

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

MASTERS OF LAW

**MANAGING WATER SERVICE PROVIDERS IN
KENYA, “*A CASE FOR GOOD CORPORATE
GOVERNANCE*”**

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DECLARATION

I, **James Muruthi Kihara** Registration Number **G62/68955/2011** do hereby declare that to the best of my knowledge this project report is my original work and has not been submitted either in part or in whole and is not being currently submitted for a degree in any other University. No part of this thesis may be reproduced without the prior permission of the author.

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This thesis has been submitted with my approval as the University Supervisor.

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DEDICATION

This thesis is dedicated to my wife, Ruth Muthui, who has been a constant source of support and encouragement during my journey in graduate school, work and life. I am truly thankful for having you in my life. This work is also dedicated to my parents, Mr. and Mrs Muruthi, who have always loved me unconditionally and who sacrificed plenty to ensure that all their children got the best education.

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ABSTRACT

At a time of diminishing sources of clean and portable water, effective management of the water sector is increasingly becoming a critical matter. As the population of Kenya grows steadily so will the demand for access to water, which is now recognized as a fundamental right under the Constitution. It is therefore necessary to adopt effective and efficient systems that will best ensure equitable and sustainable enjoyment of water resources. This research focuses on the role that good corporate governance in the water sector in Kenya can play toward this end. Corporate governance refers to the structures, processes and actors and the dynamic interactions among them that facilitate and influence decisions affecting a corporation. The motivation to carry out the research was as a result of the increasing dominance of corporate governance debates both in the local and international academic fora.

The objective of this thesis is to understand and assess whether and, if so, the extent to which the corporate governance systems of water service providers in Kenya are effectively addressing the challenges posed by limited water resources. In order to discover this, the legal and policy framework is critically discussed from an historical perspective, with emphasis being placed on the merits and demerits. Using a comparative analysis of the experiences of water service management in three African countries, i.e. South Africa, Uganda and Ghana, the study identifies the best practices that should be adopted in Kenya as well as the pitfalls that should be avoided. In this regard, it may be concluded that the study is instructive because although there has been an attempt to improve governance in the water sector in Kenya, there is scope for improvement through borrowing best practices from other countries. The findings provide a new useful dimension on how to improve corporate governance in the water sector in Kenya.

LIST OF ABBREVIATION AND ACRONYMS

1. CWSA Community Water Services Authority
2. GWSC Ghana Water and Sewerage Corporation
3. DWAF Department of Water Affairs and Forestry
4. IFAD International Food and Agriculture Development
5. ICWE International Conference on Water and Environment
6. MWI Ministry of Water and Irrigation
7. NGOs Non-Governmental Organizations
8. NWSC National Water and Sewerage Corporation
9. PURC Public Utilities Regulation Commission
10. SDGs Sustainable Development Goals
11. SOEs State-owned Enterprises
12. WASREB Water Services Regulation Board
13. WRC Water Resources Commission
14. WSA Water Service Act, 1997
15. WSB Water Services Board
16. WSP Water Service Providers
17. UNDP United Nations Development Programme

LIST OF STATUTES

1. Cap 152 Laws of Uganda, available at *act/152* assessed on 20th October 2015
2. Cap 317 Laws of Uganda, available at *http://www.ulii.org/ug/legislation/consolidated-act/317* assessed on 20th October 2015
3. Community Water and Sanitation Agency Act, 1998 (Act 564)
4. Community Water and Sanitation Agency Act (Ghana)
5. Companies Act, Cap 486 (repealed)
6. Companies Act, No. 17 of 2015
7. Constitution of Republic of South Africa, 1996
8. Environmental Management and Co-ordination Act Cap 387, 1999, Laws of Kenya.
9. Ghana Water and Sewerage Corporation Act 1965
10. National Water and Sewerage Corporation Act, Cap 317 Laws of Kenya
11. Public Utilities Regulatory Commission Act 1997
12. The Water Act, Cap. 372, 2002, Laws of Kenya
13. Water Act, Cap 152 Laws of Uganda
14. Water Service Act, No. 108 of 1997
15. The Water Bill 2014

LIST OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS

1. The Universal Declaration of Human Rights
2. International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966: entry into force 3 January 1976
3. General Comment No. 15 of the Committee on Economic, Social and Cultural Rights: The Right to Water (Twenty-ninth session, 2003), UN Doc. E/C.12/2002/11 (2002)
4. Dublin Statement on Water and Sustainable Development

CHAPTER ONE

1. INTRODUCTION

1.1 Background of the Study

Before the enactment of the Water Act 2002¹ which was brought in by the Water Policy No.1 of 1999, the legal and institutional framework on water was governed by the Water Act.² Under this Act, the responsibility for policy formulation, supervision, coordination, development of infrastructure and water resource management were under a single entity, namely the Directorate of Water Services within the ministry responsible for water. There were also other disparate sectoral laws touching on water.³ Water governance was fragmented and uncoordinated resulting in duplicity of functions and poor accountability and transparency within the water sector institutions.

The sector lacked a clear regulatory framework and a reliable system of performance monitoring and evaluation, leading to poor performance of water undertakers. The standard of water service provision in Kenya was low, characterized by poor management of water resources; and inability to attract investments for expansion of services; ; inadequate distribution of resources and efficient maintenance of the existing facilities.⁴

¹ *The Government Printer*, Laws of Kenya, Act No. 8 of 2002.

² *The Government Printer*, Laws of Kenya, Cap 372 (1962).

³ *The Government Printer*, Environmental Management and Co-ordination Act Cap 387 Laws of Kenya.

⁴ *D. Stower*, Corporate Governance in the Water Sector for Efficiency (Institute of Certified Public Secretaries of Kenya Bi- Annual Luncheon at Panafric Hotel on 2nd July 2010).

The Constitution of Kenya, 2010⁵ devolved the responsibility of the supply of water and sanitation services to the county level. It recognises the right of all citizens to safe water and basic sanitation,⁶ and the right of all consumers to be provided with goods of reasonable quality which not only protect their health but also safeguard their economic interests.⁷ Under devolution, the management, development and holding of assets will need to be done through the WSPs as appointed agents of the counties. The Constitution further establishes access to water and sanitation as a fundamental right of every person in Kenya. It requires the state, which includes all national and county entities, to work towards universal access to these basic services. In particular, Article 43 of the Constitution provides that: *“Every person has the right... to reasonable standards of sanitation and to clean and safe water in adequate quantities”*. Article 21 further states that:

“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.⁸ The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed”

Pursuant to the above provisions, it became apparent that a new water policy and statute was necessary to align the law with the decentralization prescribed in the Constitution of Kenya, 2010. The Water Bill 2014 establishes the Water Services Regulatory Authority.⁹ It monitors and regulates licensees and enforces the pertinent.¹⁰ The Authority shall be managed through a Regulatory Board chaired by a

⁵ *The Government Printer*, The Constitution of Kenya 2010.

⁶ *Ibid* Article 43.

⁷ *Ibid* Article 46.

⁸ *Ibid* Chapter 4.

⁹ *The Government Printer*, The Water Bill 2014, Section 68.

¹⁰ *Ibid* section 70.

Presidential appointee.¹¹ It also establishes a National Water Harvesting and Storage Authority headed by the CEO appointed by the Cabinet Secretary on the Board's recommendation.¹²

Under the terms of the Water Act 2002, water service provision is the mandate of corporations referred to as WSPS. These corporations comprise of family or small and medium enterprises, state-owned corporations and co-operative societies, and community-based organizations. The regulatory and supervisory systems have generally been weak due to a combination of historical and political factors that impede good governance in these corporations. In addition, they have not achieved the goal of water services provision due to lack of capacity and the lack of efficient and effective reporting systems. There has also been a lack of accountability and transparency at some regulatory and supervisory levels which has led to incidences of corruption, with documented cases having ended up at the Ethics Anti-Corruption Commission for investigation.

Consequently, the problem in most of these WSPs has been a governance crisis which requires urgent attention.¹³ Water and sanitation companies are registered as private limited liability companies, they are 100% publicly owned by the local authorities and are managing public assets to give an essential public service. They are run by Boards of Directors representing the various stakeholders in the water sector. However, it is difficult for stakeholders in the Water Services Boards and WSPs to hold their Directors and top managers accountable as they are not shareholders within the strict sense of the law.¹⁴

¹¹ *Ibid* section 69(1).

¹² *Ibid* section 31.

¹³ Kisima Newsletter, Ministry of Water and Irrigation, 2008.

¹⁴ Samuel O. Owuor & Dick W.J. Foeken, Water Reforms and Interventions in Urban Kenya, "Institutional set-up, emerging impact and challenges" available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13764/ASC-074138723-277-01.pdf?sequence=2>

The above challenges have persisted even after the Ministry of Water and Irrigation (MWI) approved and implemented the Corporate Governance Guidelines for the Water Services Sector on 18 June 2010.¹⁵ The Water Policy No. 1 of 1999¹⁶ discussed issues pertaining to: Water Resources Management , Water and Sewerage Development, Institutional Frameworks, Financing the Water Sector

This policy was supported by the Water Act 2002 which created several institutions to take charge of the provision of water services, the conservation of water catchments areas, the regulation of the water services sector, and the resolution of disputes. Under section 47(h) of the Water Act 2002 WASREB is required to develop guidelines for and provide advice on the cost effective and efficient management and operation of water services.

1.2 Statement of the Problem

Despite the Ministry of Water and Irrigation having approved the Corporate Governance Guidelines for the Water Services Sector on 18 June 2009, governance challenges continue to bedevil the water corporations set up to provide water services.¹⁷ Three principal problems can be identified. First, it has been difficult for stakeholders (the general public) to hold directors and top managers of WSPs accountable because they are not shareholders *per se*. Shareholders of the WSPs are the Local Authorities nominees and other local participants. Second, the requirements of holding the office of a director or chairman are not succinct and although the guidelines have enumerated them, they still remain inadequate. Third, it is not clear how legally binding these

¹⁵ *The Government Printer*, The Kenya Gazette, Vol. CXII—No. 61, Gazette Notice No. 7045.

¹⁶ *The Government Printer*, The Government of Kenya (1999) National Policy on Water Resources Management and Development, Sessional Paper No.1 of 1999.

¹⁷ *The Government Printer*, The Kenya Gazette, Vol. CXII—No. 61, Gazette Notice No. 7045.

guidelines are and what happens when they are contravened, especially in cases where there are requirements for licensing.

This study aims to conduct a comparative study of various systems of water governance to seek to identify challenges related to the board structure and possible solutions that can inform governance in the water industry.

1.3 Theoretical Framework

The study is premised on the corporate governance theories in general and specifically uses the agency, stewardship and stakeholder theories as its bases. Jensen and Meckling¹⁸ define the agency relationship as a contract under which one party (the principal) engages another party (the agent) to perform some service on their behalf. A crucial part of this relationship entails the principal delegating some decision-making authority to the agent. Possibly the most recognizable form of agency relationship is that of employer and employee. Another example could be shareholders (principal) and chief executive of an organization. Agency problems usually arise because of the impossibility of perfectly accounting for every possible action of an agent whose decisions affect both his own welfare and the welfare of the principal. Arising from this problem is the challenge of how best to induce the agent to act in the best interests of the principal.

