



Water Bill 2013
DEMOCRATISATION
OF WATER

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“The Water Bill presents a vital opportunity to fill the governance void in the Kenya Water Sector “

The water sector in Kenya has gone through an important process of sector reform since the the Water Act 2002. This process has greatly contributed to an improved policy and institutional framework and to a positive turn-around of the sector towards better performance whilst also attracting a considerable level of additional funding. The sector is now faced with a new challenge to align to the new Constitution of Kenya (COK, 2010). The recognition of water as a human right entails the responsibility to step up performance whilst accommodating to the new organizational situation in which county leaders will have a major responsibility for water supply and sanitation towards their population. In this alignment process the Water Bill 2013 presents a vital opportunity to fill the governance void in the Kenya Water Sector. The ongoing challenges to reforms are primarily rooted in governance issues. Poor governance often constitutes a bottleneck for policy implementation and

limits the impact of the reforms. This observation is in line with the discussion on sector governance and the need to work on interests, incentives, structures and processes in the sector. It is also in accordance with the requirement to incorporate good governance principles – such as accountability, transparency, non-discrimination and civil-society participation – in sector operations. Integrating these principles can contribute to better sector performance and to the progressive realisation of the human right to water and sanitation. Improving governance in the sector must therefore first be anchored on a strong policy and legal framework that entrenches transparency, accountability and participation. While there have been credible attempts to legislate in favour of transparency and accountability, there are still laws and practices in the sector that need to be strengthened to actualize integrity in the water sector.

Overview of the Water Bill 2013

The enactment of a new water law to replace the Water Act 2002 was necessary to align the sector with the CoK, in particular human right to water and Devolution, which placed the primary responsibility for water services with the county governments.

The Water Bill 2013 upholds the basic tenets of the Water Act 2002 and if correctly implemented could preserve and extend the gains made since 2002 in improving and developing water services, most importantly the delegation of service delivery to dedicated water service providers ring-fencing of revenues from water services and decentralization of water resources management to the grassroots. The bill establishes bodies to be in charge of water resources, services, financing and disputes resolution.

Water Resources: Are national assets belonging to all Kenyans. The Cabinet Secretary in charge of water affairs sets policies. The Water Resource Regulatory Authority (WRRRA) sets and monitors rules and regulations. Basin Water Resource Boards (BWRB) prepares and implements strategic basin water resource plans. Counties are represented on the BWRB; possibly on a rotational basis in a situation where the number of counties concerned exceeds the available

Gains under the Water Act 2002

The Water Bill 2013 is expected to build upon the gains made under the Water Act 2002. Some of the gains made include:

- The sector has attracted more resources which confirm commitment and confidence by government and development partners respectively to the reform
- Socially responsible commercialization of WSS has been successful in urban areas
- The sector is increasingly responding to regulation
- The sector is increasingly responding to human right to water and sanitation
- The sector is embracing stakeholder participation and gender parity
- Pro-poor focus has increased
- Water resources management is increasingly receiving the desired attention
- The sector is attracting quality manpower of varied skills
- There is progress in WSS coverage



seats. Water Resource Users Associations (WRUAs) with their current functions are established at the level of sub-basins and catchment areas. The Bill establishes the National Water Storage Authority (NWSA) responsible for national water works.

Water Services: Is primarily the responsibility of the county and inter-county governments, with the latter handling water supply systems covering several counties. The Bill upholds ring-fencing and regulation, i.e. what is paid for the water is used for water. Water Service Providers (WSPs) are licensed by the Water Service Regulatory Commission (WSRC). On the other hand, Water Works Development Boards (WWDB) plan and develop national water service works in consultation with the counties concerned.

Financing: The mandate of the WSTF (Water Sector Trust Fund) would extend to community initiative for water conservation.

Dispute resolution: The Bill establishes the Water Tribunal as a sub-ordinate court within the judiciary along the Land & Environmental Court mandated by the CoK. The proposed institutional framework is overly complex and

does not set out the principles and rules guiding institutional arrangements for multi-county water works. Existing institutions will to a large extent translate into the ones defined by the Bill thus ensuring a measure of continuity in the short term but perpetuating current overlays and surrendering the opportunities for reform and rationalization. This is understandable as the Bill is mainly based on submissions by existing national water sector agencies anxious to entrench themselves in the new institutional setup. On several matters of direct concern to the counties, the Bill does not clearly mention their roles nor does it state the framework for consultations with national sector institutions and among counties.

Compatibility of the Bill with Devolution

The Water Bill 2013 is not clear on what the Cabinet Secretary in Charge is supposed to do while giving him/her more powers in some instances, like in the case of appointments. It is not clear how the proposed institutions will work together with the county governments in the management of water resources and services. There are possibilities of challenges to be faced by the various institutions in executing their mandates under the current devolution structures.

