

Chapter 20:

Kenya's Water Act (2016): real devolution or simply the 'same script, different cast'

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1 Introduction

The debate surrounding the enactment of Kenya's Water Act (2016) and its relationship with its predecessor, the Water Act (2002), brings to mind the lyrics of a contemporary pop duet, 'Same script, different cast'.¹ As the jilted girl attempts to forewarn the current girl of the hurtful ways of her former boyfriend, the latter resists arguing he has changed. To persuade the impressionable new girl to see beyond the façade of the apparent change, the ex-girlfriend uses the expression 'same script, different cast' repeatedly, to demonstrate that all that has changed is the actors. In a bid to align the Water Act (2002) with the Constitution of Kenya (2010) (Constitution) and particularly to achieve the devolution enshrined in the Constitution, the Water Act 2016 was enacted following a long drawn out process beginning with the first draft Water Bill of 2012. Despite the amendments brought about by the new Act, critics argue that the Water Act (2016) is at most a superficial modification of the Water Act (2002) albeit with renamed institutions, thus evoking the parallel with the song.

Among the greatest critics of the Water Act (2016) are the county governments to which the Constitution devolves water provision and sewerage services. The Council of Governors has even moved to court to stop the implementation of the Water Act (2016), arguing that it is unconstitutional because it excludes county governments from water governance and perpetuates a centralised framework for provision and regulation of water and sanitation services.² These criticisms seem to suggest that the Water Act (2016) has failed to achieve its purpose, which is "to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution".³

1 Cox & Houston (2000).

2 *Council of County Governors v. Lake Basin Development Authority & 6 others* (2017) eKLR in which a preliminary objection against this petition was dismissed. The main matter is yet to be determined.

3 Section 3 of the Water Act (2016).

The mismatch between the content of the Water Act (2016) and the expectations of its stakeholders also brings to the fore some underlying assumptions that have driven water sector reforms over the last 20 years. For instance, an overriding principal driver of water sector reforms in Kenya has been the conviction that the governance problem facing the water sector is attributable to the lack of decentralisation. It was hoped that devolution, introduced by the Constitution, would entirely cure this ailment. While the Water Act (2016) revamps the institutional water governance framework to provide for national and county functions, critics are of the view that the framework largely comprises of a multiplicity of institutions at the national level as was the case with the Water Act (2002), albeit with these institutions being renamed under the new Act.

2 Analysis of the Water Act (2016)

In order to determine the merits or otherwise of the criticism meted against the Water Act (2016), it is paramount to conduct a comparative analysis between the provisions of the two laws. The analysis is based on the main provisions of the water law on ownership of water resources, the human right to water and water rights, and the institutional frameworks for water governance at the national and county levels. The analysis is anchored on the provisions of the Constitution, which the new Act should be aligned with.

2.1 Overall alignment with the Constitution of Kenya (2010)

Kenya's Water Act (2002) was premised on the notion that a successful water governance framework should address three main issues: delineation of roles; devolution of water and sewerage services; and privatisation. This thesis also informed the National Water Master Plan 2030 launched in 2014.⁴

The Water Act (2016) is based on a similar premise, with the additional goal of aligning the water law to the Constitution. To this end, the Act contains an overarching provision requiring its administration or application to be guided by relevant constitutional provisions.⁵ These include Article 10 on the national values and principles of governance; Article 43 outlining economic and social rights in the Bill of Rights; Article 60 on equitable, efficient, productive and sustainable management of land resources; and Article 232 on the values and principles of the public service.

⁴ Government of Kenya (2014).

⁵ Section 4 of the Water Act (2016).

2.2 Ownership of water resources

The Constitution contains some fundamental provisions in relation to the ownership of water resources and the rights of Kenyans to water and sanitation. One of the expected outcomes of the revision of the Water Act (2002) was thus the alignment of the Act to the letter and spirit of the Constitution.

In a bid to emphasise the sovereignty of the people, the Constitution clearly vests all resources of the country in the people of Kenya. Water resources, including rivers, lakes and other water bodies as defined by an Act of Parliament are included in the definition of public land.⁶ According to the Constitution, “all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals” and consequently the people of Kenya essentially own the country’s water resources.⁷

The Water Act (2002) vested the ownership of water resources in the state subject to any other rights of use granted by law. In keeping with the spirit of the Constitution, the Water Act (2016) makes it clear that while the state, and more specifically national government, is the custodian of resources, it holds them in trust for the people of Kenya.⁸ This is a fundamental departure from the Water Act (2002) and has some interesting implications to water resource governance.

Firstly, defining rivers, lakes and other water bodies as public land puts them under the mandate of the National Land Commission (NLC). Arguably, this provides a framework for sustainable governance of all-natural resources, including water.

While the Water Act (2016) contains no explicit recognition of this oversight role of the NLC, it is replete with references to other land laws including the Land Act⁹ and the Community Land Act.¹⁰ Further, in recognition of the central nexus between land and water resources, the Act provides for representation of the Principal Secretary responsible for land or his/her representative in the membership of the Water Resources Authority Management Board. Interestingly, the Water Act (2016) includes a provision subordinating its provisions pertaining to community land to the Community Land Act.¹¹

Secondly, the Water Act (2016) clarifies the effect of a devolved governance framework for water resources. During stakeholder meetings preceding the enactment of the Act, counties raised the possibility of counties hosting water resources, to charge other counties for the use of the water sourced from their county. This is for instance, Murang'a County's contention with respect to water supply from Ndakaini Dam in Murang'a to Nairobi County. Section 6 of the Water Act (2016) debunks this notion by

6 Article 62(1)(i) of the Constitution of Kenya (2010).

7 Article 61 of the Constitution of Kenya (2010).

8 Section 5 of the Water Act (2016).

9 Section 8(4) of the Water Act (2016).

10 Section 138 of the Water Act (2016).

11 Ibid.

assigning the Water Resources Authority the role of regulating the management and use of water resources as an agent of the national government.