Jensen and Meckling compared the management behaviors in two different firm structures: one where the manager owns 100% of the firm versus when the manager sells an equity share to outsiders. In the former structure, the owner maximizes the firm's welfare because the full benefit of this maximization will accrue to him. When the owner sells a 20% equity stake, agency costs will arise from the divergence of interests between the manager and the shareholders. These costs may be mitigated by the shareholders

¹⁸ *Jensen and Meckling*, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics, October, 1976, V. 3, No. 4, pp. 305-360.

incurring monitoring costs. Jensen and Meckling conclude that these agency costs are inevitable when there is a separation of ownership and control, and that to call these costs “inefficiencies” is appropriate only if comparing to an “ideal world” where the principal and agent’s interests could be aligned at no cost.¹⁹

According to the agency theory, the value of a firm cannot be maximized because managers possess discretions which allow expropriation of value to them.²⁰ The assumption is, managers will act in an opportunistic way to further their own interests before those of the shareholders. As such, it is prudent for managers to sign a contract specifying exactly what they could do under different circumstances and how profits would be allocated. The major weakness of this theory is that it is difficult to predict future contingencies, and as such complete contracts become technologically unfeasible.²¹ This theory will thus form a good basis for evaluating the corporate governance guidelines in the water sector and to examine how these guidelines seek to curtail the discretions of board officials in the water sector institutions.

The stewardship theory, developed by Donaldson and Davis,²² offers a different perspective to understand the existing relationships between ownership and management of the company. In contrast to the agency theory, this theory construes principal-agent issues somewhat differently. According to stewardship theory, some executives are likely to pursue organizational interests even when they conflict with their self-interest. This theory provides an important counterweight to the agency theory because it asserts that managers are good stewards of the corporations and diligently work to attain high levels of

¹⁹ *Don Delves & Brian Patrick, Agency Theory Summary.*

²⁰ *A. Shleifer, & R.W. Vishny, A Survey of Corporate Governance, National Bureau of Economic Research, (Working Paper 5554, Cambridge, 1996).*

²¹ *Ibid.*

²² *L. Donaldson, & J.H. Davis, 1991. Stewardship Theory or Agency Theory: CEO governance and Shareholder returns. Australian Journal of Management, 16(1): 49-64*

corporate profit and shareholder returns.²³ However, this theory notes that a board can become redundant when there is a prevailing shareholder, especially when the major shareholder is a family or government, which can lead to poor governance.²⁴

The prevailing shareholder of a firm may have differing incentives to monitor their investment in the firm. Not every shareholder may have the same liking and ability to act as an effective firm monitor. Indeed, the prevailing shareholder of a firm may have differing incentives to monitor their investment in the firm. One of the most viable ways to assess board effectiveness and performance variation is conditioned on the degree of board dependency with greater executive directors' involvement. By privilege the executive directors are presumed to have perfect information about the workings of the firm and are therefore more suitable to play a monitoring and control role as against the outsiders who might not possess the requisite knowledge and expertise required to perform the task.

The stewardship theory stresses the need for a smaller board size in line with the argument by organizational behavioural psychologists that small teams promote group cohesiveness and bonding thus increasing performance. It should be noted here that, the board responsibility under the stewardship theory is more of strategic formulation rather than that of monitoring and control.²⁵ The main shareholder of the WSB is the government. It is not clear how it holds its shares as some of the Rights on Guideline No. 4.6.5 of the Corporate Governance Guideline by WASREB may not apply to its structure. Moreover, the local authorities and local institutions invited to be shareholders shall be shareholders of the WSPs. Clause 4.2.2 of the Corporate Governance Guidelines provides that two directors shall be appointed from the local authority covered by the WSP and also that the local authorities shall be represented by their town clerks. This study will therefore examine how the board shareholding has impacted the efficiency

²³ L. Donaldson, & J.H. Davis, 'Boards and Company Performance – Research challenges the Conventional Wisdom', *Corporate Governance: An International Review*, vol. 2, no. 3, (1994), pp. 151–60.

²⁴ *Ibid.*

²⁵ Bello Lawal, *Board Dynamics and Corporate Performance: Review of Literature, and Empirical Challenges* International Journal of Economics and Finance Vol. 4, No. 1.

of WSPs in their mandate despite the existence of the Corporate Governance Guidelines in the water sector.

According to the stakeholder theory, a firm is a system of stakeholders operating within the larger system of the host society that provides the necessary legal and market infrastructure for the firm's activities.²⁶ The purpose of the firm is to create wealth or value for its stakeholders by converting their stakes into goods and services. The goal of directors and the management should therefore be to maximize total wealth creation by the firm. For supporters of the stakeholder theory of the firm, shareholders are but one of a number of important stakeholder groups. Like customers, suppliers, employees, and local communities, shareholders have a stake in, and are affected by, the firm's success or failure. According to one typical formulation of the claim, *"In the same way that a business owes special and particular duties to its investors...it also has different duties to the various stakeholder groups."* The firm and its managers have special obligations to ensure that the shareholders receive a fair return on their investment; but the firm also has special obligations to other stakeholders, which go above and beyond those required by law. In cases where these interests conflict, the demands and interests of some stakeholders, including shareholders, must be moderated or sacrificed in order to fulfill basic obligations to other stakeholders.²⁷ The WSPs are governed by a board of directors and shareholders who are local authority town clerks and other local professionals. Therefore, this theory will guide the study in assessing whether the corporations established as WSPs have provided the expected benefits for the various stakeholders

1.4 Literature Review

This section of the chapter will analyse literature that already exists in society in order to show the niche that this particular paper will seek to occupy.

²⁶ M.B.E. Clarkson, *A Risk Based Model of Stakeholder Theory*, (The Centre for Corporate Social Performance & Ethics, University of Toronto, 1994).

²⁷ *Joseph Heath and Wayne Norman*, Stakeholder Theory, Corporate Governance and Public Management: What can the History of State-Run Enterprises Teach us in the Post-Enron era? (Journal of Business Ethics 53: 247–265, 2004).

1.4.1 Literature on Water Governance

Questions regarding the ways in which water resources in Kenya can best be managed have been on the national agenda for a long time and are likely to continue featuring in the years to come. From as early as 1974 when the National Water Master Plan was adopted, policy discussions were already underway with a view to regulating the use of water resources and managing the water sector. At present, the Water Bill 2015 represents a continuation of the concerted efforts of multiple stakeholders to reform the governance of the water system in Kenya. The literature on point is vast but the discussion that follows only focuses on a select review of works that are most pertinent to the management of water service providers in Kenya.

Mumma has analyzed the implications of the Water Act, 2002 for the rural poor with particular focus on the management of water resources and delivery of water services.²⁸ The central argument he makes is that the non-recognition of informal non-statutory systems for water management in the Water Act, 2002 is a systemic weakness of the current approach to managing water service providers. Recognizing the pluralistic nature of the Kenyan legal system, he argues that it would be appropriate and ultimately more beneficial to recognize the ways in which customary law and other “alternative and complementary frameworks drawn from community practices” can be incorporated into the system of water management.²⁹ In particular, the case is made for utilizing “water user associations” (WUAs) as an institutional means to allocate water resources and regulate its use according to rules agreed to by members of such associations. As regards the rule-making and enforcement capacity of WUAs, Mumma explains that:

[I]n appropriate circumstances, a water resources use permit could be allocated to a WUA on behalf of all the members of the association. The association would then, in turn, allocate the water resources to its

²⁸ Mumma supra note 5.

²⁹ Mumma supra note 5 at 171.

*members according to internally agreed rules. The association would also enforce its rules with respect to the use of the water resource in question.*³⁰

The arguments made by Mumma are undoubtedly persuasive, but they do not venture further to explain how WUAs, as potential water services providers, should be managed, or the key approaches to be used in their governance. While that may well have been beyond the scope of his paper, it is clear that there are important questions that remain unanswered in relation to the management of the water sector in Kenya. The present research provides a comparative account of the institutional governance of water services providers in Kenya, South Africa, Uganda and Ghana. This will be analyzed from a corporate governance perspective.

Cuéllar Boada has also discussed the use of good corporate governance practices for water and sanitation enterprises, especially state-owned enterprises (SOEs), in Latin America and the Caribbean.³¹ The work focuses on defining the methodology that can be used to promote and evaluate good corporate governance practices amongst SOEs. After describing the analytical framework, Cuéllar Boada reviews the experiences of SOEs in Colombia, Peru and Brazil before presenting a technical tool that can support the effective evaluation of corporate governance practices. Subsequently, he expounds the diagnostic indicators that may be used to identify agency problems and risks of a corporate governance approach. While this report, which was prepared in conjunction with the Inter-American Development Bank, offers an important perspective of corporate governance in the water sector, it focuses primarily on the development of a specific technical tool to evaluate good corporate governance practices in SOEs. By contrast, the present research seeks to base its discussion on corporate governance theory in order so as to offer a broader understanding of the ways in which good corporate governance may impact positively on the management of water service providers in Kenya.

³⁰ Mumma *supra* note 5 at 171.

³¹ FH Cuéllar Boada, *Corporate Governance in Water and Sanitation Enterprises* (2011).

Gessellschaft für Internationale Zusammenarbeit (GIZ) has also examined the state of water resources management in Kenya and presented its findings in a report.³² The report observes that the principal cause of the problems in Kenya's water sector spring from poor governance practices of the water services providers (WSPs). Using the analogy of challenges facing sector governance in international cooperation, the report makes the case for the need and practical benefit of integrating good governance principles into the process of managing WSPs. These principles include: transparency; accountability; non-discrimination; and civil society participation. The report also emphasizes the need for democratic governance issues to form the basis for sector engagement with WSPs; in particular, it supports the promotion of public awareness and participation, disclosure of information, autonomy of regulators in the water sector, and enhanced performance monitoring.

The issues highlighted in this report seek to promote good water governance practices on the ground, but they address the matter of the ways in which WSPs should be managed in a superficial manner. Also, the focus of the report is on democratic as opposed to corporate governance practices. The present research seeks to offer an alternative view: namely, it makes the case, founded on theoretical and comparative analysis, for good corporate governance as a means to improve the management of WSPs in Kenya.

1.5 Objective of the Study

The objective is to identify Corporate Governance Challenges with the help of international regimes and make recommendations on possible measures that can be undertaken to improve their corporate governance.

1.6 Research Questions

1. What is the legal and policy framework of water governance in Kenya?
2. What are the corporate governance challenges in the water sector in Kenya in relation to WSPs?

³² GIZ, Good Governance in the Kenyan Water Sector: Policies, Pipes and the Participation of the People – Water Governance Practices on the Ground (2014).

3. What can be done to ensure improved corporate governance in WSPs in Kenya?

1. 7 Justification of the Study

Water plays an important role in the economic development of any society. Vision 2030 highlights the importance of water in national development and seeks to provide a high quality of life to all its citizens by the year 2030. Water, being both an economic and social good, is central to the achievement of all the targets set under the economic, social and political pillars in Vision 2030. Access to water services in an efficient manner is therefore crucial for the achievement of the overall goal of the vision.

The concept of good governance is now intrinsically linked with the strategies and aims of development. The 2030 Agenda for Sustainable Development, agreed at the UN Summit on 25 September 2015, commits the 193 United Nations Member States to achieve 17 ambitious Sustainable Development Goals (SDGs) by 2030. SDG number 6 is specifically devoted to achieving water and sanitation access for all. To achieve this development goal, governments target to implement integrated water resources management at all levels, and to support and strengthen the participation of local communities in improving water and sanitation management. The broad acceptance of the SDGs is matched by a general consensus on a range of developmental issues, including the need for good governance as a necessary condition for meeting these goals. The concept of good governance is taken to apply generally across all sectors, and has been actively taken up within the water sector.

