

**GENDER ISSUES IN THE MANAGEMENT OF WATER:
AN ANALYSIS OF KENYA'S LEGAL AND
INSTITUTIONAL FRAMEWORK**

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I. INTRODUCTION

Women's access to, control over and ownership of environmental resources including water is an issue of concern in many subsistence economies such as Kenya. Women have organized themselves to protect the environment and promote environmental justice: in their communities, in national organizations, in international networks, working on issues such as biodiversity, land rights, access to water and sanitation, sustainable energy and climate change. All over the world they are major agents for environmental action, prompting others to work on the basis of the linkages of environmental sustainability, gender equality and poverty reduction. In certain regions women are generally the most stable members of the community, as men pursue work in distant locations leaving women to safeguard the natural environment and ensure adequate and sustainable resource allocation within the household and the community.¹

Women's access to and control over water has come into sharp focus as it has become clear that the performance of women's day to day chores is anchored on their access to water. For instance, in times of drought, it is incumbent upon the women to provide water and food for their families.² It is therefore not surprising that many women's groups at the grassroots focus on provision of water to households. Women are the main collectors and users of water for household uses worldwide. The availability of clean water consequently reduces water collection burdens, in particular the care burden for mothers. The incidence of water-borne diseases is reduced. Commonly entitlement to water is linked to land, but land tenure laws and legal systems show major gender disparities in ownership and rights, distorting women's access to environmental assets in many parts of the world. There is also an increased incidence of physical and sexual assault when women have to walk long distances to remote areas for water and sanitation, particularly in situations of conflict and war. Access to water and sanitation closer to home, would limit women's vulnerability.

Water security ensures that all have reliable access to enough safe water at an affordable price to lead a healthy, dignified and productive life, while maintaining ecological systems that provide water and also depend on water. Access to safe water is a fundamental human need and is therefore a human right. In attempting to flesh out this right, it is opined that a human right to water should be geared towards ensuring that every person has at least 20 litres of clean water each day to meet basic needs as a minimum requirement for respecting and a minimum target for governments.³ At the national level, there is need to make water a human right by going beyond vague constitutional principles and enshrining the human right to water in the enabling legislation. Such a right should entail an entitlement to secure, accessible and affordable supply of water at no cost for those too poor to pay.⁴

¹ Women & Natural resource management- The overview of a pan-commonwealth training module. Commonwealth secretariat, Marlborough House. Pall mall. London. 1996. pg 60-61.

² See, e.g., Barbara P. Thomas, *Household Strategies for Adaptation and Change in Kenyan Rural Women's Associations* (1988) and B. Thomas-Slayter, *Politics, Class and Gender in African Resource Management: Examining the Connections in Rural Kenya* (1989).

³ See UNDP *Beyond Scarcity: Power, Poverty and the Global Water Crisis* Human Development Report, 2006

⁴ *Ibid.* pointing out that people living in Nairobi slums pay 5-10 times more than in high income areas of the city and more than consumers in London and New York.

The Millennium Development Goals (MDGs) recognize the need to promote gender equality and empower women, the need to alleviate poverty and ensure sustainable environmental management. With regard to water, the MDGs and water aim at halving the proportion of the world population without sustainable access to safe drinking water and basic sanitation.⁵ In most developing countries women are responsible for water management at the domestic and community level. It is also estimated that women and girls use more than eight hours of their day travelling from ten to fifteen kilometres to transport between twenty and fifteen litters of water in each trip”.⁶ Men, especially in rural areas, do not play the role of getting or carrying water. Their relation with water has more to do with agricultural work, and with the storage of water. This gender inequality has implications in women’s daily life, from a rights based perspective, since the carrying of water not only causes them physical disorders, but also makes it difficult for them to get involved in activities such as education, income generation, politics, leisure and recreation.⁷

Kenya enacted a new Water Act in 2002 giving legislative force to the National Water Policy on Water Resources Management and Development of 1999. This Act replaced the Water Act, Cap 372 of the Laws of Kenya and introduced new institutions to govern water as well as mediate access to water resources. A major facet of the Act is its introduction of multifarious institutions at different levels to manage water. The net effect of the reforms in the water sector is the privatisation of water resources even as the custodianship of the resource is vested in the state. Moreover, the new water management institutions come into play within a context where there are existing grassroots associations that have managed water over time. Because of structural gender differences, the management of these formal institutions is likely to be dominated by men. Consequently, the privatisation of water resources and the formalisation of water entitlements in Kenya will make women’s access more tenuous. This resonates with feminist critiques of development that have identified the marginalization of women from the means of production and livelihood as a critical factor in the subordination of women.⁸

Against this background, this paper looks at the impact of the Water Act 2002 on women’s access to water. It proceeds from the premise that access to water is critical for women’s performance of their day to day tasks as well as their effective participation in economic activities that are largely agricultural. It also argues that while the new water law is hailed as ushering in a new regime for water resources’ management in Kenya, it has not changed the situation much as afar as women’s access to water is concerned. Indeed the failure to mainstream women’s needs and interests in a water regulation regime impacts on women’s enjoyment of their rights at the social, economic and political levels.

The paper is divided into five parts. Part I is the introduction. Part II canvasses the issues of gender, human rights and development as a background to Part III which outlines the legal and institutional framework for governing water resources in Kenya. Part IV analyses the legal and institutional framework from a gender perspective arguing that there is not much change for women’s access to water. Part V concludes and proposes possible interventions to make the water law more responsive to women’s needs.

⁵ Goal 7 target 10

⁶ Whittington et al (1990)

⁷ *Ibid.*

⁸ Mies, Maria (2003) *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*, London: Zed Books and Boserup, Ester, (1970) *Women's Role in Economic Development*, New York: St.Martins Press.

