

**GOVERNING WATER AND SANITATION IN KENYA: PUBLIC LAW,  
PRIVATE SECTOR PARTICIPATION AND THE ELUSIVE QUEST FOR A  
SUITABLE INSTITUTIONAL FRAMEWORK**

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## I. INTRODUCTION

For a long time, it was assumed that water and sanitation services should be provided by government. This assumption was based on the reasoning that since water and sanitation are public goods and may also be natural monopolies, they would not be widely supplied by free markets.<sup>1</sup> Water systems – that is, the infrastructure and management mechanisms for the delivery of water and sanitation services – were therefore owned and operated by public entities, including state-owned enterprises and local authorities.

In many developing countries, however, public water systems have been wanting in significant respects. In African countries, for instance, many water systems have been plagued by problems such as high leakage levels, aging and poorly maintained infrastructure, weak billing and revenue collection mechanisms, low productivity of staff, uneconomic tariff structures and heavy financial losses.<sup>2</sup> These deficiencies of the public sector have formed the impetus for private sector participation in the management of water systems. It is hoped that private provision will “lead to greater efficiency in service provision through the private motive of the private sector, and ... provide utilities with clear objectives rather than the multiple, and often conflicting, goals imposed by government.”<sup>3</sup> This paradigm shift has been dictated by the ideology of neoliberalism, which has had a profound influence on international development policy debates since the late 1970s. The new thinking is that “managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.”<sup>4</sup>

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<sup>1</sup> See, e.g., Thelma A. Triche, *Private Participation in the Delivery of Guinea’s Water Supply Services*, World Bank, Infrastructure and Urban Development Department, Working Paper WPS-047 (1990).

<sup>2</sup> Kate Bayliss, *Utility Privatisation in Sub-Saharan Africa: A Case Study of Water*, 41 JOURNAL OF MODERN AFRICAN STUDIES 507 at 509; Franklin Cudjoe & Kendra Okonski, *The Reality of Water Provision in Urban Africa*, in THE WATER REVOLUTION 177 at 181.

<sup>3</sup> Clive Harris, *Private Participation in Infrastructure in Developing Countries: Trends, Impacts, and Policy Lessons*, World Bank, Working Paper No. 5 at 5 (2006) (Noting further that it has also been expected that private sector participation would enable the “separation of policy and regulation from provision [which] would provide accountability through the arms-length relationship that was missing under public provision.”)

<sup>4</sup> World Meteorological Organization, *International Conference on Water and the Environment: Development Issues for the 21<sup>st</sup> Century: The Dublin Statement and Report of the Conference* (Geneva: World Meteorological Organization, 1992).

While private sector participation has the potential to eliminate or at least ameliorate the deficiencies of public water systems, this potential cannot be realized in the absence of suitable – that is, effective and accountable – institutional frameworks. The market mechanism is unlikely to enhance the efficiency of water systems in the absence of regulatory mechanisms aimed at fostering competition where this is possible, and establishing and managing other market incentives for efficiency. Further, the benefits of private sector participation will not be realized unless the established institutional framework clearly assigns and coordinates institutional responsibilities. Undue fragmentation of institutional responsibilities should also be avoided since it may lead to lack of accountability and inefficiency.<sup>5</sup> In addition, the design of institutional frameworks for the regulation of water systems should be informed by an appreciation of the limitations of the market mechanism. In particular, such institutional frameworks should be designed to facilitate universal access to water services and conservation of water resources. Above all, such institutional frameworks should be democratic – that is, participatory and accountable – as this would ensure that the design and implementation of the mechanisms for private sector participation are transparent and take the public interest into account.

Over the last decade, successive governments in Kenya have been undertaking reforms in the water sector, a principal objective of which has been to enhance private sector participation in water provision. In the context of these reforms, a new Water Act was enacted in 2002, which transformed the institutional framework for water governance.<sup>6</sup> This paper critiques the Water Act of 2002 and argues that it establishes an institutional framework for water governance that is neither effective nor democratic, and is accordingly unsuitable for efficient private sector participation. The Water Act's institutional framework is not linked to important existing environmental management institutions and creates too many bodies whose responsibilities overlap; these overlaps are likely to generate conflicts in practice. The Water Act is also likely to generate conflicts between the institutions it creates and existing water governance institutions, especially local authorities. Even more significantly, perhaps, the Water Act fails to clearly assign and coordinate institutional responsibilities. Instead, there is a considerable but unnecessary fragmentation of such responsibilities and a failure to establish legal principles for the

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<sup>5</sup> Triche, *supra* note \_\_\_ at 9.

<sup>6</sup> The Water Act, Act No. 8 of 2002.

regulation of private sector participation mechanisms such as corporatization. The paper concludes that the quest for a suitable institutional framework eluded the drafters of the Water Act, which therefore requires an overhaul if it is to facilitate effective and democratic private sector participation in water provision.

Part II provides the paper's conceptual framework and examines the question of institutional design in the context of water's unique characteristics. Given water's peculiar attributes – as a public good, a natural monopoly, a merit or social good, a basic right and a scarce resource – how can public law contribute to the design of the institutional frameworks for its effective and democratic governance? Part III reviews water policy and legislative reforms in Kenya in the context of marketization and contends that while there was a clear policy intention to enhance private sector participation in water provision, the mechanisms adopted by the Water Act are unlikely to facilitate such participation, or ensure that such participation is effective and democratic. Indeed, the reforms undertaken thus far can hardly be described as an exercise in marketization. Part IV is a brief conclusion.

## II. THE ECONOMICS OF WATER, PUBLIC LAW AND THE SIGNIFICANCE OF INSTITUTIONS

### A. *The Peculiarity of Water and its Amenability to Marketization*

Water possesses a number of unique characteristics that make it difficult to marketize. As used here, marketization basically refers to the “introduction of the logic of the market into water resources management and/or water supply.”<sup>7</sup> It should be noted that there are various forms of marketization, including privatization, commercialization or corporatization, and commodification. Privatization refers to “the shift in ownership and control from the public to private companies.”<sup>8</sup> The terms commercialization and corporatization are invariably used interchangeably, and denote the restructuring of public management institutions along commercial lines, with or without private sector involvement, by introducing commercial principles and

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<sup>7</sup> Jessica Budds & Gordon McGranahan, *Privatization and the Provision of Urban Water and Sanitation in Africa, Asia and Latin America*, International Institute for Environment and Development (IIED), Human Settlements Discussion Paper Series, Theme: Water-1 (2003) at 6.

<sup>8</sup> *Id.*

practices such as efficiency, cost-benefit analysis and profit maximization.<sup>9</sup> For its part, commodification refers to the conversion of a public good into a private (or economic) good through the application of mechanisms that facilitate the appropriation of such goods so that they can be sold at prices determined through market exchanges.<sup>10</sup>

Water's characteristics that make it difficult to marketize include its status as a public good, a natural monopoly, a merit good and/or basic (human) right and a scarce resource.

In many ways, water can be described as a public good, that is, a good whose consumption does not reduce the amount available for others to consume. Public goods possess two essential attributes. First, they are "non-rivalrous," meaning that one person's use does not deprive others from using them; they are available to everyone. Second, they are "non-excludable" such that "When one individual benefits from a public good, its availability to others is not diminished, and it is practically impossible to charge individuals for its use or to exclude nonpayers."<sup>11</sup> Thus while water and sanitation services confer important public benefits, such as public protection from infectious diseases, these benefits are available to everyone but who will not necessarily pay for their use. Indeed, the reluctance to pay is perhaps more pronounced in the case of sanitation.<sup>12</sup>

It is these public good characteristics of water and sanitation that have formed the impetus for public provision. The private sector tends to produce less than the socially desirable levels of these public goods "[b]ecause of the difficulty of identifying the extent to which each individual benefits from such goods, and of charging each individual accordingly."<sup>13</sup> For this reason, ensuring that these public goods are provided at appropriate levels is considered the responsibility of government.<sup>14</sup>

Second, water supply has characteristics of a natural monopoly. A natural monopoly exists "if total costs are lower when a single enterprise produces the entire

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<sup>9</sup> Id.