The Water Act 2002 and the “Corporate Governance Guidelines for the Water Services Sector”, amongst other reforms, were aimed at improving services in the water sector in Kenya. This study will identify and document challenges in implementing these governance reforms and assess possible solutions that can inform policy and decision making in the water industry. Research has been undertaken in the field of corporate governance in Kenya, and most of the research surveys corporate governance practices in various sectors. However, none specifically involves a comparative study of corporate governance practices in the water sector. Nor has there been any research that draws specifically recommendations informed by such comparison.

It is therefore clear that there is a shortage of a comprehensive research with a bias towards WSPs in Kenya. This research cannot accurately target to cover all these aspects within the limits of this thesis. However, the discourse will create an opening for further future research, that will canvas all areas of corporate governance in WSPs in Kenya. The recommendations will also be relevant to policy-makers, various agencies in the water sector and lawyers in Kenya.

1.8 Research Methodology

This study uses a comparative analysis approach in looking at some selected practices and current national policies on water governance in Kenya, South Africa, Uganda and Ghana. By comparing the experiences of water management in Kenya with those in the selected countries, this study will contextualize the challenges of water governance and highlight the legal, policy and institutional measures that can be adopted to overcome them. The principal reason for using comparative case studies is because while the selected jurisdictions are relatively similar to Kenya in terms of water governance, all have unique experiences and important lessons which can inform future reforms to the Kenyan water regulation framework. The study will critically highlight the similarities and differences in these practices in each of the three countries. Laws, regulations, programmes and projects are considered in this study are policy measures put in place to implement and achieve specific policy statements. The comparative analysis is carried out using document reviews. Hard copy sources and electronic sources accessed from the internet are utilised. Qualitative data will be gathered from both primary and secondary data sources. Primary data includes the Constitution, Statutes and other government publications, while secondary data will be gathered from textbooks, journal articles, internet sources and newspapers. A comparative analysis will then be applied to advocate for reforms in the water sector in Kenya based on international best practices.

1.9 Limitation and Scope

The scope of the comparative studies of this paper will focus on South Africa, Uganda and Ghana. There are three reasons for choosing this scope of countries for the comparative study.

1. All in three countries are located in sub-Saharan Africa. This sees them share a number of the challenges that they face.
2. South Africa the leading economy in Southern Africa and Kenya is the leading economy in East Africa.. Comparing the water governance systems in these countries could yield useful insights on the relationship between a country's economic position and its water governance systems.
3. Except South Africa, Uganda and Ghana were colonised by Britain. The British colonial regime may have adopted similar administration in all the three countries. Studying the problems that these countries face can go a long way in finding cross-national solutions to the rich discussion.

The scope of this paper generally looks at available literature on corporate governance regimes within the water sector across the world. It is accepted that there is likely to be numerous other articles focused on good governance in the water sector which are not referred to in this review. Data collected by oneself is collected with a concrete idea in mind; usually to answer a research question or just to meet certain objectives. In this sense, qualitative data sources may provide one with a vast amount of information, but quantity is not synonymous of accuracy. Literature reviewed might not generalize the scenario in other countries or other settings i.e., findings might be unique to a specific area included in the research study. The possibility of misleading by drawing conclusions that are normally due to selection bias, opinionated weighing of the studies chosen for the review, undetermined inclusion criteria, and failure to consider the relationships between study characteristics and study results. There also exists the limitation of determining and integrating complex interactions when a large volume of material is involved.

1.10 Overview of Chapters

Chapter one is the introduction and background to the study. It includes a statement of the problem, the theoretical framework, literature review, objectives of the study, methodology and chapter breakdown.

Chapter two is an analysis of the legal framework governing the provision of water services in Kenya. The chapter examines the development of water governance in Kenya. Select provisions of the Constitution of Kenya, 2010 are also analyzed. The Water Act 2002 has been discussed at length. Also discussed in this chapter is the Model Water Services Regulations, 2007 and the Corporate Governance Guidelines for the Water Sector.

Chapter three underscores the importance of water governance and then compares water governance systems in South Africa, Uganda and Ghana.

Chapter four specifically interrogates the challenges facing water governance systems in Kenya.

Chapter five presents recommendations and conclusions derived from the study.

CHAPTER TWO

ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE PROVISION OF WATER SERVICES IN KENYA

2.1 Introduction

This chapter evaluates the legal framework governing the provision of water services in Kenya from pre-colonial times to the present time. The appraisal is done with a view to identifying the inadequacies in the legal regime and subsequently set the stage for making recommendations on how best it can be improved. The chapter is divided into two broad thematic areas namely the historical development of water governance and the current legal framework governing the provision of water services in Kenya. A number of subthemes flow from the two broad thematic areas. These include: pre-colonial water governance in Kenya, colonial water governance in Kenya and the post-colonial water governance in Kenya. The second limb of the thematic areas encompasses a focused discussion of various legislative instruments that have been enacted since 2002 to govern the provision of water services in Kenya. Some of the legislative instruments that have been purposively selected for the analysis include: the Water Act 2002 which was informed by the National Water Policy 1999; the Corporate Governance Guidelines for the Water Services Sector; and the Model Water Services Regulations. The Water Bill 2014 will also be briefly discussed. The chapter also includes a discussion of the relevant Articles of the Constitution of Kenya, 2010 that have a bearing on the governance of the provision of water services in Kenya.

2.2 Historical Development of Water Governance in Kenya

This subsection of the paper will provide a historical view of water governance in Kenya. It sees the subject develop from pre-colonial Kenya to neo-colonial Kenya that was history of water

development in Kenya pre-2002. Subsequently, the section also shows the post-2002 in order to give contextual definition to the paper in its discussion.

2.2.1 Pre-Colonial Period

A key feature during this period is that there was no uniform legal system across the territory now called Kenya.³³ Instead, the different communities that occupied Kenya had their own customary law-based legal systems which regulated all aspects of their life.³⁴ During the pre-colonial period, water, like land was communal property.³⁵ It was communal in the sense that everyone in the community had a right of access to and use of water resources. Additionally, control over the water resources was not vested in an individual but rather in the communities. This arrangement worked well for the communities because it facilitated the utilization of water resources in a sustainable manner. Moreover, the fact that water resources were a community rather than an individual resource ensured that there was equity in access and utilization of water resources.

The system of management of water resources during the pre-colonial period was underpinned by customary law. Given the fact that the respective customary laws of the various communities was as varied as the number of communities in the territory at the time, there were variations in the water regulations among the different communities.³⁶ These variations were particularly more pronounced among communities that lived in areas of high water availability

³³ *C Huggins* 'Water Policy and Law in a Water-Scarce Country: Implications for Smallholder Irrigation in Kenya (2001)' available at <<http://publications.iwmi.org/pdf/H030844.pdf>> (last accessed on 6th October 2015)

³⁴ *E Cotran*, Restatement of African Law: Kenya Vol 1 & 2 (1968).

³⁵ *ibid.*

³⁶ *ibid.*

and those that lived in areas of low water availability.³⁷ However, as has been alluded to earlier, the common strand that ran across the various communities at the time was that management of water resources was vested in the communities rather than in individuals. Another key feature of this period was that management of water resources was mainly concerned with regulating the access to water by community members. Persons who were not members of a given community could also be allowed to access water resources controlled by another community provided they sought permission or at times made reciprocal arrangements with the community that exercised control over a given water resource.³⁸ For instance, the *Pokot* and the *Marakwet* of the former Rift Valley province had a system of mutual assistance for households of the same clan. This system was meant to ensure access to water and land.³⁹

Interests in land and water resources broadly fall into two groups. Rights that are held through traditional systems, and rights that derive from the English system introduced and maintained through laws enacted by the colonial and subsequently the national parliament. The former is loosely known as customary tenure bound through traditional rules i.e. customary law. The latter body of law is referred to as statutory tenure, secured and expressed through national law.⁴⁰

To sum up the discussion in this section, there are two main features that characterized water management during the pre-colonial period. First, the overriding concern for the

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *The International Fund for Agricultural Development (IFAD); Country Report - Kenya Land and Natural Resources Tenure Security Learning Initiative for East and Southern Africa.*

communities was that of access to water by members of the community as well as members of other communities who had mutual assistance arrangements with the community that exercised control over a given water resource. Second, the community leadership structures such as councils of elders were the bodies that were tasked with regulating and controlling use of and access to water and water resources. It is noteworthy that the indigenous water management systems at the time worked well for the communities. However, these indigenous systems were subsequently disregarded by the colonial authorities who imposed their own version of water management systems which Kenya continued to utilize even after independence.

2.2.2 Colonial and Post-Colonial Period

The water management systems during the colonial period were principally aimed at addressing the needs of the settler community. Consequently, this period was characterized by an erosion of indigenous systems of water management as the colonial regime transplanted into Kenya the legal framework that governed water management in Britain.⁴¹ The colonial administration granted settlers priority in access to and control of water resources. This priority was entrenched by way of codification of the necessary legal instruments. The first water legislation was contained in Section 3 of the Crown Lands Ordinance of 1902 and only covered the issuance of water permits. In succession to this Ordinance, the Water Rules of 1903 and later 1909 were formulated.⁴²

The colonial period was also characterized by the emergence of large scale water development projects.⁴³ Such projects were undertaken in the emerging urban administrative areas and in the settler farms. The

⁴¹ *Huggins*, supra note 50.

⁴² *E N Nyanchaga & K S Ombongi* 'History of Water Supply and Sanitation in Kenya, 1895 – 2002' *P Juuti et al* (ed) 'Environmental History of Water' (IWA Publishing, London 2007 at page 272).

⁴³ *ibid.*

projects were necessitated by the fact that, at the time, the increasing demand for the use of water in urban administrative areas and settler farms could no longer be satisfied through the traditional channels.⁴⁴ Thus there was need, for instance, to introduce piping of water to serve both the urban administrative areas as well as the needs of settlers in the settler farms and ranches.

The key feature during this phase was the onset of government involvement in the management of water and water resources. At first, it was as a response to the needs of the settler community. Subsequently, more government involvement was necessitated by the fact that the country was undergoing increased urbanization especially in the emerging administrative towns. The rise of government involvement led to a corresponding decrease in community involvement in the management of water and water resources. Part of this decline was also attributable to the fact that the contest between the formal legal system and the indigenous justice system which was based on customary law had seemingly been decided in favour of the former.⁴⁵ This set the stage for further government involvement in the management of water during the post-colonial period.

Post-Colonial Period

The immediate post-colonial period picked up from where the colonial period had reached, with government being regarded as the main provider of water services. While there were a few areas in which management of water was still conducted through communities, the overall responsibility for water management in the country was vested in the government.⁴⁶ During this period, the government was responsible for a number of water management activities including: developing and executing water

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *Mumma* supra note 5.

supply schemes, construction of irrigation infrastructure; and exercising oversight functions.⁴⁷

Additionally, since the government was supplying communities with water, the communities no longer took it upon themselves to protect their water resources. This is a function which had effectively been transferred to the government. Arguably, this also signaled the emergence of disinterest in the management of water resources by communities which were then getting accustomed to simply accessing water without much regard to the prevailing water governance systems, if any.

