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HUMAN RIGHTS, GENDER AND WATER IN KENYA LAW, PROSPECTS AND CHALLENGES

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PART II

KENYA

Chapter 3

Human Rights, Gender and Water in Kenya: Law, Prospects and Challenges

Patricia Kameri-Mbote and Francis Kariuki

1. INTRODUCTION

Water and sanitation are essential for development and preconditions for poverty reduction, health and security (GoK, 2012). However, access to water and sanitation amongst the rural and urban poor in Kenya remains very low, (UNDP, 2007) making significant the fact that approximately 80% of all communicable diseases are water-borne (UNDP, 2007). The situation might, indeed, be worse: reports indicate that 65.9% of the Kenyan population will be living below the poverty line by 2015 (GoK, 2005). According to the Joint Monitoring Programme,¹ access to safe water supplies throughout Kenya is 59%. Out of the Kenyan population of 45 million, 17.5 million lack safe water (Water.org, 2014).

In Kenya, as elsewhere in Africa, the burden of fetching drinking water from outdoor sources falls disproportionately on women and girls

1 See Joint Monitoring Programme for Water Supply and Sanitation of WHO Report 2012. See also the 2008 report which revealed that 59% of Kenyans (83% in urban areas and 52% in rural areas) had access to improved water sources. 19% of Kenyans (44% in urban areas and 12% in rural areas) were reported as having access to piped water through a house or a yard connection.

(UNICEF, 2012). In Sub-Saharan Africa, people spend 40 billion hours every year just walking to collect water, with women bearing two-thirds of the burden of drinking water collection. This leaves less time for other socio-economic activities (UNICEF, 2012). In Kenya, collecting water takes longer than 30 minutes per trip for more than a quarter of the population (UNICEF, 2012; Maoulidi and Salim, 2011).²

The average distance people travel to reach water sources in rural Kenya ranges from two to 12 kilometers which is further than the 1,000 metres recommended by WHO. Apart from the distance, concerns about the quality of the water arise since the consumers share water points with animals, which can result in contamination.

In urban areas like Nairobi, the time spent collecting water is much less than that spent in rural areas, especially where there is piped water. (Uwazi, 2010). The cost of water in urban areas is, however, not affordable for the poor who are likely to pay much more than the middle-class in urban areas of Kenya (Uwazi, 2010), as explained below, thus inhibiting their enjoyment of the right to water.

The inadequacy in quantity and quality of water is also a problem that calls for action on the part of the government in order to achieve the Millennium Development Goal (MDG) by 2015 and the post-2015 development agenda. It is notable that water laws and policies have not promoted access to water services and sanitation provision for the rural and urban poor. Informal settlements have not been recognized in urban plans and, as such, lack water and sanitation supply infrastructure. Local authorities are not involved in water and sanitation services' supply arrangements and this has created room for other actors to bridge this gap (GoK, 2005). Worse still, water and sanitation service provision has been linked to land tenure, thus denying millions of landless people access to water. Consequently, the poor have to access water from unregulated water providers where water tariffs are 5-20 times more than tariffs applying to metered facilities.

2 This considerably reduces the time that women and girls have for other activities such as childcare, income generation and school attendance. See also Maoulidi and Salim (2011), who note that women in Kisumu spend a disproportionate amount of time on household tasks, which leaves them with less time to engage in income-generating activities. The average distance to the nearest water point in Kisumu is one kilometre. They further add that in poor urban areas, establishing water points near homes is very beneficial because it not only provides safe water for the whole community, but also alleviates girls' and women's workloads.

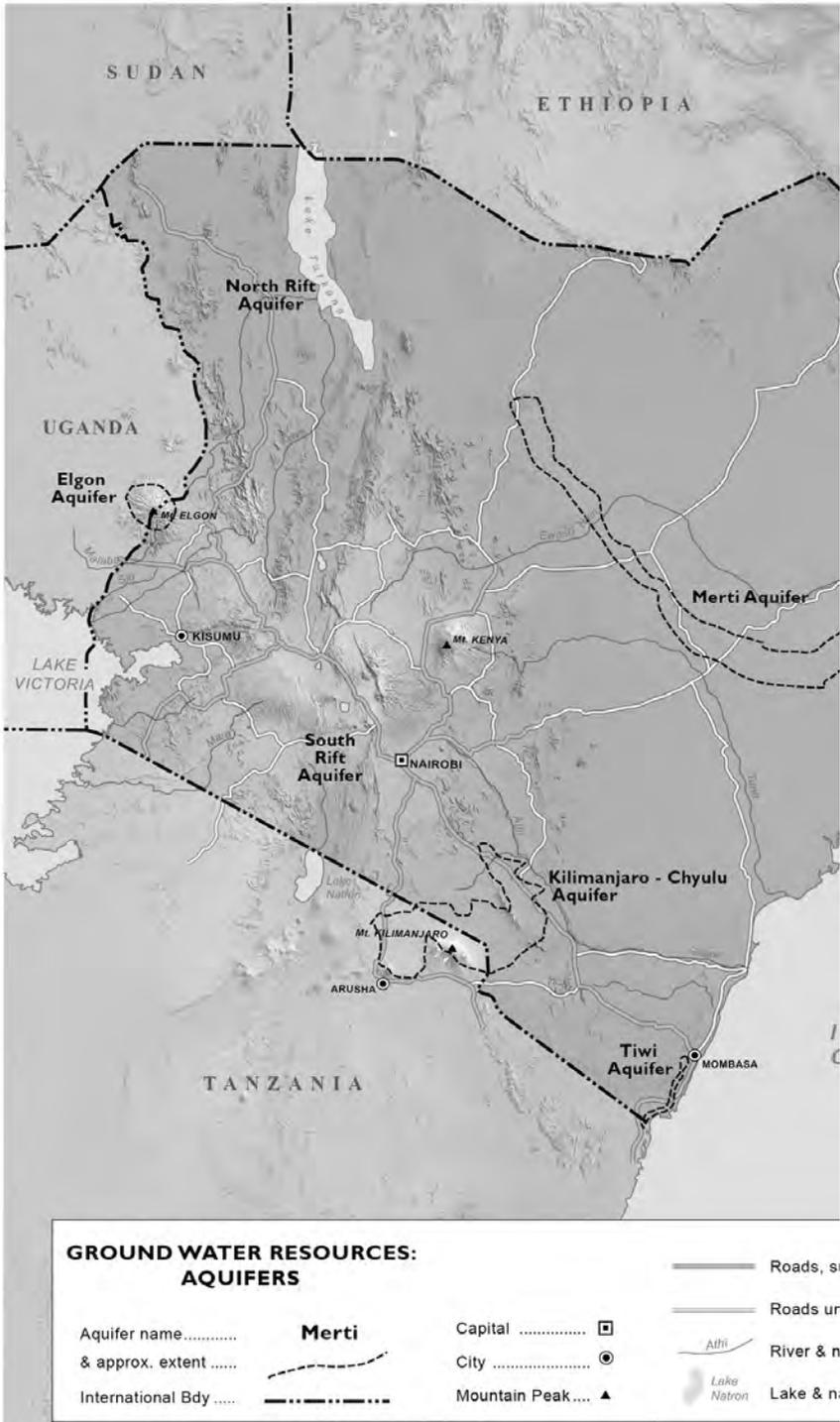
Against this background, this chapter will examine water laws and policy in Kenya against the backdrop of the human rights framework set out in Chapter 2, which addresses the rights of individuals and groups and the corresponding obligations of the actual duty bearers, paying specific attention to three interrelated rights: the rights to water and sanitation, the right to participation, and the right to equality and non-discrimination. It examines the pre-colonial, colonial and post-colonial laws and policies, as well as developments under the 2010 Constitution of Kenya. Our aim is to highlight the continuities and discontinuities in water law and policy and identify the key drivers and the internal and external processes. We argue that in spite of water sector reforms, and the laws and policies emanating from those reforms, the rights to water and sanitation, to participation in water governance, and to gender equality for the rural and urban poor remain a mirage. Moreover, the implementation of the right to water has been limited to water for domestic purposes and has not included water for broader livelihood purposes. It concludes, however, that the implementation of the 2010 Constitution of Kenya – which provides for the right to water and devolution where the national and county governments share governance responsibilities (including that of the water sector) – allows opportunities for realizing the right to water for the rural and urban poor.

