, <<http://www.un.or.th/ohchr/issues/rba/Pdf/discussrba.pdf>> (last visited 27 July 2008).

⁷¹ Simon Maxwell, Overseas Development Institute (ODI), *Briefing Paper*, September 1999, 1.

economic and cultural rights should be simultaneously advanced in a rights based approach to poverty alleviation.⁷²

There is thus an unmistakable consensus among the various theories on rights-based approach that the full realisation of human rights should be a vital goal of all development efforts. The approach canvassed in this article therefore perceives human rights as vital components of development programs and policies that must necessarily be integrated in all processes designed to deliver the promises of global development, including access to safe drinking water in the context of the MDGs. Taken together, the rights-based approach articulated here contemplates human-centred modalities for water governance in ways that emphasise equality and non-discrimination; accountability and transparency; and popular participation.⁷³

The right to water was only implicitly mentioned in the Universal Declaration of Human Rights (UDHR), 1948.⁷⁴ The international recognition of water as a right was advanced through the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966,⁷⁵ and continued with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979,⁷⁶ and the

⁷² UNDP, *Integrating Human Rights with Sustainable Human Development: A UNDP Policy Document, 1998*, at <http://magnet.undp.org/Docs/policy5.html> (last visited 27 July 2008). For a compilation of how governmental and non-governmental organisations and a wide range of other agencies perceive the rights-based approach, see Susan Appleyard, *A Rights-Based Approach to Development: What the Policy Documents of the UN, Development Cooperation and NGO Agencies Say*, OHCHR Asia-Pacific Human Rights Roundtable No. 1, September 2002.

⁷³ See generally Nguyen, *supra* note 69, at 6 (indicating these as the critical “rights” considerations).

⁷⁴ Article 25, UDHR provides: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” See Filmer-Wilson, above note 2, 227, contending that this provision encompasses the right to water.

⁷⁵ See Bluemel, above note 46, 967-68; Salman M.A. Salman & Siobhan McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (Washington, DC: World Bank, 2004) 2, both arguing that Articles 11 and 12 of the ICESCR make “water” a prerequisite for the fulfilment of every other human right.

⁷⁶ Article 14(2)(h), CEDAW provides: “States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

Convention of the Rights of the Child (CRC), 1989.⁷⁷

Over the past three decades, water has been addressed in a number of international conferences, which have recognised that water as a basic human need and some have gone as far as explicitly affirming the right to water.

In 1977, the Mar del Plata Action Plan that emerged from the UN Water Conference held in Mar del Plata, Argentina, stated:

(A)ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.⁷⁸

Furthermore, at the International Conference on Population and Development, in Cairo, 1994, and the Second United Nations Conference on Human Settlements (Habitat II), in Istanbul, 1996, 177 and 171 states, respectively, unanimously adopted international declarations which stated that the right to an adequate standard of living includes water.⁷⁹ These have been followed by several other declarations and soft law instruments.⁸⁰

At the African regional level, even though the main human rights treaty in Africa, namely, the African Charter on Human and Peoples' Rights, 1981, only guarantees that "every individual shall have the right to enjoy the best attainable state of physical and mental health", it is arguable that this right and the measures to secure it necessitates the inclusion of the right of access to safe water.⁸¹ A later treaty, the

⁷⁷ Article 24 of the CRC, paralleling Article 25 of the UDHR, provides that a child has the right to enjoy the highest attainable standard of health and that measures taken to secure this right shall include "combat[ing] disease and malnutrition...through, inter alia...the provision of adequate nutritious foods and clean drinking water."

⁷⁸ Asit K. Biswas, "From Mar Del Plata to Kyoto: An Analysis of Global Water Policy Dialogues", April, 2003, <<http://www.doccentre.net/docsweb/water1/water-biswas.htm>> (last visited 27 July 2008).

⁷⁹ *Ibid.*; *UN World Water Development Report* above note 5, 63; Salman & McInerney-Lankford, above note 75, 7-8.