However, over time, it became apparent that the model adopted by the government for the management of water and water resources was not tenable. The key reason for this was the heavy capital outlay that was required for the provision of water services.⁴⁸ Consequently, from the 1980s onwards, the government began reducing the scope of its water provision services by adopting an approach that was focused on the communities themselves managing water infrastructure and the provision of water services.⁴⁹ Arguably, this marked the onset of the bottom-up approach as opposed to the top-down approach in the management of water infrastructure and provision of water services. However, the new approach was not clearly defined and perhaps set the stage for the problems that continue to bedevil the provision of water services in Kenya up to date. After the enactment of the Water Act 2002, there seemed to be concerted effort on the part of government to embrace community water management systems, but this was in a modified manner that differed from the water management systems used by communities during the pre-colonial period.

⁴⁷ See *Huggins* supra note 50.

⁴⁸ See *Mumma* supra note 5.

⁴⁹ *ibid.*

The Post-2002 Period

As discussed in Chapter One, one of the defining moments in the governance and management of water and water resources was the enactment of the Water Act 2002. While the Act made a number of far reaching changes to the governance of water and water resources, it was nevertheless premised on certain ideas which held sway before the enactment of the Act. Key among this was the retention of the concept of water as a public good. Akech defines a public good as one whose consumption does not reduce the amount available for others to consume.⁵⁰ He further contends that public goods have two key attributes namely non-rivalry and non-excludability.⁵¹ Non-rivalry espouses the idea that the use by one person does not deprive another person from using a given resource.⁵² On the other hand, non-excludability refers to the idea that the benefits that an individual derives from a given good do not diminish the availability of the particular good to others, and that secondly, there would be great difficulty in charging individuals for its use and excluding those who are unable or refuse to pay for use of the given good.⁵³

One of the results of regarding water as a public good has been that the state then assumed the responsibility as a trustee of the given good on behalf of the citizens. The basic tenet underlying any relationship of trusteeship is that it is a fiduciary relationship that is based on good faith.⁵⁴ As such, a trustee is held to a high level of accountability emanating from the very nature of the relationship. While the government, vide the Water Act 2002, devolved many of the functions of water management such as provision of water services, it is expected that the high levels of accountability which were expected of the government would also cascade to the devolved water management units. As the ensuing discussion

⁵⁰ *Migai Akech* 'Governing Water and Sanitation in Kenya: Public Law, Private Sector Participation and the Elusive Quest for a Sustainable Institutional Framework' Paper presented at the workshop entitled Legal Aspects of Water Sector Reforms (Geneva 2007).

⁵¹ *ibid.*

⁵² *Thelma Triche* 'Private Participation in the Delivery of Guinea's Water Supply Services' (1990) WPS-047.

⁵³ *ibid.*

⁵⁴ See *Akech*, supra note 67.

shows, there was a mixed bag of results heavily comprising of violation of the tenets of the “trustee” relationship that was created between the water users (citizens) and the entities that were tasked with provision of water services. Part of the reason for such violation was due to inadequacies that were inherent in the Water Act 2002 and the various legislative instruments that were put in place to give effect to its provisions.

However, the Water Bill creates a conflict between the two authorities in relation to application for permits for water use. The Water Resources Regulatory Authority is tasked with issuance of water permits.⁵⁵ On the other hand, the Water Services Regulatory Authority is charged with the task of setting licence conditions and accrediting WSPs, and also required to monitor and regulate licensees and enforce the licence conditions.⁵⁶ Moreover, the Water Bill does not devolve the said services and fails to establish a framework for devolution of water services. Though it also establishes the Water Work Development Boards and the Water Services Regulatory Authority, the reforms it seeks to introduce are not novel as most are contained in the Water Act 2002.

After experiencing budgetary constraints in the 1980’s, the Kenyan government resolved to hand over the provision and management of water resources to the local communities. The communities were to be custodians of the water supply schemes, including their assets.⁵⁷ The key objective of community management was to vest ownership of water supplies and the relevant assets in the community. The reforms brought by the Water Act 2002 introduced radical changes to the legal framework, including separating the management of water resources from the provision of water services.

The Water Act 2002 was intended to address the challenges of institutional inefficiency and pave the way for reforms in the water sector. It brought about water sector reforms by separating policy

⁵⁵ *Ibid* section 10 (d).

⁵⁶ *Ibid* section 70 (c) and (d).

⁵⁷ A *Mumma* ‘Kenya’s New Water Law: An Analysis of the Implications of Kenya’s Water Act 2002 for the Rural Poor’ *Koppen V, M Gordano and Butterworth J* (ed), *Community Based Water Law and Water Resource Management in Developing Countries* (2007).

formulation from regulation and water resources management from water services provision. It also defined clear roles for the actors and provided for a decentralized institutional framework by establishing the Water Resource Management Authority.⁵⁸ Moreover, it introduced greater stakeholder participation (democratization) in the management of the sector by empowering the Authority to give permits for certain activities.⁵⁹ It further introduced new administrative structures and a radical governance framework that adopts corporatization at the institutional level.⁶⁰

The Water Act 2002 also introduced the Water Services Regulatory Board (WASREB), the Water Services Boards (WSB) and the Water Service Providers (WSP).⁶¹ Under the Act WASREB is mandated to develop guidelines for and provide advice on the cost effective and efficient operation of water.⁶² As a result of sector reforms, responsibility for water and sanitation service provision was devolved to eight regional WSBs: Athi (which serves the capital Nairobi); Coast; Tana; Lake Victoria North; Lake Victoria South; Northern Rift Valley; and, since 2008, Tanathi Water Services Board. WSBs are responsible for asset management, which is for the development and rehabilitation of water and sewerage facilities, and investment planning and implementation. The sole shareholder of all WSBs is the Government and the respective directors are appointed by the Government.

The following sections of this discussion highlight some of the deficiencies in the legal regimes that fostered rather than stemmed the emergence of poor corporate governance practices among the WSPs. However, before commencing that discussion, it would be important to highlight provisions of the Constitution of Kenya, 2010 which have a bearing on the kind of governance that is expected of WSPs.

⁵⁸ Section 7 of Act No. 8 of 2002, Laws of Kenya.

⁵⁹ *Ibid* Section 25.

⁶⁰ *Ibid* Section 11.

⁶¹ *Ibid* Sec 51.

⁶² *Ibid* Section 47 (h).

2.3 The Water Act 2002

The institutional framework established by the Water Act 2002 has been discussed in Chapter One. This section builds upon the discussion in Chapter One by highlighting provisions in the Act which have contributed to the poor corporate governance by corporations that are engaged in the provision of water services. A number of criticisms have been advanced against the provisions of the Water Act 2002.

It has been argued that the provisions of the Act which seek to govern the provisions of water services are convoluted and have only served to exacerbate rather than enhance the governance of the water sector.⁶³ For instance, the Act seeks to promote a water governance system that is governed by market forces while simultaneously providing for a command- control model. The Act provides for the two models without delineating the extent of applicability of each model. As was bound to happen, instances of overlap between the two models have often arisen resulting in ramifications which impacted negatively on the provision of water services in Kenya. The negative impact on the water governance system in Kenya flows from the very nature of the two models.

The market forces model is premised on the idea that provision of water services will be governed by market forces which will provide adequate incentives for the various players in the water provision sector to embrace good practices in various matters including governance.⁶⁴ The market forces model is also premised on the idea that market incentives will provide adequate impetus to secure the cooperation of regulated entities.⁶⁵

On the other hand, the command-control model is premised on the notion that the government directs the regulated entities on all aspects of their operation.⁶⁶ The mechanism called command-control refers to

⁶³ See *Akech*, supra note 67.

⁶⁴ See *Akech*, supra note 67.

⁶⁵ See *Akech*, supra note 67.

attributes that cannot be delegated and are exclusive to the State system, and are traditionally applied by the public power, by legal disciplining and exercising police power. They are the more traditional instruments and use a compulsory application approach: - it is decided directly (sometimes unilaterally), what situation is desired for the water body, and then the police power of the State is used to achieve it.⁶⁷ The governmental power under this model is usually exercised by a government agency that has been specifically established to exercise control over the regulated entities.

When applied to governance of corporations that provide water services, the two models seemingly advance different positions. The market forces model advances the position that corporations that provide water services will adopt good governance practices because the market will provide enough incentives for the corporations to engage in good corporate governance without external interference. On the other hand, the command-control model is hinged on the idea that corporations that are involved in the provision of water services cannot adopt good practices, particularly with regard to governance, if there is no external control by the government through the relevant government agency.

Adopting and sticking to one of the models is neither advisable nor efficient. What is required is adopting the two models but with clear delineations as to the extent of the applicability of each model. The converse position that has been adopted in the Water Act 2002 has led to the emergence of grey areas which have in turn been exploited by corporations that provide water services in Kenya. The manifestation of the exploitation is partly seen in the bad governance practices among the Boards of water corporations.

In the regulation of a commodity such as water which is both a public good and possesses many of the characteristics of a natural monopoly, it is desirable that the relevant legal framework embraces the principles of efficient and effective regulation. A reading of some provisions of the Act suggests that the

⁶⁶ See *Akech*, supra note 67.

⁶⁷ *Mônica Porto & Francisco Lobato*, “ Mechanisms of Water Management: Command & Control and Social Mechanisms” <http://www.cepal.org/samtac/noticias/documentosdetrabajo/7/23397/inbr01605.pdf>, Accessed on 8th October 2015.

Act fails to utilise these principles. Sections 53 and 55 of the Act illustrate this. Section 53(1) provides that a WSB shall be responsible for the efficient and economical provision of water services authorised by the license. However, while section 53(1) vests the responsibility for provision of efficient and effective water services on the WSBs, section 53(2) provides that water services authorised by license shall be provided by an agent of the Board except in the circumstances where the Regulatory Board is satisfied that the procurement of such an agent is not possible or that the provision of such services by an agent is not practicable. Section 55 of the Act establishes WSPs and provides that a WSB established under section 53 may arrange for the exercise of all or any of its powers and functions under license by WSPs. When read together, the upshot of the two sections is that there are bound to be instances of overlap between the functions of WSBs and WSPs yet in effect, the WSBs are principally meant to be playing an oversight role over WSPs. The duplicity in roles does not augur well for the enforcement of good governance practices among the WSPs

While the Water Act 2002 provides for the licensing of WSPs by the WSBs, the Act failed to provide for the regulation of the corporatization of water and sanitation departments of the then existing local authorities. Consequently, most of the water and sanitation departments of the former local authorities simply converted into companies under the now repealed Companies Act Cap 486 Laws of Kenya which was the relevant law that governed the establishment of companies in Kenya at the time. It was a glaring omission in the Water Act to fail to provide for the regulation of the corporatization of the provision of water and sanitation departments. Indeed, as Akech notes, all that the Act provided was that Water Services Boards may contract WSPs to perform their functions.⁶⁸ Consequently, most of the WSPs were established as private companies under the repealed Companies Act Cap 486 Laws of Kenya. The regulatory framework provided for in the repealed Companies Act was inadequate as far as the regulation of the private companies that were established to provide water and sanitation services were concerned.

⁶⁸ See *Porto & Lobato* supra note 76.

This was due to the fact that the composition of these companies, particularly their Boards, did not fall strictly within the confines of the sort of companies which were envisaged under the Companies Act.