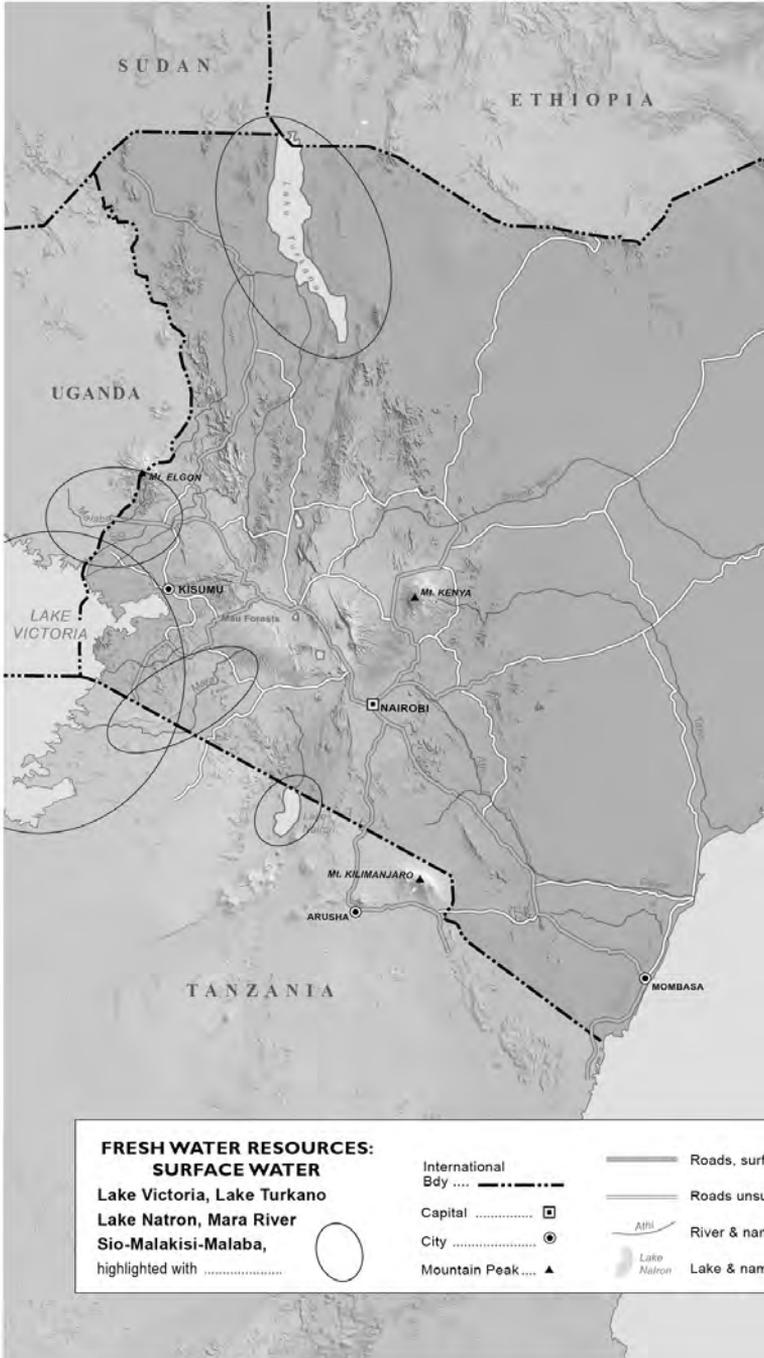
This chapter is divided into seven sections. Section 2 deals with the interface between water resources, land, and human rights, while Section 3 outlines the pre-colonial and colonial water law and policy. Section 4 addresses water law and policy in post-colonial Kenya while Section 5 canvasses the legal and policy initiatives domesticating the right to water in Kenya. Section 6 looks at the emerging jurisprudence relating to the implementation of the right to water and related rights, and Section 7 provides our conclusion.

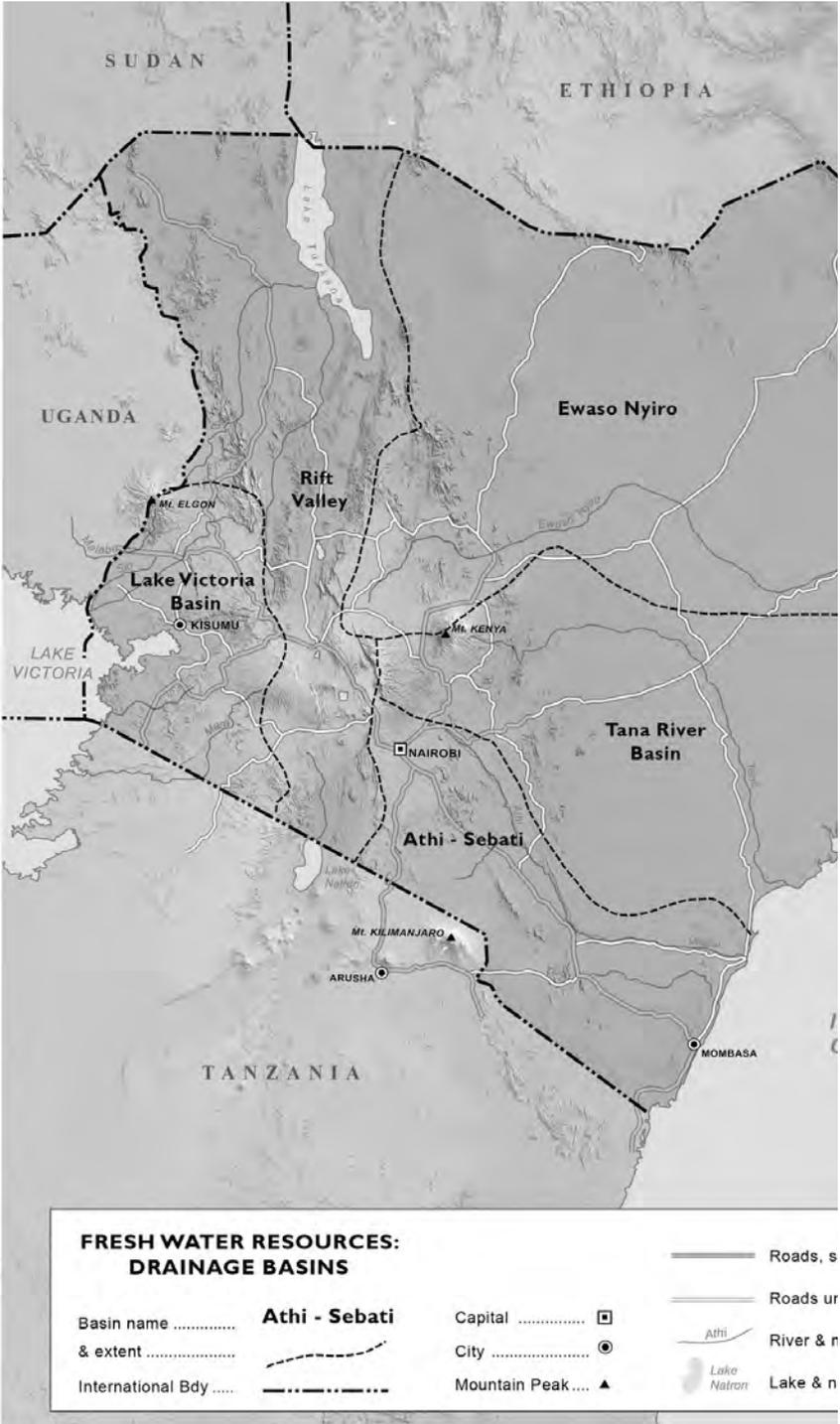
2. WATER RESOURCES, LAND AND HUMAN RIGHTS

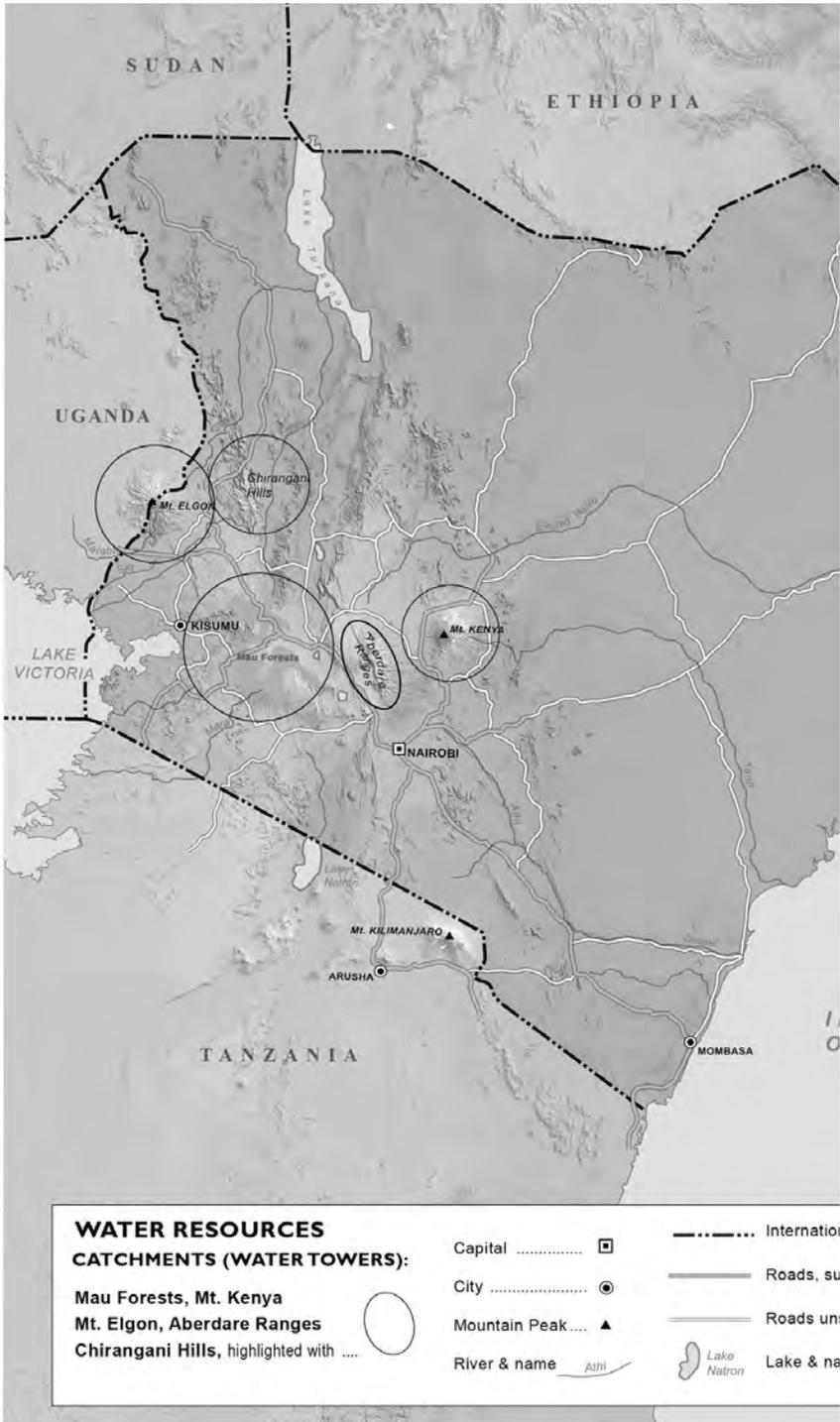
2.1 Water resources in Kenya

Kenya has enormous water resources including five catchment areas or ‘water towers’ – the Mau forest, Mount Kenya, Aberdare ranges, Mt Elgon and Cherangani Hills. Freshwater resources include rivers, lakes, wetlands and reservoirs distributed within five drainage basins – the Tana, Athi, Ewaso Nyiro, Rift Valley and Lake Basin. Besides, Kenya shares about 50% of her surface water resources with her immediate neighbors. It shares









Lake Victoria with Uganda, Tanzania, Rwanda and Burundi; Lake Turkana Basin with Ethiopia; River Mara and Lake Natron with Tanzania; and the Sio-Malakisi-Malaba system with Uganda (GoK, 2005).

