



GOVERNING WATER AND SANITATION IN KENYA

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INTRODUCTION

- The paper's Concern: how public law can contribute to the establishment of effective and accountable institutional frameworks for private sector participation in the provision of water and sanitation services.
- The paper takes the view that 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.



INTRODUCTION II

- The paper uses water law reforms in Kenya as a case study and critiques the new Water Act of 2002 (NWA).
- Argument
 - The NWA establishes an institutional framework for water governance that is neither effective nor democratic, and is therefore unsuitable for efficient private sector participation.



ECONOMICS, PUBLIC LAW AND INSTITUTIONS

- Water and sanitation services possess certain unique characteristics that predispose markets for their provision to numerous failures.
 - They are public goods, natural monopolies, merit or social goods, basic (human) rights; water is also a scarce resource, whose quality and availability poor sanitation undermines.
- Governmental oversight is required to prevent/correct these market failures, with a view to:
 - Ensuring these services are provided at optimal and sustainable levels.
- The role of government is enhanced after marketization, given the complexity of the task of regulating marketization processes.



ECONOMICS, PUBLIC LAW AND INSTITUTIONS II

- In the context of water marketization, public law has two main concerns:
 - To ensure that power is exercised in a democratic (that is accountable and participatory) manner.
 - The Construction and regulation of water markets ought to be democratic if these markets are to serve the public interest.
 - Concern: the democracy deficit in marketization processes.
 - To ensure that marketization processes facilitate or enable the efficient provision of 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 manage other market incentives for efficiency (e.g., tariffs, subsidies).



ECONOMICS, PUBLIC LAW AND INSTITUTIONS III

- Regarding the design of institutions, public law should play a facilitative or enabling role.
 - That is, ensure that the institutional framework for water governance encourages private actors to invest in water markets.
 - It therefore becomes important for the institutional framework to clearly assign and coordinate institutional responsibilities.
 - Further, regulatory mechanisms and the manner of their deployment should be clear and predictable.
 - Undue fragmentation of responsibilities should also be avoided, as it may lead to inefficiency and lack of accountability.
 - Finally, the institutional framework should be responsive to the needs of water users. Water governance should thus be participatory.



WATER REFORMS IN KENYA: POLICY PRESCRIPTIONS

- Principles to guide the reform process:
 - Sustainable, rational & economic allocation of water resources;
 - Supply of sufficient quantities of good quality water;
 - Safe disposal of wastewater & environmental protection;
 - Establishment of efficient & effective institutional framework;
 - Development of sound & sustainable financing system;
 - Integration & decentralization of water resources management;
 - Separation of policy and regulatory functions from service provision;
 - Development of effluent discharge standards;
 - Encouragement of private sector participation; and
 - Establishment of cost-recovery principle.



WATER REFORMS IN KENYA II: THE NEW WATER ACT

- The NWA establishes two main regulatory bodies: the WRMA & WSRB.
- As far as the provision of water and sanitation services is concerned, it envisages that the Minister will establish WSBs, which will then be licensed by the WSRB to provide water and sanitation services.
- Further, it envisages that instead of providing these services directly, the WSBs will contract them out to WSPs.
- So far, the water departments of some local authorities have been “corporatized;” these water companies now act as the WSPs.



THE NWA AND PRIVATE SECTOR PARTICIPATION

- General Observations
 - The NWA fails to clearly assign and coordinate the responsibilities of its agencies. Instead, there is a considerable but unnecessary fragmentation of responsibilities.
 - The NWA fails to establish clear legal principles for the regulation of private sector participation mechanisms such as corporatization.
 - The management and provision of water remains the responsibility of public agencies; the reforms undertaken so far can hardly be described as an exercise in marktization.



THE NWA AND PRIVATE SECTOR PARTICIPATION II

- Specific Observations
 - The perpetuation of executive control of water institutions; the NWA's regulatory agencies do not have operational autonomy.
 - The concentration of power is not conducive for democratic governance of water.
 - There is no meaningful decentralization. The role of CAACs is merely to advise the WRMA, which is not obliged to take their advice into account.
 - NWA establishes regulatory agencies without reference to the EMCA (the framework law on environmental management).



THE NWA AND PRIVATE SECTOR PARTICIPATION III

- There is no clear separation of responsibilities between the WRMA & WSRB, especially concerning the licensing regime.
 - This regime is superfluous, bureaucratic and cumbersome
 - The functions of WRMA & WSRB should be performed by a single entity, given the overlaps in their functions.
- The Introduction of WSBs adds an unnecessary layer of bureaucracy that can only hinder efficiency in the provision of water & sanitation services.
 - There is no rationale for the establishment of these monolithic WSBs.
 - Local authorities continue to provide water & sanitation services, alongside WSBs.



THE NWA AND PRIVATE SECTOR PARTICIPATION IV

- The NWA's provisions on marketization:
- The WSB performs regulatory functions alongside the WSRB. At the same time, it is, or can be, a market actor, that is a provider of water services.
 - It is thus not clear when command-and-control regulation ends and the use of market incentives begins. For example, the WSB is empowered to make regulation to vary the terms of a water provision agreement it has entered into with a WSP!
- The NWA fails to embrace informal water providers. The technical and financial criteria established for the grant of licenses are likely to prevent their participation in provision of water & sanitation services.



THE NWA AND PRIVATE SECTOR PARTICIPATION V

- The NWA fails to regulate the corporatization of water & sanitation departments of local authorities into water companies.
 - The formation of these water companies has not been democratic.
 - There is no clear separation of ownership & control in these companies, contrary to principles of good corporate governance.
 - Indeed, some of the water companies have inherited the bad governance practices of the local authorities.
- It is also not clear who has ultimate authority for establishing and regulating tariffs.
- The NWA also fails to pay sufficient attention to sewerage.
- Its dispute resolution provisions are also inadequate.



CONCLUSION

- If the potential of private sector participation is to be realized, public law should:
 - Ensure that marketization processes are democratic, so as to prevent corruption and facilitate the realization of public regarding outcomes; &
 - Create an enabling environment for private sector participation by establishing a rational institutional framework and clear regulatory mechanisms.
- Water law reforms in Kenya are inadequate in both respects.