II. GENDER, HUMAN RIGHTS AND WATER

A. GENDER AND HUMAN RIGHTS

Gender refers to the socially constructed characteristics of men and women wherein gender roles are socially constructed, learned, dynamic and change over time and differing within and between cultures. Gender roles are influenced by wide ranging factors such as class and ethnicity. While sex broadly refers to the biological set up of an individual, gender goes beyond by socially constructing male and female stereotypes that people fit into with diverse formal and informal sanctions to ensure conformance to set roles. Gender roles are therefore universal and biological.

Feminism aims at ending the inequalities between the male and female sexes and a feminist is thus a person who is interested in bringing about change and in improving the situation of women. The goals of feminism have however been cast in different ways by different scholars. Shulamith Firestone declares feminism's aim as the overthrow of the oldest, most rigid class/caste system in existence, the class system based on sex – “a system consolidated over thousands of years, lending the archetypal male and female roles an undeserved legitimacy and seeming permanence.”⁹ Bell Hooks states feminism is "a commitment to eradicating the ideology of domination that permeates western culture on various levels--sex, race, and class, to a name a few. ¹⁰ Ruth Whitney for her part, asserts that feminism's goal is to destroy all forms of domination. In her view, ending patriarchy's belief that one group is superior to another and thus has the right to dominate will help stop men's power over women, the rich over the poor and whites over people of color.¹¹

The method of improving women's lot depends on the community that one comes from and the kind of experiences that they come across.¹² For instance, in the gender division of labour in Kenya, women are the main collectors and users of water at the domestic level. They decide where to collect it and how to draw, transport, store and use it.¹³ Additionally, women and children are generally responsible for domestic water-collection and management.¹⁴ Women make choices about the water they collect. Many women must decide between a water source that is distant providing higher quality water and one that is near but providing lower quality water due to time and security considerations. ¹⁵ Indeed, the amount of time women spend collecting water affects the amount of time they have for education and paid

⁹ S. Firestone, *The Dialectic of Sex*, New York: William Morrow, (1970), pp. 144-145

¹⁰ Sheila Ruth, *Issues in Feminism*, 4th Edition, Mountain View CA: Mayfield, (1998) 5. See also Celestine Ware, *Woman Power*, Tower, New York (1970) 3; S. Firestone, *Dialectic of Sex*, The Dialectic of Sex: New York: William Morrow, 1970(.15); K. Millett, *Sexual Politics*, New York Quadrangle, 1973(.62); and Anne Kaedt, *Radical Feminism*, Quadrangle, New York (1973) vii.

¹¹ Ruth Whitney, *Feminism and Love, Transforming ourselves and Our World*, Cross cultural publications, inc. Indiana (1998).

¹² This explains the mergence of various strands of feminism (liberal, Marxist, radical, ecofeminism) looking at different causes and consequences of women's marginalisation and proposing different ways of dealing with them.

¹³ See, e.g., Wanjiku Chiuri & Akinyi Nzioki, Women : Invisible Managers of Natural Resources, in *Groundwork: African Women as Environmental Managers* 27 (Shanyisa A. Khasiani, ed. 1992 giving an example of a village where women bought water tanks for each other and determined that rain water was or drinking and other uses would utilize water from the river that they stored sperealy from the rain water.

¹⁴ Huggins 2000

¹⁵ Nyong and Kanroglou 2001; Crow and Sultana 2002.

work. In Kenya, as in many societies, women's and children's reproductive work and other domestic labour are not considered "real" work in a context where social and cultural norms have naturalized women's domestic roles.¹⁶ Cultural norms in much of the world most likely serve to undervalue domestic work. For instance, it is estimated that the value of time spent collecting water for households in Ukanda, Kenya is nearly equal to the wage rate for unskilled labour.¹⁷

Whether the activities that a women's group engaged in securing access to water is a feminist group or not is a contested issue. Most people associate feminism with a militarism that such a women's group may not have. In my view however, since the group of women come together to remove a situation that prevents them from fully participating in the life of the community – lack of access to water- it is broadly speaking a feminist group. I subscribe to Naomi Wolf's broad definition of feminism as encompassing "every woman and every man who cares about women"; any person "laying claim to our humanity, all of it, not just the scenic parts"; and "feminism [as] the ultimate human rights movement." [words in bracket mine]¹⁸ Limiting the meaning of feminism to a combative rendition obscures feminism's essence and purpose as very creative and applicable to all realms where domination by one group (including individual states or groups of states) over another for whatever reason exists.

Feminism, however defined, aims at enabling women to have the authority and ability to critically analyze their own situations and have control over the means to determine their own lives. The critical thing is to link feminism to the realm of human rights which have developed progressively since the end of the Second World War.

B. WOMEN'S RIGHTS AS HUMAN RIGHTS

Legal rights comprise a cluster of claims, powers and immunities.¹⁹ The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state for instance to ensure the enjoyment of those rights by its citizenry. Human rights are guaranteed as basic for all members of the human race. They include equality of all before the law and equal protection of the law, protection from discrimination on grounds of sex, ethnic origin, tribe, religion among others and protection from torture, cruel, inhuman or degrading treatment, right to own property and freedom of conscience, expression, movement, religion, assembly and association. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of all governments. The Universal Declaration of Human Rights is the basic International statement of the inalienable and inviolable rights of all members of the human family. It is intended to serve as "the common standard of achievement for all people and all nations", in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists? The covenants relating to human rights have provisions barring all forms of discrimination in the exercise of the human rights.

¹⁶ Suda, 1996

¹⁷ Whittington et al (1990)

¹⁸ N. Wolf, *Fire with Fire*, New York: Random House, 1993, Pp 95,120,132,151,232,310

¹⁹ Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial reasoning and other Essays*, (Cook, ed., 1922).

Basic international law instruments explicitly provide that the rights provided for in them are to be enjoyed by all human beings. The Charter of the United Nations in its Preamble states

We the peoples of the United Nations determined ...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have agreed..."