<sup>10</sup> Karen Bakker, *Neoliberalizing Nature? Market Environmentalism in Water Supply in England and Wales*, 95 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 542 at 544 (2005).

<sup>11</sup> Triche, supra note \_\_ at 2.

<sup>12</sup> Budds & McGranahan, supra note \_\_ at 14 (Observing that "Users are less willing to pay for safe sanitation, yet its provision is highly desirable from a public health perspective.")

<sup>13</sup> Triche, supra note \_\_ at 2.

<sup>14</sup> Id at 3.

output for a given market than when any collection of two or more enterprises divide the production amongst themselves.”<sup>15</sup> Natural monopolies can be explained by two factors: the fixed costs of the production are much higher than their variable costs, and their production is subject to important economies of scale.<sup>16</sup> The supply of water and sanitation services tend to be natural monopolies because the infrastructure required for their supply requires very high investment costs and is subject to important economies of scale.<sup>17</sup> These considerations invariably make the construction of competing systems impractical.<sup>18</sup> Governments typically regulate natural monopolies to prevent overpricing thereby ensuring that they do not exploit the public. Again, the natural monopoly characteristics of water supply have constituted an important rationale for public provision.

Third, water is considered to be a merit good and/or a basic (human right) or social good. Merit goods are goods that everyone ought to have in the interests of equity or social justice; they are goods that the society wants its members to have out of concern for their welfare, irrespective of ability to pay. Because water is essential to sustaining life, many societies consider it a merit or social good, to which every one should have a right.<sup>19</sup> Indeed, the Dublin Principles acknowledge the right of access to clean water and sanitation at an affordable price. Even more significantly perhaps, the United Nations Committee on Economic, Cultural and Social Rights has declared that water is a “social and cultural good” and that access to water is a human right, which “entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses.”<sup>20</sup> Countries that have ratified the United Nations Covenant on Economic, Social and Cultural Rights are therefore required to “take the necessary steps towards the progressive achievement of the right of everyone to an adequate standard of living, including access to water and sanitation.” The need to ensure access to water for all has constituted a further rationale for public provision of water and sanitation services.

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<sup>15</sup> Budds & McGranahan, supra note \_\_ at 11.

<sup>16</sup> Triche, supra note \_\_ at 3.

<sup>17</sup> Id at 4-5.

<sup>18</sup> Id at 5.

<sup>19</sup> Budds & McGranahan, supra note \_\_ at 12.

<sup>20</sup> United Nations Economic and Social Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Draft, General Comment No. 15, Committee on Economic, Cultural and Social Rights, Geneva, 11-29 November, 2002.

Finally, water is a finite environmental resource, and one that is particularly prone to overuse.<sup>21</sup> Further, the abstraction of water from natural water sources often imposes environmental costs over and above those borne by those responsible for such abstraction.<sup>22</sup> The need to conserve water constitutes a rationale for governmental regulation of water systems and providers to facilitate the internalization of the costs of water utilization thereby facilitating its sustainability.

### *B. Public Law, Water Marketization and the Design of Institutions*

The characteristics of water and sanitation discussed above have predisposed markets for their provision to numerous failures. Thus in the absence of governmental oversight, markets for the provision of water and sanitation services will not ensure their provision at optimal or sustainable levels. Indeed, the role of government is perhaps enhanced after marketization given the complexity of the regulatory task.

The task of regulating water and sanitation markets is complicated by the need to balance the various values that water and sanitation represent. After marketization, water and sanitation are to be deemed economic or private goods. At the same time, they are still considered social goods to which everyone should have a right, or at the very least, a right of access. And water is a scarce resource which ought to be managed sustainably. This means that whatever mode of private sector participation is adopted, government will need to perform the important tasks of allocating monopoly rights, regulating prices, monitoring performance and even making the most costly investments, including establishing and maintaining water and sanitation infrastructure.<sup>23</sup> This process of regulation entails the exercise of immense power, whose exercise will impact upon the rights and liberties of the citizenry.

In the context of water marketization, therefore, public law has two main concerns. The first is to ensure that power is exercised in a democratic – that is, accountable and participatory – manner. In particular, the construction and regulation of water markets ought to be democratic if they are to serve the public interest. The second is to ensure that marketization processes facilitate the efficient provision of

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<sup>21</sup> Budds & McGranahan, *supra* note \_\_ at 14.

<sup>22</sup> *Id.*

<sup>23</sup> Triche, *supra* note \_\_ at 4.

water and sanitation services, access to these services, and sustainable management of water resources. If the benefits of private sector participation are to be realized, it therefore becomes important for public law to establish institutional frameworks that foster competition where possible and establish and manage other market incentives for efficiency, such as tariffs and subsidies.

The need for democratic governance in water marketization should be seen in the broader context of the lack of democracy in the construction and implementation of marketization processes. Public lawyers are concerned that these processes are neither participatory nor accountable, and that the delegation of public functions to private entities is producing a “democracy deficit,” since they invariably bypass traditional accountability mechanisms, which are in any case no longer sufficient.<sup>24</sup> Marketization represents an instance where bureaucrats are likely to make the important decisions, without the scrutiny of the elected representatives of the citizenry. In the absence of effective public controls, therefore, it can be expected that there will be corruption and the outcomes of marketization processes will not be public regarding. Accordingly, public law instruments to ensure democracy in the design, award, implementation and regulation of water marketization initiatives are required.

As far as the design of institutions is concerned, public law should play a facilitative or enabling role. That is, it should ensure that the institutional framework for water governance encourages private actors to invest in water markets. For this reason, it is important that the institutional framework clearly assigns and coordinates institutional responsibilities. The regulatory mechanisms and the manner of their deployment should also be clear. In the absence of such clarity in the institutional framework, private actors are likely to consider the regulatory framework unpredictable and uncertain to an extent that they cannot predict the costs and benefits of regulation. Accordingly, they would in such circumstances be discouraged from investing in water markets.

In addition, institutional frameworks for water governance ought to avoid undue fragmentation of institutional responsibilities. This may not only lead to lack of accountability but may also occasion inefficiency by adding layers of bureaucracy and fomenting turf wars among regulatory agencies. Equally, it would be undesirable

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<sup>24</sup> Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEG. STUD. 379 at 384 (2001). [Hereinafter *The Limits of Globalization*].

to concentrate institutional authority. As Andrew Macintyre has observed, “political frameworks that either severely concentrate or severely fragment decision-making power are prone to characteristic... governance problems.”<sup>25</sup>

A final consideration in the design of institutions relates to the need for institutional responsiveness, that is, “the achievement of ‘congruence between community preferences and public policies’ such that activities of the institution are valued by the public.”<sup>26</sup> In the context of water, institutional responsiveness can only be achieved where governance is participatory. It may thus be necessary to decentralize the institutional framework for water governance, since decentralization may enhance citizenry access to, and participation in, water governance frameworks.<sup>27</sup>

The following Part reviews water policy and legislative reforms in Kenya in the context of marketization and critiques the suitability of the established institutional framework for effective and democratic private sector participation in water markets.

### III. WATER REFORMS IN KENYA: THE TURN TO MARKETS?

#### A. *Forms of Marketization in Water and Sanitation*

Throughout the world, marketization in water and sanitation is being effected through various mechanisms. In some cases the private sector participates through contractual arrangements, including service contracts, management contracts, lease contracts, concession contracts, BOT (build, own, transfer) contracts. In other cases, “the government transfers the water business to a private entity, including the assets (infrastructure), on a permanent basis.”<sup>28</sup> This is the so-called divestiture model, which has been adopted only in a few cases. The private sector may also participate through joint ventures, under which “a private company forms a company with the

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<sup>25</sup> ANDREW MacINTYRE, *THE POWER OF INSTITUTIONS: POLITICAL ARCHITECTURE AND GOVERNANCE* ix (Ithaca: Cornell University Press, 2003).