⁸⁰ Among these are Article 8 (1) Declaration on the Right to Development, 1986; UN Declaration on Environment and Development ("Rio Declaration") the Rio Declaration, 1992; *Dublin Statement on Water and Sustainable Development*, International Conference on Water and the Environment, Dublin, 31 January 1992 ("Dublin Declaration"); Political Declaration of Johannesburg, 2002; and lately, the WHO Guidelines for Drinking-Water Quality, 2006. For an analysis of some of these instruments, see Sarah I. Hale, "Water Privatisation in the Philippines: The Need to Implement the Human Right to Water" (2006) 15 *Pacific Rim Law & Policy Journal* 765, 780-782.

⁸¹ See Anton Kok, "The Right to Water and Environment in South Africa", in Lawrence Mashava (ed.), *A Compilation of Essential Documents on the Right to Water and Environment* (Pretoria: Centre for Human Rights, 2000) 1, 3.

African Charter on the Rights and Welfare of the Child, 1990, makes a more direct pronouncement on the obligation of African states “to ensure the provision of adequate...and safe drinking water” in fulfilling the foregoing provision for children.⁸²

At the national level, only a few states have established formal legal frameworks acknowledging water as a human right, and of course, even fewer have embarked on practical implementation of a constitutional right to water. Perhaps the most outstanding example of the latter group is South Africa whose Bill of Rights provides

Everyone has the right to have access to sufficient food and water.⁸³

Based on this explicit provision, various policies and statutory measures have been put in place to implement this right in post-apartheid South Africa.⁸⁴ Significant here is the *National Water Act* (NWA), enacted in 1998, which establishes an all-inclusive principle for all water resources on the need to protect basic human and ecological needs. To this end, the NWA creates the ‘Reserve’ which is meant to implement the right of access to water guaranteed in the 1996 Constitution. The Reserve primarily creates a basic human needs reserve, which ‘provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene.’ It also creates an ecological reserve, which ‘relates to the water required to protect the aquatic ecosystems of the water resource.’ This is the only right to water established by the NWA regime and it supersedes all other uses of water; in other words, the amount of water required for the Reserve must be guaranteed before water resources are allocated to other water users.⁸⁵

There are indications that the human right to water is gaining further national and international appreciation. Empirical survey shows that numerous states around the world have Constitutions that recognise

⁸² See Article 14(2)(c) African Charter on the Rights and Welfare of the Child, 1990.

⁸³ Section 27(1)(b), Constitution of South Africa, Act 108, 1996.

⁸⁴ For some of the scholarly explorations into the normative and practical aspects of a rights-based approach to water governance in South Africa, see Jaap de Visser, Edward Cottle & Johann Mettler, “Realising the Right of Access to Water: Pipe Dream or Watershed?” (2003) 7 *Law Democracy & Development* 1; G. J. Pienaar & E. van der Schyff, “The Reform of Water Rights in South Africa” (2007) 3(2) *Law, Environment & Development Journal* 179; Anton Earle, Jaqui Goldin & Phemo Kgomo, *Domestic Water Provision in the Democratic South Africa – changes and challenges*, September 2005, <http://www.acwr.co.za/pdf_files/02.pdf> (last visited 27 July 2008).

⁸⁵ See generally Alix Gowlland-Guatieri, *South Africa’s Water Law and Policy Framework Implications For The Right To Water*, International Environmental Law Research Centre (IELRC) Working Paper 2007-03 (Geneva: IELRC, 2007) 4.

a general right to a healthy environment which implicates water.⁸⁶ In 2004, the human right to water was enacted in the Uruguayan Constitution following a referendum in which more than 64 percent of the population voted in favour of the amendment.⁸⁷ While judicial decisions concerning water as a human right are scarce, courts in India, Argentina, Brazil and South Africa have, in some cases, reversed decisions to disconnect water supply to poor people who could not afford to pay.⁸⁸ This is immensely instructive for African states.