These were essentially departments of local authorities which were converted into companies. Their formation did not necessarily take the path that other private companies take in their formation. Third, and perhaps most importantly, is the fact that water is a public good and under the Constitution of Kenya, 2010, has found constitutional enunciation under the right to water. Consequently, there was need for the Water Act to have more robust regulations to govern the corporatization of water services. Indeed, while the National Water Policy of 1999 had anticipated and provided for the corporatization of the water and sanitation departments of local authorities, there was no legal framework that was established to guide or govern this process. Thus while the public, which is the consumer of water services, was expected to be involved in the formation of these corporations, it was hardly involved with the end result, with the consequence that even after the formation of the corporations, it was difficult for members of the public to hold the corporations accountable.

The lack of participation by the public set the stage for the emergence of a culture of poor governance practices in the corporations, a situation which was further compounded by the lack of accountability mechanisms. Consequently and as was bound to happen, the challenges which arose, including those of governance, were addressed in a piecemeal manner and after the fact. This piecemeal approach has not been effective in redressing some of the challenges that have bedeviled the corporations that were formed to provide water services. This has especially been manifested in the attempts to rein in the poor corporate governance practices in most of these corporations. Part of the reason for these challenges was fusion of ownership and control in the companies that were formed to provide water services.⁶⁹ The principles of good corporate governance demand that there should be clear separation of

⁶⁹ See *Mumma*, supra note 5.

ownership and control of a company.⁷⁰ Where the two are fused in the same entity, it is almost inevitable that bad governance habits will creep in. The dictates of the agency theory will likely hold sway in such a company as opposed to the stewardship or stakeholder theory.⁷¹ This is because there are no measures to guard against the owner-managers of the companies seeking to maximize the realization of their own interest rather than those of other stakeholders even when the commodity involved is such a vital resource like water.

The fact that the companies were wholly owned by the local authorities meant it would be difficult to ensure managerial autonomy while at the same time facilitating measures to hold the managers accountable. Akech notes that given the composition of the companies, it is arguable that they were private in name only.⁷² Additionally, given that the then mayors, town clerks and treasurers of local authorities were members of the Boards of the companies, they were likely to exercise control over the Boards of the companies despite the Boards also comprising of persons drawn from outside the local authorities. This reaffirms the fact that the Boards not only owned the companies, but also controlled them, in effect creating the perfect storm for the emergence and thriving of bad governance practices in the companies. Indeed, it was only a matter of time before the companies embraced the bad governance practices that were associated with local authorities. More worrying was the fact that scandal tainted officers of the local authorities could readily be appointed to the management positions of the companies, including in such significant positions as chief executive officers.⁷³

⁷⁰ See *Akech*, supra note 67.

⁷¹ See section 1.3

⁷² *ibid.*

⁷³ *K'Akumu and Appida*, 'Privatisation of Urban Water Provision: The Kenyan Experiment' (2006) 8 *Water Policy* Vol 8 No 4 pp 313–324, IWA Publishing 2006

To avoid the challenges discussed above, there was need to provide for more accountable and participatory mechanisms in the formation of the companies. Additionally, the Act should have clearly provided for the separation of ownership and control of the company. While local authorities owned the companies, persons affiliated with the local authorities should not have been allowed to become members of the Boards of the companies. Furthermore, in order to ensure some form of public participation and to allow for measures to hold the companies accountable, there was need to reserve a certain percentage of the ownership of the companies in the national government. These provisions would have been provided for in the Water Act 2002 rather than the repealed Companies Act as the Water Act 2002 was a sector specific Act whose sole focus is on the water sector. It was not feasible in any way to incorporate sector specific provisions in a general Act such as the repealed Companies Act Cap 486 Laws of Kenya.

2.4 Model Water Services Regulations, 2007

The Model Water Services Regulations were promulgated by the Water Services Regulatory Board in 2007 pursuant to the provisions of Section 47(k) as read with section 73 of the Water Act 2002. The Regulations were promulgated with a view to providing the technical and administrative framework for the Water Act 2002 while further ensuring that water services in Kenya are developed, conserved, managed and controlled in ways which take into account a number of factors including: increasing the awareness by the public of the responsibilities and rights of all players in relation to the provision of water and sewerage services; the need to define the rights, responsibilities and obligations of WSBs, WSPs and water consumers; and the need to clarify providing for fines, penalties or restitution in case of offence by either of the parties.⁷⁴

Regulation 4 of the of the Model Water Services Regulations defines “Water Service Provider” to mean a company, non-governmental organization, society, trust or other person or body providing water services under and in accordance with an agreement with the licensee within whose limits of supply the

⁷⁴ WASREB, *Model Water Services Regulations* (Government Printer 2007).

services are provided or any other entity providing services in accordance with the Water Act 2002. This definition therefore covers the companies that were formed when water and sanitation departments of the former local authorities were corporatized into private companies providing water services. As such, these companies fall under the ambit of the Regulations.

While the right to water is now recognized in the Constitution of Kenya, 2010,⁷⁵ the Regulations also made provision for this right. Regulation 7 provides that where a Water Service Provider has been engaged through a Service Provision Agreement, consumers within that Water Service Provider's service area shall have access to water as a minimum right. Additionally, the regulation vests in the WSP a mandatory responsibility to provide consumers with access to drinking water. The upshot of this regulation, especially when read against the background of Article 43(1) (d) of the Constitution, is that the duty to ensure the realization of the right of access to water is heavily shouldered by WSPs. Consequently, the expectation is that WSPs will embrace the best practices in all their operations including governance in order to effectively discharge their mandate as enumerated in Regulation 7 and generally falling under the ambit of Article 43(1) (d) of the Constitution.

Regulation 8 provides the conditions that consumers must meet in order to be entitled to water supply. The conditions are enumerated as making an application to the appropriate WSP and executing a contract for the provision of water between the consumer and the WSP. Once the consumer has met these conditions, it is the duty of the WSP, pursuant to Regulation 10, to initiate water supply. Failure to discharge this duty without reasonable cause shall make the WSP liable to pay such fine as shall be imposed by the licensee.

In an effort to guard against malicious or willful refusal by a WSP to provide water services, the regulations prescribe the conditions under which the applicants may be denied service as well as the

⁷⁵ See Article 43 (1) (d) of the Constitution of Kenya, 2010.

circumstances which warrant the termination of a service.⁷⁶ The regulations go on to further provide for the situations in which service may not be terminated. Regulation 16 provides for penalties that may be imposed by the WSBs on WSPs which provide poor services. However, the penalties prescribed are arguably too lenient to have any meaningful deterrent or punitive effect on WSPs who provide poor services, especially as a result of bad governance practices within the WSPs.⁷⁷

While the regulations require WSPs to submit reports to WSBs every three months, these reports only focus on the operations of the WSPs.⁷⁸ Arguably, as per the regulations, WSPs are not required to make any reports at their strategic level which is where the Boards of directors would normally be placed. The lack of a reporting requirement for the board may contribute to poor governance practices as any malpractices by the board can only be detected once they manifest themselves at the operational level. This is assuming that such manifestations will make it to the report to be submitted to the WSBs.

In an effort to provide mechanisms to hold WSPs accountable to water consumers, the regulations prescribe that each WSB shall require that each WSP maintain at least one customer service centre for the purpose of addressing and resolving applicant and consumer service requests and complaints. Again, while the spirit of this regulation is commendable, its shortcoming lies in the fact that it is only targeted at the operational level of the WSPs. The regulations do not provide for any clear mechanisms through which a consumer can raise a complaint against a director or the whole board of directors of a WSP. It appears that the regulations presume that consumers' grievances will always be at the operational level of the WSP and may not be directly targeted at the Boards of the WSPs. This is further reflected in the

⁷⁶ See generally Regulation 11 of the Model Water Services Regulations 2007.

⁷⁷ See generally Regulation 16 of the Model Water Services Regulations 2007.

⁷⁸ See generally Regulation 23 of the Model Water Services Regulations 2007.

dispute resolution provisions and consumer appeals provisions of the regulations.⁷⁹ The regulations lack adequate provisions to ensure there is effective oversight over the activities of the Boards of WSPs.

The Regulations also provide for the appointment of WSPs. WSBs are empowered to contract WSPs who fall into any one of the following four categories: a company registered under the Companies Act owned by private persons; a company registered under the Companies Act and formed by a local authority which was an undertaker within the terms provided under the repealed Water Act Cap 372; a trust registered under the laws related to trusts; a society registered under the Societies Act and owned by a community; and a natural person who shall be a water vendor.⁸⁰ Most WSPs fall under the second of the five categories listed above. Consequently, while the regulations provide for the criteria that the WSPs must meet, the regulations lack adequate provisions to ensure that WSPs, especially those whose establishment falls under the second category, embrace and adhere to good governance practices in discharging their mandate. The same defect is also present in regulation 133 which provides for the qualifications that directors or trustees of a board of a WSP must possess. It is this lack of clear provisions that resulted in a situation where the former local authorities exercised both ownership and control of WSPs. This set off a chain reaction which manifested in adoption of poor corporate governance practices by WSPs and ultimately provision of poor or no water services at all to the consumers.

2.5 Governance of Water Services

2.5.1 What is Governance?

Governance means to control and regulate. It is the exercise of influence to maintain good order and adherence to predetermined standards of behaviour.⁸¹ ‘Control’ suggests that a person or group possesses power to determine what actions are taken, while ‘regulate’ refers to the rational limitation of autonomy,

⁷⁹ See generally parts XV and XVI of the Model Water Services Regulations 2007.

⁸⁰ See generally part XIII of the Model Water Services Regulations 2007.

⁸¹ A. Knell, *Corporate Governance, How to Add Value to Your Company: A Practical Implementation Guide*, (CMA Publishing, Elsevier, 2006).

whether it is by a manager of the organization concerned or an external bureaucrat.⁸² Governance is thus vital to the success of any organization, from small domestic organizations to large international organizations.⁸³

2.5.2 What is Corporate Governance?

Corporate governance is the system by which companies are directed and managed. It influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimized. Good corporate governance structures encourage companies to create value (through entrepreneurship, innovation, development and exploration) and provide accountability and control systems commensurate with the risks involved.⁸⁴ Corporate governance is one of the most effective tools to reduce the incidence of corruption, especially in the corporate sector.⁸⁵

The term corporate governance appears to have been coined in the early 1960s. However issues pertinent to the term had been discussed earlier. In 1932 Berle and Means⁸⁶ had a discourse on separation of ownership from control of corporations. The term “corporate governance” has been defined differently by some prominent scholars. Demb and Neubauer in their classic work⁸⁷ define corporate governance as the process by which corporations are made responsible for the rights and wishes of stakeholders.

⁸² S. Turnbull, ‘Corporate Governance: Its scope, concerns & theories’ *Corporate Governance: An International Review*, Blackwood, Oxford, vol. 5, no. 4, (1997), pp. 180-205, available at <http://cog.kent.edu/lib/turnbull4.html>, accessed on 21/10/2014.

⁸³ Available at http://blogs.law.uiowa.edu/ebook/sites/default/files/Governance_&_Accountability-Theory.pdf, accessed on 20/10/2014.

⁸⁴ ASX Corporate Governance Council, Principles of Good Corporate Governance and Best Practice Recommendations, March 2003.

⁸⁵ Mensah et al, Corporate Governance and Corruption in Ghana, (African Capital Markets Forum, 2003).

⁸⁶ Adolf A. Berle, Jr. and Gardiner C. Means: *The Modern Corporation and Private Property*, New York: The Macmillan Company, 1932.