The Bill should define more precisely how counties and regional boards will interact with national institutions. More specifically:

- The relationship between the county governments and the WWDB or regional offices of the NWWDB should be defined.
- The relationship between the Counties and the WRBB's should be defined.
- The links between WRUA's and the Counties should be defined, because conservation has been given to the Counties while the WRUAs receive their support from the national institution, WRRRA. This therefore means their relationship should be direct.
- The capacity of WRUAs needs to be strengthened: There is potential for WRUAs to be funded by Counties in respect to the County Governments' responsibilities in catchment protection. In addition, it may be useful to provide in the Bill a role for WRUA councils/networks/associations that have come up as viable institutions to lobby for county support.
- The Bill needs to spell out how the right to water will be progressively realized in its various dimensions thereby circumscribing the legal obligations of "duty bearers" i.e. counties and water service providers.

The Water Bill 2013 and Water Sector Governance

The water sector must strongly embrace the eight dimensions of good governance in water as well as in other public service sectors, namely: transparency, accountability, performance monitoring, participation, equity, inclusiveness, independent regulation and enforcement. Implementation of the proposal of the Bill requires supportive institutional arrangements including: separation of operational management and oversight functions, clarity in institutional roles (no gaps and no duplication) as well as processes including stakeholder consultations, competitive selection of cadres, reporting, external auditing, internal rules and procedures and enforcement mechanisms.

Sector Institutions: The Bill proposes a number of bodies which raise a number of issues, for instance:

- With unclear mandates, citizens will not be able to hold the government to account
- On appointments to the bodies, there is limited cushioning of the institutions from political interference by the appointing authorities.

To improve governance of the sector institutions,

- There should be a defined framework for monitoring, evaluation and reporting for the proposed institutions and devolved structures so as to encourage information sharing and public participation in decision making. Quarterly reports by the institutions are encouraged for a more engaging information sharing. Scorecards for institutional performances should be formulated for citizens.
- They need to plan for frequent water forums by stakeholders, where the institutions present their plans for public approvals and recommendations.

The right to water: The governance structures do not provide enough space for the realization of the right to water. With water services devolved to the Counties, the Bill does not adequately respond to devolution, in the sense that it does not expressly state the role of County Governments.

Ring-fencing of water revenues: The money collected from the water should be ploughed back to the sector to increase investments. Ring fencing is not supported by legislation or regulation; there should be means of punishing errant water sector institutions.

Water Resources

- As a rule, the CoK mandated SRC (Salary Review Commission) should have the final words on compensation beyond simply advising the Cabinet Secretary.
- Charges and fees applied to the usage of water resources should be ring-fenced and used to support water resource management & conservation undertaken in particular by WRUA's.
- WRUA's links with Counties should be defined, and their capacity strengthened. WRUAs shall eventually be funded by Counties as funding from WARMA will be discontinued.

- The links between WRBB and Counties should be defined.
- The relationship between WRRRA and the WRBBs (which are separate legal entities) should be defined; will the by WRRRA license the WRBB.
- Arrangements are needed to coordinate/harmonize various management plans dealing with the protection of natural resource in a given area, e.g. forest, wildlife, water etc.
- Voluntarism in WRUA is not sustainable for continuous functions, and needs to be supported with the requisite structures.
- The symbiotic relationship between the Water Towers Agency (WTA) and Water Resource Regulatory Authority (WSRA) is clear. Therefore, the agency should be mentioned in the bill.



County specific laws: County governments may want to formulate their unique water related laws that respond to the provisions of the national water law, e.g county specific water-related needs, such as irrigation, agriculture, livestock watering or household consumption.

- **Proposed mitigation measure:** County Water Ministers Committee: Members have met twice to define an appropriate engagement with the Cabinet Secretary. There is a standing committee of the county ministers which will look into the effects of the Bill on the water sector within the Counties. The Isiolo County minister is the coordinator. Moreover, several Counties have begun putting in place processes to begin drafting their county water bills, for instance, Kajiado, Machakos, Makueni and Laikipia.

Inter-county water resources: Counties may face challenges in exploitation of water resources and managing supply utilities that cut across counties. In the case of such shared resources, there needs to be systems and procedures in place so as to avoid misuse/corruption and conflicts.

- **Proposed mitigation measure:** Counties need to be encouraged to come up with a shared institution where the concerned counties are represented, to coordinate their interests

Devolution Structures: Most County Governments have not fully taken up their responsibilities due to the administrative challenges they still have. Some counties are yet to have Chief Officers who should be the experts to help govern water affairs in their counties. Certain counties may not have enough human resources or enough budget allocations for water to enable them to deliver their water and sanitation mandates.

- **Proposed mitigation measure:** Counties have inherited staff who worked from the DWOs and old national government structures. Many counties have shown the desire to recruit their own staff. County governments should not look for people elsewhere. There should be a negotiated working spirit and none performers should not be imposed on the county.

Financing: While it is only water services which have been devolved, County Governments face pressure from the citizens to tackle any water related challenges, whose financing may not be available.