In a landmark elaboration on the content of the plethora of international legal instruments implicating the right to water, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the body of experts monitoring the implementation of the ICESCR adopted its General Comment on the Right to Water in 2002 based on Articles 11 and 12 of the ICESCR.⁸⁹ The CESCR emphasised the government's legal responsibility to fulfil the right and defined water as a social, cultural and economic good in addition to being an economic commodity.⁹⁰ The right to water applies primarily to water of acceptable quality and quantity "for personal and domestic uses", placing an emphasis on "affordable" water supply.⁹¹

The need for access to water for farming and other productive uses was also acknowledged in the General Comment, while "priority in the allocation of water must be given to the right to water for personal and domestic uses."⁹² Acknowledging that there can be constraints due to water scarcities, the CESCR recommended the "progressive

⁸⁶ These include: Argentina, Belarus, Benin, Brazil, Bulgaria, Burkina Faso, Cambodia, Cape Verde, Chile, Colombia, Congo, Costa Rica, Ecuador, Eritrea, Ethiopia, France, Gambia, Greece, Guatemala, Honduras, Hungary, India, Japan, Kazakhstan, Korea, Kyrgyzstan, Laos, Macedonia, Mali, Mexico, Moldova, Namibia, Netherlands, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Turkey, Uganda, Venezuela, and Zambia. Scanlon et al, above note 46, 11-20.

⁸⁷ Articles 47 and 188, Constitution of Uruguay, 2004. See also Hale, above note 80, 783.

⁸⁸ See generally Gowlland-Guatieri, above note 85, 7; Philippe Cullet, *Water Law in India: Overview of Existing Frameworks and Proposed Reforms*, Working Paper 2007-01 (Geneva: IELRC, 2007). See, in particular, *Residents of Bon Vista Mansions v. S. Metro. Local Council*, 2002 (6) BCLR 625, 643-44 (W) (South Africa).

⁸⁹ See CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, 11-29 November 2002.

⁹⁰ *Ibid.*, para. 1.

⁹¹ *Ibid.*, para 2.

⁹² *Ibid.*, para 6.

realisation” of the right to water and identifies international donors and non-state actors and their responsibility to assist by providing financial and technical assistance.⁹³ This is of huge significance for the developing states of Africa particularly in the fulfilment of the MDG Number 7 in Africa.

Now, the question thus comes to the fore: What makes the rights-based approach a *sine qua non* for water governance in Africa in the MDG context? For many reasons, the rights-based approach is crucial in defining the benefits of the rights-holder(s) and in identifying the obligations of the duty-bearer(s). It is equally critical in addressing the problem of access, participation and non-discrimination. In these regards, I classify what I consider the more significant *raison d'être* for a rights-based approach to water governance in Africa as follows:

- It represents a comprehensive platform for evaluating the policies and actions of African governments in relation to their water-related obligations contained in various legal and policy instruments;
- It will provide a substantive operational agenda for policymakers in meeting the objective of popular ownership and empowerment;
- For those who constitute the most vulnerable and most deprived in Africa are to be able to make any effective water claims as “peoples”, the rights-based approach could become a platform for accessing information, for pressing collectively for individual and/or group rights, and for accessing fair assessment of competing claims;
- It will define the role of the African state as purveyor of those rights that enhance the conditions of human life in their respective situations. In this regard, it does not require the state to be a mere charitable entity but to become *responsible* for promoting *policies* that will secure the MDG regarding water;
- It will provide a viable framework for scrutinising the contractual commitments of governments to commercial operators and invariably render them accountable to democratic demands and priorities; and
- It will help all non-state operators in the water sector to promote genuine development beyond induced bureaucratic set-ups that produce contrived water policies and services.

The rights-based approach works in tandem with international initiatives and other development efforts, focusing on the twin issues of equality of access and sustainable development. With regard to water resources, *all* human rights are to be perceived as components

⁹³ *Ibid.*, paras. 18, 36 and 60

of holistic response to the pressures of economic globalisation, without compromising the interest of future generations. It would seem appropriate to explore some practical experiences of human-focused water initiatives and popular participation in water governance.

Rights-Based Approach to Water Governance: Lessons Learnt

Even though the rights-based approach remains largely a theoretical concept and confined to mainstream development discourses, the positive realities in its application to several social spheres, in different national contexts, cannot be overemphasised.