<sup>26</sup> Richard C. Crook, *Decentralisation and Poverty Reduction in Africa: The Politics of Local-Central Relations*, 23 *PUBLIC ADMINISTRATION AND DEVELOPMENT* 77 at 79 (2003).

<sup>27</sup> Thus “Decentralisation advocates argue that, because decentralization brings government closer to the governed both spatially and institutionally, government will be more knowledgeable about and responsive to the needs of the people.” *Id.* at 77.

<sup>28</sup> Budds and Mcgranahan, *supra* note \_\_ at 20.

public sector, with the participation of private investors, which then takes a contract for utility management.”<sup>29</sup> The commercialization or corporatization of public water utilities is also becoming popular.

The contractual arrangements require some elaboration. Service contracts are short-term agreements under which a private contractor assumes responsibility for specific tasks, such as installing water meters, repairing pipes or collecting bills. The private contractor is paid a fixed or per-unit fee agreed in advance. Since the private contractor is only responsible for specific tasks, service contracts allocate the least responsibility in comparison to the other contractual arrangements.

A management contract is similar to a service contract, save for the fact that it covers the full range of water operations; thus the contractor is responsible for the operation and maintenance of the water and/or sewerage network. In both cases, a public authority bears the full commercial risk and the compensation of the contractor is not usually directly linked to operational efficiency or cost control. Service contracts and management contracts are typically used in situations where the private sector considers it too risky to invest.

In contrast, under lease contracts and concessions, various measures of commercial risks are shifted to the private contractor. In the case of the lease contract, the contractor rents facilities from the public authority, which retains responsibility for investments. The contractor finances the working capital for operation and maintenance, and its remuneration is determined by tariffs. It collects the tariffs, pays the lease fee to the public authority, and retains the difference. In a concession contract, the contractor manages the whole utility at its own commercial risk, unlike in a lease contract where this responsibility is shared with the public authority. In a concession contract, the contractor is also required to invest in the maintenance and expansion of the water system. Concession contracts typically have long terms of between twenty and thirty years, to allow the contractor to recoup expended capital.

Last but not least are the build-own-operate (BOT) contracts, which are similar to concession contracts, with the addition that the private contractor here assumes the responsibility for constructing the infrastructure from scratch. The private contractor then manages the infrastructure, with the public authority

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<sup>29</sup> Id.

purchasing the supply. When the contract ends, the assets may remain with the private contractor or be transferred to the public authority.

In African countries, most water marketization contracts have been management and lease contracts.<sup>30</sup> The explanation for this preference is that private actors are reluctant to seek more demanding options such as lease contracts and concessions due to a perception that investing heavily in these countries is “too risky.”<sup>31</sup> In addition, the political will to implement lease contracts and concessions is often absent given the apprehension that such contracts will lead to high increases in water tariffs.<sup>32</sup> For these reasons, commercialization or corporatization has become an appealing alternative.

Corporatization seeks “to increase the organizational flexibility and financial viability of a specific service by giving it an existence that is legally separate from that of government.”<sup>33</sup> Corporatization is thus a “structural reform process” since it “changes the operational conditions of public sector organizations in order to place them on a commercial basis [sometimes] in a competitive environment.”<sup>34</sup> At the same time, government retains the responsibility for providing broad direction to the corporatized entity in key performance targets, such as financial targets and universal service obligations.<sup>35</sup> The corporatized entity is thus given narrower task domains, explicit performance measures and targets, and a greater emphasis is placed on the responsibility of the chief executive to deliver on these targets.<sup>36</sup>

These objectives of corporatization can be achieved through different organizational forms. The most commonly used organizational forms are a business unit within a government department, a government corporation, or a corporatized utility.<sup>37</sup> But all these forms adopt the same approach to managing service delivery. In all cases, there is first an attempt to ring-fence the entity to be corporatized, which

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<sup>30</sup> Budds & Mcgranahan, *supra* note \_\_ at 39.

<sup>31</sup> *Id.* at 40.

<sup>32</sup> Virginia Roaf, *After Privatisation: What Next? An Assessment of Recent World Bank Strategies for Urban Water and Sanitation Services*, Heinrich Böll Stiftung, Global Issue Papers, No.28, 2006 at 25.

<sup>33</sup> Laila Smith, *Neither Public Nor Private: Unpacking the Johannesburg Water Corporatization Model*, United Nations Research Institute for Social Development, Social Policy and Development Programme Paper No.27, at 1 (2006).

<sup>34</sup> Stephen Teo, *Evidence of Strategic HRM Linkages in Eleven Australian Corporatized Public Sector Organizations*, 29 PUBLIC PERSONNEL MANAGEMENT 557 at 558 (2000).

<sup>35</sup> *Id.*

<sup>36</sup> Nancy Bilodeau, et al, “Choice of Organizational Form Makes a Real Difference”: *The Impact of Corporatization on Government Agencies in Canada*, 17 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY 119 at 121 (2006).

<sup>37</sup> Smith, *supra* note \_\_ at 1.

entails identifying all the costs incurred in providing the service in question and centralizing these costs for the sake of greater transparency.<sup>38</sup> The entity to be corporatized is then insulated from political interference, by transforming it into a business unit and nourishing a corporate culture so that it can run the service autonomously.<sup>39</sup> Finally, the entity is institutionally removed from the state “in order to separate the politics of policy development from operations.”<sup>40</sup>

In order for corporatization to succeed, “there needs to be independent management oversight, good incentive schemes, and the companies must be held accountable, with full public disclosure of results.”<sup>41</sup>

In Kenya, policy makers have adopted the corporatization model of marketization. The following sections review the limitations of the old water and sanitation regime and critique the policy and legislative reforms that sought to address its deficiencies. While the policy responses expressed a clear intention to enhance private sector participation in water provision and sanitation, the implementing legislation may considerably hinder such participation. Indeed, the corrupted form of corporatization that has been adopted in the new dispensation precludes private sector participation since only public entities are allowed to provide water and sanitation services.

### *B. The Provision of Water and Sanitation Prior to Reforms*

Prior to the advent of reforms, water and sanitation services were the responsibility of local authorities and the National Water Conservation and Pipeline Corporation (NWPC), a state corporation established under the State Corporations Act.<sup>42</sup> The NWPC was established in 1988 to manage government operated water supply systems.<sup>43</sup> At the same time, the government established a Ministry of Water, which was responsible for the development and management of water systems.<sup>44</sup> This

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<sup>38</sup> Id at 2.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Roaf, supra note \_\_ at 18.

<sup>42</sup> The State Corporations Act, Chapter 446, Laws of Kenya.

<sup>43</sup> Albert Mumma, *Kenya's New Water Law: An Analysis of the Implications for the Rural Poor*, Paper Prepared for the International Workshop on “African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa,” 26-28 January 2005, Johannesburg, South Africa at 1.

<sup>44</sup> Id.

ministry was established pursuant to the National Water Master Plan of 1974, which sought “to ensure availability of potable water, at a reasonable distance, to all households by the year 2000.”<sup>45</sup> It was then felt that this objective could only be realized by “actively developing water supply systems,” a task that was then entrusted to the ministry.<sup>46</sup> The establishment of the NWCPC should also be seen in this context. Thus the NWCPC is under the control of the Ministry of Water.

This regime did not, however, ensure universal access to water and sanitation services, and a considerable size of the population was serviced by self-help or community groups. Indeed, “by 2000, less than half the rural population had access to potable water and, in urban areas, only two thirds of the population had access to potable and reliable water supplies.”<sup>47</sup>

The principal statutes governing water provision and sanitation were the Water Act<sup>48</sup> (hereinafter, the Old Water Act or OWA) and the Local Government Act (LGA),<sup>49</sup> and they established an elaborate institutional framework for the delivery of these services.