There are groundwater resources extending across the borders. Some of the aquifers are the North Rift aquifer, shared with Ethiopia, South Rift Aquifer, Kilimanjaro-Chyulu and Tiwi, shared with Tanzania, the Merti Aquifer, shared with Somalia and the Elgon Aquifer, shared with Uganda (GoK, 2005). Groundwater is mainly accessed through the drilling of boreholes. With increasing demands for water, domestic and commercial users are increasingly drilling private boreholes, with uncertain implications for groundwater resources (AMCOW, 2010). The other source of water is rainwater that is harvested for domestic uses, grazing and irrigation. Rainwater is not a year-round source of water due to the intermittent nature of rainfall in Kenya, and the variability from year to year and region to region. At the coast region, the Indian Ocean is another main water resource as is Lake Victoria to residents of Kisumu.

Despite the abundance of water resources, Kenya is classified as a chronically water-scarce country, with an annual renewable fresh water supply of only 647m³ per capita (GoK, 2005). Most of the catchment areas are threatened by human settlements, logging, charcoal burning, cultivation and grazing. For example, despite gazettement as a water tower, the Mau watershed has lost about 200,000 hectares over a span of about 40 years from 1970 to 2010 as a result of exploitation of forest resources. Development of water resources is also very low, with only 15% of the safe yield of renewable fresh water resources being developed. There remains an opportunity to exploit the balance of 85%. This would require investments in water storage infrastructure, which has been so low that the country has been unable to deal with extreme hydrological events. Indeed, water storage per capita has declined dramatically, from 11.4 m³ in 1969, 4.7 m³ in 1999, to currently about 4m³. In addition, the low water storage capacity is a result of a failure to protect the natural buffering capacity of water catchments and wetlands, and a lack of water storage infrastructure to deal with the shock from extreme hydrological events (GoK, 2005). Further, an imbalance in water abstraction rates across the five drainage systems creates a threat to future water availability. Water reforms in Kenya have focused on water service provision, with water resources management receiving little attention. Water service provision cannot be sustainable if water resources are not well managed.

2.2 Water availability, distribution and demand

Water is unevenly distributed in time and space, and millions of Kenyans do not have sustainable access to safe water. Development of water resources is low and no new resources are being developed. This has created a high demand for water, ultimately resulting in a rise in water prices. Increase in water demand has also led to conflicts over scarce resources between diverse users (UNDP-Kenya, 2010). The trend is projected to continue with an expected 10% annual growth in economy which will require an increase in the fresh water per capita by at least three times (Sida, 2009).

The main water uses are irrigation at 70%, domestic uses at 20%, livestock at 4%, and industrial use at 3% while others, including fisheries and wildlife, are about 3%. Although irrigation is the major water user, only 20% of the potential area of 540,000 hectares is under irrigation (Osinde, 2007). The projected increase in the area under irrigation to 1.3 million hectares by the year 2030 and the anticipated growth of industries will translate into an exponential rise in demand for water. Such intensive growth must be balanced against the demand for water for domestic and personal use and for livelihoods, particularly by women in rural areas. This is because small-scale agriculture, driven by women and the rural poor, may be neglected as government pursues large-scale, water intensive irrigation.

With a projected rise in water demand, a need arises for improving and increasing water abstraction levels in the country. The current water abstraction rate is 5.5%, which is far below the country's potential, of which 84.7% is surface water and the rest underground (GoK, 2007). Estimated average annual water availability is thus 20.2 billion cubic meters (Sida, 2009). Water availability also varies between rural and urban areas, and in most cases is dependent on income levels. Different reports give differing estimates of water and sanitation coverage in the country, but all acknowledge that water access is low. Some reports estimate that access to safe water³ in urban areas stands at 89.7% and in rural areas at 43.5% translating to a national coverage of about 57%. Access to safe sanitation

3 Access to safe water is described as the percentage of the population with reasonable access to an adequate amount of water from an improved source, such as a household connection, public standpipe, borehole, protected well or spring or rainwater collection. Reasonable access is defined as the availability of at least 20 litres per person per day from a source within one kilometre of the dwelling.

services is about 81% of the population, with 94.8% in urban areas and 76.6% in the rural areas. It is also instructive to note that variations exist from region to region and within regions in terms of access to water supply and sanitation. A UNDP report indicates that Kenya's urban poor are among those with lowest access to improved sanitation facilities worldwide (UNDP-Kenya, 2010).

2.3. The interface between water, land and human rights

Water is essential for development. Without access to water, other human rights cannot be realized, particularly by women belonging to marginalized groups and the poor. In Kenya, the mortality and morbidity due to water-borne and sanitation-related diseases accounts for about 70% of all diseases. (UNDP-Kenya, 2010). The government, as the main duty bearer, needs to improve access to water for personal use, domestic use and for livelihood purposes.

The water and sanitation needs of the powerless, mostly the poor and women, are not adequately catered for.⁴ Gender equality and women's empowerment are pivotal in achieving the MDGs, and are necessary pre-conditions for overcoming poverty, hunger and disease (UNDP-Kenya, 2010). In Kenya there are glaring gender gaps in access to and control over resources such as land and water; this impedes women's participation in water and land governance and their capacity to initiate water infra-structural projects. For instance, less than 5% of women have title deeds in Kenya.⁵ In addition, land laws tend to privilege economic and private use and thus limit women's and communities' access to key water sources located on private land.

Water rights and land ownership are interrelated. The notion of individual ownership of land confers exclusive rights including over water resources. One cannot get a water connection or a water permit if one is not the owner of the land. Land ownership has therefore contributed to the exclusion of and discrimination against the landless, especially women, in accessing water. According to Onyango, land ownership and settlement patterns continue to influence community management of water sources (Onyango, 2007), which further contributes to gross under-representation of women in decision-making processes (UNDP-Kenya, 2010). Water law has also developed on the premise that power derives only from formal norms and institutions (UNDP-Ken-

4 See Chapter 4 and Chapter 6 in this book.

5 GoK (2009).

ya, 2010). Consequently, customary water governance institutions and other informal governance authorities operating outside formal law are not recognized. As such, access to water for the rural and urban poor, where traditional and informal water governance is still predominant, is yet to be realized.⁶ Within informal settlements, the effect has been the existence of unregulated informal water service providers who charge exorbitant fees for water and sanitation services.

3. WATER LAW AND POLICY IN PRE-COLONIAL AND COLONIAL KENYA

In pre-colonial Kenya, water governance was the remit of traditional authorities and institutions guided by norms, rules, customs and traditions (Juuti et al., 2007). Each of the communities inhabiting Kenya had its own water governance norms and institutions. Unwritten norms, which varied with time and place, governed how water resources were controlled, managed, and conserved. There were no statutes or written rules governing water resources. Further, these were held communally and each community member had rights of access to the resources. Access to and use of water resources was based on one's membership in the community controlling a particular territory and not premised upon ownership of the underlying land (Juuti et al., 2007: 20). Indeed, individual ownership of land and water resources, as understood in English property law, was unknown among African societies. Nonetheless, local norms oftentimes discriminated against and excluded women from decision-making processes, since most governance institutions were comprised of men.

Major reforms in the land and water sector occurred when the traditional, indigenous and communal land and water governance systems were replaced by the colonial powers with new norms emphasizing individual (male) ownership of land and linking these to water rights. This led to the disorganization and suppression of local, indigenous and communal water governance systems (Juuti et al., 2007). Nonetheless, local norms and governance institutions still continue to operate and guarantee access to water for many in Kenya, particularly in rural areas.⁷

3.1 Water law and policy in the political economy of colonial Kenya

Water law and policy in the colonial era focused on the acquisition of control over water resources, and its supply to white settlers to drive the

6 See Chapter 6 and Chapter 5 in this book.

7 See Chapter 6.

European agricultural economy. Initially, there were no comprehensive water laws, and when they emerged, they were developed piecemeal in response to emergent needs. As will be seen shortly, there was under-development of water resources and water pollution policy and law, and no attention was given to the natives' water rights for consumption, livelihood and livestock rearing. The introduction and imposition of the British legal system in Kenya marked the beginning of a systematic (albeit unsuccessful) attempt at the disintegration and destruction of traditional and indigenous land and water governance institutions that operated amongst most Kenyan communities. To achieve their objectives in the protectorate, the colonialists had to acquire control over land (Okoth-Ogendo, 1991) and resources on the land including water. In 1897, the Indian Land Acquisition Act of 1894 was applied to Kenya to enable settlers to gain control and acquire rights to land in the territory. Further, under the East African (Lands) Order-in-Council of 1901, all land that was not physically occupied by the natives was converted to Crown land, which the Commissioner had powers to dispose of (Okoth-Ogendo, 1991). The assertion of original title to land gave the protectorate authorities power to exploit natural resources, including water (Okoth-Ogendo, 1991). Further alienation was achieved through the Crown Lands Ordinances of 1902 and 1915. More specifically, the effect of the 1915 Crown Lands Ordinance was the total disinheritance of Africans and conversion of land that they occupied to Crown land thus rendering them, in Okoth-Ogendo's words, 'tenants at the will of the Crown' (Okoth-Ogendo, 1991; Ghai and McAuslan, 1970).