Illustration 1: Ghana

The rights-based approach places particular emphasis on the involvement of human beings in the processes through which policy goals are determined and implemented, and could help in eliminating conflicts among stakeholders in the water sector. A case illustrating this assumption can be found in the involvement of SKANSKA, a Swedish MNE, in the privatisation of water in Ghana. As part of the World Bank/IMF conditionalities for aid, Ghana had been mandated to privatise certain public utilities including water system. Consequently, SKANSKA had won the bid for the management of the country's extensive water resources.⁹⁴ Following massive protest by the organised civil society under the auspices of the Ghana National Coalition Against the Privatisation of Water, the World Bank, as sponsors of the initiative, had to beat a retreat by proposing that SKANSKA be given a three-year contract which would then be subjected to popular review, as opposed to a ten-year lease.⁹⁵ While popular involvement in the policy drafting process was ignored, the experience shows the value of popular ownership of water governance and the impact that grassroots mobilisation could achieve to curb abuses.

⁹⁴ See Sara Grusky, "Privatisation Tidal Wave: IMF/World Bank Water Policies and the Price Paid by the Poor", *Multinational Monitor*, September 2001, <<http://multinationalmonitor.org/mm2001/01september/sep01corp2.html>> (last visited 27 July 2008).

⁹⁵ *Ibid.* See also Webreck, above note 43, 32.

Illustration 2: Kyrgyzstan and Tajikistan

Beyond polemics, it is beneficial to have water users involved in the management of the irrigation systems they depend upon. Since the early 1990s, therefore, several large and small-scale initiatives to establish water user associations (WUAs) were taken in various developing states. While some recorded successes in influencing water governance in their localities, others were shown to have recorded resounding failure, as most groups were found to be inactive and eventually existed only on paper.⁹⁶ While there are extensive studies on the diverse trends,⁹⁷ what is vital to the present discourse is to highlight how a people-owned, grassroots-based WUA could be an essential component in promoting equitable water governance.

As with many other civil society-inspired concepts, the World Bank had adopted WUAs as part of its policy models in promoting the participatory component of its privatisation prescriptions.⁹⁸ Today, it is the government and its irrigation agency that prescribes the role of WUAs in several states.⁹⁹ The Kyrgyzstan and Tajikistan experiences demonstrate the significance of democratic ownership of WUAs at the grassroots. According to Sehring:

The concept of the Water User Association (WUA) seems ideal to merge all the main normative objectives of the current water governance discourse: it is a democratic grass-roots organisation of the water users themselves at decentralised level, independent from state structures. It finances itself with members' payments for the service of water delivery. Its main tasks are the maintenance

⁹⁶ See François Molle, Nittaya Ngernprasertsri & Savakon Sudsawasd, "Are Water User Organisations Crucial for Water Management?", Paper presented at the 6th Conference on Participatory Irrigation Management, Beijing, 20-26 April 2002, <http://www.wca-infonet.org/servlet/BinaryDownloaderServlet?filename=1035464324781_wugs_beijing.pdf&refID=86774> (last visited 27 July 2008).

⁹⁷ See, for example, Benjamin U. Bagadion, *Are Water User Organisations Crucial for Water Management?* (Tokyo: Asian Productivity Organisation, 2002); Water Conservation and Use in Agriculture (WCA), "Knowledge and Subtopics on Water User Association Issues", <<http://www.wca-infonet.org/servlet/CDSServlet?status=ND0xMjQ2JjY9ZW4mMzM9KiYzNz1rb3M~>> (last visited 27 July 2008).

⁹⁸ See generally Jo Smet, "Water User Associations" (Washington, DC: World Bank, 2003) 1. See also Ashok Subramanian, N. Vijay Jagannathan & Ruth Meizen-Dick, *User Organisations for Sustainable Water Services*, World Bank Technical Paper No. 354 (Washington, DC: World Bank, 1997) 32; D. L. Vermillion, *Impacts of Irrigation Management Transfer: A Review of the Evidence*, Research Report No. 11 (Colombo: International Water Management Institute) 2.