The Universal Declaration of Human Rights of 1948 states succinctly that "Everyone is entitled to all the Rights and Freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status" (Article 2). Though this declaration was not intended at inception to impose legal obligations on parties, a party adhering to the Charter would be expected to ascribe to its provisions. This would then call for domestication of the provisions of the Charter.

From these two landmark instruments have sprung similar promulgations at international, regional and national levels. At the international level, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for equal enjoyment of all economic, social and cultural rights (Article 3); the right to education (Article 13); and the right to take part in cultural life (Article 15) among others.

In similar vein, the International Covenant on Civil and Political Rights (ICCPR) provides for the "equal rights of men and women to the enjoyment of all civil and political rights..." (Article 3). These rights include freedom from "cruel, inhuman or degrading treatment or punishment" (Article 7); freedom from arbitrary arrest or detention" (Article 9); freedom from "unlawful interference with ... privacy, family, home or correspondence" (Article 17); the right to "take part in the conduct of public affairs, directly or through freely chosen representatives" (Article 26 (a)); the right to "have access on general terms of equality, to public service" among others.

International instruments such as Agenda 21 outline the role of women in environmental management.²⁰ It identifies the following actions as critical to sustainable development:

- Full, equal and beneficial integration of women in all development activities including national ecosystem management and control of environmental degradation;
- Increase in the proportion of women decision-makers, planners and technical advisers, managers, extension workers in the environment and development fields;
- Elimination of constitutional, legal, administrative, cultural, behavioural, social and economic obstacles to women's participation in sustainable development;

20 United Nations Conference on Environment and Development: Agenda 21 Adopted at Rio de Janeiro, 1992. *See also* United Nations Conference on Environment and Development: Convention on Biological Diversity - Done at Rio de Janeiro, June 5, 1992, reprinted in 31 I.L.M. 818 (1992) Preamble, Art 8j & 10c and United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Adopted at Rio de Janeiro, June 14, 1992 - Principle 20 also outline the role of women in environmental management.

- Passing relevant knowledge to women through curricula in formal and non-formal education;
- Valuation of roles of women; and
- Ensuring women's access to property rights and agricultural inputs

The Convention on Biological Diversity also recognises the role that women play in the management of biological resources and calls for facilitation of women in the performance of those critical roles.²¹ Similarly Principle 20 of the Rio Declaration²² states that

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development

At the regional level we have, for instance, the African Charter on Human and People's Rights, which articulates a number of basic rights and fundamental freedoms and makes them applicable to African states. At Article 18(3) it provides that "[T]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". Elaborating on this provision, the Africa Union has concluded the Optional Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa. In the preamble, it notes that 'women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995'. It also reaffirms the principle of gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development. It pays particular attention to the rights of women to land and environmental resources. At Article 15, the right to land is linked to food security and provision to women with access to clean drinking is underscored. Article 19 dealing with sustainable development exhorts states' parties to promote 'women's access to and control over productive resources such as land and guarantee their right to property'.

Similarly, the Action Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD), underscores the role of women in environment management and the need to ensure their active participation in decision-making. The World Summit for Sustainable Development (WSSD) Action plan underscored the need to

Provide access to potable domestic water, hygiene education and improved sanitation and waste management at the household level through initiatives to encourage public and private investment in water supply and sanitation that give priority to the needs of the poor, within stable and transparent national regulatory frameworks.²³

At national levels, many states have entrenched bills of civil and human rights in their constitutions, enabling their citizens to attack laws and decrees which, although lawfully passes, offend civil and political rights which have been declared so fundamental as to

21 See United Nations Conference on Environment and Development: Convention on Biological Diversity - Done at Rio de Janeiro, June 5, 1992, reprinted in 31 I.L.M. 818 (1992) Preamble, Art 8j & 10c

22 and United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Adopted at Rio de Janeiro, June 14, 1992 - Principle 20 also outline the role of women in environmental management.

23 Paragraph 15 of WSSD Plan of Action (2002)

require them to be guaranteed forever. Moreover, private entities may be prevented from engaging in discriminatory acts in respect of access to housing, services or jobs by domestic human rights legislation.

B. HUMAN RIGHT TO WATER

Water is a fundamental and inalienable human right and a common good that every person and institution of this planet should protect. This resource is, like air, a heritage of humanity and must be dealt with in that way. Water is not merchandize and no person or institution should be allowed to get rich from the sale of it.

The right to water was adopted as a human right in general comment 15 by the Committee on Economic, Social and Cultural Rights. It provides a new framework for law and policy supplanting the Dublin Principles which have too often been understood in the African context to mean water with the right price. To deny people water denies them life. The United Nations has determined that the International convention on Economic, Social and cultural rights includes a right to water. Article 24 of the convention on the rights of the child states that the child has a right to clean drinking water. Article 14.2 of the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) states that rural women have a right to enjoy adequate living conditions, particularly in relation to housing sanitation, electricity and water supply, transport and communication on equal basis with men. As pointed out above, Article 15 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa obliges states parties to “provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food”.

The human right to water is also recognized in the United Nations Convention on the law of Non-Navigational Uses of Watercourses. The statement (A/15/869 of April 1997) affirms that in determining vital needs in the event of conflicts over the use of watercourses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.

States parties are under an obligation to prevent private water service operators from compromising the right to equal, safe and affordable water in terms of regulatory systems including independent monitoring, public participation and penalties for non-compliance.²⁴ Taking the human right beyond the nation state the committee on Social and Economic Human Rights in General recommendation 15 also recommends that United Nations agencies and other international organizations concerned with water should cooperate effectively with states parties in relations to the implementation of the right to water. The committee also recommends that international financial institutions such as the World Bank, International monetary fund, the African Development Bank should take into account the rights to water in their lending policies, credit agreements, structural adjustment programs and other development projects.