Water basins in Kenya, as in other jurisdictions, cut across various county boundaries and thus the vesting of ownership in specific counties would have resulted in the need for complex inter-county arrangements for sharing of water resources. Australia's water governance framework is a good example of the complexities that arise when ownership and management of water resources is vested in state governments as opposed to the federal government.¹²

The Water Act (2016) also includes any water works that relate to cross-cutting water resources or works whose objective is to serve national government in the definition of national public water works. This further clarifies the issue of ownership and management of water resources.¹³ In the fourth schedule of the Constitution, public works constitute a function of the national government in contrast with county public works, which are a function of county governments.¹⁴ The Act also grants wide-ranging powers to the national government in relation to public water works including powers to acquire land required for these national public water works. Arguably, this seems to go against the spirit of devolution and subsidiarity, as it gives a blank cheque to the national government in relation to designating certain water resource infrastructure as national public water works, thus taking away the powers of county governments over these.

2.3 Water: a human right or still an economic good?

The Water Act (2002) treated water primarily as an economic good, a common trend in water sector reforms globally.¹⁵ Consequently, under the Act, water rights were vested in the Minister in charge of the sector and could only be granted through permits or other means anticipated in the Act. The Act had no provisions explicitly recognising the nature of water as a public good or considering the governance of water resources in the context of public trusteeship.

Apart from vesting the ownership of water resources in its people, the Kenyan Constitution is a progressive one with an enriched Bill of Rights incorporating the economic, social and cultural rights in the list of fundamental rights. The Constitution, by explicitly recognising the human right to water, emphasises an important and fundamental dimension of water resources. The Constitution additionally requires the government to take affirmative action to ensure that minorities and marginalised groups

12 Kildea & Williams (2010: 595).

13 Section 8, Water Act (2016).

14 Fourth Schedule Section 19 of the Constitution of Kenya (2010).

15 Cullet (2006: 206).

have reasonable access to water.¹⁶ The responsibility for 'progressively' realising this lies with the national government.¹⁷ Counties are, however, very critical in this regard as they are responsible for water service provision. One primary objective of the Water Act (2016) is to align the water law to the Constitution's recognition of water as a human right. The realisation of this objective calls for cooperation and collaboration between the national and county governments.

2.3.1 Right to water and the Water Act (2016)

The Water Act (2016), in alignment with the Constitution, explicitly recognises the fundamental right of every person in Kenya to clean and safe water in adequate quantities and to reasonable standards of sanitation.¹⁸ Further, the Act clearly stipulates that the role of regulating the management and use of water resources lies with the national government through its agent, the Water Resources Authority.¹⁹

Arguably, the recognition by the state of the right to water and reasonable sanitation standards provides a basis for obliging the state to put in place measures to redress issues of underserviced rural populations and the urban poor. However, the recognition by a Constitution or a water law of the right to water and sanitation in and of itself does not ensure the realisation of the right. It is necessary to define the normative content of the right so as to provide a basis for making the right justiciable. Justiciability of the right depends on a clear agreement on the minimum core constituting the right as evidenced by case law from other jurisdictions with similar rights in their legal frameworks.²⁰ In the case of Kenya's Constitution, the provisions relating to the enforcement of the Bill of Rights seek to ensure the justiciability of the rights.²¹

Apart from recognising the right to water and sanitation, the Water Act (2016) attempts to flesh out some normative content constituting the government's obligation relating to the progressive realisation of the right. For instance, the Act requires the Cabinet Secretary responsible for water to prepare a five-year National Water Services Strategy which will include the plans in place for the progressive realisation of this right to water and sanitation to all. The Water Services Regulatory Board (WASREB) is also obliged to make regulations, which should among other issues, address the progressive realisation of the right to water services.²² In addition, the Act requires that Water Service Providers (WSPs) that hold county or national public assets, to refrain

16 Article 56(e) of the Constitution of Kenya (2010).

17 Section 64(2) of the Water Act (2016).

18 Section 63 of the Water Act (2016).

19 Section 6 of the Water Act (2016).

20 *Mazibuko and Others v. City of Johannesburg and Others* (2009) 28 ZACC.

21 Articles 20-22 of the Constitution of Kenya (2010).

22 Section 72(1)(n) of the Water Act (2016).

from paying dividends or making any other payments as long as the universal rights of access to safe and clean water have not been achieved in the designated service areas.²³

From the foregoing, it is evident that the Water Act (2016) contains substantive provisions that distinguish it from the Water Act (2002) in relation to the right to water and sanitation. The Water Act (2002) contained no provisions on the human right to water and sanitation.

2.3.2 Water rights

The Water Act (2016) clarifies the distinction between ‘water right’ and the right to water. The Act defines the term ‘water right’ as the right to have access to water through a water permit. The human right to water under the Act recognises the right of all its citizens to access safe drinking water and reasonable sanitation under the Constitution.

The Water Act (2002) vested the right to use water in the Minister, except to the extent that this right was alienated under the Act or under any other law.²⁴ The Water Act (2016) does not contain a similar provision. It vests ownership of all water resources in the people of Kenya. In relation to water rights, the Water Act (2016) provides that after its commencement, all rights in respect of any water resources can only be granted pursuant to provisions of the Act.²⁵ The primary mode of granting water rights under the new Act continues to be through permits from the Water Resources Authority (WRA), the successor to the Water Resources Management Authority (WRMA), thus suggesting that not much has changed. However, the Water Act (2016) recognises the concept of public trusteeship by vesting the ownership of water in citizens, with the state, through the national government, playing the role of administration of the water resources.²⁶ This is consistent with the Constitution.

The provisions on requirements for water permits and exemptions from the need to obtain a permit in both Acts are generally similar. However, the Water Act (2016) introduces some minor changes that could have important ramifications.