⁹⁹ See Bagadion, above note 97, *ibid.* See, for example, sections 91-98, National Water Act, No. 36, 1998 (South Africa) dealing with the establishment, powers and disestablishment of water user associations.

of the tertiary irrigation system; the operation of this system, i.e. the distribution of the water obtained by the district water agency to the member farms in an equitable manner; and the collection of ISF from its members. Due to the accountability of the democratically elected board towards the members – the farmers – equitable water distribution [is] be guaranteed.¹⁰⁰

From the Kyrgyzstan and Tajikistan experiences, collaborating with the state enhances access to resources such as grants and subsidies, as well as influence over the management of water resources at a higher level than that of singular WUAs. In the case of developmental WUAs, collaborating with the state can provide access to knowledge through state sponsored capacity building efforts. This can lead to increased independence in the long term as members become less dependent of external support for the management of their service. It is also clear from the Kyrgyzstan and Tajikistan scenarios that the provision of secure access to water is an important tool with which poverty can be alleviated, although its effectiveness depends on secure access to other productive resources such as land and training and capacity building.¹⁰¹

However, WUAs can only enhance equitable and effective water governance where the members have been trained to manage the water supply system efficiently and effectively; where the members have been trained to produce and market goods efficiently; where the members have been provided with secure access to water; where the members have been provided with secure access to land; and where the members have been provided with secure access to production inputs.¹⁰²

Illustration 3: Laos

While the two previous case studies did not directly employ the language of the rights-based approach, their background and impacts commend the concept. In a more context-specific way, however, the conceptualisation and operation of a rights-based approach to the programming strategies of the NAM SAAT/SIDA/UNICEF project in

¹⁰⁰ Jenniver Sehring, “The Politics of Water Institutional Reform a Comparative Analysis of Kyrgyzstan and Tajikistan”, Paper presented at the 2006 Berlin Conference on Human Dimensions of Global Environmental Change “Resource Policies: Effectiveness, Efficiency and Equity”, Berlin, 17-18 November 2006, 10.

¹⁰¹ *Ibid.*, 11-13.

¹⁰² For an insight into the South African WUAs scenario, see Department of Water Affairs and Forestry, “Empowerment of the Poor through Agricultural Water User Associations: A Clarification of Policy With respect to the Establishment and Operation of Developmental Water User Associations”, 13 February 2002, 17.

Laos is instructive.¹⁰³

With active fiscal support from the Swedish International Development Agency (SIDA), the United Nations Children's Fund (UNICEF) in Laos entered into a partnership with the Centre for Environmental Health and Water Supply (NAM SAAT) and the Laotian Ministry of Health, for the Laos Water and Environmental Sanitation Project, in which both NAM SAAT and the local communities were to be empowered to collaborate in designing, implementing, accessing and managing community water resources and sanitation facilities under a rights-based structure with focus on the participation of all stakeholders and accountability mechanisms that would guarantee empowerment and equity.¹⁰⁴

Barnerjee gives insight into the background of this landmark initiative. In his words,

[the] rights-based philosophy to water use implies that the people themselves have the democratic authority to make the decisions about water. And such authority translates to ownership issues relating to water use: ownership of water resources *per se* and ownership of the decision-making processes that govern water use. Such ownership may be expressed through different democratic structures and systems.¹⁰⁵

It is instructive for our present purpose to note that in selecting the hubs of the Laos water project sites, the collaborating bodies considered the following criteria: (a) high proportion of poor, disadvantaged ethnic minority communities located in remote, often rocky areas; (b) existing needs – based on a participatory assessment of quality of life indicators, health, poverty and investment indicators; (c) past record of limited support to the rural water and sanitation activities, focussing on empowering communities to enjoy their right to water and sanitation; and (d) all stakeholders, that is, district and provincial officials under NAM SAAT, the communities and the mass organisations, demonstrating the willingness to actively participate in project activities, including willingness and ability to pay.¹⁰⁶

Barnerjee's seminal work on this project is exhaustive and we do

¹⁰³ Upala Devi Banerjee, "Adopting Rights-Based Programming Strategies Towards Developing Capacities for Accessing Sustainable Water and Sanitation Facilities: The NAM SAAT/SIDA/UNICEF Partnership in Luang Prabang Province in Laos – A Case Study", in Upala Devi Banerjee (ed.), *Lessons Learned from Rights-Based Approaches in the Asia-Pacific Region* (New York, NY: UNDP and Office of the High Commissioner for Human Rights, 2005) 239.