The Crown Lands Ordinance of 1902 had provisions dealing with the issuance of water permits, and under the 1915 Crown Lands Ordinance the Water Permit Rules of 1919 were enacted. These rules gave the Director of Public Works Department the power to consent to or refuse to permit the abstraction of water from a spring, river, lake or stream. The effect of the rules was to privilege the colonialists' water rights, resulting in inequitable distribution of water resources (Juuti et al., 2007). In essence, there was the prioritization of commercial water uses by settlers over the domestic and livelihood needs of natives. This trend continues even today, when large-scale farmers are prioritized among water users.⁸

The colonial government used the law effectively as an instrument for prioritizing access to water resources by and water uses for the settlers

8 See generally Chapter 4 by P. K. Mbote and E. Odhiambo, on the Lake Naivasha Basin.

over those of the natives (Juuti et al., 2007). This resulted in the dispossession of the natives' land and water rights. They based their acquisition of ownership of water resources on the notion that the resources, including land, were ownerless. Theorists have questioned this view, which was based on the difference of expression of rights of native Africans from Western conceptions (Okoth-Ogendo, 2003), and thus undermined any rights that Africans held under native customs. In addition, under the common law conception of land, a landowner held everything on that land including water resources. Having effectively acquired control over water resources, protectorate authorities then developed infrastructure for water supply for the settlers. The Uganda Railway was the main supplier of water in the interior of the country between 1900 and 1920 (Nilsson and Nyangeri, 2008). Water supply did not factor in issues of sustainability. The 1913/14 Colonial Report shows that all rivers were polluted and that people used the single-bucket system, whereby the contents of the buckets were disposed of in the sea in Mombasa, and buried in trenches in Kisumu and Nairobi, as sewage schemes had not yet been installed (Great Britain, 1915). Further, between 1913 and 1914, the Protectorate had to get a loan of £250,000 from the Imperial Treasury for the purposes of, *inter alia*, improving the provision of a pipe-borne water supply for Mombasa (Great Britain, 1915). Again, the 1929 Annual General Report for the colony stated that water boring was successfully carried out by the water boring organization of the Public Works Department. Most drilling was carried out to drive settler farming and for local Native Councils in Native Reserves. The local Native Councils had the mandate of providing, maintaining and regulating water supplies for natives in the areas where they had been established (Great Britain, 1934). Water abstraction from public streams was done to further the European economy, leading to an increase in farming (Great Britain, 1930). Overall, land in actual native occupation was neglected in law and policy leading to what has been referred to as the duality of land relations, in which the settler sector was developed and supported while the native-occupied areas were relegated to informal customary norms and institutions.⁹

Between 1920 and 1940, the State sought to assume a prominent role in water provision to meet the objectives of public health, efficiency and vital strategic interests (Nilsson and Nyangeri, 2008). In 1929, the Water Ordinance No. 35 was enacted. It made provision for the conservation of water and for the regulation of water supply, irrigation, and drainage. It

9 GoK (2002).

vested all natural bodies of water in the Crown, vested the right of control in the Governor in Council, and establishing a Water Board. The work of the Water Board was to grant water rights according to the Ordinance. The Ordinance also defined the relationship between the government, as the grantor of water rights, and the licensees as recipients and holders of the water rights. It also provided for offences and penalties for infractions against its provisions. This law was the first comprehensive water law under colonial rule and took effect in 1935, thus fully establishing the role and powers of the State in relation to water (Nilsson and Nyangeri, 2008). By this law, the State took over from the Uganda Railways as the main provider of water in urban areas. For example, in Nairobi and Nakuru, local authorities were put directly in charge of water supply, while in other areas water supply was taken over by the Public Works Department (Nilsson and Nyangeri, 2008). The Ordinance also sought to extend water development to areas occupied by Africans.

Within the colonial set up, vesting water resources in the State was necessary for the promotion of European interests. In this regard, the colonial authorities launched the Development and Reconstruction Authority (DARA) in 1946 as an investment programme to spur rapid development of urban water supplies. According to the architects of the programme, small towns' water supplies were seen as 'vital for the development of the country, and as the expenditure involved is normally recoverable through the rates charged, is in every way a suitable object for the allocation of Development Funds' (Nilsson and Nyangeri, 2008). Water pricing during the colonial period was therefore based on the principle of full cost recovery from users. Cost recovery required water schemes to be economically viable to the government including being financially and technically sound. Essentially, this meant that those who could not afford to pay could not access water services. As will be seen later, cost recovery in water supply continues to inform water laws in Kenya to date. To improve local water supply within the framework of DARA, water users' associations were established by the colonial authorities (Nilsson and Nyangeri, 2008; Juuti et al., 2007).

Land reforms and the expansion of agriculture in the 1940s led to overcrowding, soil erosion and water pollution in European and native reserves. The government reacted to this by enacting the Land and Water Preservation Ordinance (No.4) to prevent deterioration in land quality in the European areas. Under the Land and Water Preservation General Rules 1940, the Governor had powers of, *inter alia*, regulating the watering of

livestock, the burning or clearing of vegetation where necessary to preserve the soil and its fertility, the prevention of the formation of gullies, and the maintenance of bodies of water (Okoth-Ogendo, 1991).

Gender inequality in land ownership, which continues to impede women's participation in water governance, partly has roots in the land reforms carried out in the 1950s. During the land consolidation, adjudication and registration processes, which characterized land reforms in the native reserves, land was mainly registered in the names of male household heads; customary rights of use, which most women had, were not noted on the register. This led to their extinction (Okoth-Ogendo, 1991). Land reforms thus contributed to the disenfranchisement of women in land matters, a factor that still persists today. Additionally, the settlement and land tenure from the colonial times resulted in the duality of land and water property rights especially in informal settlements. The duality was manifest in the existence of well-defined and protected rights in settler areas and largely neglected and ill-defined land and water rights of natives. This duality continues to hinder access to basic services, including water and sanitation, by the poor (Okoth-Ogendo, 1991). Additionally, government policies and plans do not recognize informal settlements in urban areas and have sought to restrict their growth, yet their number and population continues to grow.¹⁰ The exclusion of these areas from plans relegates them to the shadow of the law and they are not supplied with basic services (Osinde, 2007).

The 1929 Water Ordinance was revised in 1951, and in 1972, when it was renamed Chapter 372 of the Laws of Kenya. It is evident that the emphasis on recovering infrastructure costs, together with a water provision cost-recovery policy introduced in this era, was not effective in ensuring universal access to water services, especially for natives. Only those who could afford it were served by the water supply infrastructure. Thus, firstly, water supply systems in urban areas were better than those in the rural areas partly because the returns from investment in water supply were better. Economic viability provided incentives for investment in water supply infrastructure in urban areas. Secondly, urban supplies permit investors to reach a larger catchment because of higher population densities. In consequence, a relatively low investment will yield greater returns due to economies of scale; a piped supply to a remote dwelling on the top of a mountain would cost a great deal more.

10 See also Chapters 6 and 4.

4. WATER LAW AND POLICY IN POST-COLONIAL KENYA

Colonial laws and policies continue to influence water governance and performance of water sector institutions today. The first few years of independence depict a carry over from the colonial era. There was a general focus on economic growth exemplified by the formulation of Sessional Paper No. 10 of 1965, under which the infrastructure for economic and social development (including the water sector) was to be placed under State control (GoK, 1965). Under this policy, the government was to be involved in virtually all productive activities, including provision of water services (UNDP, 2007). Water supply was not regarded as a social service but as a public service, alongside transport, telecommunications and electricity. To spur economic growth, water supply was to be handled by financially self-sustaining schemes, such as water services for the municipalities. There was no consideration of human rights to water and sanitation or the right to equal participation in water governance. The main focus was on full cost-recovery from water users. Reports indicate that in the 1960s virtually all urban areas had access to piped water from public systems (Nilsson and Nyangeri, 2008).

As the economy and the population grew in the early years of independence, inequalities continued to widen between the rich and the poor. A patron-client relationship developed between the central government and local authorities, in which the latter sought public resource allocations from the former. Local authorities became entangled in corruption and misuse of resources. There was favouritism in water supply, and the poor were often excluded from public water supply systems (Nilsson and Nyangeri, 2008). Local authorities were criticized for lack of capacity, absence of guidelines on access, and failure to bridge gaps in law and policy affecting water supply. In later years, some opined that local authorities did not understand the water reform processes and changes and how these influenced decision-making at their level (UNDP, 2007). Concerns about human rights and participation of the citizenry in decision-making did not feature at this time.

In the 1970s, the government began to change national policies and the water sector became a prioritized area for intervention. The Development Plan of 1970-74 sought to expand water development by supplying water to the whole rural population, which was relatively underserved, before 2000. However, the plan did not deal with cost recovery. It increased municipal water tariffs and all users had to pay regardless of their

economic situation. The plan was developed with donor assistance from Sweden (Juuti et al., 2007). The Water Act Cap 372¹¹ provided the legal framework for implementing the policy. Under the Act, the minister in charge of water resources was required to appoint a 'Water Undertaker' for each town. The Water Undertaker could be the local authority, the government through its ministry responsible for water, or any other person or organization. The Undertaker developed regulations, to be approved by the minister, defining the operations and tariffs in the service area. The minister would also have a monitoring role to ensure the quality of service (Nilsson and Nyangeri, 2008).