The inclusion of requirements for a permit and the water charges for abstraction of water resources in the Water Act (2002) was criticised for being prejudicial to the rural poor, as it implied the privatisation of water rights and their control by those who could afford land and the charges for acquiring and maintaining permits under the Act.²⁷ Further, the separation of water resource management from water service provision at

23 Section 131(3) of the Water Act (2016).

24 Section 5 of the Water Act (2002).

25 Section 7 of the Water Act (2016).

26 Section 9 of the Water Act (2016).

27 Mumma (2008).

the local level, was faulted as working against integrated customary law systems for water governance already in existence in some rural areas, which systems played both roles of regulation and service provision.²⁸ The fact that the new Act adopts the same system of permits and of delineating institutional roles seems to confirm the suspicion that there has been no real change to the script.

Further confirming the apparent lack of change, is the manner in which the Water Act (2016) links permits to land or undertakings on land. This approach to water governance has been criticised on the basis that groundwater is often the main source of drinking water for most people, and thus tying water rights to land rights does not contribute to a social perspective to water or to the realisation of the human right to water.²⁹ It has been argued that in fact, this linkage serves to privatise water rights and in so doing, limit the right to acquire such rights to those who have rights to land or the potential to acquire these rights.³⁰ Poor rural communities end up disadvantaged because they do not often have title to the community land to which their water resources are appurtenant. They can thus not acquire water rights under the Act.

While the Water Act (2016) largely seems to adopt the approach of the Water Act (2002), it provides some reprieve to poor rural communities. The contemporary Act explicitly recognises the existence of community land rights as demonstrated by its subordination of the application of its provisions to any written laws relating to community land.³¹ Arguably, the import of this provision is to limit the extent to which the Water Act (2016), including its provisions relating to water permits, are applicable to community landowners.

Paradoxically, the envisaged written law relating to community land, alluded to above and that is given precedence over the Water Act (2016), seems to take away some of this privilege. The Community Land Act (2016) provides that the management of community land shall be subject to national and county government laws and policies in relation to, among other matters, water protection, securing sufficient residual water, hydraulic engineering and dams safety.³² A broad interpretation of this provision implies that the Community Land Act is subordinate to the provisions of the Water Act (2016), in so far as most, if not all, the provisions of the latter Act are ultimately intended to ensure water protection, secure sufficient residual water, hydraulic engineering and safety of dams.

In relation to Water Resource Users Associations (WRUAs), the Water Act (2016) introduces a proviso recognising that agreements between the WRA and a WRUA may make available a portion of the water use charges for use to finance regulatory

28 Gachenga (2012).

29 Cullet (2006: 206).

30 Mumma (2008).

31 Section 138 of the Water Act (2016).

32 Section 38(2)(c) of the Community Land Act (2016).

activities undertaken by the WRUA on behalf of WRA.³³ This provision expands the mandate of the WRUAs, by anticipating their potential to conduct some of the activities of the WRA. Arguably, this could to some extent be regarded as an implicit recognition of the regulatory role played by communities in their community-based water governance systems.

A further minor change introduced in the Water Act (2016) is in relation to objections to permit applications. Under the Act, parties opposed to the grant of a permit, may object in writing to the Water Tribunal, within thirty days of publication of the notice of application.³⁴ Under the previous Act, parties' objections were addressed to the WRMA.³⁵ The transfer of the mandate to the Water Tribunal established under Section 119 of the Water Act (2016) helps to distinguish the role of the regulator (WRA) from the role of the adjudicator, the Water Tribunal.

The amendments discussed above confirm that the Water Act (2016) is aligned to the Constitution in so far as ownership of water resources and the recognition of the rights to water and reasonable sanitation services are concerned. However, the extent to which the rest of the Act makes provision for the implementation of the human right to water and sanitation is debatable given the maintenance of the permit system as the mode of acquiring water rights. Nonetheless, there are opportunities for challenging the implementation of the Act by the national or county government where the realisation of the human right to water is hindered. The development of case law in this area will, with time, hopefully help to interpret the extent to which the Water Act (2016) can be deemed to conform to the Constitution.

3 Devolution and the water laws

Among the fundamental governance changes introduced by the 2010 Constitution was the creation of a devolved government, with clear separation of roles between the national and county governments. Kenya's devolved government is based on the division of the country into 47 geographical units referred to as counties. In accordance with the concept of integrated water resources management, Kenya is divided into five main river basins: Lake Victoria Basin; Rift Valley Basin; Athi River Basin; Tana River Basin; and Ewaso Ngiro Basin. These basins traverse across the various county boundaries.

In relation to devolution of water governance, the Constitution, in its fourth schedule, identifies and sets out the role of the national government to protect the environment and natural resources, including water resources, with the objective of

33 Section 42(3) of the Water Act (2016).

34 Section 40(5) of the Water Act (2016).

35 Section 29(5) of the Water Act (2002).

“establishing a durable and sustainable system of development”.³⁶ This specifically encompasses the management of national public works, water protection, securing sufficient residual water, hydraulic engineering and safety of dams.³⁷ The county government is responsible for the implementation of national water policy and the management of county public works and services, which include stormwater management systems and the provision of water and sanitation services.³⁸

3.1 Institutional frameworks of the 2002 and 2016 Water Acts: ‘same script, different cast?’

Among the most lauded reforms introduced by the Water Act (2002) was the establishment of a clear institutional framework with clearly defined and delineated roles. The Act separated the role of policy formulation, water resource regulation and planning on the one hand, from that of direct water and sanitation service provision on the other. It provided for a twofold institutional structure that respected this delineation of roles separating management and regulation from service provision. The rationale for this clear delineation of roles was to avoid a potential conflict of interest arising where only one institution is vested with ownership of water resources, the roles of resource allocation and management and service provision. Any other approach would be tantamount to turning such an authority into the judge and jury in their own case.

The Water Act (2002) was thus intended to achieve subsidiarity and decentralisation, allowing for decision making to happen at the lowest appropriate level. The implementation of the principle of subsidiarity and the pro-poor approach in sector policies and strategies, it was believed, would result in greater equity. The subsidiarity envisioned would provide sector institutions with the autonomy necessary to function efficiently, while ensuring greater transparency and accountability in sector institutions.