The OWA established the following institutions for the management of water and sanitation: the Minister, the Water Resources Authority, Catchment Boards, Regional Water Committees, the Water Apportionment Board, Local Water Authorities, and Water Undertakers. The OWA vested the “water of every body of water under or upon any land” in the Government, and entrusted their control to the Minister.<sup>50</sup> The OWA imposed on the Minister the duty “to promote the investigation, conservation and proper use” of water resources, and gave him/her wide powers to facilitate the performance of this duty, including powers to acquire land, construct water works, and to establish protected catchment areas.<sup>51</sup>

The main responsibility of the Water Resources Authority was to advise the Minister on various aspects of water resource management, such as demand management and conservation.<sup>52</sup> It was also the responsibility of the Water Resources Authority to establish catchment areas, and to appoint Catchment Boards

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<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id at 2.

<sup>48</sup> The Water Act, Chapter 372, Laws of Kenya (Repealed) [Hereinafter, OWA].

<sup>49</sup> The Local Government Act, Chapter 265, Laws of Kenya [Hereinafter, LGA].

<sup>50</sup> OWA, §§ 3 and 4.

<sup>51</sup> Id, §§ 7, 8-18.

<sup>52</sup> Id, § 20.

for such areas in consultation with the Minister.<sup>53</sup> Their task was to advise the Water Apportionment Board on the utilization of water supplies and the regulation of water permits.<sup>54</sup> The Water Apportionment Board was responsible for issuing water permits.<sup>55</sup>

The Minister also appointed a Regional Water Committee for each province, whose main responsibilities were: to advise the Minister on water conservation, development and policy; to submit recommendations on water development to the Water Resources Authority; and to receive and consider proposals for water development projects from local authorities and advise the Water Resources Authority thereon.<sup>56</sup>

The Local Water Authorities were also appointed by the Minister, and they were mainly responsible for “the management and use of water or the drainage or reclamation of lands in any area” under permits granted to them in respect of community projects.<sup>57</sup>

Last but not least were the Water Undertakers, who were also appointed by the Minister and had the responsibility of distributing water supplies in their areas of operation, which were to be established by the Minister after consulting the Water Resources Authority.<sup>58</sup> Invariably, the Water Undertakers were local authorities. In this regard, the local authorities were answerable to the Urban Development Department of the Ministry of Local Government.<sup>59</sup>

The provisions of the OWA were augmented by the LGA, which empowers local authorities to “undertake the supply of, and establish, acquire and maintain works for the supply of water” within their areas of operation.<sup>60</sup> In addition, the LGA empowers local authorities to “establish and maintain sewerage and drainage works within or without its area.”<sup>61</sup>

The above institutional framework was problematic in a number of respects. First, there was an undue concentration of power in the Minister in charge of water.

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<sup>53</sup> Id, § 22-23.

<sup>54</sup> Id, § 23(2).

<sup>55</sup> Id, Parts VIII and IX.

<sup>56</sup> Id, § 24.

<sup>57</sup> Id, § 27.

<sup>58</sup> Id, § 124.

<sup>59</sup> Joseph Onjala, *Good Intentions, Structural Pitfalls: Early Lessons from Urban Water Commercialisation Attempts in Kenya*, Centre for Development Research, Copenhagen, Working Paper 02.2, at 5 (2002).

<sup>60</sup> LGA, § 178.

<sup>61</sup> Id, § 168.

The Minister appointed virtually all the members of the water management bodies established by the OWA, and on the basis of criteria that were not always clear. The Minister even established the Local Water Authorities, a function that should perhaps have been delegated to the Water Resources Authority as the body with expertise on water matters. Second, there was an undue fragmentation of institutional responsibilities. For instance, the Water Resources Authority and the Regional Water Committees were both tasked with advising the Minister on water conservation, and it was not clear which of the two bodies had final authority. Third, there was no clear assignment of institutional responsibilities which led to uncertainty in decision making. This was especially the case with the regulation of local authorities in their role as water undertakers, which were controlled by both the Department of Urban Development in the Ministry of Local Government and the Department of Water Development in the Ministry of Water. As one commentator has noted, “These two centres of control at times were not in concert hence causing instability in decision making.”<sup>62</sup> Fourth, the institutional framework was not democratic and there was, for instance, very little participation by water users in decision making. Indeed, the boards of the bodies established by the OWA were dominated by public officials. Finally, the institutional framework was state centric and provided no room for private sector participation.

These institutional deficiencies contributed a great deal to the poor performance of the water and sanitation sector.<sup>63</sup> In particular, it was felt that “the heavy control that the central government exercised over local authorities... interfered with the efficient running of [the latter’s] water and sewerage departments.”<sup>64</sup> For example, the concentration of authority in the central government “made it difficult for water service providers to make independent, timely and appropriate decisions in response to local service needs.”<sup>65</sup>

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<sup>62</sup> O. A. K’Akumu, *Privatization Model for Water Enterprises in Kenya*, 8 WATER POLICY 539 at 552 (2006).

<sup>63</sup> Onjala, *supra* note \_\_\_ at 8 (Observing that “Local Authorities are ineffective in providing water services not so much due to their fault but to the way they have been treated by the higher echelons of government.”)

<sup>64</sup> O.A. K’Akumu & P. O. Appida, *Privatisation of Urban Water Provision: The Kenyan Experiment*, 8 WATER POLICY 313 at 317 (2006).

<sup>65</sup> *Id* at 315.

### *C. The Policy Responses*

In efforts to enhance the efficiency, accessibility and sustainability of water and sanitation services, the Moi Government promulgated a new policy – the National Policy on Water Resources Management and Development<sup>66</sup> (hereinafter, Water Policy) – which sought to deal comprehensively with the problems confronting water and sanitation services. The Water Policy identified the problems which have constrained the development of the water sector as including: the shortage of funds for development, operation and maintenance of water supplies and management of water resources; over-centralization of decision making; fragmentation of water resource management responsibilities; lack of proper co-ordination of the various actors in the sector; and, lack of proper inter-linkages with other water related sectors.<sup>67</sup> The Water Policy established four specific principles that would guide efforts to address these problems, namely: (a) the sustainable, rational and economical allocation of water resources; (b) the supply of sufficient quantities of water of good quality while ensuring safe disposal of wastewater and environmental protection; (c) the establishment of an efficient and effective institutional framework; and (d) the development of a sound and sustainable financing system for effective water resources management, water supply and sanitation development.<sup>68</sup>

As far as the institutional framework is concerned, the Water Policy sought integrate and decentralize water resources management “by adopting three... management levels (including National, Basin, Sub-basin/Catchment levels) and setting up and or strengthening appropriate institutions clearly defining the role of each and how they relate to each other.”<sup>69</sup> There is thus a desire to manage water on a “drainage or catchment basis to conform to its natural dictates.”<sup>70</sup> Second, the Water Policy also called for the review of the OWA so that it could “be in harmony with other Acts on water resources management issues.”<sup>71</sup> In addition, the Water Policy

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<sup>66</sup> Republic of Kenya, The National Policy on Water Resources Management and Development, Sessional Paper No. 1 of 1999 [Hereinafter, Water Policy].

<sup>67</sup> Id at 7-8, 13, 15.

<sup>68</sup> Id at 9.

<sup>69</sup> Id at 14, 16.

<sup>70</sup> Id at 14.