⁸⁷ Demb and Neubauer, *The Corporate Board: Confronting the Paradoxes*. Oxford University Press, Oxford, 1992

The financial crises of Enron, WorldCom and Parmalat have revived interest in the discussion concerning the proper governance of companies. It became evident that in these corporations, managers may pursue their own private interests at the expense of shareholders when they are not closely monitored. These scandals have reinforced the importance of corporate governance i.e. the financial and legal framework for regulating the relationship between a firm's management and its shareholders. Corporate governance in the academic literature seems to have been first used by Richard Eells in 1960⁸⁸ to denote "the structure and functioning of the corporate polity". But the question as to how to manage companies and that of the best structure to achieve an optimal allocation of resources is as old as the history of companies.

According to the WASREB Corporate Governance Guidelines, "corporate governance" refers to the establishment of an appropriate legal, economic and institutional environment that allows companies to thrive as institutions for advancing long-term shareholder value and maximum human-centred development while remaining conscious of their other responsibilities to stakeholders, the environment and the society in general. On this understanding, corporate governance is the set of arrangements through which organizations account to their stakeholders. Research has consistently shown that sound corporate governance supports economic development by promoting the efficient use of resources and by creating conditions that attract both domestic and foreign investment. More importantly, corporate governance, along with political and social governance, forms a consistent set of norms that underpin democracy and a market-based economy. Corporate governance also describes all the influences affecting the institutional

⁸⁸ *Richard Eells*, *The Meaning of Modern Business: An Introduction to the Philosophy of Large Corporate Enterprise*. Columbia University Press, New York.

processes, including those for appointing the controllers and/or regulators⁸⁹ involved in organising the production and sale of goods and, by extension, the influences that impede good corporate governance practices in the water sector institutions despite the existence of the Corporate Governance Guidelines in the sector.

2.5.3 Corporate Governance Guidelines for the Water Services Sector

In an effort to rein in the increasing incidences of poor corporate governance practices in the water sector generally and especially with regard to WSPs, the Water Services Regulatory Board promulgated the Corporate Governance Guidelines for the Water Services Sector. The guidelines are aimed at enhancing the understanding of what it entails to be a water service institution.⁹⁰ The principal purpose of the guidelines is to assist water service institutions to meet their objectives in service delivery.⁹¹ With regard to directors of water service entities who may not be well acquainted with what to expect, the guidelines are meant to assist them in certain matters which, *inter alia*, include: the standards of boardroom behaviour to adopt; how to serve the public with water services; how to involve other stakeholders; where to provide guidance; and what to monitor.⁹² It is noteworthy that while the guidelines are tailored to the water sector, they solely adhere to the standards that were set in the now repealed Companies Act.

The development of the guidelines was necessitated by the appreciation of the fact that WSPs are expected to operate in a manner that will maximize efficiency in the provision of water services and provide satisfaction and safety to water consumers.⁹³ The guidelines appreciate and note the fact that cost

⁸⁹ S. Turnbull, 'Corporate Governance: Its scope, concerns & theories' *Corporate Governance: An International Review*, Blackwood, Oxford, vol. 5, no. 4, (1997) pp. 180-205.

⁹⁰ WASREB, *Corporate Governance Guidelines for the Water Services Sector* (Government Printer 2009).

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.*

effective and efficient management and operation of water services can only be realized if the leadership in the water sector institutions is guided by the tenets of good governance.⁹⁴ The guidelines further underscore the fact that in the water services sector, good corporate governance requires that Boards and senior management of the WSBs and WSPs must govern their entities with integrity and enterprise in a manner which entrenches and enhances the objectives agreed under the license and Service Provision Agreement.⁹⁵ Part of the reasons why there is need to embrace the principles of good corporate governance in the sector is in order to create ethical business enterprises and to improve the relationships between such water enterprises and their various stakeholders. Embracing good corporate governance provides a guiding light to leadership at the board level which, among other things, enables the board to focus on the objective of realizing leadership that is transparent and accountable to the public.

The guidelines provide detailed requirements for the appointment and composition of Boards of various institutions in the water sector.⁹⁶ In an effort to reduce instances where the ownership and control of a WSP was vested in a single entity, the guidelines require that the Boards of WSPs shall be drawn from diverse sectors.⁹⁷ These include: two directors from the local authority, two members from the business and manufacturing professions, one local professional from the professional bodies nominated from their bodies, one representative from resident organizations and one member of a woman's organization.⁹⁸ While the provisions enumerated above are good on paper, their implementation may not be as straightforward. This is due to the fact that in addition to the provisions being largely normative and

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

largely aspirational, there is no enforcement mechanism to ensure that institutions in the water sector actually abide by the provisions.

Also, the guidelines do not provide for any sanctions where a given institution fails to abide by its provisions. As such, there is need to make adherence to the provisions of the guidelines an imperative obligation for all the institutions in the water sector. Further, the guidelines need to provide for clear sanctions where an institution deviates from its provisions. More importantly, perhaps, there may be need to replace “Guidelines” with “Regulations” under the Water Act. Guidelines connote a mere suggestion of conduct that is expected; it simply suggests some form of guide. However, if proper corporate governance is to be realized in the various institutions in the water sector, there is need to move beyond “mere suggestions” to some form of enforceable rules which require compliance.

2.6 Select Provisions of the Constitution of Kenya, 2010

The first relevant provision is to be found in the supremacy clause of the Constitution. Article 2(1) affirms the supremacy of the Constitution. It provides that the Constitution binds all persons and all State organs at both levels of government. The import of this provision on the governance of water service provision is that it requires everyone in the Republic of Kenya, with no exception, to abide by the provisions of the Constitution. As applied to governance of WSPs, Article 2(1) provides the basis for holding individuals involved in the governance of water accountable under various constitutional provisions which specifically address issues of water and governance.

Article 10 of the 2010 Constitution provides that the national values and principles of governance listed therein bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. Article 10(2) lists the national values and principles to include, inter alia, participation of the people, good governance,

integrity, and transparency and accountability. The phrase “all persons” as used in the Article also covers individuals who are involved in governance of the water services generally and water service provision in particular. The Article enjoins them to uphold certain national values and principles. By discharging their mandate, it could be argued that the Boards of WSPs are applying the law. Specifically, it is arguable that since the Boards flow from the Water Act 2002, the discharge of their mandate inevitably entails application of the parent statute which established the Boards in the first place. It is also arguable that the discharge of the mandate of the Boards of WSPs falls within the implementation of public policy decisions as envisaged in Article 10 of the Constitution. The net effect of these expositions is to illustrate that Boards can be held to a constitutional standard of national values and principles of governance as far as the discharge of their mandate is concerned.

The Constitution under Article 43(1) (d) guarantees the right to clean and safe water in adequate quantities for every person in Kenya. The nature of rights requires a corresponding duty to meet the entitlements that are bequeathed by such rights. Article 21 states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

Clause 2 of the same Article imposes an obligation upon the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. The Fourth Schedule of the Constitution outlines the distribution of functions between the national government and the county governments. Sections 2 and 11 of the Fourth Schedule of the Constitution stipulate that the functions and powers of the county governments include water and sanitation services, storm water management in ‘built-up areas’, and solid waste management. Section 22 of the Fourth Schedule places the responsibility for developing policy and regulation for water resource management with the national government, while counties are responsible for implementing these policies. It is therefore expected that for the national government to progressively realise this right, it must set minimum national standards and monitor the following:-

- allocation of funding to the sector and effective use of funds;
- adherence to minimum standards by providers of water services; and,
- provision of water services within the service area, and
- progress towards meeting constitutional right to water.

This submission contends that while Article 21 does not expressly address Boards of WSPs, the Boards are nevertheless part of the entities that are expected to play a role in ensuring that every person enjoys the right to clean and safe water in adequate quantities. The realization of this right, though progressive, may be hampered by poor corporate governance practices in the Boards of WSPs. Consequently, the constitutional enunciation of this right requires all stakeholders in the water sector to take all steps to ensure that they minimize or completely avoid any acts or omission whose effect would be to threaten or curtail the progressive enjoyment of the right to clean and safe water in adequate quantities.

Apart from Article 43(1) (d), Article 2(6) of the Constitution provides that international agreements and treaties that Kenya has ratified relating to the rights to water have force of law in Kenya. For example, Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires State Parties to ensure that there is continuous improvement in realising the right to clean and sufficient water.⁹⁹ Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The Committee on Economic, Social and Cultural Rights, the body that monitors the implementation of the ICESCR, has been confronted continually with the widespread denial of the right to water in developing as well as developed countries.¹⁰⁰ Over one

⁹⁹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; Ratified by Kenya on 1st May 1972

¹⁰⁰ General Comment No. 15: The Right to Water (Twenty-ninth session 2003), UN Doc. E/C.12/2002/11 (2002).

billion persons lack access to basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.

2.7 The Water Bill 2014

In 2010, after the promulgation of the new Constitution the water sector was thrown into a spin with the devolution of water services delivery. Article 43 1(b) (d) provided for the right to clean and safe water in adequate quantities. Schedule 4, of the Constitution delineates how these functions ought to be shared between the national and county governments. The Water Bill, which is pending parliamentary approval, has been aligned to the Constitution 2010 and the National Water Master Plan 2030, and seeks to restructure the institutions established under the Water Act 2002. The current Act saw the formation of several institutions with duplicated roles resulting in over-spending on recurrent expenditure. The Bill has, among other things, proposed the scrapping of some institutions and establishment of new ones. Even so, the number of proposed institutions remains high as does the presence of duplicated roles.¹⁰¹

2.8 Conclusion

This chapter has evaluated the legal framework applicable to WSPs in Kenya. Its analysis has embraced a historical approach of water governance in Kenya from the pre-colonial period up to and beyond the post 2002 period when the Water Act was enacted. Its discussion has traced how water governance was initially vested in the communities during the pre-colonial period, how it shifted to the state during the colonial period, and subsequently how it was once again decentralized in the Water Act 2002. More importantly, the evaluation has highlighted the key gaps in the legal framework that have been exploited to further poor corporate governance practices in Boards of various WSPs. This sets the stage for making recommendations on the way forward. However, before making recommendations, it would be important to identify examples from other countries in the world that have had successful water governance

¹⁰¹ *Hakijamii*; The Water Bill 2014, Ensuring the Progressive Realisation of the Right to Water and Sanitation.

systems. Consequently, the next chapter undertakes a comparative analysis of the water governance system in Kenya *vis-à-vis* other select countries.

CHAPTER THREE

3. CHALLENGES FACING THE WATER GOVERNANCE SYSTEM IN KENYA, WITH PARTICULAR FOCUS ON THE PROVISION OF WATER SERVICES

3.1 Introduction

Georgia and Rob argue that while water is ubiquitous, water governance and management are often fragmented and compartmentalized.¹⁰² They further opine that finding ways to effectively manage such a complex and necessary resource like water poses a fundamental challenge in any society.¹⁰³ This statement appositely captures the state of the water governance system in Kenya. While much has been done, the challenge is yet to be surmounted. According to K' Akumu, the symptoms of poor water governance in Kenya have been manifested in many ways. These include: increased incidences of unaccounted-for water in urban areas; ineffective metering of all the water consumers, ineffective collection of water revenue; uneconomic tariffs; excess staff of water service providers; and conflict of roles in the various institutions of the water management sector.¹⁰⁴

This chapter discusses the challenges that confront the governance of the water sector in Kenya with a particular emphasis on the challenges that have rocked the governance of institutions that are tasked with the provision of water services. The challenges are grouped according to major thematic areas that have been identified from the discussion in the preceding chapters. The challenges have been identified from the discussion of the legal framework relating to water governance in Kenya in Chapter Two as well as the comparative analysis of the water governance system in Kenya, South Africa, Uganda

¹⁰² Georgia S and Rob L, 'Challenges for Water Governance in Canada' (2010) Water Policy and Governance Group: Governance for Source Water Protection in Canada, Report No 2, 5.