Delineation of roles and subsidiarity were intended to provide the founding pillars for a decentralised water governance framework. Ownership and management under the Water Act (2002) was to be left to national government and that of service provision devolved to local government, communities and the private sector. In comparison to other service sectors, Kenya's water sector reforms leading to the Water Act (2002), arguably gave the sector a considerable head start in the devolution anticipated by the Constitution.

The legal and institutional framework established under the Water Act (2002) incorporated the key principles driving modern global water reforms. Supporters of the

³⁶ Fourth Schedule Part 1(22) of the Constitution of Kenya (2010).

³⁷ Ibid.

³⁸ Fourth Schedule Part 2(11) of the Constitution of Kenya (2010).

Water Act (2002) point out that it had all the ingredients for a successful modern water law in so far as it considered water as primarily an economic good, but managed in an integrated way that catered for poverty orientation, sustainability, cost recovery and human rights.³⁹ However, these water sector reforms confirm that an ideal legal framework is insufficient for successful water governance, as demonstrated by some persistent centralisation challenges that still gnaw at the Kenyan water sector. Kenya's overall legal framework, prior to the enactment of the 2010 Constitution, was largely state-centric.

Despite the separation of the role of service provision from regulation and management, institutions established to focus on the latter role also suffered various challenges due to the lack of autonomy from central government. Corruption and unethical practices such as bribing to obtain permits or cover up abstraction, skewed water allocations in exchange for money or political support, kickbacks to regulatory officials to overlook pollution incidents or distort environmental impact assessments and generally weak accountability and inadequate capacity to enforce regulations also affected the effectiveness of the institutions.⁴⁰ Further, problems such as irregular tendering and procurement continued to undermine the successful implementation of projects. The provisions of the Water Act (2002) seeking to decentralise functions thus lacked an enabling environment. Indeed, critics of the Water Act (2002) argued that the decentralisation under the Act was merely nominal as its approach to water governance was largely state-centric.

Given the above challenges, the greatest expectation of the people of Kenya and of county governments, following the promulgation of the 2010 Constitution, was that the Water Act (2016) would make the devolution of water resources governance a reality. Unfortunately, the Water Act (2016) seems to maintain the same institutional framework as its predecessor, albeit with some change of names. While a deeper scrutiny of the provisions of the Water Act (2016), reveals some substantive changes to the institutions, the question that still needs to be answered is whether these changes are sufficient to result in a change in script moving forward.

3.2 Water policy, resource management and regulation

As noted above, the Water Act (2002) introduced an institutional framework for managing water resources that distinguished between water resource management and regulation on the one hand, and water and sewerage service provision on the other. Further, the Act provided for a few national institutions such as the Water Appeals Board, the National Water and Conservation Pipeline and the Water Services Trust Fund. In

39 GIZ (2012).

40 Ibid.

relation to regulating and managing water resources, the Act provided for the Water Resources Management Authority (WRMA), the Catchment Areas Advisory Committees (CAAC) and WRUAs.

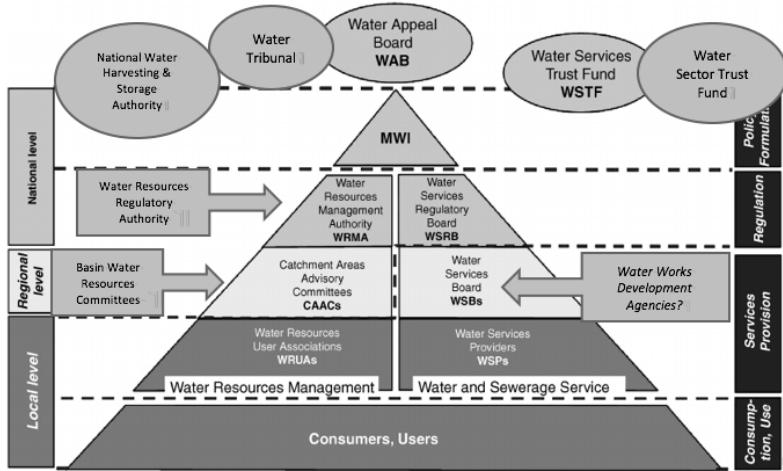


Figure 1: Institutional Framework Water Act 2002, modified to incorporate changes in the Water Act 2016⁴¹

The Water Act (2016) maintains a similar institutional framework, replacing a few of the institutions of the Water Act (2002), or renaming and redefining their membership and roles as discussed in the following sub-sections.

3.2.1 The Water Tribunal

The Water Act (2002) established a Water Appeal Board (WAB) consisting of a chairman, with the qualification of a judge of the High Court, appointed by the President on the recommendation of the Chief Justice and two other persons appointed by the Minister. The WAB heard appeals by holders of water rights affected by a decision or order of the Minister, WRMA or WASREB, concerning a permit or licence granted under the Act.⁴² The judgement of the WAB was final save for matters of law, which could be appealed to the High Court.⁴³

41 Ministry of Water and Irrigation (2007).

42 Section 84 of the Water Act (2002).

43 Section 87 of the Water Act (2002).

Under the Water Act (2016), the Water Appeal Board has been replaced by the Water Tribunal.⁴⁴ Appeals from decisions of the WRA in relation to applications for permits lie to the Water Tribunal.⁴⁵ Unlike under the previous Act, the Chairperson of the Tribunal and other staff shall be appointed by the Judicial Service Commission and not by the President or the Minister.

The jurisdiction of the Water Tribunal is wider than that of the Water Appeals Board. Any person directly affected by the decision or order of the Cabinet Secretary, WRA, WASREB or any person acting under their authority, can appeal to the Tribunal despite not having a right or proprietary interest.⁴⁶ Appeals from decisions of the Tribunal in matters of law lie to the Land and Environment Court.⁴⁷

Arguably, the change in the appointing authority of the Chairperson and staff of the tribunal will result in professional as opposed to political appointments. Further, it provides a more conducive environment for the Tribunal to exercise professionalism and independence in executing its mandate, including in determining appeals against decisions of the Cabinet Secretary.