¹⁰⁴ *Ibid.*, 245.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, 251.

not need to revisit it. Suffice to say, however, that apart from emphatically showing that a rights-based approach to water governance appropriately responds to the conceptual problems of decentralisation and privatisation, the approach has proven in the Laos case its capacity to guarantee procedural legitimacy through popular participation and inclusion, paying special regard to vulnerable groups that are normally excluded from the decision-making process. In another respect, the Laos experience conveys the lessons that unclear roles and responsibilities under decentralisation processes, low capacity and limited civil society capital, limited investment in rights-based water projects as well as limited inter-sectoral partnerships could hamper the enthronement of effective, people-friendly water governance.¹⁰⁷

Extrapolating from all the above arguments and experiences, a rights-based approach to water governance exhibits the capacity to strengthen the normative agenda for regulatory and protective policies in an objective way and to facilitate universally acceptable tools and operational guidance which are pivotal in justifying policy measures and informing their design, implementation and evaluation. This would be a veritable response to the ‘democratic deficit’ highlighted in privatisation discourses. The other benefit in applying a rights-based approach to the water question in Africa is that beyond rendering governments accountable to democratic demands, it could subdue the impact of unscrupulous MNEs who would indulge in exploitative and anti-people activities – a corollary of the “naming and shaming” stratagem. Invariably, when this eventually generates reformative reactions among the generality of MNEs, a veritable synergy will emerge for more effective monitoring of tackling their excesses and impunity in Africa.

For the MDGs to become a tool for advancing the dignity of human beings, they must be treated not as a technical process, but as a political process. There is therefore a pressing need for the civil society to push for a rights-based approach to the MDGs that goes beyond improving statistical indicators to addressing root causes of human rights violations. A holistic approach will enable the international development community to pursue water issues with the human being at the centre. In this regard, discourses on the MDGs implicating water should focus on *safe and adequate access* so that the full utility and value of MDGs can be realised. The global population left behind by the MDGs also needs to be factored in. It is in this light that progress on improved access to water and sanitation under the MDGs has been

¹⁰⁷ *Ibid.*, 270-272.

adjudged as sub-optimal in Africa, and it is here suggested that the goal now needs to be bolstered through an alternative model that integrates the global public goods approach. A well-coordinated approach to water issues in the MDGs, which is integrative, effective and equitable, flexible and inclusive, as proffered in the approach canvassed in this article can help steer priorities right and impel new actions towards success in economic efficiency, social equity and sustainability of water governance in Africa.

Conclusions

The premise from which this article proceeded is that important as water sector reforms may be for the equitable, affordable and sustainable access to water for all Africans, it is equally necessary to humanise the consequences of such reforms. While current water sector reforms in African states aim at the introduction of innovative water policies and laws for the objectives of effectiveness and participation, it is imperative that all water users, or in other words everyone, should be aware of the implications of ongoing and proposed reforms for human rights, in the first instance, and the ultimate attainment of the MDGs. At present, despite the frequent consultations that have taken place in policy-making circles over water reforms and the implementation of the MDGs, there is little awareness of the unfolding changes at the level of individual human beings who are most likely to be affected by these reforms.

The lack of popular participation and of democratic decision-making has become increasingly contentious as exemplified by the controversy over the adoption of water sector reforms induced by the World Bank and the IMF in African states. This article has attempted to show that a comprehensive participatory model which provides opportunities for disentangling all the implications of the reform interventions is therefore necessary for the efficacy of further actions and policies.

In formulating the trajectories of comprehensive rethinking of water sector reforms, and in pursuing the MDG target on water, it is crucial to ensure that any further reforms in the water sector effectively benefit the poor, focus on access to safe drinking water and prevent the complete commercialisation of a sector directly concerned with the fulfilment of all human rights. This was the basis of the rights-based approach rigorously canvassed in this article.

Far from being an *ex cathedra* pronouncement on all the dynamics that should inform water governance and the fulfilment of the MDG target on water in Africa, this article would have served its purpose if it stimulates further intellectual discussions on its theme.

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