<sup>71</sup> Id at 19.

indicated that the role of Government would be “redefined with emphasis on regulatory and enabling functions as opposed to direct service provision.”<sup>72</sup>

On the subject of sanitation, the Water Policy acknowledged the inextricable link between water supply provision and wastewater disposal and expressed the Government’s intention to develop effluent discharge standards and desire “to make water abstraction and disposal permits dynamic and economic instruments for water pollution control.”<sup>73</sup> Further, the Water Policy called for the introduction of effluent discharge levies.<sup>74</sup>

Finally, on the question of private sector participation, the Water Policy states that the Government will encourage “the full participation of the communities and the private sector” by “creating an enabling environment for all actors to operate effectively and efficiently.”<sup>75</sup>

Another key policy document is the National Water Services Strategy (the Strategy), which has been formulated by the Minister for Water and Irrigation pursuant to the requirements of the Water Act of 2002. Its mission is to ensure “Sustainable access of adequate and affordable water and sewage services to all Kenyans through rehabilitated and expanded water supply and sewage systems and through efficient, responsive institutions.”<sup>76</sup> The Strategy establishes a number of guiding principles, including: the separation of policy and regulatory functions from service provision; decentralization of responsibilities and decision making; establishment of the cost-recovery principle; private sector participation; and, linkage between water supply and sewerage management and development.<sup>77</sup>

In particular, the Strategy seeks to enhance private sector participation by: establishing an effective, transparent and autonomous regulatory mechanism, enhancing competition through transparent and effective criteria, promoting local private sector participation, and promoting the integration of small scale independent water services providers.<sup>78</sup>

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<sup>72</sup> Id at 42.

<sup>73</sup> Id at 22, 40.

<sup>74</sup> Id at 52.

<sup>75</sup> Id at 31, 42.

<sup>76</sup> The Draft National Water Services Strategy (2005-2007), 2005 at 7.

<sup>77</sup> Id.

<sup>78</sup> Id at 15.

*D. The Water Act of 2002: Plus ca Change...*

The Water Act of 2002 constitutes one of the principal mechanisms for the implementation of the Water Policy. This section reviews the key provisions of this new Water Act (hereinafter, NWA) and critiques the suitability of its institutional framework to facilitate the effective and democratic participation of private actors – whether formal or informal – in the provision of water and sanitation services.

i. The Institutional Framework Established by the NWA

The NWA establishes the following institutions for the management of water and sanitation: the Minister, the Director of Water, the Water Resources Management Authority (WRMA), the Water Services Regulatory Board (WSRB), Water Service Boards (WSBs), Water Service Providers (WSPs), Catchment Area Advisory Committees (CAACs), Water Resources Users Associations (WRUAs), the National Water Conservation and Pipeline Corporation (NWCPC), the Water Services Trust Fund (WSTF), and the Water Appeal Board (WAB).

As under the OWA, the control of “every water resource” is entrusted to the Minister.<sup>79</sup> Again, the Minister retains the duty “to promote the investigation, conservation and proper use of water resources” and is now also required “to ensure the effective exercise and performance by any authorities or persons... of their powers and duties in relation to water.”<sup>80</sup> In the performance of these duties, the Minister “shall be assisted” by the Director of Water.<sup>81</sup>

The WRMA and the WSRB are the NWA’s principal regulatory agencies. The functions of the WRMA are to: (a) develop principles, guidelines and procedures for the allocation of water resources; (b) monitor and reassess the national water resources management strategy<sup>82</sup>; (c) receive and determine applications for permits for water use; (d) to monitor and enforce conditions attached to permits for water use; (e) regulate and protect water resources quality from adverse impacts; (f) manage and

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<sup>79</sup> NWA, § 4(1).

<sup>80</sup> Id, § 4(2).

<sup>81</sup> Id, § 4(3).

<sup>82</sup> The national water resources management strategy is to be formulated by the Minister after consulting the public. Id at § 11(1).

protect water catchments; and (g) determine charges to be imposed for the use of water from any water resource.<sup>83</sup>

Conversely, the key functions of the WSRB are to: (a) issue licences for the provision of water services; (b) determine water provision standards; (c) develop guidelines for the fixing of tariffs for the provision of water services; (d) develop guidelines for and provide advice on the cost-effective and efficient management and operation of water services; develop model performance agreements for use between licensees and WSPs; (e) monitor the operation of agreements between WSBs and WSPs; (f) promote water conservation and demand management; (g) determine fees, levies, premiums and other charges to be imposed for water services; to liaise with other bodies for the better regulation and management of water; and (h) to advise the Minister on matters concerning water services.<sup>84</sup>

As far as the provision of water and sanitation services is concerned, the NWA envisages that the Minister will establish WSBs,<sup>85</sup> which will then be licensed by the WSRB to provide water services.<sup>86</sup> Further, the NWA envisages that the WSBs will, instead of providing these services directly, contract them out to WSPs.<sup>87</sup>

In an attempt to implement the Water Policy's desire for the management of water on a catchment basis, the NWA empowers the Minister to establish a CAAC for each catchment area. The function of the CAACs is to advise the WRMA on matters such as water resources management and conservation, and the regulation of permits.<sup>88</sup>

The WRUAs are forums for the resolution of conflicts and co-operative management of water resources in catchment areas.<sup>89</sup>

The NWA also retains the NWCPC, which was established under the old water regime. The NWCPC is now required to develop works "for the purposes of a state scheme for the provision of bulk water supplies for use by licensees and water service providers" on behalf of the Minister.<sup>90</sup>

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<sup>83</sup> Id, § 8.

<sup>84</sup> Id, § 47.

<sup>85</sup> Id, § 51.

<sup>86</sup> Id, § 53(1).

<sup>87</sup> Id, §§ 53(2), 55.

<sup>88</sup> Id, § 16(2).

<sup>89</sup> Id, § 15(5).

<sup>90</sup> Id, § 22(4).

At the same time, the NWA establishes the WSTF “to assist in financing the provision of water services to areas of Kenya which are without adequate water services.”<sup>91</sup> The WSTF is to be managed by trustees appointed by the Minister.<sup>92</sup>

Finally, the NWA establishes the WAB and entrusts it with the responsibility of hearing and determining appeals filed by “any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or licence.”<sup>93</sup>

## ii. The NWA and Private Sector Participation

As indicated in the review of the Water Policy in Part III(C) above, the Government intended to encourage “the full participation of the communities and the private sector” by “creating an enabling environment for all actors to operate effectively and efficiently.” This important policy goal is unlikely to be realized unless the NWA’s institutional framework is overhauled. As the following discussion demonstrates, the NWA fails to clearly assign and coordinate the responsibilities of the agencies it has created. Instead, there is a considerable but unnecessary fragmentation of such responsibilities and a failure to establish clear legal principles for the regulation of private sector participation mechanisms such as corporatization. As under the OWA, the management and provision of water under the NWA is the responsibility of public agencies and the water reforms undertaken thus far cannot be considered an exercise in marketization.

One of the striking features of the NWA is the perpetuation of executive control of water institutions, which hinders the democratic governance of water. As we have seen, the Minister is now responsible for ensuring “the effective exercise and performance by any authorities or persons... of their powers and duties in relation to water.”<sup>94</sup> The NWA thus confers upon the Minister considerable power to meddle in the work of the two main regulatory bodies, namely the WRMA and the WSRB.<sup>95</sup>

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<sup>91</sup> Id, § 83(2).

<sup>92</sup> Id, § 83(4).

<sup>93</sup> Id, §§ 84, 85.

<sup>94</sup> Id, § 4(2).

<sup>95</sup> See, e.g., K’Akumu & Appida, *supra* note \_\_ at 322 (Observing that “The Act also gives the minister undue powers... to meddle in the operations of the water sector. The minister has a hand in everything. The case of the Nairobi City best illustrates this situation. In Nairobi, a political activist without any

Indeed, previous experience in Kenya has shown that such ministerial powers are not always deployed in the public interest.<sup>96</sup> What is particularly worrisome in the case of the NWA is that no attempt has been made to ensure the independence of the WRMA and the WSRB from the executive. The idea behind establishing these regulatory bodies was to ensure that water governance was guided by expertise; this will not be possible where the minister retains the power – which is itself not regulated – to interfere with the work of regulatory agencies.