3.2.2 The National Water Harvesting and Storage Authority

The Water Act (2016) establishes the National Water Harvesting and Storage Authority, whose role is to act on behalf of the national government in developing policy and implementing strategies relating to national water harvesting and storage and the development and management of the related national public water works.⁴⁸ Under the Water Act (2002), the National Water Conservation and Pipeline Corporation was responsible for development works and managing assets for purposes of state schemes for storage and impounding of water for purposes of bulk water supplies.⁴⁹

The establishment of the National Water Harvesting and Storage Authority more closely aligns the constitutional provisions on the role of the national government with the institutional framework established by the Water Act (2016). One of these roles is the national government's obligation to secure sufficient residual water, which task is assigned to this Authority. It is hoped that the Authority will address problems of lack of water harvesting plaguing Kenya. Currently, approximately 43% of the total water generated in the country is either lost or unaccounted for.⁵⁰ Further, the National Water Harvesting and Storage Authority is expected to be instrumental in ensuring that the

44 Section 119 of the Water Act (2016).

45 Ibid.

46 Section 121 of the Water Act (2016).

47 Section 124 of the Water Act (2016).

48 Section 30 and 32 of the Water Act (2016).

49 Section 22(4) of the Water Act (2002).

50 Water Services Regulatory Board (2016).

national government meets its obligation to secure the human right to water of all Kenyans. Currently, Kenya's per capita consumption stands at approximately 43 litres per person per day.⁵¹

3.2.3 The Water Sector Trust Fund

A Water Services Trust Fund was established under the Water Act (2002) to assist in financing the provision of water services to areas of Kenya without adequate water services. This was intended to provide a mechanism for redressing the common problem of underserved populations.⁵²

The Water Sector Trust Fund established under the Water Act (2016) may, on the face of it, seem to be a mere replacement of the Water Services Trust Fund.⁵³ However, the renaming of the institution in the new Act helps demonstrate the wider mandate of the Fund. The 2016 Act also includes more detailed provisions on the composition and functions of the Board of Trustees for the Fund.

Further, the Water Act (2016) includes provisions allowing for funding of counties through conditional and unconditional grants, to assist in financing their development and management of water services in marginalised or underserved areas. Such financing extends beyond direct service provision activities to include community-level initiatives for sustainable management of water resources and research activities in the areas of water resource management.⁵⁴

Under the Water Act (2016), the Water Sector Trust Fund is critical for successful implementation of devolved water governance. The Act provides for the various sources of money for the Fund, which include an allocation from the national budget and from the Equalization Fund, and proceeds from any levies imposed on consumers of piped water from licensed water service providers.⁵⁵

3.2.4 The Water Resources Regulatory Authority

Under the Water Act (2002), WRMA was responsible for the overall management of water resources at the national level. Under the Water Act (2016), WRMA has been replaced by Water Resources Authority (WRA). The change in name lays emphasis of its role as regulator apart from manager. The Water Act (2016) provides that the WRA

51 Ibid.

52 Section 83 of the Water Act (2002).

53 Section 113 of the Water Act (2016).

54 Section 114 of the Water Act (2016).

55 Section 117 of the Water Act (2016).

shall serve as the agent of the national government and so regulate the management and use of water resources.⁵⁶

While the objective of WRMA and WRA are significantly similar, the composition of the governance board of the WRA and its mode of operation is more developed in the Water Act (2016).⁵⁷ Under the Water Act (2002), WRMA was ultimately responsible for: developing and enforcing standards relating to the management and use of water resources; the planning and issuing water permits; and collecting permits and water use fees.

The Water Act (2016) provides for a Management Board and sets out the composition of the members of this Board,⁵⁸ while the previous Act simply provided for the existence of a Governing Board comprising of a Chairman, appointed by the President, and ten other members appointed by the Minister. The composition of the Management Board in the Water Act (2016) reflects the recognition of the need for coordination between related sectors such as finance, environment and land. The detailed list of the members of the Governing Board and the requirement that all members of the Management Board hold relevant professional qualifications and experience,⁵⁹ is a response to the challenges faced under the Water Act (2002). The wide discretion enjoyed in selecting the ten members of the Governing Board and the lack of specification on the qualification and competencies of the members resulted in political appointments of persons without the requisite skills.

Further, the provisions on appointing the Chief Executive Officer (CEO) of the WRA under the Water Act (2016) differ from those on appointing the WRMA CEO. The Act provides for an appointment by the Cabinet Secretary on recommendation of the Management Board,⁶⁰ rather than the previous position, where the Authority, with approval of the Minister, appointed the CEO.⁶¹ The qualifications and term of office for the CEO of WRA are also specified under the new Act.⁶²

The mandate of the WRA is largely similar to the mandate of WRMA, with a few modifications. For instance, while WRMA was previously responsible for the preparation of the National Water Resources Strategy, this is the responsibility of the Cabinet Secretary under the Water Act (2016).⁶³ Further, the role of WRA has been extended to include the classification of water resources for purposes of determining water resources' quality objectives.⁶⁴ This was previously the role of the Minister.⁶⁵ WRA

56 Section 6 of the Water Act (2016).

57 Section 14 of the Water Act (2016).

58 Section 14(1) of the Water Act (2016).

59 Section 14(3) of the Water Act (2016).

60 Section 17 of the Water Act (2016).

61 Section 9(1) of the Water Act (2002).

62 Section 17 of the Water Act (2016).

63 Section 10 of the Water Act (2016).

64 Section 24 of the Water Act (2016).

65 Section 49 of the Water Act (2002).

is also responsible for ensuring the presence of a national monitoring and geo-referenced information system for water resources.⁶⁶ The Water Act (2016) provides that information on water resources shall be accessible to the public at a prescribed fee.⁶⁷ This is in accordance with Article 35 of the Constitution, which provides for the right of access by the public to information held by the state.