Focus was on water supply to boost other sectors of the economy with little attention given to water resources management and access to water for domestic and livelihood purposes. No attention was given to conservation of water resources to ensure their availability for future generations. The relevant institutions for water governance were: the Minister; the Water Resources Authority, Catchment Boards, Regional Water Committees, the Water Apportionment Board, Local Water Authorities,¹² and Water Undertakers. The institutional framework under the Act concentrated much power in the minister in charge of water; unduly separated institutional roles; created uncertainty in decision-making among institutions; gave water users little room for participation, and was State-centric with no room for private sector participation (Akech, 2008: 315). This Water Act (Chapter 372, which has since been repealed) made no provision for stakeholder engagement or public participation in water governance and had no special mechanisms targeting the poor and women.

The cost recovery policy in water supply was revisited in the Development Plan of 1974-78. However, the popularization of the basic needs approach in water policy at the international level in the late 1970s, led the government to change its national water policy. Water supply was now viewed as a social service and cost-recovery was not over-emphasized. Donors became increasingly interested in water supply so as to increase access to water and sanitation globally. However, the basic needs approach in water supply did not last long and was reversed by Sessional Paper No.1 of 1986, under which water supply was seen as a pay-for-service and not as a social good or service for the benefit of the largest number of people in the largest possible way. To implement the pay-for-service approach, the National Water Conservation and Pipeline Cor-

11 Chapter 372, Laws of Kenya (Repealed).

12 Local authorities had the main responsibility for water provision.

poration was established in 1988 to operate a number of urban water supplies on a commercial basis (Nilsson and Nyangeri, 2008).

During the 1990s, the performance of the water sector deteriorated, particularly in urban areas, because of low government funding, poor management of utilities, mismanagement of funds, and rising water demand. This partly created the need for reforms, buttressed by several public health crises directly related to poor water services. In addition, there were macroeconomic reform initiatives promoted by bilateral agencies and international finance institutions, which also played a part in catalyzing reform in the water sector (AMCOW, 2010).

A second National Water Master Plan was developed in 1992 by the government in collaboration with Japan International Co-operation Agency (JICA). Reforms were geared towards principles and targets of economic sustainability and good governance ensuring greater access to water. One of the main aims was poverty reduction, particularly in urban poor and rural areas, by ensuring sustainable access to safe water (Osinde, 2007). Water provision in rural areas was based on a supply-driven approach, placing much emphasis on infrastructural development. No measures were put in place for participation in decision-making and overall governance in the water sector. In the late 1990s, the government realized that it did not have sufficient resources to meet rising water demand in the country. Moreover, water demand was exceeding available water resources. Sessional Paper No.1 of 1999¹³ was therefore formulated, with the overall goal of facilitating the provision of water in sufficient quantity and quality and within a reasonable distance to meet all competing uses in a sustainable, rational and economical way. The policy separated policy formulation, regulation, and service provision, and defined the roles of sector actors clearly within a decentralized institutional framework. It also allowed for private sector participation and increased community development (GoK, 1999).

With this policy, there was a shift from the supply-driven approach to a demand-driven approach raising the need for resources to meet rising water demand (GoK, 2012). This shift was also informed by the Integrated Water Resources Management (IWRM) policy that was based on the Dublin Principles, which sought to balance the prevailing neo-liberal economic discourses, advocated by actors such as the International Monetary Fund and the World Bank, with the growing movement for par-

13 GoK (1999).

ticipatory natural resource management and sustainable development.¹⁴ Gender concerns were raised as part of the shift towards IWRM.

This shift paved the way for the participation of private sector and non-governmental organizations (NGOs) in water supply with a number of NGOs partnering with government and donor agencies to develop community water projects in rural and urban areas (Juuti et al., 2007; UNDP, 2007). The main donor agencies were the Swedish International Development Agency (Sida), the Japan International Co-operation Agency (JICA), the Norwegian Agency for Development Co-operation, the Finnish Development Agency and the German Development Agency. Human rights dimensions lay at the core of this shift, and were understood as crucial for meaningful community and individual participation in democratization, decentralization and sustainable water management. Gender concerns were, however, largely ignored. In essence, water governance during the post-colonial period was largely a continuation of colonial water law and policy, did not adopt a pro-poor focus, and allowed for minimal community engagement as recipients of services. Access for the poor was purely tokenism. Water was chiefly perceived as important for economic growth and was supplied on market principles. Little attention was paid to human rights issues and the participation of different water users, such as women, in water governance; domestic and livelihood water uses and needs were ignored; women's concerns were relegated to the back burner.

5. THE RIGHT TO WATER IN KENYA: THE PRESENT LEGAL CONTEXT

Despite the gloomy picture painted above, developments at the international level on the right to water have had an impact on water law in Kenya. There has been an emphasis on providing all people with access to sufficient quantities of safe water and proper sanitation. The climax of these efforts was General Comment No. 15,¹⁵ a general recognition of the human right to water through a resolution of the United Nations General Assembly that outlines the components of the right to water. It is important to note that not all states accepted the right to water as embedded in Article 11 of the International Covenant on Economic, Social and Cultural Rights. Further, as outlined in Chapter 2 of this book, the focus of the right has been more on domestic water uses than on broader liveli-

14 See Introduction.

15 CESCR (2013).

hood uses, which would include food security.¹⁶ The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Water must be available, of good quality and accessible.¹⁷ Accessibility means that all must have access without discrimination including women, minorities, disabled, displaced, and other vulnerable groups. Obligations are also imposed on State Parties to respect, protect and fulfill the right to safe drinking water.¹⁸ These need, however, to go beyond drinking, cooking and washing to include other water-related activities at the household level, such as food production and processing. (Chenoweth, 2008)

In Kenya, a number of measures have been undertaken leading towards the recognition of the right to water. Such measures include Sessional Paper No. 1 of 1999, the Water Act 2002 and the 2010 Constitution of Kenya. Both the Water Act and Sessional Paper, at least in theory, recognize a right to water. For example, Sessional Paper No. 1 of 1999 enabled the country to include elements of Integrated Water Resources Management. The Water Act 2002 provided that water resources are to be managed in the public interest, as stipulated in the National Water Resources Management Strategy (2007-09), while water supply and sanitation, were guided by the National Water Services Strategy (2007-15), which recognizes a human right to water. However, in practice, the right to water is yet to be realized since all – including the poor – must pay to access water. The attempts made by the Water Services Trust Fund, established under the Water Act 2002, with the mandate ‘to assist in financing the provision of water services to areas of Kenya which are without adequate water services’ (Section 83) are yet to ensure access to adequate, affordable water for the poor in Kenya. One of its major limitations has been its concentration on rural areas.

5.1 Water Act 2002

Reforms introduced by this Act included the separation of water resources’ management from water services’ provision; separation of policy-making from the day-to-day administration and regulation; decentralization of functions to lower-level State organs; and the involvement of the private sector in water resources management and water services provision. The long-term objective of these reforms was poverty reduction in the

16 It is worth noting that the 20 litres provided as the benchmark level of need is insufficient to cater for livelihood uses, including food security.

17 See Paragraphs 10-12.

18 See Paragraph 20.

rural and urban areas, through the establishment and development of a well managed and sustainable water sector (KWAHO, 2009). Moreover, under the Water Act, water supply and sanitation were to be guided by the National Water Services Strategy (2007-15). Section 49(3)(a) of the Water Act 2002, requires the National Water Services' Strategy to frame plans and programmes for the progressive realization of the right to water. The Act does not address gender-equal participation in water governance but the 2006 Presidential Directive on affirmative action for women in all appointments has resulted in greater women's visibility in the water sector institutions.¹⁹

The Act treats water mainly as an economic good and, in efforts to increase access to water, it brings the private sector on board. Water supply is only to be provided by a water service provider,²⁰ defined as a company, NGO, or other body or person providing water services under and in accordance with an agreement with the licensee within whose limits of supply the services are provided.²¹ All municipalities are obliged to manage and operate water services along business and corporate lines and to embrace the full cost of recovery in the provision of water services.²² Water Service Providers (WSPs) acquire water in bulk from Water Service Boards (WSBs). Water supply is based on the principle of cost recovery, which requires users to pay for water and sanitation services. The issue of affordability is not addressed and the poor and vulnerable groups, including women, cannot access water without paying. This has resulted in the proliferation of self-help groups, NGOs and faith-based organizations in water and sewerage services' provision (GoK, 2012).

Regulation of water rights under the Act is based on a permit system.²³ A permit is predicated principally on land rights. It is an offence to construct or employ any works without a permit for a purpose for which a permit is required.²⁴ Section 34 stipulates that a permit runs with the land or undertaking. It is important to note that permits operate principally where land is under formal tenure; therefore, land under customary tenure is excluded. As long as it remains in force, a permit is appurtenant to that portion of land or that undertaking and passes with any

19 For instance WASREB has been chaired by a woman since 2012.

20 Section 53(2), Water Act 2002.

21 See Section 2, Water Act 2002.

22 See Section 57(5) (d), Water Act 2002.

23 Section 8 (1) (c) and (d) of the Water Act 2002.

24 Section 27 (1) (a).

demise, devise, alienation, transfer, or other disposition thereof, whether by operation of law or otherwise.²⁵ In addition, where land to which a permit is appurtenant has been, or is about to be, subdivided, the Water Resources Management Authority may grant a new permit, subject to the permit holder acquiring the necessary easements.²⁶ With few women having titles to land compared to men, women as a gender and as part of a socio-economic class are unable to get permits and are therefore affected negatively. This is also the case where women need water connections. Application of the permit system also means that women cannot utilize water resources in economically productive activities such as irrigation and commercial livestock rearing because they lack water rights to water resources.²⁷ The permit system implies that small-scale water users without ownership rights lose out to large-scale users who hold a permit.