It is the duty of states to ensure that water is affordable by adopting measures such as use of appropriate low-cost techniques and technologies; appropriate pricing policies such as free or low cost water and income supplements. Any payment for water services has to be based on the principles of equity ensuring that these services are affordable for all.

²⁴ General recommendations 15,23 & 24

State parties are also obliged to ensure that the right to water is enjoyed without discrimination on the grounds of sex, class, colour, religion or political opinion. Inappropriate resource allocation can lead to indirect discrimination. Investment should according to comment 15, not disproportionately favour expensive water supply services and facilities that are only available to a small percentage of the population.

Article 1 of the CEDAW and Article 2 of the protocol to the African charter on Human and people's rights on the right of women in Africa substantiates the principle of non discrimination in relation to water, land and food security. The two instruments oblige nation states to take measures to eliminate both direct and indirect discrimination. The concept of indirect discrimination encompasses development policies and programs that on their face value are gender neutral but in practice are biased against large groups of female users in comparison with male users. Policies, programs and plans for improvements and investments in water that are based on a division between domestic and productive water use are will often have discriminatory effect.

In 1995, during the Fourth World Women's Conference (Beijing China), the Governments committed in the Beijing declaration "to promote the knowledge and favour the investigation of women's role, particularly in rural and indigenous areas, in watering, land management and cleaning up, by focusing particularly on the knowledge and experience of indigenous women". Paragraphs 174-188 of the Beijing Platform for Action deal with food, water and agriculture, underscoring the need to recognise and reward women for their performance of tasks hereunder; to equip them with resources necessary to perform the tasks; and ensure that they actively participate in planning, decision-making and implementation of programmes. Paragraph 182 specifically requires that rural women's rights to land be secured to ensure that they have access to land, capital, technology, know-how and other productive resources that they need. This action is critical for women's access to environmental resources. Paragraph 188 requires governments to

Pay greater attention to the preservation and the maintenance free from pollution of any kind of sources of water supply for irrigation and domestic consumption, applying special remedial measures to relieve the burden placed on women by the task of fetching water...they should construct wells, bore-holes, dams and locally made water catchment devices sufficient for all irrigation and domestic consumption... Women should be included by governments and agencies in all policy planning, implementation and administration of water supply projects...

Similarly, in the Ministerial declaration of the Second World Water Forum 2000 it was established that the best way to protect the planet's ecosystem is to consider women's involvement in the planning process, thereby ensuring their participation in issues linked to water and land ownership.

III. LEGAL AND INSTITUTIONAL FRAMEWORK FOR WATER MANAGEMENT IN KENYA

A. CONSTITUTION

The current Kenyan constitution has no provision on the right to water. Courts, in seeking to bring in entitlements to a clean and healthy environment have invoked the provisions of the Constitution on the right to life. Kenya has however been going through a constitution review process and the proposed drafts of the national have included an explicit right to water in the following words – ‘everybody has a right to water in reasonable quality and adequate quantities’. It is important to point out that there is no definition of what amounts to an adequate amount of water. Similarly, the drafts provide that every person has the right to a reasonable standard of sanitation and more broadly that ‘every person has the right to an environment that is safe for life and health’ and to ‘have the environment protected from pollution’.

The recognition of a right to life as being the basis of a right to a clean and health environment has to be seen against the broader context of women’s rights and specifically Section 82 of the Kenyan constitution provides that no law shall make provision that is discriminatory ‘either in itself or in the effects’. Under Section 82 (3) discrimination is defined as “affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex ...”. (Section 82 (3). A number of laws are exempted by Section 82 (4) from the provisions against discrimination. These include laws on marriage, divorce, burial and devolution of property on death and personal law matters; laws affecting members of a particular tribe or race in a matter exclusively concerning them and such an action is seen as justifiable in a democratic society. The laws exempted by Section 82 (4) are in areas that directly affect women’s access to land and environmental resources and can impinge upon the enjoyment of the right to life particularly in a patriarchal setting. There is no provision in any of the Constitution pointing to the express right of women to environmental resources or to water.

B. ENVIRONMENT MANAGEMENT AND COORDINATION ACT, 1999

The Environmental Management and Coordination Act of 1999 (EMCA) creates an overall supervisory agency to manage environmental issues. It also provides for public participation in environmental law. The act establishes the National Environment Council (NEC), National Environment Management Authority (NEMA), provincial and district environment committees, and the Public Complaints Committee. Each of these administrative structures provides for public participation which is an important entry point for women’s participation.

EMCA provides for the right of every person to a clean and healthy environment. It also makes it every person’s obligation to protect and manage the environment.²⁵ The limitations that women have with regard to the constitution are likely to impact on their right to a health environment as provided for in EMCA. Moreover, EMCA is gender neutral and as I have

²⁵ Environmental Management and Coordination Act (1999) [hereinafter EMCA], § 37.

argued elsewhere gender neutral legal rules which assume equality of men and women may give rise to or emphasize gender inequality.²⁶

C. SECTORAL WATER LAW

1. The Repealed Water Act

The thrust of the repealed Water Act Cap 372 Laws of Kenya was to provide for management, conservation, use, and control of water resources and for the acquisition and regulation of rights to use water; the other to regulate the provision or supply of water and sewerage services so that it is made available to the public, as it is a public good. Broadly speaking, it had three issues that could lead to gendered impacts are:

(a) Ownership and Control of Water Resources

Sections 3 and 4 of the Water Act vested ownership and control of every water resource in the State. Vesting water resources in the state is a clear recognition of the centrality of the resources. It flows from the public trust doctrine which holds that certain natural resources should be held by the sovereign in trust and on behalf of all the citizens because of their unique characteristics and central importance. This follows the realization that certain assets are inherently public and not subject to ownership by either the state or private actors.²⁷ The State must not alienate trust property unless the public benefit that would accrue outweighs the loss of the public use or “social wealth” derived from it.