3.2.5 The Basin Water Resources Committees

The Water Act (2016) uses the term 'basin area' to refer to a defined area from which rainwater flows into a watercourse.⁶⁸ The term catchment area under this Act means an area that is part of a basin.⁶⁹

Catchment Advisory Committees under the Water Act (2002) are replaced by Basin Water Committees under the Water Act (2016).⁷⁰ The Basin Water Resources Committees are responsible for managing water resources within their respective basin areas. The composition of these Committees and their mode of operation are provided for in detail under the Act. The Catchment Areas Advisory Committees under the Water Act (2002) played a merely advisory role.

While the Water Act (2002) provided for a maximum of 15 members, the Water Act (2016) caps the maximum number of members at seven.⁷¹ Under the latter Act, a representative appointed by the WRA after approval by the County Assembly, shall represent county governments whose area is within the basin in the respective Basin Water Resources Committee. Arguably, this provision offers the opportunity for devolved county governments to play a greater role in the management of water resources falling within their counties. The provisions of the Water Act (2016) in relation to the composition of these committees also demonstrate the balance sought between inclusion and technical expertise as well as the effort to guard against capture.⁷²

3.2.6 The Water Resources Users Associations

Under the Water Act 2002, Water Resources Users Associations (WRUAs) could be established for cooperative management of water resources in catchment areas and for

66 Section 21(1) of the Water Act (2016).

67 Section 21(3) of the Water Act (2016).

68 Section 24 of the Water Act (2016).

69 Section 2(1) of the Water Act (2016).

70 Section 25 of the Water Act (2016).

71 Section 26(1)(a) of the Water Act (2016).

72 Section 26(3) and (4) of the Water Act (2016).

conflict resolution.⁷³ The Water Act (2016) contains provisions similar to those of the Water Act (2002) but adds that Basin Water Committees may contract WRUAs as agents to perform certain duties in water resource management.⁷⁴ The use of the words “may contract” and “as agents” could arguably mark the beginning of a more formal and expanded mandate of WRUAs in the management of water resources at the sub-basin level. However, the extent to which WRUAs will be formally engaged to act as agents of the Basin Water Committees at the grassroots level is dependent on the extent to which the challenges faced by WRUAs in exercising their mandate are addressed.⁷⁵

3.3 Water and sewage service provision

Under the Water Act (2002), the Water Services Regulatory Board (WASREB), the Water Services Board (WSB) and the Water Service Providers (WSPs) addressed water service provision. The Water Act (2016) maintains, to a large extent, this institutional framework for water service provision. Further, contrary to the expectations of county governments, the Act does not explicitly or immediately devolve the provision of water and sanitation services to counties as would have been anticipated given the provisions of the Fourth Schedule of the Constitution.

3.3.1 The Water Services Regulatory Board

On the face of it, the Water Act (2016) seems to maintain the status quo in so far as the Water Services Regulatory Board is concerned. Under the Water Act (2002), the WASREB had the overall role of regulating water service provision, thus taking responsibility for issuing licences, setting service standards and guidelines for tariffs and prices; and providing mechanisms for handling complaints. Under the Water Act (2016), WASREB continues to be the agent of national government with wide-ranging powers in relation to water service provision, thus calling into question the extent to which service provision under the Act has been devolved to county governments as anticipated by the Constitution. However, some apparently subtle changes in the contemporary Act significantly alter the landscape for water service provision.

Under the Water Act (2002), the Chairman of WASREB was a presidential appointee and the Minister appointed the other ten members of the Board.⁷⁶ The Chief Executive Officer (CEO) of the Board was appointed by the Board and would be

73 Section 15(5) of the Water Act (2002).

74 Section 29(4) of the Water Act (2016).

75 Aarts (2012).

76 Section 46(3) of the Water Act (2002).

responsible for the management of WASREB.⁷⁷ The Water Act (2016) provides for a leaner WASREB comprising of a Chairperson appointed by the President, four members appointed by the Cabinet Secretary and the CEO.

Apart from setting national standards for water service provision, the Water Act (2016) expands the functions of WASREB to include the evaluation and recommendation of water and sewerage tariffs to county water service providers; setting of licence conditions; accrediting WSPs; and developing a model memorandum and articles of association for use by water companies applying to be registered as WSPs.⁷⁸

Under the Water Act (2016), the role of county governments in the context of water service provision seems to be limited to establishing water service providers, whose function it is to provide water services within the specified areas and to develop county assets for water service provision.⁷⁹ In what seems to be an attempt to safeguard water service provision from political capture, the Act stipulates that members of the Board of Directors of WSPs must possess qualifications that meet the standards set by WASREB and cannot be serving as elected members of a county government, holding office in a political party, or be members of Parliament.⁸⁰

One of the challenges faced under the Water Act (2002) was the delay in the transfer of ownership of water services' assets from local authorities to Water Service Boards (WSBs). Under the Water Act (2016), ownership of water services' assets of county-owned or cross-county owned WSPs established as public institutions are vested in the public with the WSPs holding them on behalf of the public.⁸¹ The Act further requires the Cabinet Secretary to make regulations for the transfer of national public assets to the county WSPs, which regulations should include arrangements to protect public assets in the event of private sector participation, through for instance, the separation of operations from asset holding and development.⁸² This provision is consistent with the public trust doctrine, where the government or its agents hold public property in trust for the public.

3.3.2 Water Works Development Agencies

Under the Water Act (2002), the responsibility for providing water services was vested in Water Service Boards (WSBs), which were issued with licences to supply water services and regulated by WASREB. WSBs were responsible for the efficient and economical provision of water services authorised by licence. The ownership of plant,

77 Section 48 of the Water Act (2002).

78 Section 72(1) of the Water Act (2016).

79 Sections 77 and 78 of the Water Act (2016).

80 Section 80 of the Water Act (2016).

81 Section 83 of the Water Act (2016).

82 Section 84 of the Water Act (2016).

equipment or other assets, with or without associated liabilities, in connection with water services previously held by the government were by law to be transferred to WSBs.⁸³ The members of WSBs were ministerial appointees.