¹⁰³ *Ibid.*

¹⁰⁴ K' Akumu O, 'Toward Effective Governance of Water Services in Kenya' (2007) 9 Water Policy 529, 533.

and Ghana. The discussion of the challenges sets the stage upon which the study makes recommendations on the way forward.

3.2 Corruption

It appears that the conversion of the water and sanitation departments of the local authorities into private companies did little to curtail the vice. Indeed, it has been argued that some of the water companies are now part of cartels which seek to make maximum financial gain from the provision of water services often through a number of methods, chief among them being corruption.¹⁰⁵ According to the United Nations Development Programme (UNDP), corruption is the misuse of public power, office or authority for private benefit through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.¹⁰⁶

A number of these practices have been rife in various public and private institutions that are tasked with the provision of water services in Kenya. It has been argued that corruption thrives in institutions where the officials have broad and unchecked authority, perverse incentives, little or no accountability, or where the accountability exists, it responds to informal patron-client linkages rather than adhering to existing rules, regulations and contracts.¹⁰⁷ The UNDP identified four features of institutions that are prone to corruption. A keen examination of the water service providers in Kenya reveals that they are characterized by one or more of these features.

Corruption-prone institutions are usually characterized by a strong concentration of power in the executive branch and in private and public monopolies.¹⁰⁸ This concentration of power is usually further

¹⁰⁵ The study by *Birongo and Le* supra note 111) notes that the Nairobi Water Company is part of a cartel which is keen to perpetuate the existing water problems so that the financial gain of the cartel is not threatened.

¹⁰⁶ United Nations Development Programme supra note 104.

¹⁰⁷ *Ibid*; Water Integrity Network, *Fighting Corruption in Water Worldwide* (Water Integrity Network 2006)2.

¹⁰⁸ United Nations Development Programme supra note 104.

accompanied by weak or inexistent systems of checks and balances, lack of transparency in decision making and limited access to information. Most water and sanitation companies in Kenya enjoy a monopoly over the provision of water services in their areas of jurisdiction. Furthermore, the systems of checks and balances to control these monopolies are weak. Consumers are often unaware of the decision-making processes as they are neither consulted nor involved. Lastly, consumers of the services of water services providers usually have little or no access at all to relevant information that they may require for purposes of holding the water service providers accountable.

Institutions that are prone to corruption are characterized by high levels of discretionary decision making.¹⁰⁹ Put differently, rather than decisions being made according to well laid down procedures and established regulations, they are made according to the whims of individuals. The lack of certainty and predictability in decision making processes provides a window for corrupt practices to creep in. Indeed, this has manifested itself in the leadership of the various water service providers where decision making is highly discretionary.

The lack of accountability and strong systems of oversight and enforcement also contributes to corruption in institutions.¹¹⁰ Even though Kenya adopted a hierarchical structure in its governance; this has not necessarily translated into stronger systems of oversight and enforcement. Water service providers have been able to exploit loopholes and overlaps in the legal framework to dodge accountability and oversight systems which have been put in place. There is lack of adequate monitoring and evaluation has greatly weakened the enforcement mechanisms are either very weak or altogether absent.

Soft social control systems provide fertile grounds for corruption where soft control systems usually lead to an environment where corruption is accepted and tolerated.¹¹¹ The power wielded by

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ UNDP Water Governance Facility, *Bondo Villagers Preserve Water as a Human Right* (UNDP Water Governance Facility 2010) 2.

water service providers could arguably be said to have contributed to the emergence of the soft social control systems. This has resulted in a situation where consumers would rather be involved in corrupt practices so as to get water services rather than demand and get what is rightfully theirs. This has perhaps been the biggest challenge in ridding the water service providers of corruption.

3.3 Privatization

Like many other developing countries, allowing the privatization of water services as part of the reforms to the water sector. The privatization of the provision of water services in Kenya yielded a mixed bag of results for the consumers. One of the benefits realized has been increased efficiency in the provision of water services. However, the increased efficiency has also been accompanied by an increase in the water tariffs with the result that many of the urban poor have been unable to afford the water services that are provided by the water service providers.¹¹² This is despite the fact that the right to water is now constitutionally guaranteed.

Arguably, the main problem that characterized the privatization of the provision of water services in Kenya is that it was rushed. In other words, the process of privatization of the provision of water services in Kenya began before the requisite regulatory and institutional framework had been put in place. Subsequently, it was only after problems began emerging that regulations were put in place. As an example, it was only after the newly established water and sanitation companies were infested with serious governance malpractices that the Corporate Governance Guidelines 2009 were enacted.

Privatization of the provision of water services in Kenya has resulted in a situation where private entities are the service providers with the government as service regulator. However, there has been a significant gap between the regulatory activities of the government and the operations of the private

¹¹² Transparency International Kenya, *Mombasa Water Improvement Pact- Bringing Water Providers and Users Together* (Transparency International Kenya 2012) 2.

entities. Consequently, water service providers have had a free hand even where this has been detrimental to the consumers. This has further been compounded by the fact that a number of the government agencies that are supposed to be carrying out the regulatory function are also involved in the provision of water services. This duality of roles makes it difficult for them to undertake their regulatory function ..

3.4 Decentralization of Water Control and Decision-Making

As discussed in Chapter Two, water governance generally and the provision of water services in particular, was centralized during the colonial regime.¹¹³ However, from the 1980s onwards, the government, faced with increasing costs of provision of water services, embarked on the process of decentralizing the provision of water services. Consequently, provision of water services became a function of the now defunct local authorities. The conversion of the water and sanitation departments of the local authorities into private water and sanitation companies fits within the wider narrative of the decentralization initiatives in the water sector.

Where decentralization of water governance is well deployed, it can yield a win-win situation for both water consumers and the water service providers. A study by the Water and Sanitation Program noted that effective decentralization of the provision of water services in informal settlements in Kisumu improved technical and financial deliverables. Water was more accessible to consumers.¹¹⁴

The main challenge that faces the decentralization process in the water sector in Kenya is that the transfer of responsibility is not accompanied by a corresponding transfer of authority: decentralization without devolution. This paralyzed local authorities. This was because while the responsibility to provide water services had been transferred to them, they had not been equipped with the necessary technical and

¹¹³ See section 2.2.2 above.

¹¹⁴ Castro V, *Improving Water Utilities Through Delegated Management: Lessons from the Utility and Small-Scale Providers in Kisumu, Kenya* (Water and Sanitation Program (WSP) 2009)2. The decentralization approach adopted in Kisumu was based on a delegated management model (DMM) that is built around a contractual relationship between water service providers and small scale-private operators who have the financial incentives to increase access and improve services.

institutional capacity to provide the services. Insufficient capacity building initiatives to enable the local authorities to provide water services were undertaken. Even when water and sanitation departments of the local authorities were converted into private companies, they were still riddled with the same problems that faced water service provision by the local authorities.

Decentralization entails ensuring that decisions are made at the lowest level possible.¹¹⁵ It envisages a situation where water consumers are able to participate in making the decisions that affect them.¹¹⁶ This has not necessarily been the case in Kenya. This is because the water service providers hardly involve the consumers in their decision making processes. While decision making has been decentralized to a lower level, this has not necessarily translated into a situation where consumers are involved in the decision making processes. This has in turn made it almost impossible for consumers to hold the water service providers accountable. Although the principles of effective water governance advocate for both a top-down and a bottom-up accountability mechanism, the nature of the decentralization process only facilitates a top-down accountability mechanism. The lack of a comprehensive accountability mechanism has not augured well for the provision of water services by the water service providers with the result that it is ultimately the consumers who bear the brunt of the inadequate accountability mechanisms.

3.5 Lack of Effective Regulation

For there to be effective regulation of any given sector, there is need for a clear and comprehensive regulatory framework to govern the sector. This is not necessarily the case in Kenya with regard to the governance of the water sector generally and the provision of water services in particular. This is attributable to a number of factors. First, the setting up of various institutions to provide water services preceded the establishment of a legal and regulatory framework to govern these sectors. This resulted in a

¹¹⁵ *Tropp* supra note 123.

¹¹⁶ *Ibid.*

situation where the institutions were operating without a clear legal and regulatory framework or even where such framework existed, it was highly inadequate.

This was especially manifested in the process of decentralization of water services as well as during the conversion of the water and sanitation departments of the local authorities into private companies. Consequently, the sector developed as a rogue sector before relevant legislation was enacted to rein in some of the malpractices that had taken root. It goes without saying that uprooting some of the entrenched malpractices would not be an easy task. Closely related to this is the fact while in some instances the concerned regulatory bodies are mandate to monitor compliance with the standards set, they often lack the capacity to make the water service providers report with the required details and quality.¹¹⁷ This in turn negatively affects the quality of services that are provided to consumers.

Second, the governance of the water sector in Kenya and especially that of the provision of water services appears to have moved from a period of under regulation to a period of over-regulation.¹¹⁸ While over regulation may be beneficial in the sense that it may cover almost every possible issue, it also carries certain risks. Key among these is that it may create instances of overlap and in some instances redundancies.¹¹⁹ In Kenya, the Water Act 2002 is the main Act that governs the water sector. However, the Environmental Management and Coordination Act is the main Act as far as matters to do with the environment are concerned. There have been a number of instances where there have been overlaps and instances of conflicting provisions of the Water Act 2002 and the Environmental management and Coordination Act. This was especially manifested in the roles of the various institutions that are established under the two Acts. The instances of overlap have created room for exploitation of the

¹¹⁷ Juliane O and Werchota R, *Promising Practices: On the Human Rights-Based Approach in German Development Cooperation Water and Sanitation: Ensuring Access for the Urban Poor in Kenya* (GIZ 2013)4.

¹¹⁸ *Mumma* supra note 5; *Akech* supra note 67.

¹¹⁹ Rampa F, 'Analysing Governance in the Water Sector in Kenya' (2011) European Centre for Development Policy Discussion Paper no 124, v.

provisions of the Acts by various water service providers. It goes without saying that this exploitation of the statutory provisions has often been to the detriment of the water consumers.

Third, the legal and regulatory framework governing the provision of water services in Kenya does not explicitly provide the parameters for the regulation of the water sector. Consequently, the lack of clearly defined parameters has contributed to ineffective regulation of the water service providers. This is coupled with the fact the regulatory function is vested in many bodies, ranging from all the institutions in the hierarchy of the water governance system to the recently created Ministry of Water. The existence of many bodies undertaking the regulatory function has led to numerous cases of duplicity of roles. This has ultimately resulted in ineffective rather than more effective regulation of the water service providers. In addition, most of the water service providers lack internal mechanisms of regulation. The lack of self-regulation means that most water service providers are severely handicapped as far as the detection and redressing some of their internal challenges is concerned. In the absence of internal self-regulation by the water service providers, it takes external regulation mechanisms to flag and take remedial action where malpractices are unearthed among the water service providers.