There is therefore little departure from the past, since power is still concentrated in the Minister. This concentration of power is not conducive for the democratic governance of water. Indeed, the NWA only makes token efforts to democratize decision making. It empowers the Minister to appoint the CAACs, whose function is to advise the WRMA on the proper management of water resources.<sup>97</sup> It also provides for the establishment of WRUAs. While these attempts to involve water users in the management of water resources are encouraging, they are insufficient for two reasons. First, the role of the CAACs is merely to advise the WRMA; the WRMA is not obliged to take such advice into account. In addition, it is not clear how the Advisory Committees are to be funded, and their sustainability is therefore doubtful. Secondly, it is not clear how the WRUAs are supposed to perform their functions alongside the WRMA, which has overall responsibility for water resources management. In the absence of effective regulation of the relationship between the WRMA and the WRUAs, it is likely that the former will ignore the resolutions and decisions of the latter.

As we saw in Part II, an institutional framework should establish clear lines of responsibility if it is to be effective. In addition, it should be harmonized with existing institutions in order to facilitate an organized and coordinated approach to the management of its subject matter, which in this case is water. Unfortunately, the institutional framework established by the NWA does not adhere to these principles in a number of respects.

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corporate experience or any stake in the city was appointed to head the city water company apparently because the minister and the appointee came from the same political party.”)

<sup>96</sup> See, e.g., J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 828 at 848-849 (Discussing the abuse of ministerial powers in the context of public procurement).

<sup>97</sup> NWA, § 16.

First, the NWA establishes regulatory agencies without any reference to the Environmental Management and Co-ordination Act (EMCA),<sup>98</sup> which establishes the National Environmental Management Authority (NEMA) as the principal agency responsible for environmental regulation.<sup>99</sup> In particular, EMCA provides that NEMA shall “exercise general supervision and co-ordination over all matters relating to the environment.”<sup>100</sup> In the absence of a clear provision in the NWA spelling out how the WRMA and WSRB are linked or accountable to NEMA, the NWA is likely to perpetuate the undesirable situation which EMCA sought to remedy, namely the lack of coordination in the management of environmental resources such as water. In addition, in the absence of a clear hierarchy, the NWA is likely to fuel turf wars, with the WRMA and WSRB resisting accountability to NEMA on the strength of their independent establishment under the NWA.

Second, the power conferred by the NWA on the Minister of water to “exercise control over every water resource” is likely to undermine NEMA’s authority. Further, the NWA confers on the WRMA powers such as regulating and protecting water resources quality from adverse impacts and managing and protecting water catchments without any reference to NEMA, which is declared by EMCA to be the lead agency as far as environmental management is concerned. There is therefore an urgent need to rethink the relationship between NEMA and the WRMA/WSRB, with a view to making them clearly subordinate to NEMA.

Third, there is no clear separation of responsibilities between the WRMA and the WSRB. For example, there is no clear distinction between the “permits to use water” under section 25 of the NWA, which are to be issued by WRMA, and the “licences for the provision of water services”, which are to be issued by the WSRB under section 57 of the NWA. The Act thus seeks to separate processes that should best regulated as part of a continuum.

In my opinion, a water licensing regime should pursue two objectives. The first is to ensure that the abstraction of water takes into account resource conservation and sustainability concerns. The second is to ensure that applicants have the technical and commercial capability to provide water services. Furthermore, a single licensing regime should suffice to ensure that these twin objectives are realized. From this

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<sup>98</sup> The Environmental Management and Coordination Act, Act No. 8 of 1999 [Hereinafter, EMCA].

<sup>99</sup> Id, § 7.

<sup>100</sup> Id, § 9(1). In addition, §9(2)(a) provides that NEMA shall, inter alia, “co-ordinate the various environmental management activities being undertaken by the lead agencies.”

perspective, the NWA's licensing regime is superfluous, bureaucratic and cumbersome. It is not entirely clear at what points in time one is expected to apply for the permit and the license respectively. And while the NWA stipulates that only WSBs can apply for licenses, it does not state who exactly is supposed to apply for a permit. The absence of clarity in the NWA's licensing regime raises the interesting question as to what would happen were a license to be granted and a permit denied, and vice versa. Accordingly, the distinction that the NWA seeks to draw between "permits" and "licences" is both unnecessary and confusing. The Act should therefore be amended with a view to adopting a single terminology and a uniform licensing regime.

And in the interests of institutional efficiency, the functions of the WRMA and the WSRB ought to be performed by a single entity, given the overlaps in their functions. For example, section 47(m) of the NWA provides that it shall be the function of the WSRB "to promote *water conservation* and demand management measures." While it is apparent from the scheme of the NWA that the jurisdiction of the WSRB only extends to matters relating to "*water provision*," section 47(m) clearly covers matters beyond water provision, which ought to be the preserve of the WRMA, which is entrusted with the management of water resources.<sup>101</sup> Evidently, water conservation and provision are inextricably linked and rationality demands that they should be managed by a single entity.

Fourth, the introduction of the WSBs adds an unnecessary layer of bureaucracy that in all likelihood will hinder efficiency in the provision of water and sanitation services. To begin with, the Water (Plan of Transfer of Water Services) Rules of 2005 (hereinafter, Transfer of Water Services Rules) do not provide any rationale for the establishment of the seven WSBs.<sup>102</sup> In effect, the NWA entrusts the

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<sup>101</sup> Thus section 8 of the NWA gives the WRMA the responsibilities of regulating and protecting water resources quality from adverse impacts, and managing and protecting water catchments.

<sup>102</sup> The Water (Plan of Transfer of Water Services) Rules, 2005, Legal Notice No. 101 of 2005, were made by the Minister for Water and Irrigations in exercise of the powers conferred by sections 110 and 113(3) of the NWA. These Rules establish the following WSBs: the Coast WSB (to serve the districts of Kilifi, Kwale, Lamu, Mombasa, Taita/Taveta, Tana River and Bura); the Athi WSB (to serve the districts of Kajiado, Machakos, Kiambu, Thika, Makueni and Nairobi); the Tana WSB (to serve the districts of Kirinyaga, Muranga, Nyeri, Embu, Mbeere, Kitui, Meru Central, Tharaka, Meru South, Meru North, Mwingi and Maragua); the Rift Valley WSB (to serve the districts of Nakuru, Narok, Baringo, Keiyo, West Pokot, Turkana, Koibatek and Nyandarua); the Northern WSB (to serve the districts of Garissa, Ijara, Mandera, Wajir, Isiolo, Marsabit, Moyale, Laikipia and Samburu); the Lake Victoria North WSB (to serve the districts of Bungoma, Busia, Kakamega, Vihiga, Mt. Elgon, Lugari/Malava, Teso, Butere/Mumias, Uasin Gishu, Nandi North, Trans Nzoia and Marakwet); and the Lake Victoria South WSB (to serve the districts of Kisii Central, Gucha, Kisumu, Nyando, Siaya,

water and sanitation needs of as many as seventeen districts to a single WSB. Should private actors seek to provide water and sanitation services, for instance, they must deal with this monolith, which in many cases is likely to be located far away from the point of service. Thus a private entity that desires to provide water services in Suba district must travel all the way to Kisumu to apply for a license from the Lake Victoria South Water Services Board, assuming that this Board will be located in Kisumu.

In any case, the transition from the old to the new regime has not been made easy by the new legislative framework. For instance, the NWA has not repealed section 178 of the Local Government Act, which authorizes local authorities to “to undertake the supply of, and establish, acquire and maintain works for the supply of water” within their areas of operation.<sup>103</sup> This is likely to create conflicts between WSBs and the local authorities who can both legitimately claim to have a legal mandate to provide water services.

Further, the Transfer of Water Services Rules empower WSBs to “purchase, lease or otherwise acquire facilities owned by local authorities for provision of water services.”<sup>104</sup> It is likely that the transition process will stall in cases where local authorities refuse to sell or lease their facilities to the WSBs, or where there is a failure to reach an agreement on the terms of such sales or leases. For the foreseeable future, it therefore seems that the old regime and the new regime will operate side by side. Indeed, it is likely that the local authorities will politically resist this transition given that the status quo suits them. From the viewpoint of private sector participation, this scenario is anything but enabling.