The Water Act (2002), provided for the requirement of a licence for any person supplying more than twenty-five thousand litres of water a day for domestic purposes; or more than one hundred thousand litres of water a day for any other purpose; with an exception for provision of water to employees or on the premises of certain settings such as hospitals, schools, hotels and research institutions.⁸⁴

The Water Act (2002) envisaged that WSBs would exercise and perform their powers and functions under licence through one or more agents referred to as Water Service Providers (WSPs).⁸⁵ The WSB could, however, also perform direct service provision of water services, where it was not possible to do so through an agent. The Minister had residual powers under the Act to provide water services to consumers with the assistance of the National Water Conservation and Pipeline Corporation under certain conditions.⁸⁶ WSPs could be private firms, non-governmental organisations, companies owned by the local authorities or community groups.

A report compiled in 2012 aptly describes how the autonomy sought from central government, intended to reduce bureaucracy and improve efficiency, was undermined under the Water Act (2002) regime.⁸⁷ Local authorities delayed the transfer of assets and equipment to WSBs, hampering their effectiveness and their capacity to ring-fence funds for re-investment as anticipated by the Act.⁸⁸ The lack of autonomy was further exacerbated by the politicisation of the appointment of officers by the Minister, leading to patronage, nepotism, conflict of interest and opportunism, as demonstrated by board expenses constituting a great percentage of total expenditure.⁸⁹

With the enactment of the Water Act (2016), it was presumed that the WSBs, along with their powers and mandate, would automatically be devolved to county governments. However, the Water Act (2016) takes a slightly different approach. The Act does not provide for WSBs, though the Water Works Development Agencies (WWDAs) seem to be the equivalent of the old WSBs, albeit renamed. The Water Act (2016) confirms this by providing that all assets and liabilities formerly held by WSBs will be deemed to belong to the WWDAs, subject to the provisions of the 2012 Transition to Devolved Government Act.⁹⁰ The former Tanathi Water Services Board also confirms this by describing its mandate as per Section 68 of the Water Act (2016),

83 Section 113(2) of the Water Act (2002).

84 Section 56 of the Water Act (2002).

85 Sections 53 and 55 of the Water Act (2016).

86 Section 67 of the Water Act (2016).

87 GIZ (2012).

88 Ibid.

89 Ibid.

90 Section 152 of the Water Act (2016).

which provision relates to the role of a WWDA.⁹¹ However, a closer scrutiny of the provisions relating to the WWDA indicates certain pertinent differences between this institution and the WSB envisaged by the Water Act (2002).

The Water Act (2016) provides for the possibility of the Cabinet Secretary establishing, by a Gazette notice, one or more WWDA with a defined geographical area of jurisdiction. Although the WWDA are corporate bodies as were the WSB, the composition of the former's members is different. The WWDA Board comprises of a Chairperson, appointed by the Cabinet Secretary, and four other members also appointed by the Cabinet Secretary from counties within the basin area and the Chief Executive Officer.⁹² In contrast, the Water Act (2002) gave the Minister discretion in determining the number of members of a WSB through a Gazette notice.⁹³

Section 68 of the Water Act (2016) sets out the functions and powers of the WWDA which include undertaking the development, maintenance, management and operation of national public water works in their jurisdiction. A national public water work is defined, under Section 8, as one designated as such by the Cabinet Secretary by Gazette notice. The provision further sets out the basis for its designation, which is the fact that the water resource on which it depends is cross-cutting, is financed by the national government and is intended to serve a function of the national government, or a function which has been transferred to the national government by agreement between the national and county government. WSBs, on the other hand, were responsible for the efficient and economical provision of water services through an agent.⁹⁴

WWDA are mandated to act as a WSP until the responsibility for operation and management of the waterworks are handed over to a county government or their respective WSPs. They are also tasked with providing reserve capacity, technical services and capacity building to county governments and WSPs in their respective areas.⁹⁵

The Water Act (2016) provides for the handing over of national public works from WWDA to the county government, the joint committee or authority of the county governments within whose area the water works fall, or to the relevant WSP for purposes of provision of water services.⁹⁶ Nevertheless, the same provision in the Act makes this transfer of the ownership of the assets to the county government subject to the payment of any outstanding liabilities. Further, the Act provides that should a county government or its agent default on the repayment of any outstanding loans arising from the development, rehabilitation or maintenance of the works, the WWDA can

91 See <www.tanathi.go.ke> (accessed 20-5-2018).

92 Section 66 of the Water Act (2016).

93 Section 51 of the Water Act (2002).

94 Section 53 of the Water Act (2002).

95 Section 68 of the Water Act (2016).

96 Section 69 of the Water Act (2016).

petition WASREB to order a transfer of the WSPs functions back to the WWDA until full repayment of the loan.⁹⁷

A further confirmation of the caution exercised in the transfer of assets, is the Gazette notice from the Cabinet Secretary for Water and Irrigation that established the date of commencement of the Act as 21 April 2017. This notice excludes from this date of commencement: Sections 152 and 155, which relate to transfer of assets from WSBs to WWDA and from the Water Appeals Board to the Water Tribunal; and Section 153 which relates to the transfer of assets from WSBs to cross county WSPs.⁹⁸ Further, the revocation of Section 156(3) relating to the transition period for the institutions under the Water Act (2002) to institutions under the Water Act (2016) stipulated that such revocation did not extend to the Water Appeals Board and to WSBs.⁹⁹

The above provisions seem to delay the devolution of ownership and management of county public works as implied by the Constitution. However, the prudence exercised seems justified in view of the experience of the devolution of health services in Kenya which has been characterised by challenges arising from capacity gaps, rampant corruption, inadequate allocation of county funds to the sector and conflicts between national and county governments.¹⁰⁰

3.3.3 Water service providers

Under the Water Act (2002), WSPs, which could be companies, non-governmental organisations of other persons or bodies, were responsible for providing water services under a licence agreement with a WSB. One main challenge of the Water Act (2002) was the political capture of WSPs. It was not uncommon to find among the list of approved registered WSPs, names of politicians in central government or their agents, either as individuals, companies or non-governmental organisations.¹⁰¹ The registered WSPs also lacked financial capacity and technical expertise to provide water services.