Linking water rights to land may be inappropriate in informal settlements where residents are not the owners of underlying land. Government has failed to develop infrastructure for water supply in informal settlements because the residents are not the real owners of the underlying land. Water services provision is thus left to cartels, who charge exorbitant prices for water. Those without land rights also pay exorbitant prices for water for consumption from informal service providers, as they are not served by the formal providers. This implies that those without ownership rights cannot effectively engage in economically productive activities that require water, such as irrigation and commercial livestock farming (Njuguna, 2012). It is, therefore, evident that the permit system does not sit well with the State's obligation to respect and protect the right to an adequate living standard, the right to food and the right to health.

5.2 Who were the drivers of reforms?

Water reforms in Kenya have been driven by different internal and external actors. The internal actors include the Ministry of Water and Irrigation and its agencies such as the Water Resources Management Authority; Water Services Providers (WSPs); the Ministry of Environment and Mineral Resources through the National Environment Management Authority (NEMA); the Ministry of Public Health; and the Municipal Council and local civil society organizations. The external actors include development partners and donors such as German Technical Co-oper-

25 Section 34 (1).

26 Section 34 (3).

27 Njuguna (2012)

ation, German Development Bank, Water and Sanitation for the Urban Poor (WSUP), United Nations Human Settlements Programme (UN-Habitat), Japan International Cooperation Agency (JICA) and United Nations Children's Fund (UNICEF). Other actors include community-based networks and NGOs.

Donors have played a major role in capacity building, and in responding to emergencies by providing funding and access to poor communities in remote areas and in managing community supplies. For instance, in the 1990s, donors funded about 62% of the development budget for the water sector while the government only financed about 38% from general revenues (GoK, 2005). The funding to the Ministry of Water and Irrigation (MoWI) increased in absolute terms from USD64 million in 2003/04 to USD379 million in 2009/10. In relation to the GDP, donor funding has kept pace with inflation. There was an increase of 0.4% in 2003/04 to 0.9% in 2008/09 (AMCOW, 2010). However, a huge portion of the capital budget, over 80% of the ministry's allocations, has gone to water supply and sanitation rather than irrigation. Nonetheless, it is not clear what proportion was allocated to urban versus rural, and water supply versus sanitation allocations. This lack of clarity is due to the preference that is given to urban water supply compared to rural water supply. Urban water supply continues to receive most of the funding compared to rural areas, necessitating the intervention of NGOs and other informal water providers (AMCOW, 2010). In addition, donor funding was channeled through the Water Services Trust Fund (WSTF) to promote water provision in rural areas and informal settlements, but WSTF funding is still low.

Through the Kenya Water and Sanitation Project and the Water Sector Reform Project, development partners have been involved in setting up water sector institutions since 2005 (Sida, 2009). There have, however, been challenges such as ensuring transition from old institutions to new ones and ensuring complementarities and synergy among institutions. This, coupled with inadequate funding, explains in part the failure to meet the targets set by water and sanitation supply systems (Sida, 2009). More specifically, overlaps between the new water sector institutions, pre-reform institutions and the ministry persist nearly ten years after the institutions were established. This problem has been compounded by the emergence of new institutions established under the 2010 Constitution such as the counties and the amalgamation of ministries dictated by the reduction of ministries from 42 to about 20. In this milieu of an evolving institutional framework, focus on the poor, gender, good governance, stakeholder

participation, viability, sustainability, and objectives towards MDG goals continue to be a moving target and are unlikely to be fully achieved in the short term (Sida, 2009). It is worth noting that the incomplete transfer of staff and water supply and sewerage assets from the MoWI, local authorities, the National Water Conservation and Pipeline Corporation, and other public bodies to the WSBs and WSPs has continued to directly impact on the financial viability of WSPs (AMCOW, 2010). This is now compounded by the constitutional provision that separates water resource management functions (placed under the national government) from water service provision (placed under the county government).²⁸ A major concern is how to secure the gains made in the reform process and ensure that the right to water provided for in the Constitution is realized (World Bank, 2013). A number of cases have already come before the courts in which county governments have been challenged for appointing the members of the boards of Water Service Providers in contravention of processes established under the reforms.²⁹

Notwithstanding the support that Water Service Institutions (WSIs) have received from the government, donors and development partners, access to water services and sanitation remains low at 53% and 69% respectively (Water Services Regulatory Board, 2014) and it is likely that the sector MDG targets of 80% urban water and 77.5% urban sanitation coverage by 2015 will not be attained (World Bank, 2013). This is likely to greatly affect access for the poor. Not surprisingly, civil society actors have become increasingly involved in water supply and sanitation in rural and informal settlements, filling in the provision gaps.³⁰ This is likely to positively affect the incorporation of the rights-based approach to water provision and a shift from the focus on the economic good of water (Moyo, 2011). This is important in ensuring the realization of the right to water, since without the participation of grassroots organizations and civil society, planning, formulation and implementation of water reforms may not capture the needs and priorities of the poor. There is, however, need for synergies, legitimization and institutionalization of the role of

28 See generally the Fourth Schedule to the Constitution of Kenya, 2010.

29 See e.g. *Okiya Omtatah Okioti and 3 others v Nairobi City County and 5 others*, High Court Petition No. 143 of 2014.

30 These organizations include the Kenya Alliance of Residents Association (KARA), Nairobi City Consortium, Kenya Water and Sanitation CSO's Network (KEWASNET), UMANDE Trust, Majina Ufanisi, Kenya Water for Health Organisation (KWAHO), Transparency International-TI, Muungano wa Wanavijiji, PAMOJA Trust and Hakijamii.

CSOs in water supply (Osinde, 2007). The laws and policies aligning the water sector with the Constitution which are currently before Parliament provide an opportunity to institutionalize this participation as part of the constitutional requirement of stakeholder engagement and public participation. (Article 10(2)) There is, however, a dearth of NGOs, CBOs and other civil society groups with adequate capacity working in the actual advancement of water governance in the reform process (Osinde, 2007).

5.3 Constitution of Kenya 2010 and water provision

The Constitution places a high premium on the core themes in this book – the right to water and sanitation, the right to gender equality and the right to gender-equal participation in governance – including them in the National Values and Principles of Governance (Article 10) and in the Bill of Rights (Chapter 4). Indeed, the implementation of the Constitution has far-reaching implications for water governance and the realization of the right to water for all Kenyans. The Constitution provides for gender equality unequivocally and unambiguously (Article 27) and requires that legislative and other measures including affirmative action programmes and policies be taken to ensure that the rights it provides for are realized. (Article 27(6)).

The Constitution expressly recognizes the right of every person to clean and safe water in adequate quantities (Article 43(1)(d)) thus providing individuals and civil society groups with a basis for engaging and exhorting the government at the national and county levels to respect, protect, promote and fulfill the right. In addition, the Constitution recognizes the right to reasonable standards of sanitation.(Article 43(1)(b)) Recognition of the rights to water and sanitation as distinct human rights in the Bill of Rights is important because of the priority usually given to the right to water when the two rights are lumped together. The government at the national and county levels is therefore under a duty to ensure that conditions exist for the realization of the right to water and enjoyment of the right to reasonable standards of sanitation. Further, the right to water is grouped together with other economic and social rights such as the rights to food (Article 43(1)(c)), a healthy environment (Article 42), housing (Article 43(1)(b)), education (Article 43(1)(f)), health (Article 43(1)(a)), and social security (Article 43(1)(e)), underscoring the fact that these rights are interrelated since in most cases those without access to water and sanitation also do not enjoy the related rights. The grouping of the right to water together with other social and economic

rights, may suggest that the right to water in Kenya is wide and includes the right to water for livelihood and not only for personal and domestic uses. This is so, because without access to water, it becomes difficult to realize other rights such as the rights to life, to food, to health and to an adequate standard of living. It will be interesting to see whether courts adopt this broad definition.

The State is also under a duty to observe, respect, protect, promote and fulfill the right to water in international law. Article 2(6) of the Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya'. This implies that there is no need for the legislative process of domesticating international treaties, which can be a barrier to the realization of rights provided for in international treaties. There is, however, a conflicting provision in Article 94(5) which reserves the power of making law to Parliament: 'No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.' State representatives in international treaty negotiations are not MPs, and hence the need for clarity on the application of treaties in national courts. With regard to the rights to water and sanitation and participation in water sector governance, there is a bill before Parliament that contains the provisions beyond the Constitution and UN and regional commitments. This is fortified by the equality and anti-discrimination provision (Article 27) with regard to gender.

The Constitution, like UN agreements, requires that legislative, policy and other measures, including the setting of standards be taken to achieve the progressive realization of the right to water under Article 43 of the Constitution.³¹ This is in appreciation of the fact that recognition of the right to water in the Constitution is not enough, and that much must be done towards its realization especially in rural and informal urban settlements. Consequently, where the right to water is denied, violated, infringed or are threatened, one has a right to seek redress in court.³² A court may grant a number of reliefs including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law, which denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; or an order for compensation and an order of judicial review.³³

31 See Article 21(1) and (2), Constitution of Kenya, 2010.

32 See Article 22, Constitution of Kenya, 2010.

33 See Article 23(3), Constitution of Kenya, 2010.

Essentially, the right to water entitles every person to a continuous supply of water for livelihood purposes and basic sanitation. This issue continues to dog the water sector in Kenya, which has not met the international benchmarks that provide that, in order to have a basic access to 20 litres per day, the water source has to be within 1,000 metres of the home and collection time should not exceed 30 minutes in urban areas, or, alternatively, two kilometres in rural areas. This addresses the concern that women and children travel long distances per day to fetch water in Kenya. Further, the cost of access to water should not exceed 5% of the household income (UN OHCHR, 2010; KWAHO, 2009).³⁴ Indeed, as noted above, the poor pay much more for water than the rich who get metered water (UNDP, 2006).