Proposed mitigation measure: County Governments need to come up with an elaborate civic education on water resources and services management. Counties need to pick the issue of ring-fencing of finance, to ensure expanded investment in the water sector.

Opportunities

The CoK 2010 avails the following opportunities for the promotion of integrity, transparency and accountability in the water sector:

Bill of Rights: The CoK has clear provisions in the bill of rights which provides for the right to life, dignity, safe environment, housing, sanitation and safe water in adequate quantities. The constitution therefore, lays the benchmark upon which any water related legislation must be grounded.

Citizen Participation: The constitution provides for citizen participation in governance. County governments are mandated to involve their citizens in the planning and decision making processes. The institutions proposed in the Water Bill 2013 must therefore, strongly provide for citizen participation in the water sector.

Devolution: It brings devolution closer to the people as they seek solutions to the water challenges from the devolved structures near them. The Water Bill must then align to the reality of devolution and respond to its provisions such as delegated duties. The Council of County Water Ministers provides an opportunity for citizens to articulate specific water issues.

Requirements for Water Management under the new Constitution

Key requirements and strategic orientations for the management of water under the new constitution include;

Right to water: The CoK 2010 (Art. 43 (1) (d)) establishes a legal foundation for the right to water and sanitation in line with the International Covenant on Economic, Social and Cultural Rights. The Human Rights-Based Approach (HRBA) to Water and Sanitation services requires that the sector operates in a more pro-poor, accountable and inclusive manner. Right to water does not mean free water. The realization of the right to W&S will be progressive. Basic standards and benchmarks for various dimensions of the right need to be defined in relation to the economic and social contexts. This will enable to circumscribe more precisely the legal obligation of “duty bearers”, i.e. mostly county governments and appointed service providers.

County Governments (Devolution): The CoK establishes the County Governments which have been mandated to be in charge of water and sanitation services in the counties. The Bill is not elaborate on County Governments. It should therefore, align itself to the county system, and make it clear on the functionality of the systems and institutions proposed alongside the County Governments. The County Governments also need to have baselines for water resources and water services, which would advise them on the achievement of the right to water, and application/effectiveness of technology.



Way forward

Enactment of the Bill should be fast-tracked. The longer the Bill stays, the more difficult it will be to implement it, with County Governments already rolling out their water plans without having to clear laws.

Poor governance in the water sector (corruption, misuse of resources, nepotism, political appointments etc) needs to be addressed by the Bill and any legislative loopholes need to be plugged.

Consolidate the position, as a basis for continued engagement with sector players, till the ultimate realization of a Water Act.

Establish status of the Water Bill with the Ministry of Water, Commission for the Implementation of the Constitution (CIC) and Parliament.

Stakeholders' Water Bill 2013 second lobbying/engagement meeting with the parliamentary committee on environment, water and natural resources.

There needs to be a more sustained dialogue between CSOs, County Governments and The National Government Ministry. Efficiency in sustainable water use will be achieved through sector-wide integration.

Parallel systems in the sector should be immediately resolved and curtailed (i.e District Water Officers versus Water Service Providers)

Investment in the water sector should be based on an investment plan developed in a participatory way from sub-counties to counties to National government with strong stakeholder participation. Equally required are clear accountability and reporting mechanisms to the public at both county and national government levels.

Sector financing in a sustainable manner must be ensured. No lease fee should be charged from water service providers for the use of public assets e.g fees to local authority, WSB, etc.

Non performing sector institutions should be phased out and not reformed, rather new institutions should be established to take over streamlined and distinct mandates. The Bill must ensure the separation of financing , implementation and oversight to promote good governance and reduce corruption in the sector

Non- viable WSPs which are liabilities (always seeking unjustified subsidies for the Ministry to pay for operation costs) should be dissolved and clustering of WSPs should be based on economic viability.

Mandatory integration of good governance and integrity components in all Water Sector institutions practices.

Other influencing factors/elements determining the water sector policies

Associative responsibilities by other sectors such as energy, agriculture, industry and tourism, which are closely linked to the water sector, need to be strengthened:

Corporate Social Responsibility: Corporate organizations should be involved in water conservation and private investments in water supply. Gained made in public-private partnerships in the water sector should be sustained.

Bottled Water Industry: Ideally this is a water sector component owing to the fact that the water is tapped from a source before it becomes a subject of industrialization, as a product of human consumption. If WSPs can convince citizens that their water is of good quality, they could improve their revenue. People's perceptions on water needs to be changed.

Civil Society: The place of the civil society needs to be strengthened to be independent regulators and observers of the water sector. They need support for continued capacity development of citizens.

Voice of the People: The end consumers need to have supportive structures to continue engaging their service providers in the water sector. The citizen-watch groups need to be progressively strengthened. The voice and energy of the youth need to be exploited to enable water become more profound in citizens' daily discussions. The youth groups can be supported to begin water advocacy initiatives.



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