In accordance with the Constitution, the Water Act (2016) transfers the responsibility of water service provision to county governments.¹⁰² County governments are responsible for establishing WSPs (public limited companies under the Companies Act 2015), which shall be responsible for providing water services within the specified area and also for developing county assets necessary for water service provision.¹⁰³

97 Section 69(3) of the Water Act (2016).

98 Legal Notice No. 59 of 2017.

99 Legal Notice No. 60 of 2017.

100 Kimathi (2017: 55).

101 GIZ (2012).

102 Section 77 of the Water Act (2016).

103 Ibid.

The Water Act (2016) attempts to mitigate the risk of political capture of WSPs by setting out clear conditions for WSPs when applying for licences. Members of the Board of a WSP cannot at the time of nomination for appointment be serving as elected members of a county government; hold office in a political party; or be serving members of Parliament.¹⁰⁴ The Act further requires that the application for a licence as a WSP, made to WASREB, must be publicised and subjected to the input of stakeholders including the county government. The Act includes clear provisions on the requirements for an application and grounds for revocation or suspension of a licence. An application for a licence must include, among other things, evidence of a business plan, financial capability and plans for infrastructural development as a safeguard against the financial and technical challenges faced under the Water Act (2002), and which they continue to battle with to date.¹⁰⁵

4 Same old law or a water law for sustainability?

The comparative analysis above of the substantive law and institutional frameworks under both Acts suggests that although the changes introduced by the Water Act (2016) might appear at a cursory glance to result in a similar script with a few changes to the institutions, some fundamental changes have been made to Kenya's water law.

Further, the true basis for evaluating the effectiveness or failure of the Water Act (2016) ought to be its capacity to achieve its primary purpose, which is "to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution".¹⁰⁶ Whereas the county governors and the Council of Governors have focused on devolution as the principal goal of the Constitution, a more holistic reading of the Constitution, particularly in the context of management of natural resources, demonstrates that the principle of sustainable development is equally critical.

4.1 Devolution in the context of subsidiarity

Arguably, the Water Act (2016) has maintained, at least in broad terms, the institutional framework of the Water Act (2002). The framework under the Water Act (2002) was founded on the principle of delineating and decentralising the roles of water management and service provision. Consequently, the fact that the Water Act (2016) does

104 Section 80 of the Water Act (2016).

105 Kanda (2018: 19).

106 Section 3 of the Water Act (2016).

not depart radically from this main framework does not undermine its alignment with the constitutional requirement for devolution.

The failure of the Water Act (2002) to achieve the decentralisation intended was not the result of fundamental flaws in the Act itself, but rather challenges in implementing the law. These challenges included the lack of technical expertise and financial capacity at the local level to which roles had been decentralised. Political capture of positions in the institutions established by the Act also undermined the capacity of these institutions to achieve their mandate.

The Water Act (2016) has attempted to devolve certain aspects of water resource governance to county governments. However, the analysis of the Act also demonstrates a cautionary approach, supporting a gradual devolution rather than an immediate devolution. Further, the Act seems to introduce safeguards to mitigate the risk of facing similar challenges to those characterising the Water Act (2002) decentralisation process.

Such caution is not averse to the principle of subsidiarity, which requires that the functions of government be performed at the lowest level possible provided that they can be performed adequately.¹⁰⁷ Where the lower levels of government cannot perform these functions, a failure to intervene on the part of the national government would amount to shirking its responsibility to its people.

4.2 Sustainable development as a national principle of governance under the Constitution

The Constitution of Kenya includes sustainable development as one of its governance principles.¹⁰⁸ In the context of natural resource governance, the national government is required to “ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits”.¹⁰⁹ This function is further reiterated in the fourth schedule of the Constitution in relation to water protection, securing sufficient residual water, hydraulic engineering and the safety of dams.

The Water Act (2016), like the Water Act (2002) ascribes the role of regulation, policy development, management of water resources, as well as national water harvesting and storage to the national government. This is to be expected as sustainable water resource management for Kenya can be best achieved if the role is pitched at the national level.

107 Marshall (2005).

108 Article 10(2)(d) of the Constitution of Kenya (2010).

109 Article 69(1)(a) of the Constitution of Kenya (2010).

As noted above, the Act seems to have adopted a prudent and slow approach to devolving water service provision to county governments. The experience of the health sector in which a rapid devolution of health service provision to county governments resulted in a crisis supports the wisdom of taking a staggered and prudent approach. The rushed devolution in the health sector was characterised by duplication of roles by national and county governments, inadequate support and financing of systems and processes at county government levels, and delays in accessing resources resulting in a failure by county governments to manage their health units.¹¹⁰ Given the critical need for sustainable water management in Kenya, there may be some wisdom in retaining some control of water services' management and provision at the national level to avoid a similar scenario as that faced in the health sector.

Further, given the intra-county geographical extension of water resources, the management of water resources and even water service provision in some cases ought to remain within the mandate of the national government to ensure the sustainability of these water resources. As the experience of other countries demonstrates, the challenges faced in achieving sustainable management of basin areas that cut across states and territories has led to an increased move towards greater control by the federal government.¹¹¹

From the foregoing, it appears that the comparison between the Water Acts 2002 and 2016 reveals that this is not entirely a case of 'same script different cast'. Further, even where the script is the same, then the adage that 'if it ain't broke don't fix it' applies.

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