With regard to sanitation, the sanitation infrastructure must be in a private, safe and dignified environment (KWAHO, 2009; UN OHCHR, 2010). Toilets must be within, or in immediate vicinity of, each household, educational institution or workplace and available for use day or night with appropriate facilities for use by children, the disabled and the elderly (KWAHO, 2009). The basic infrastructure for sanitation and sewerage system for households and public use must be functional and culturally acceptable, providing privacy for both men and women. A shared toilet facility should not be shared by more than four households. In the chapters on Naivasha and Mathare,³⁵ it is clear that these conditions are far from being met. Indeed, while the cost of sanitation and water should not exceed 5% of the household income, residents in these areas pay more and some do not have access to sanitation facilities at all times owing to insecurity (KWAHO, 2009).

To realize the right to water amongst minorities and other marginalized groups, Article 56(e) of the Constitution obliges the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups have reasonable access to water, among other social services. Article 27(2) on equality and non-discrimination provides that women and men should be treated equally, including the right to equal opportunities in political, economic, cultural and social spheres. This extends to productive water uses, such that women's water uses should be given equal treatment to men's water uses such as irrigation.³⁶

34 UNDP suggests 3% of household income as a benchmark.

35 See chapters 4 and 6.

36 See Chapter 2.

The Constitution also establishes an Equalization Fund³⁷ to be used by the national government in providing basic services, including water, to marginalized areas to the extent necessary to bring those areas to the level generally enjoyed by the rest of the nation.³⁸ Whether these provisions benefit women and the poor and facilitate their realization of the right to water remains to be seen.

5.4 Devolution and water governance

The Constitution creates two levels of government: national and county governments. Functions have been apportioned between the two levels generally and in relation to water services particularly. On the one hand, water services' provision is under county governments, making them responsible for meeting the water needs of people in their respective counties (World Bank, 2013).³⁹ On the other hand, water resource management and trans-county issues such as protection of water resources and prevention of pollution are the responsibility of the national government.⁴⁰ This is justifiable on a number of counts:

- i. water resources are very unevenly distributed among counties in Kenya and counties are dependent, sometimes wholly, on water resources from other counties;⁴¹
- ii. counties do not have the capital necessary to develop infrastructure such as multipurpose dams;
- iii. infrastructure, developed so far, has been through financing arrangements with the national government which has necessitated transitional handing over arrangements;
- iv. the national government is better placed to deal with pollution issues which may affect water resources in different counties;
- v. there is need to set national standards for service provision that apply across counties to ensure that water supplied is accessible, acceptable, affordable, and of a standard quality;

37 Article 204(1), Constitution of Kenya 2010.

38 See Article 204(2), Constitution of Kenya, 2010.

39 World Bank (2013), p.6.

40 See Section 22 of the Fourth Schedule, Constitution of Kenya, 2010.

41 For example, counties such as Nairobi, Mombasa, Eldoret and Kakamega are dependent on water from other counties.

- vi. the national government needs to develop water and sanitation policies, and oversee and support the counties in the performance of their water service provision roles, to ensure that all citizens have access to water and sanitation, as provided for in the Constitution.

A major support function of the national government is ensuring that funds allocated for county governments are released and facilitating the development of counties' capacities to provide water and sanitation services to citizens (World Bank, 2013). Indeed, the national State organs are required to ensure reasonable access to their services in all parts of the country,⁴² including access to water and sanitation services. It is important to note that gender-equal participation is required for both levels of government and the expectation is that this will apply to institutions set up to manage water.

The promulgation of the Constitution and the establishment of counties have posed a challenge for the momentum in water sector reforms, as efforts are made to improve service delivery with discussions on how to build on ongoing reforms rather than rapidly overhauling the system before it coalesces (World Bank, 2013). This discussion is likely to continue; the critical issue is to ensure that water provision and sanitation coverage, especially in rural and informal settlements in urban areas, is improved and that the poor and marginalized are not left out. There is also a window of opportunity for gender-equal participation and the consideration of water uses for women for domestic and livelihood purposes. Devolution of water services' provision to counties must be linked to funding, implying that existing and new money flows for water investments is evaluated and agreements reached between the national and county governments about how these investments are re-organized and applied (World Bank, 2013). This process provides an entry point for gender.

5.5 Draft Water Policy, 2012⁴³

In a bid to align the water sector policies to the Constitution of Kenya 2010, the government prepared a Water Policy in 2012. This policy adopts a human rights based approach to water governance with a pro-poor focus. It provides for the creation of and anchors water sector institutions (WSIs). The Policy expresses the need to move towards gender

42 Article 6(3), 2010 Constitution of Kenya.

43 GoK, 2012.

equality in the WSIs (GoK, 2012), with the government committing to enforce the constitutionally enshrined rule that not more than two-thirds of elective or appointive posts should be held by members of one gender. This rule facilitates the participation of women in water sector institutions including representation on boards of the institutions in the sector. It also states that women shall be encouraged to invest in, and have access to, employment opportunities in the water sector (GoK, 2012). This is in recognition of the fact that women, children and persons with disability are among the poorest in society and are the most affected where water supply and sanitation services are inadequate, often with life-threatening consequences. Water association groups (WAGs) and Water Resource Users Associations (WRUAs) empower women to participate in decision-making. The policy requires that WAGs and WRUAs must have among their members 30% women and that at least 50% of water kiosks be operated by women (Republic of Kenya, 2012). Water for livelihood is dealt with under the policy as it seeks to enhance access to water for economic and social growth to increase, *inter alia*, livestock production, gradually increase irrigated land for crop agriculture, and to increase industrial production.

5.6 Draft National Environment Policy, 2013⁴⁴

This draft policy will be the overarching policy on environmental matters in Kenya. It recognizes the important role that gender plays in the management of the environment (GoK, 2013). It also recognizes that different social groups and demographic sectors are impacted differently by environmental challenges. In addition, it appreciates that different actors play unique roles in managing the environment given their unique capabilities, experiences and knowledge relating to the environment (GoK, 2013). The policy therefore requires that access to and ownership of natural resources should be enhanced for both genders, people living with disabilities, and marginalized and minority groups. This is to be attained through the provision of incentives to attract the under-represented gender and other vulnerable groups into environmental management careers, occupations and programmes (GoK, 2013). It will also be achieved through gender mainstreaming and equity in all sustainable development policies.

44 GoK (2013).

5.7 Draft Water Bill 2014⁴⁵

This bill, currently before Parliament, seeks to align the Water Act with the Constitution. The fact that it replicates many of the provisions of the Water Act 2002 may limit its capacity to deliver the human rights promise. Ownership of water resources is vested in the national government and held in trust for the people.⁴⁶ The bill recognizes the right to water and creates institutions tasked to ensure that this right is fulfilled.⁴⁷ Interestingly, water rights under the bill are still premised on the permit system.⁴⁸ A 'water right' under the bill is described as the right to have access to water through a water permit. The bill seems to recognize local custom-based water rights, as it defines a 'landholder' in relation to land for purposes of getting a permit as any person who by any established right, custom or estate is entitled to be the holder or possessor of land.⁴⁹ The bill is, however, not clear on the right to water for livelihood and replicates the constitutional provisions on the right to water without amplifying the issues of access, affordability and quality. These issues have been raised with the Parliamentary committee discussing the bill, which is yet to become law.

Water service provision under the bill will be done with a view to fulfilling the right to clean and safe water and reasonable standards of sanitation.⁵⁰ To ensure the realization of the right to water, the bill requires the Cabinet Secretary to formulate a Water Strategy providing government's plans and programmes for the progressive realization of the right to water.⁵¹ The Water Strategy is to contain details on existing water services, number and location of persons not provided with a basic water supply and basic sewerage services, standards for the progressive realization of the right to water, and a reasonable mobilization strategy for the implementation of the plans.⁵² This provides a good point for bringing on board gender concerns and water needs for livelihood. Water Works Development Boards are established as agents of the national government to develop national public water works for water services. These will be

45 Draft Water Bill 2014.

46 See Clause 5 of the Draft Water Bill 2014.

47 See Clause 4 of the Draft Water Bill 2014.

48 See Clauses 34-54.

49 See Clause 2.

50 See Clause 62 of the Draft Water Bill 2014.

51 See Clause 63(1) of the Draft Water Bill 2014.

52 See Clause 63(3) of the Draft Water Bill 2014.

critical in the realization of the right to water. Their role is to formulate development and investment plans for rural and urban areas; provide input to the national development and financing plan; provide technical assistance to the WSPs, as county government agents for county asset development in consultation with the respective county governments; hand over developed public assets to the licensed county water services providers, cross-county water services providers or to the county water department according to the rules of the Cabinet Secretary; and facilitate the establishment of cross-county water service providers.⁵³ The proposed Water Services Regulatory Authority will protect the interests and rights of consumers in the provision of water services.⁵⁴ It is therefore a critical actor in delivering the rights to water and sanitation and gender-equal participation in the water sector. The Authority will, among other things, determine and prescribe national standards for the provision of water services and asset development for water services; evaluate and recommend water and sewerage tariffs to the county WSPs and approve their imposition in line with consumer protection standards; set license conditions and accredit WSPs. Accreditation of WSPs will ensure that the companies have the capacity to provide water in the counties. In addition, setting of tariffs by the Authority underscores the impact of the authority's activities on people's livelihoods. Further, the setting of national standards by the Authority will ensure that water standards are uniform across the country and that no county will allow unsafe and unclean water to be sold to the people. This will contribute to the attainment of the right to water in so far as safety and quality is concerned.