So neither can the King intrude upon the common property, thus understood, and appropriate it to himself or the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power, and that, in theory at least, could not exist in a free government.²⁸

From the provisions of the Act, control of all water resources in the country is centrally controlled by the State. This has far reaching implications for the management of water resources and provision of water services to women. The challenge for women seeking to access water is that even the public at large are not in many instances able to hold governments accountable for actions in relation to the public trust. In some instances, resources that are subject to this trust are parcelled out to individuals or entities that are connected to the government resulting in privatisation of public resources. This has happened in Kenya with respect to land and the beneficiaries of such grants are hardly ever women.²⁹

²⁶ Patricia Kameri-Mbote, ‘Gender Considerations in Constitution-Making: Engendering Women’s Rights in the Legal Process’, in *University of Nairobi Law Journal* (2003).

²⁷ Joseph L. sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* 68 Michigan Law Review Part 1.

²⁸ 6 N.J.L. 1, 50 (NJ 1821)

²⁹ See generally Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004).

(b) Access

The right to use water under the Act was vested in the Minister and pegged to a permit system. Section 5 provides

The right to the use of every water body is hereby vested in the Minister, and, except in accordance with any such right, no person shall divert, abstract, obstruct or use water from a body of water otherwise than under this Act.

It is an offence for any person to draw water from any water body without the Minister's permission. Since women are the primary water collectors their access to water can be restricted or denied all together especially where the permission is pegged to payment of fees or meeting with the Minister. The implication of this is that women cannot use water to irrigate their land for subsistence agriculture or cash crops, which may have negative effect on nutritional status and livelihood of the household since this affect the private sphere where women are the main actors.

To use water resources without a permit is an offence. Significantly, domestic provision of water for household and sanitary purposes and the watering and dipping of stock, minor irrigation among others require permits. The pegging of water use to permits means that the water is not free. Its use privatises water rights to a small section of the community who are mainly landowners who are capable of acquiring and using water resource permits. Women are incapable of meeting the permit requirements due to their financial status in the society and are by implication expressly marginalized.

Section 48 of the Act also provided that permits to be appurtenant to land for which it is issued tying it to ownership or control of a particular or definable land. Since most women do not own land, this provision excludes them and buttresses the predominance of landowners with regard to the use of water resources. The permit system is also based on land ownership defined to mean holding of, which gives recognition to documented titles which women lack and therefore perpetuates their marginalization in acquisition and the right to use water resources. The land tenure system also prioritises documented individual or corporate ownership of land over communal systems of access to land and land use which do not require documented title, such as exist in most parts of rural Kenyan where most women live. The Act therefore marginalizes collectivities, such as poor rural community groups in the acquisition and exercise of the right to use water resources. This undermines women's ability to utilize water resources effectively in economic activities such as irrigation and commercial livestock rearing or subsistence agriculture.

2. The Water Act, 2002

Kenya's present institutional arrangements for the management of the water sector date back to the launch of the National water Master plan in 1974. The primary aim of the water plan was to ensure availability of potable water, at a reasonable distance to all households by the year 2000. It also aimed to achieve this objective by actively developing water supply systems. The government was required to provide water services directly to the consumers in addition to the role of policy making, water regulation and financing of water.

The Kenya government later developed a full fledged national water policy adopted by parliament as sessional paper no 1 of 1999. This policy stated that the government's role would be redefined away from direct service provision to regulatory functions. The Municipal councils, the private sector and communities were to take up the service provision

role. Regulations would be introduced to give other institutions the legal mandate to provide water services and to provide mechanisms for regulation.

The reforms highlighted in the Water Act 2002 revolve around four areas: the separation of the management of water resources from the provision of water services; the separation of policy making from day today administration and regulation; decentralization of functions to lower level state organs and the development of non-governmental entities in the management of water resources and in the provision of water services.

The Water resources Authority, established in section 7 of the act is responsible for the allocation of water resources. It is expected to develop principles, guidelines and procedures for the allocation of water resources, assess and re-assess water resources potential, receive and determine applications for permits for water use, monitor and enforce conditions attached to the permits for water use, regulate and protect water resources quality from adverse impacts, manage and protect catchment areas, determine charges and fees to be imposed for the use of water from any water source, gather and maintain information on water resources from time to time to publish forecasts, projections and information on water resources and also liaise with other bodies for the better regulations and management of water resources. It will establish offices in the Catchment Areas called Catchment Area Advisory Committee whose membership consists of Government Officials, Stakeholders and Communities. The present Catchment Areas include Lake Victoria South, Lake Victoria North, Rift Valley, Athi, Tana and Ewaso Nyiro.

Section 14 of the Act provides that the Authority may designate catchment areas. The Authority shall formulate for each catchment area a catchment area management strategy which shall be consistent with the national water resources management strategy. The Authority shall also establish regional offices in or near each catchment area as stated section 10. The Authority shall also appoint a committee of up to fifteen people for each catchment area to advise its officers at the appropriate regional office on matters concerning water resource management.

Under section 46, the Water services regulatory Board, is mandated to licence all providers of water and sewerage services who supply water services to more than twenty households. The community managed water systems are required to obtain a licence from the regulatory board. Earlier these community water systems operated without a licence. However, there is concern that the Act does not adequately safeguard against price increases.

The Water Supply and Sewerage Development are placed under the Water Services Regulatory Board which is also a corporate body and whose functions will include issuance of licences for the provision of water, determination of standards for the provision of water services to consumers, establishment of procedures for handling complaints made by consumers against licensees, monitoring of compliance with established standards for the design, construction, operation and maintenance of facilities for water services, monitoring and regulation of licensees and to enforce licence conditions, advise licensees on procedures for dealing with complaints from consumers and monitor the operation of these procedures, develop guidelines for fixing of tariffs for the provision of water services and develop model performance agreements for use between licensees and water service providers.