In my estimation, it would have been preferable to have retained the institutional framework established by the OWA, under which water provision was mainly the responsibility of local authorities, while enhancing their capacities to enter into partnerships with private sector entities and community groups. Thus the local authorities should continue to own the water and sanitation infrastructure but outsource provision where this is deemed feasible.

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Bondo, Homabay, Nyamira, Migori, Kuria, Suba, Rachounyo, Kericho, Buret, TransMara, Bormet and Nandi South).

<sup>103</sup> Section 111(2) of the NWA only repeals sections 168-176 of the OWA.

<sup>104</sup> Transfer of Water Services Rules, § 5(1)(d).

While the NWA's bureaucratic and convoluted institutional framework in and of itself constitutes a significant barrier to the democratic and effective governance of water, its provisions regulating marketization make matters even worse.

In the first place, the provisions of the NWA dealing the provision of water and sanitation services are confusing and will not be easy to apply in practice. In this regard, the NWA is caught between two worlds. It seeks to apply a market model and a command-and-control model simultaneously, without stipulating where either model begins or ends. Typically, under a command-and-control model, a governmental body basically tells regulated entities what they should do, and there is no room for the latter to negotiate the contents of regulation. Conversely, a market model uses market incentives (such as the possibility of making profits) to obtain the cooperation of regulated entities.

In the case of water, there is typically a need to utilize both approaches to regulation, given that water is in many ways a natural monopoly. This means that the extent to which the market will ensure efficient and, especially, equitable delivery of water services will be limited, thereby necessitating some command-and-control regulation. But even where both regulatory approaches are deployed imultaneously, there is a need for a clear delineation of responsibilities. For example, it is not desirable for a regulator to compete with market actors for the provision of water services.

The NWA does not adhere to these principles of efficient and effective regulation, as evidenced by the provisions of sections 53, 55 and 73. As the licensee, the WSB shall be "responsible for the efficient and economical provision of water services authorised by the licence."<sup>105</sup> But water services authorized by a license shall, in the first instance, "be provided by an agent of the board."<sup>106</sup> What the NWA thus envisages is that the WSB will contract out the provision of water to the WSPs.<sup>107</sup> Further, such contracting out arrangements may provide for "the concurrent performance, by the [WSB] and the [WSP], of the same functions in different parts of the area defined by the board's limits of supply."<sup>108</sup>

At the same time, the NWA provides that "A licensee shall make regulations for or with respect to conditions for the provision of water services and the tariffs

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<sup>105</sup> Id., § 53(1).

<sup>106</sup> Id., § 53(2).

<sup>107</sup> Id., § 55(1).

<sup>108</sup> Id., § 55(4)(a).

applicable.”<sup>109</sup> Thus the WSB also performs regulatory functions alongside the WSRB. And the WSB is, or can be, a market actor, that is, a provider of water services.

These provisions of the NWA raise the interesting question as to whether a WSB (as a licensee) can vary the terms of an agreement with a WSP through the making of such regulations. There is nothing in the Act to stop a WSB from doing so, except that were it to do so it would defeat the whole point of establishing a market model in the first place.

In addition, the NWA empowers the Minister to appoint the WSBs, which may contract out its functions to a WSP.<sup>110</sup> But this contract must be approved by the WSRB.<sup>111</sup> Given that the contract is between the WSB and WSP, it is not clear why the WSRB’s approval is necessary. From a regulatory viewpoint, once the decision has been made that contract should be the main instrument for water provision it should not be the function of the WSRB to approve water provision contracts after they have been entered into. Apart from the unnecessary bureaucracy and inefficiencies this is likely to generate, it amounts to excessive regulation. In my estimation, the most that the WSRB should do is to establish guidelines or baselines that such contracts should adhere to while giving WSBs and WSPs sufficient room to negotiate mutually beneficial contracts.

Quite evidently, the NWA fails to establish an “enabling environment” for private sector participation. It also fails to embrace informal water providers, such as community groups and self-help groups. The NWA mandates any person wishing “to provide water services to more than twenty households, or supply more than twenty five thousand litres of water a day for domestic purposes, or supply more than one hundred thousand litres of water a day for any purpose” to obtain a licence.<sup>112</sup> And in order to obtain such a licence, an applicant must meet certain criteria which seek to establish its technical and financial competence to provide water services. Many informal water providers are unlikely to meet these criteria. Their only alternative is to enter into a water provision contract with the WSBs, a task which is not any less

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<sup>109</sup> Id, § 73(1).

<sup>110</sup> Id, § 51.

<sup>111</sup> Id, § 53(2).

<sup>112</sup> Id, § 56(1).

complex and demanding resource-wise. In practice, therefore, it is likely that the communities served by these informal providers will be denied access to water.<sup>113</sup>

These provisions of the NWA are reinforced by the Transfer of Water Services Rules, which compel “private entities, community-based organizations, or non-governmental organizations providing water services under previous water undertakerships” to enter into management contracts with WSBs.<sup>114</sup>

Secondly, the NWA fails to regulate the corporatization of the water and sanitation departments of local authorities. Whereas the policy expectation was that marketization would in the first instance entail the corporatization of these departments, no legislative framework has been established for this critical activity. All the NWA provides is that WSBs “may” contract WSPs to perform their functions.<sup>115</sup> In practice, therefore, a good number of the said departments were transformed into water companies wholly owned by the local authorities well before the enactment of the NWA.<sup>116</sup> They were established as private companies under the Companies Act.<sup>117</sup>

In the absence of legislative oversight of the corporatization process, the principles of effective corporatization outlined in Part II have largely been ignored. Furthermore, the formation of the water companies has neither been participatory nor accountable. Indeed, it is unlikely that these companies will enhance efficiency in the provision of water and sanitation.

There is, in the first place, no clear separation of ownership and control in these water companies, contrary to the principles of good corporate governance. The idea behind establishing the water companies partly owned by the local authorities should be to ensure managerial autonomy while equally facilitating managerial accountability. Neither of these objectives is likely to be met considering the manner in which these companies have been constituted. These companies are wholly owned by the local authorities, even though in order to satisfy the requirements of the Companies Act, the Mayor and the Town Clerk each hold one share on behalf of the local authority, as in the case of the Nairobi City Water and Sewerage Company Limited. Thus these water companies are private in name only. Again, while a good

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<sup>113</sup> See Mumma, *supra* note \_\_ (Arguing that “self-help groups,” help groups,” for instance, are not legal persons and would not therefore qualify to be water service providers.)

<sup>114</sup> The Water (Plan of Transfer of Water Services) Rules, Rule 5(1).

<sup>115</sup> The NWA, §55(1).

<sup>116</sup> K’Akumu & Appida, *supra* note \_\_ at 319.

<sup>117</sup> The Companies Act, Chapter 486, Laws of Kenya.

number of the members of the boards of directors of these companies are drawn from outside the local authorities, they are nevertheless likely to be dominated by the officers of the local authorities, given that the mayor, the town clerk and the treasurer are also members thereof.

In my view, the water companies are unlikely to exercise managerial autonomy in these circumstances. Indeed, research already indicates that some of these companies have inherited the bad governance practices of the local authorities.<sup>118</sup> Further, it is at the moment possible for corrupt or incompetent officers of local authorities to become the chief executive officers of the water companies.<sup>119</sup>

In order to facilitate the realization of the benefits of corporatization, there is a need to regulate the formation of these companies to ensure that the process of establishing them is accountable and facilitates their efficiency. Further, to facilitate a clear separation of ownership and control, such a regulatory framework should do the following: (a) bar all persons affiliated with a local authority (mayor, town clerk, treasurer and other officers of the local authority) from being appointed as directors or officers of any water company; (b) establish objective criteria for the appointment of members of the boards of the water companies; and (c) provide for partial ownership of the water companies by the central government, which would then act as a check on the activities of the water companies.