WSPs, established in clause 76 of the bill as agents of the county governments, are also critical to the realization of the right to water. They are to provide water services within the area specified in the license and develop county assets for water service provision.⁵⁵ Water service providers are responsible for the efficient and economical provision of water services so as to fulfill the right to water.⁵⁶ While commercial viability is a major concern in the bill, reflecting the over-emphasis on economic considerations in water service provision, the bill provides that no person or community shall be denied water services principally on the grounds

53 See Clause 67 of the Draft Water Bill 2014.

54 See Clause 69(1) of the Draft Water Bill 2014.

55 See Clause 77(1) of the Draft Water Bill 2014.

56 See Clause 90(1) of the Draft Water Bill 2014.

that provision is not commercially viable.⁵⁷ County governments are also enjoined to put in place measures for the provision of water services to rural areas considered not to be commercially viable for water services' provision.⁵⁸ Such measures include developing point sources, small-scale piped systems and stand pipes which meet the standards set by the Water Services Regulatory Authority and which may be managed by the community associations, by NGOs or by a private person under a contract with the county government.⁵⁹ This brings the access issue of the human right to water to the fore.

The provisions of the bill are a departure from the Water Act 2002, which did not explicitly recognize the right to water, gender-equal participation, and community-based water projects. The bill, unlike the 2002 Act, provides for water supply provision in rural and peri-urban areas which will enhance access to water and sewerage services.

Devolution of water resources management and services provision should contribute to greater realization and fulfillment of the right to water. However, devolution should be implemented in a way that builds on the gains achieved through water sector reforms and weaknesses worked on to realize the right to water. Mechanisms of fitting the institutions under the 2002 Act into the devolution set up should thus be devised and evaluation carried out to determine whether these institutions have served their purpose, and whether there is any justification for retaining them as they are in the bill. There will also be a need to investigate whether existing water sector institutions have increased water service provision, and the impact they have had on the poor and women. It is important to ensure that the right to water for these categories of people is not hindered by the privatization of water service providers, licensing requirements for water providers, permit requirements, and tariffs which impede access to water services by the poor, including women. Regulation of water rights based on the permit system may deny women access to water for livelihood. It is to be noted that, whereas the bill recognizes the right to water, it fails to provide for a right to water for livelihood, especially where women need water for growing food crops. Although domestic water uses take precedence over water use for any other purpose,⁶⁰ water for broader livelihood purposes is not mentioned and this can be considered as devolution is rolled out.

57 See Clause 92(1) of the Draft Water Bill 2014.

58 See Clause 92(2) of the Draft Water Bill 2014.

59 See Clause 92(3) of the Draft Water Bill 2014.

60 See Clause 41(2). The Bill does not define what 'domestic water uses' are.

6. JUDICIALIZING THE RIGHT TO WATER AND THE REALITIES OF POWERLESSNESS

It is important to note that the Constitution of Kenya has been lauded for having very transformative provisions. These provisions, however, need to be brought alive, and one of the ways in which this happens is through court actions. Judicial pronouncements are useful as they give meaning to rights by espousing the normative content of those rights. Judicial interpretation of rights makes them meaningful to right-bearers, especially the poor and women. Recent court decisions have sought to give meaning to the right to water as enshrined in the 2010 Constitution.

The transitional provisions of the Constitution state that ‘all law in force... shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution’ (Sixth Schedule Part 2 Section 7(1)). In one decision, the high court has held that the rights under Article 43 are interconnected.⁶¹ Violation or denial of one right may mean denial of the other rights. Further, in *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 others*,⁶² the court underscored the challenges which treating water as an economic good and managing it on market principles occasions for the poor, who have a constitutionally guaranteed right to water. The Judge in the case noted, referring to General Comments No. 4 and 7 on the UN Committee on Economic, Social and Cultural Rights, that ‘an adequate house must contain facilities for health, security, comfort and nutrition; all beneficiaries should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services’. Referring to the requirement to pay for water services, the judge stated that under the Water Act 2002, the water supply system requires payment of a fee to access water, and if an individual does not pay, they cannot claim a denial of their right to water. He, however, pointed out that the Water Act needed to be aligned to the Constitution, specifically with regard to the right to water (Para. 100). According to the court, there is a need for water suppliers and the State to adopt a rights-based approach to the provision of water services, so that a person is not denied

61 *June Seventeenth Enterprises Ltd (Suing on its own behalf and on behalf of and in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority and 4 others* [2014] eKLR.

62 [2011] eKLR.

access to water for non-payment, especially where one proves that one is unable to pay. Further, the court observed that recognition of a human right in the Constitution was not enough to ameliorate the plight of those without access. It stated that:

... This Court has a special responsibility to develop, and comprehensively so, the meaning of all the rights in the Bill of Rights, especially social-economic rights such as the right of access to clean and safe water. It is important therefore to elaborate on the normative content of the right to water so as to help the State realize its constitutional obligations.

Defining the normative content of the right to water with certainty and clarity will give the right meaning in the lives of the poor people of Kenya (Moyo, 2011).

In *Joseph Letuya and 21 others v Attorney General and 5 others*,⁶³ the court was of the view that the purpose of the rights in Article 43(1) of the Constitution is to ensure that persons to whom they apply attain a reasonable livelihood. While considering the nature of rights to dignity, life and a livelihood, the court observed as follows:

...that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution.

As argued elsewhere in this chapter, the right to water in the Constitution should be understood in a wider context and in relation to the other socio-economic rights, as they are all connected and indivisible, and it cannot be said that one set of rights is more important than another. All the rights in the Bill of Rights need to be observed for a person to attain a reasonable livelihood. Regarding Article 56(e), the court in the *Joseph Letuya* case noted that the

need for affirmative action for, and special consideration of minority and indigenous groups arises from the fact that indirect indiscrimination of these groups may result from certain actions or policies which on their face look neutral and fair, but which will have a differential effect on these groups because of their special characteristics.

The high court has also had occasion to discuss the issue of participation, affordability and quality in *Kiriinya M. Mwendia v Runda Wa-*

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*ter Limited and another.*⁶⁴ The petitioner argued that the Runda Water, a water supplier, sold water of low quality and at higher price compared to Nairobi City Water and Sewerage Company (NCWSC). He also argued that he was entitled to be supplied with water from a company of his choice as per Article 46 of the Constitution. The court, in finding that each WSP has its exclusive area of jurisdiction, stated that:

...the petitioner has no right to receive water from NCWSC or any other water company of his choice and this Court cannot vary the term of Runda Water Service Agreement for his benefit. As the petitioner's property falls within LR No. 7785, he is entitled to apply to Runda Water for the connection... Runda Water will be happy to supply water to him.

Each water service provider having exclusive jurisdiction can thus be a basis for denial or violation of the right to water. A water user is obliged to buy water from the WSP even when the tariffs are high. This does not augur well for a rights-based approach to water. Other actors should be free to supply water, even where there is a licensed water service provider.

7. CONCLUDING REMARKS

This chapter has given a comprehensive overview of water laws and policy in Kenya. It demonstrates the arduous process of bringing the right to water and sanitation, the right to gender-equal participation, and the right to gender equality to the national plane. It outlines the development of water law and policy in Kenya, depicting a history of continuities and discontinuities of themes from one era to the other. The human rights based approach has in most stages been relegated to the back as economic considerations have *always* taken centre stage. For instance, cost-recovery is one theme that has run through the development of water law and policy in Kenya. Water supply has been on the basis of the water user's ability to pay. Colonial policies and post-colonial policies were based on cost-recovery in water supply. Currently, water supply is governed by the Water Act 2002, which is based on cost-recovery. The draft Water Bill 2014 currently before Parliament heralds a shift, as it seeks to align the water sector laws with the Constitution which provides for a right to water. While the bill provides for the right to water, it falls short of providing for accessibility, availability and affordability of water for livelihood purposes, even though the grouping of this right together with other social and economic rights in the Constitution implies a right to water for livelihood. The bill seems to be informed by cost-recovery and

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does not address the challenge of high water tariffs, which are a barrier to the realization of the right to water by the poor and women. This makes it harder for the poor and women to access water for personal and domestic uses and for livelihood. An emphasis on cost-recovery also seems to ignore small-scale water users such as small-scale farmers or women with kitchen gardens.

Although, some policies have recognized a rights-based approach in water supply, it has not been implemented in practice. A human rights based approach to water governance would require a change in water supply policy. WSPs should not discontinue or deny the poor access to water for non-payment. In urban areas, some households use more than 30% of their income on water. The government should assure citizens of a minimum amount of water entitlement irrespective of payment especially for the poor and create an enabling environment for the participation of CBOs and NGOs in water supply. The enlistment of participation of other actors is important, since the rights-based approach does not envisage that the State will be the sole provider of basic services. The swift passage of the Draft Bill is necessary if the right to water is to be firmly anchored in law. Another aspect of water governance that has continued over the years is support from donors and development partners. Donor funding has been instrumental in driving reforms in Kenya. Although their role has been critiqued, this chapter concludes that donor and development partners' support has been instrumental in promoting a pro-poor focus in water supply, especially in rural areas and within informal settlements.

In conclusion, we find that, in spite of water sector reforms and laws and policies implementing those reforms, the right to water for the rural and urban poor is far from realization. As a result, poor households continue to spend more time, and pay more money, in accessing water and sanitation services compared to the rich. The participation of women in water governance also needs to be scaled up and their interests taken into account in framing access, availability and affordability tenets of the right to water. However, as discussed above, the process of implementing the 2010 Constitution, particularly the provisions on devolution and the human rights based approach to water, present opportunities for improving access to water services and sanitation for the poor and women in Kenya. There is also an opportunity to promote gender-equal participation and gender equality generally, and specifically within the water sector.