Section 51 of the Act establishes Water Services Boards. These boards are responsible for the provision of water and sewerage services within their area of coverage. These boards are prohibited by the Act from engaging in direct service provision. They have to identify water service providers to provide water as their agents. However, the law allows water service boards to provide water services directly in situations where they are unable to identify a water service provider able and willing to do so.

The Act envisages the appointment of private individuals to the boards of both the Authority and the regulatory board. Subsection 3 of section 16 states that the members of the catchment advisory committee shall be chosen from the representatives of farmers, pastoralists, the business community, non governmental organizations as well as other competent persons. Similarly members of the water services boards may include private persons. The Act provides a role for community groups, organized as water resources user associations in the management of water resources. Section 15 states that these associations will act as for conflict resolution and cooperative management of water resources. As stipulated in section 53, community self help groups providing water services may qualify as water service providers. In the rural areas where private sector water service providers are likely to be few, the role of community self-help groups in the provision of water services is likely to remain significant despite the new legal framework.

Critics of the Water Act 2002 contend that there is no clear recognition of the role of community based organizations despite evidence of their importance. Njonjo and Lane (2002) found that eight million people who have access to improved water in the rural areas, 30% are served by community managed water supply schemes developed by self help groups. Njonjo found that community water associations are diverse in nature and capacity ranging from fairly sophisticated systems with well structured tariffs to simple gravity schemes operated without any formal processes.

Like its predecessor, section 3 of the Act vests all water resources in the state. Section 4 states that the minister shall have, and may exercise control over every water resource. The minister therefore has a duty to promote the investigation, conservation and proper use of water resources throughout Kenya. The minister also has a duty to ensure the effective exercise and performance by authorities or persons in the water sector. Overall the Act has vested all water resources in the country in the state. The minister for water controls the water resources and subjects the right to use water to a permit requirement. The Act empowers the Minister to declare a water emergency in the event of rainfall failure, accidents, or any other unforeseen circumstance. In the circumstances, the Minister may direct any person who has a supply of water in excess of their needs for domestic purposes to supply the areas concerned. Non-compliance would constitute an offence.

Section 27 makes it an offence to construct or use water without a permit. The exceptions to the permit requirement relate to water use for domestic purposes, uses of underground water in areas not considered to face groundwater stress and to uses of water drawn from artificial dams. Section 32 stipulates the factors to be taken into account in considering an application for permit. These are; the existing lawful uses of water; efficient and beneficial use of water in the public interest; the likely effect of the proposed water use on the water resource and on other water users; the strategic importance of the proposed water use; the probable duration of which the water is required; that the use of water for domestic purposes shall take precedence over the use of water for any other purpose including agricultural purposes and in

granting the permit, the authority may reserve such part of the quality water in a water resource as is required for domestic purposes.

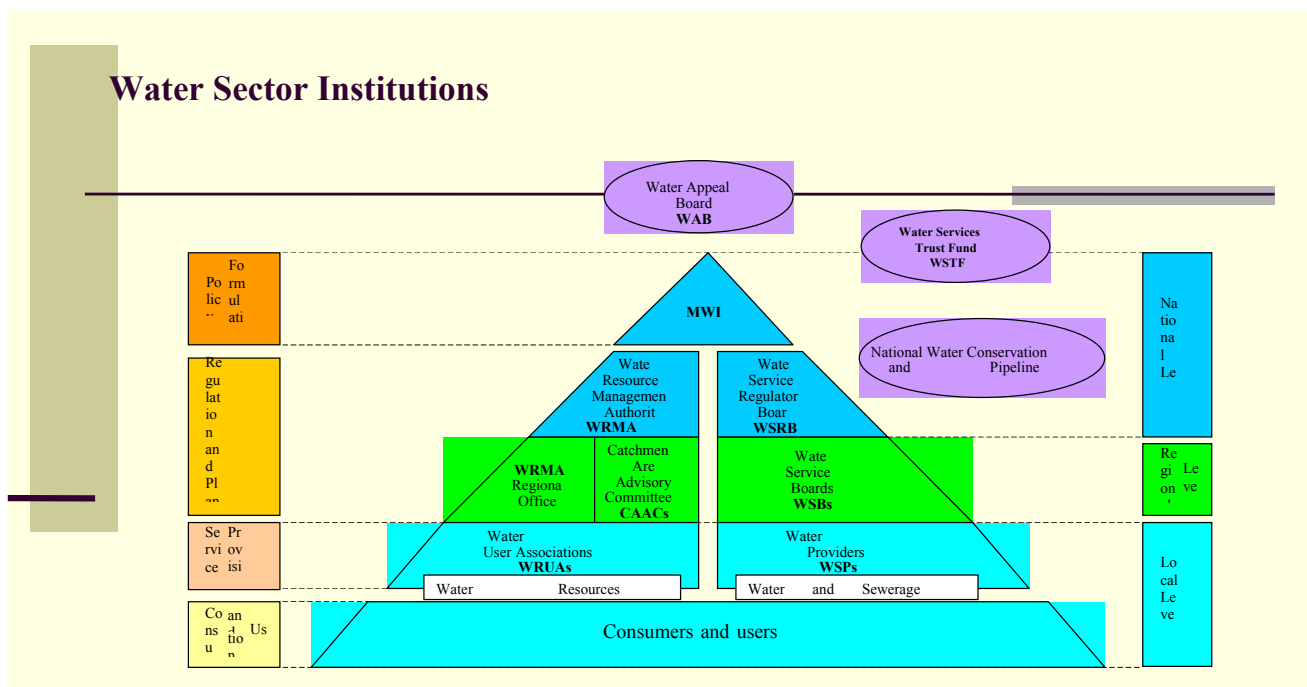
Permits are given for a specified period. The Authority has been given the power to impose a charge for water. This charge includes the cost of processing a permit application as well as a premium for the economic value of the water resources being used. Water therefore becomes an economic good. The charge here is basically used as a mechanism for regulating the use of water. The concept of issuance of permits translates into privatizing water rights to a small section of the community. This would be the property owners who are able to acquire and use water resource permits.