The NWA's provisions on tariffs are also vague and do not provide a sufficient incentive for private sector participation. It is not clear who has ultimate responsibility for establishing and regulating tariffs. On the one hand, the Act provides that it is the responsibility of the WSRB to "develop guidelines for the fixing of tariffs" and to "determine fees, levies, premiums and other charges to be imposed for water services."<sup>120</sup> On the other hand, it provides that while applying for a license, a WSB should among other things furnish its "proposed tariff structure."<sup>121</sup> Again, it empowers the WSBS – in their capacity as licensees – to "make regulations for or with respect to conditions for the provision of water services and the tariffs applicable."<sup>122</sup> At the same time, the WSBs are expected to enter into contracts with

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<sup>118</sup> Onjala, *supra* note \_\_\_ at 19 (Observing that "As it turned out, chief executives who were often accused of corruption and mismanagement were allowed to take over the operations of the new water companies.")

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, §47(g) and (o).

<sup>121</sup> *Id.*, § 57(2)(e).

<sup>122</sup> *Id.*, § 73(1).

WSPs for the provision of water services. As we have seen, the WRMA is also responsible for determining “charges to be imposed for the use of water from any water source.”<sup>123</sup>

These provisions of the NWA raise a number of concerns. First, what is the link between the charges to be imposed by the WRMA and the tariffs to be established/proposed by WSRB and/or WSBs? Second, does the Act contemplate that the WSRB will only establish tariff guidelines, which is then to guide the WSBs when the latter make tariff regulations and/or contracts with WSPs? Third, in the context of the contracts between WSBs and WSPs, are the tariff structures proposed or established by WSBs non-negotiable? And if they are non-negotiable, what then is the point of the contract?

If it is to encourage private sector participation, the NWA should establish clear provisions regarding the processes of establishing and reviewing/modifying tariffs, and place ultimate responsibility for the regulation of tariffs in a single institution. This is because the tariff regime is a principal mechanism for realizing the profit motive of private actors. Private actors should be able to predict how they are going to make profits from investing in the provision of water and sanitation services. They are unlikely to be able to do so where the tariff regime is as uncertain as that of the NWA.

The NWA’s provisions on dispute resolution are also wanting and serve to discourage private sector participation. In particular, the Act fails to provide for the administrative review of the actions of the WRMA, WSRB and the WSBs. All the NWA provides is that “An appeal shall lie to the Water Appeal Board.”<sup>124</sup> The nature of the “appeal” contemplated by the Act is not clear. Further, it is not clear where, in the first instance, an aggrieved party should seek justice.

Ideally, the WAB should be an administrative review body, whose determinations may then be challenged before the ordinary courts of law, as opposed to an appellate body as it is currently established under the NWA. In this regard, the new Public Procurement and Disposal Act is instructive insofar as it requires that “any person who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity... may seek administrative review.”<sup>125</sup>

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<sup>123</sup> Id, § 8(g).

<sup>124</sup> Id, § 85(1).

<sup>125</sup> The Public Procurement and Disposal Act, Act No. 3 of 2005, § 93.

The implications of the WSTF for private sector participation should also be noted. The NWA seeks to pursue the noble goal of universal service by establishing the WSTF, whose objective is to ensure that even those who cannot afford water services have access thereto. Nevertheless, the provisions of the Act relating to the WSTF are inadequate in one significant respect. The NWA provides that the trustees of the WSTF “shall develop and apply principles governing the grant of moneys from the Fund and for achieving the object of the Fund.”<sup>126</sup> What principles are these? For instance, is access to poor areas to be achieved by giving the Fund’s resources as subsidies to WSPs? In the absence of principles or guidelines for the application of this universal service fund, it is likely that it may be abused. In addition, the utilization of the Fund’s resources as subsidies to the WSPs may not be efficient, given the experience that subsidies often promote inefficiency. There is thus an urgent need to establish the necessary guidelines. In addition, it will be important to establish an elaborate administrative machinery and oversight mechanisms to ensure its accountability. Given the importance of ensuring that those who cannot afford water and sanitation services have access to a basic minimum thereof, the principles for facilitating the objective of universal access should clearly be established in the NWA and not left to delegated legislation.

Finally, the provisions of the NWA concerning sewerage services require clarification. It appears from the provisions of the Act that licensees shall be responsible for regulating the discharge of “any trade effluent.”<sup>127</sup> The Act requires any person seeking to discharge such effluent to apply to the licensee for “consent.”<sup>128</sup> In addition, licensees are empowered to “fix and impose a sewerage service levy on all water services within the limits of supply of the licensee, to cover a reasonable part of the cost of disposing of the water supplied within those limits.”<sup>129</sup>

These provisions raise a number of concerns. First, does the NWA centralize the disposal of sewerage – which has previously been the responsibility of local authorities – in the monolithic WSBs? Second, does the Act require each local authority to apply to a WSB for the said consent, should this service not be contracted out to a WSP? Third, if the task of disposing of sewerage is to be contracted out to WSPs, how is the WSB’s role as a regulator – in managing disposal of sewerage – to

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<sup>126</sup> NWA, § 83(5).

<sup>127</sup> Id, § 76(1).

<sup>128</sup> Id, § 76(2).

<sup>129</sup> Id, § 77.

be reconciled with its role as a market actor? Finally, is it envisaged that where a WSP takes on the task of sewerage disposal then the WSB will grant it an automatic consent to dispose of trade effluents?

The provisions of the Act relating to the disposal of sewerage need to be reviewed with a view to: (a) regulating the process of granting consents; (b) harmonizing the provisions relating to the provision of water services and the disposal of sewerage (for example harmonizing the licensing regime with the granting of consents); and (c) establishing clear lines of responsibility for the disposal of sewerage.

#### IV. CONCLUSION

The private sector has much to contribute in efforts to address the deficiencies of the public provision of water and sanitation services in Kenya. But if the potential of private sector participation is to be realized, public law ought to ensure that marketization processes are democratic. By subjecting marketization processes to public participation and accountability, public law is likely to prevent corruption and enable the realization of public regarding outcomes. Secondly, public law should create an enabling environment for private sector participation by establishing a rational institutional framework and clear regulatory mechanisms.

Water law reforms in Kenya are wanting in both respects. As we have seen, the NWA's institutional framework constitutes a significant barrier to the democratic governance of water, given the concentration of power in the Minister and the resulting lack of meaningful decentralization of the institutional framework, the undue fragmentation of, and overlaps in, institutional responsibilities, the failure to harmonize the water governance framework with existing environmental management institutions, and the addition of an unnecessary layer of bureaucracy in the form of the monolithic Water Service Boards. In addition, the provisions of the new water legislative framework governing the transition to the new regime is wanting in material respects thus ensuring the parallel operation of the old and the new regimes.

In addition, the framework for private sector participation is anything but enabling. The NWA's provisions dealing with the provision of water and sanitation services are unclear and unpredictable. Thus the licensing regime is bureaucratic,

cumbersome and confusing. For instance, the Water Service Boards are both regulators (alongside the WSRB) and market actors. This conflation of roles can only work to the detriment of efficient private sector participation in water and sanitation. Again, the NWA fails to embrace informal water providers who have been the main providers of water services in rural areas. The NWA also fails to establish clear principles for the regulation of sanitation, and access to water and sanitation services by the poor. Above all, the NWA fails to regulate the corporatization of the water departments of local authorities. The policy expectation was that the corporatization exercise would eventually facilitate private sector investment in these companies. This objective is unlikely to be realized unless the regulatory process facilitates their accountability and efficiency.

The NWA therefore requires an extensive review if it is to facilitate effective and democratic governance of, and private sector participation in the provision of, water and sanitation services.