The obtaining of a permit is attached to land ownership. Section 34 requires that a permit specify the particular portion of any land to which the permit is to be appurtenant. This provision reinforces the predominance of landowners with regard to the use of water resources. It is premised on a land tenure system of individual titling and that means communal systems of access to land and land use which do not require title are left out. The Act therefore marginalizes the poor rural community groups in the acquisition and exercise of the right to use water resources

The rights to provide water services are also subject to licensing requirements. Section 56 states that no person shall provide water services to more than twenty households or supply more than twenty five thousand litres of water a day for domestic purposes or more than one hundred thousand litres of water a day for any purpose except under the authority of a licence. Community groups must obtain a licence in order to be able to continue supplying water to their members. This is likely to have far reaching implications for member based rural water supplies given the requirement for technical and financial competence, which are a precondition to obtaining a licence.

Section 57 provides that an application for a licence may be made only by a water services board which therefore has a monopoly over the provision of water services within its area of supply. This board however, can only provide the licensed services through an agent known as water services provider which can be a community group, a private company or a state corporation which is in the business of providing water services.

In order to obtain a licence, the applicant must prove his/her technical and financial competence to provide the services; the applicant has to present a sound plan for the provision of an efficient, affordable and sustainable service; propose satisfactory performance targets and planned improvements and an acceptable tariff structure. The applicant or any water services provider by whom the functions authorized by the licence are to be performed will provide the water services on a commercial basis and in accordance with sound business principles and, where water services authorized by the licence are to be provided by a water service provider which conducts some other business or performs other functions not authorized by the licence, the supply of those services will be undertaken, managed and accounted for as a separate business enterprise.



Source: Kenya National Water Development Report <www.unesco.org/water/wwap>

IV. ANALYSIS OF THE GENDER RESPONSIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK

There have been varied responses to the current reforms in the water sector. The opponents of the Kenya's current Water Policy view the policy to be more biased toward the regulation of larger-scale private and non-governmental suppliers of water, rather than the facilitation of small community groups. In northern Kenya, the elders' role in managing water resources as custodians is noteworthy. They manage water extraction from boreholes and determine entitlements of community members to water. District umbrella water users' associations include these elders as they know the status of the water resources and are revered among their community members. Significantly, these groups have not been taken into consideration in the formation of new institutions under the Water Act.³⁰

Community groups would benefit greatly from reliable technical input into water system design, institutional support for group formation and conflict resolution, and cost sharing of infrastructure investments. Despite the obvious obstacles, a significant number of community groups in Kenya have mobilized themselves to protect and pipe water to their members' homesteads. Policy makers and planners must see community groups as important water service suppliers and adjust policies and programmes accordingly.

³⁰ Chiuri et al, Integrating Gender Perspectives in Water Policies and Institutions: Realizing New Options for Water Management in Kenya, Paper presented at a conference on Gender, Resources' Management and Local Institutions of the CWPf International Forum on Water and Food, held in Vientiane, Lao, PDR, November 12-17, 2006.

As mentioned earlier, permits run with the land, the men and women who do not own land or are not able financially to acquire such contracts are often left out of the water business. Further, gender neutral investment policies targeted towards productive water uses have as a result often disproportionately favoured expensive water supply services controlled by men.

A. INSTITUTIONS

The new institutions introduced under the Water Act 2002 were supposed to increase efficiency in the management and supply of water resources in the country. They have however, not enhanced women's access to and management of water resources in the country. Indeed, when subjected to a gender analysis, a number of these institutions are largely if not totally male dominated.

1. Water Resources Management Authority (WRMA)

In the current governing body of the WRMA as established under section 7 of the act, out of a membership of eleven (11), none is a woman.³¹ This can be attributed to the fact that the law here does not give the gender composition of the boards' membership and does not provide an affirmative action clause requiring that a number of members of the board be women. Thus, women representation within this board is not guaranteed.

2. Water Services Trust Fund (WSTF)

The fund is established in section 83 of the water act 2002 to assist in the financing the provision of water services to areas without adequate water services. It is composed of 9 members of whom, two (2) are women. Even though there are women, the gender imbalance is discernible. Furthermore, to qualify for funding under this trust fund, one has to be registered as a legal entity by the registrar of societies and also have a viable proposal which means one has to have, or be able to source technical and business competence to write a fundable proposal. This requirement can lock out women and women's groups since the illiteracy levels among women are high.

While Kenyan law requires self-help groups to be formally registered, there is no specific legislation governing how they work. For instance, non involvement of women as formal members in community water associations is a common denominator of water projects in the upper Nyando basin. It has also been observed that women's participation in environmental conservation in Nyando and Kericho districts is low. This is because of the compartmentalisation of different aspects of the environment with women's farm work and house hold responsibilities being seen as not core conservation work.³² This flows from the failure to appreciate the interconnectedness of the environmental field and the fact that 'environment' as an issue of concern is removed from women's lives.

³¹ *Ibid.*

³² Suda (2000)

Institutional Gender Analysis

Institution	Male	Female
WAB	2	1
MWI	5	0
WSTF	9	2
NWCPC (CEO)	1	0
WRMA (HQ)	11	0
WSRB (HQ)		0
WRMA (regional) (CEOs	7	1
CAAC-chairs (8)	8	0
WSBs (CEOs) 7	7	0
WRUAS (River Njoro)	10	5

Source: Chiuri et al, Integrating Gender Perspectives in Water Policies and Institutions: Realizing New Options for Water Management in Kenya, Paper presented at a conference on Gender, Resources' Management and Local Institutions of the CWPf International Forum on Water and Food, held in Vientiane, Lao, PDR, and November 12-17, 2006.

3. The Water Appeals Board (WAB)

The water appeal board is established under Section 84(1) of the water act. Section 84(2) (a) states that the board shall comprise of 'a chairman to be appointed by the president on the recommendation of the chief justice, who shall be a person qualified to hold or who has held the office of a judge of the High Court of Kenya', and 'two other persons', to be appointed by the minister'. Thus the gender composition of the 3 person board is not specified. Bearing in mind the small number of women judges in Kenya, it is indeed possible to lack female representation in this board.

4. Water Catchment Areas Advisory Committee (CAAC)

Of the 8 CAACs provided for in the Act to manage national catchment areas, none is headed by a woman. This is despite the fact that each CAAC has to have a membership from all stakeholders (farmers, pastoralists (where applicable), entrepreneurs and academicians). However because no affirmative action clause is provided for, women's representation here is again dismal.

5. The Water Resource Users Associations (WRUAs)

This institution is established by the catchment management strategy found in Section 15(5) of the Water Act. Water Resources Users Associations comprise fora for conflict resolution and co-operative management of water resources in catchment areas. Again, the Act does not dictate the gender composition of the WRUAs.

6. Water Services Regulatory Board

The water services regulatory board's establishment is in section 46(1) of the Water Act 2002. The board is allotted the responsibility of issuance of licenses as well as to maintain the appropriate standards for the provision of water services among other functions as outlined in

section 47 of the Act. There are 7 boards in the country, each headed by a chief executive officer (CEO); none of these CEOs is a woman.

7. Water Service Boards

There are seven of them in the country, also headed by a chief executive officer. Of these, none is chaired by a woman.

B. RIGHTS TO WATER

As pointed out, the Water Act vests retains the state centric control of water assuming that the state will then grant rights to water equally to the citizenry. This is fallacious given that this law operates in a much gendered context and that we live in a patriarchal society where the locus of grant of rights is the male. Granting equal rights in this case can lead to failure by women to realise their access to water. Further the linking of these rights to water replicates the gender inequalities in land ownership, control and access in Kenya where women hold less than 5% of the registered titles to land.³³

The pegging of water rights to a licence remains a handicap under the present Act. Indeed the criminalization of use and abstraction of water from a water resource without a permit gets women on the wrong side of the law if they are unable to get permits, but desperately require the use of water.

C. WATER SUPPLY

Section 53 (2) provides for water services providers who can be a company, an NGO or a person with a licence. Many women are barred from being water providers because to have a licence one needs to own the property upon which the water source is found. This may be title to land next to a water resource or where a borehole has or can be sunk. Many women lack title to land and can therefore never be water services providers. Even where a woman owns some land, she may still be barred from water service provision by the financial requirements in licence applications. Few women, especially in rural areas can afford license fees.

Another impediment for women is that the process of water service provision requires literate actors who can provide water ‘on a commercial basis and in accordance with sound business principles’. Whether an individual or a community, the licensee requires financial and technical competence, which many women may be lacking. Indeed the Act also stipulates that water service provision must be given by an individual, a community or an NGO, in the business of providing water services. This requirement excludes most women as the requirement for capital and specialized business knowledge is out of reach for most women.

Under the Water Act 2002, there is an increased emphasis on the commercialization of water, whereby local authorities form autonomous water and sewerage companies with independent boards of directors to provide water services and re-invest (ring fence) water revenues in

³³ Personal Communication with Register of Titles

service delivery improvement.³⁴ The companies formed under the Water Act 2002 as separate legal entities from local authorities are mainly interested in profit maximization and do not take into account the needs of poor consumers a large number of whom are women. Those unable to pay are left out from acquiring an adequate supply of clean, safe water.

V. CONCLUSION AND WAY FORWARD

Currently, water is not accessible to many people in Kenya. Facilities are in poor shape. At a Nairobi conference in 2003 on private-sector participation in infrastructure building it was noted that the private sector did not have the motivation to invest in water. The reasons included the large capital outlay required and the long period to recoup benefits. Responsibility for investments coupled with the desire to keep tariffs low to enable the poor to access the services, is likely to make the private sector even more nervous. In the circumstances, the public sector will largely have to take responsibility for water infrastructure. To make women's access to water a reality, there is need to mainstream gender into the strategic interventions and to have women represented in the decision-making organs.

The law governing water in Kenya is gender-neutral in formulation. However when implemented practically, its interaction with other social norms and practices prevailing in Kenya today leads to inequitable outcomes such as the marginalization of women in the governance structures of these bodies. There is therefore need for the inclusion of gender equity perspectives in the new water law as has been done in other countries. For instance, the South African National Water Act of 1998 includes among its explicit purposes the promotion of "equitable access to water", redressing the results of past gender discrimination and ensuring "appropriate" gender representation in the competent institutions. Also under the Water Act of South Africa, the responsible minister may appoint members of the governing board of catchment management agencies to achieve "sufficient" gender representation. Another example is the Nepali Irrigation Regulation of 2000 which specifically requires that executive committees of water user associations include at least two women (out of nine members).

Ultimately, commercialisation must take into account, the needs of poor and disadvantaged consumers. The ability to pay must be fully considered and differentiated tariffs developed to ensure an adequate supply of clean, safe water across the board. The commercialisation of the water sector should never be allowed to diminish the livelihoods of already marginalised groups such as women.

Given the centrality of water in life, water resources' management should be based on a participatory approach. Both men and women should be involved and have an equal voice in managing the sustainable use of water resources and sharing of benefits. The role of women in water related areas needs to be strengthened and their participation broadened. This calls for gender mainstreaming in both the normative and institutional framework for water management.

³⁴ Wambua S., Water Privatisation in Kenya ////