3.6 Mismatch between the Constitution of Kenya, 2010 and Water Legislation

The Water Act 2002 was enacted before the promulgation of the Constitution of Kenya, 2010. Thus a number of its provisions, though not necessarily unconstitutional, do not necessarily fit within the spirit of the Constitution of Kenya, 2010. For instance, one of the hallmarks of the Constitution is its provision for devolution. The fourth schedule of the constitution provides that water and sanitation services shall be a function of county governments. The Water Act 2002 does not reflect an appreciation of this constitutional provision. It is hoped that the Water Bill 2015 fully aligns itself to the provisions of the Constitution.

More importantly, the right to water is now constitutionally enshrined.¹²⁰ Hence, the legislation governing the water sector including the provision of water services needs to be aligned to this constitutional provision. Indeed, it should be the overarching principle that guides the provision of water services in Kenya. According to the Water and Sanitation Program, there are three areas that need to be addressed to align the relevant water laws with the provisions of the Constitution.¹²¹ The Fourth Schedule uses such terms as “national public works”, “county public works” and “public investment”, but does not clearly define how these terms relate to water services.¹²² Furthermore, water legislation needs to provide clarity on the issue of charges for water so as to resolve the emerging conflicts where some water rich counties have sought to charge water poor counties for the export of water to the water deficient counties.¹²³

3.7 Conclusion

This chapter has highlighted the challenges that face the water governance sector in Kenya and especially the provision of water services. The next chapter provides recommendations on the way forward in light of the challenges discussed above.

¹²⁰ Article 43 (1) (d) provides that every person has the right to clean and safe water in adequate quantities.

¹²¹ Water and Sanitation Program, *Devolution in Kenya: Opportunities and Challenges for the Water Sector* (Water and Sanitation Program 2013)2.

¹²² *Ibid.*

¹²³ *Ibid.*

CHAPTER FOUR

4. COMPARATIVE ANALYSIS OF WATER GOVERNANCE SYSTEMS IN OTHER JURISDICTIONS

4.1 Introduction

This chapter provides a comparative analysis of various water governance systems in a number of purposively selected countries in Africa. The chapter also incorporates a discussion of water governance generally. The general discussion of water governance is aimed at providing the background against which the comparative analysis is undertaken. As such, the discussion encompasses the various conceptions of water governance. Additionally, the discussion also highlights the broad classifications of water governance systems that have been adopted by selected countries across the world in their efforts to ensure that their citizens have access to this key resource.

Three countries have been selected for the comparative analysis. These are Uganda, South Africa and Ghana. The three countries share a number of similarities with Kenya. First, they are all in sub-Saharan Africa, thus they share a number of the challenges that bedevil countries in the region. Second, South Africa is one of the leading economies in Africa while Kenya is the leading economy in the East African region. A comparative analysis of the water governance systems in Kenya and South Africa may potentially yield useful insights on the correlation, if any, between a country's economic position and its water governance systems. Third, with an exception of South Africa, Uganda and Ghana, just like Kenya, were colonised exclusively by Britain. As such, while the British colonial regime may have adopted similar methods of governance in all the three countries, they all panned out differently upon attaining independence. These differences have also been reflected in the manner that the countries put in place measures and institutions to govern the water sector. It would thus be useful to identify and evaluate the similarities and differences between the water governance systems of the various countries. Lastly, the

right to water has found constitutional enunciation in two of the countries selected for the comparative analysis, namely South Africa and Uganda.

The constitutions of these countries are much older than Kenya's Constitution which was promulgated on 27 August 2010. However, the Constitution of Kenya, 2010, just like the constitutions of Uganda and South Africa, also provides for the right to water. In this regard, it would be important to evaluate the extent to which countries such as South Africa and Uganda have succeeded in putting in place water governance systems that facilitate the realization of the right of access to water. This can then be compared with the measures that Kenya has taken to reorganize its water governance systems to ensure the realization of the right to water as provided for in the Constitution of Kenya 2010. Ultimately, the best practices identified from other countries may provide useful lessons for Kenya in reorganizing its water governance system.

4.2 Water Governance

This section discusses water governance with regard to the provision of water services. Accordingly, it would be important to provide the definitions of both phrases as will be applied to the study. Water services have been defined as the services that are necessary to enable water users to use their water resources on a sustainable basis.¹²⁴ On the other hand, provision of water services has been defined to include activities such as the abstraction, conveyance, treatment and distribution of water to water users; the collection, removal, treatment and disposal of waste generated due to the use of waste water and the provision of resources, assistance and information associated with these activities.¹²⁵ This shall be the operational definition of "provision of water services" as used in the study.

¹²⁴ Thomson H and others, 'Policies, Legislation and Organisations Related to Water in South Africa with Special Reference to the Olifants River Basin' (2001) 18.

¹²⁵ *Ibid.*

From the outset, it is important to highlight the fact that just like there exists various definitions of governance, water governance, which is facet of governance, also has many definitions. However, for purposes of this study, water governance can be defined in two ways. First, water governance involves the range of political, social, economic and administrative systems in place to develop and manage water resources.¹²⁶ A second conception of water governance is that it refers to the ways in which societies organize themselves to make decisions on water.¹²⁷ It is important to point out that according to these definitions, governance is not limited to the government or public sector governance only. On the contrary, the definitions also envisage the role that the private sector and civil society institutions play, especially in the provision of water services. The governance of water, therefore, anticipates and addresses the relationships that exist among the various stakeholders. The relationships include but are not limited to those between organizations whether public or private and social groups that are involved in water decision making whether at the horizontal, cross-sectoral, vertical levels and between rural and urban areas.¹²⁸ Consequently, the operating principles of water governance include upward and downward accountability, transparency, participation, equity, rule of law, ethics and responsiveness.¹²⁹

Another conception of water governance is water governance at the macro level and micro level.¹³⁰ Water governance at the macro level refers to the water governance systems that have been put in place at the national level in a given country while water governance at the micro level refers to local

¹²⁶ *United Nations Development Programme*, The Challenges of Water Governance (United Nations Development Programme 2005) 47; *Chan W*, 'Issues and Challenges in Water Governance in Malaysia' (2009) 6 *Iran Journal of Environmental Health, Science and Engineering* 143; *Ahkmouch A*, 'Condition for Success 1 "Good Governance"' (2012) *Organisation for Economic Development 4th World Water Forum Report* 3.

¹²⁷ *Rob L and Murray D*, 'Governance for Source Water Protection in Canada' (2012) *Water Policy and Governance Group Synthesis Report*, iv.

¹²⁸ *United Nations Environmental Programme (UNEP)*, 'Water and Development: Industry Contribution' (2004) 26 *Industry and Environment* 32.

¹²⁹ *Rogers P and Hall A*, *Effective Water Governance (Global Water Partnership 2003)* 15.

¹³⁰ *Michael M and others*, *Water Sector Governance in Africa (Water Partnership Programme 2010)* 1.

mechanisms of water governance.¹³¹ Water governance at the micro level is concerned with situations where the provision of water services has been decentralized to the local level. While in some countries water governance is strictly at the macro level, in other countries water governance is exclusively at the micro level. A third category exists; this comprises of countries that have adopted water governance systems at both the macro and the micro level.

The case of water governance in Kenya could be used to illustrate this. Before the onset of colonialism, it is arguable that the customary water governance systems were synonymous with a micro level water governance system.¹³² During colonialism, the regime was set on centralization of management of water resources and provision of water services.¹³³ Consequently, it could be argued that during this period, water governance was at the micro level. However, from the 1980 onwards up to the enactment of Water Act 2002 and the period beyond, the government adopted an approach of decentralization of water services while at the same time retaining certain core functions at the national level.¹³⁴ Consequently, it is arguable that presently, water governance in Kenya is both at the macro and the micro level.

Having highlighted the macro and micro systems of water governance, the study will delve into a brief discussion of water governance systems at the micro level. This is because the concern of the study, which is the provision of water services in Kenya, is an activity that mainly takes place at the micro level. Put differently, the nature of provision of water services in Kenya today adopts the decentralization model rather than a centralized model where it is the national government which is principally concerned with the provision of water services.

¹³¹ *Ibid.*

¹³² See *Huggins* supra note 50.

¹³³ *Ibid.*

¹³⁴ See *Mumma* supra note 5.

Decentralization of water governance entails the transfer of authority for decision-making, financing and management to representative and accountable local governments as well as the delegation of certain public functions to autonomous or semi-autonomous bodies.¹³⁵ The principle of decentralization is enumerated in the Dublin Statement on Water and Sustainable Development.¹³⁶ This was an agreement that emanated from the International Conference on Water and Environment (ICWE) which was held in Dublin, Ireland in 1992. Principle 2 of the Agreement, which provides for decentralization, states as follows:

*Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels. The participatory approach involves raising awareness of the importance of water among policy makers and the general public. It means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.*¹³⁷

The principle of decentralization as enumerated above has influenced the development of the water sector in a number of countries. Birongo and Le observe that the principle is a crucial point for defining the transparency, accountability, inclusiveness, responsiveness, sustainability and efficiency in water legislation and institutions.¹³⁸ The fact that the principle calls for making of decisions at the lowest appropriate level, but it also embraces the principle of subsidiarity. However, for decentralized water governance system to be effective, the entities vested with the authority and responsibility for provision of water services at the decentralized level must abide by the principles of effective water governance.¹³⁹

¹³⁵ Johnson W and Rondinelli D, Decentralization Strategy Design: Complimentary Perspectives on a Common Theme (Research Triange Institute 1995) 3.

¹³⁶ *The Dublin Statement on Water and Sustainable Development* Adopted on January 31, 1992 in Dublin, Ireland, Available at <<http://www.un-documents.net/h2o-dub.htm>> accessed 17 October 2015.

¹³⁷ *Ibid.*

¹³⁸ Birongo J and Le N, 'An Analysis of Water Governance in Kibera, Kenya' (Roskilde University Center 2005)36.

More importantly, decentralization of water services must be anchored on a robust legal, policy and regulatory framework.¹⁴⁰ Additionally, the entities that are tasked with ensuring the success of decentralization of water services must be vested with adequate capacity to effectively discharge their mandate.¹⁴¹ A study by the UNDP notes that while many African countries have attempted to decentralize the governance of water, including the provision of water services, few have succeeded in transferring decision making authority to the entities created to facilitate the decentralization process.¹⁴² This has resulted in situations where there has been a transfer of responsibility but no transfer of authority (decision-making power). This has had a negative effect on the expected gains of decentralization of water governance.

The negative effects have manifested themselves in what has been referred to as attributes of bad water governance. These attributes include: the lack of professional integrity; non-enforcement s; communities that cannot stand up for their rights; poor management; corruption. Countries such as Kenya and Malawi have been classified as among those whose decentralization of water governance has transferred responsibility to the local units but not necessarily the tools for decision making .¹⁴³ On the other hand, Uganda, South Africa and Senegal are listed as examples of countries that have been comparatively more successful in transferring both responsibility and authority.¹⁴⁴

The concern of water governance, just like governance in general, is the extent to which concerned individuals and institutions have embraced good governance practices and the operating principles of water governance. With regard to water, the institutions and individuals involved in water

¹³⁹ *Rosenweig F*, 'Case Studies of Decentralisation of Water and Sanitation Systems in Latin America' (2004) 2 Strategic Paper 1 Environmental Health Project.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² See United Nations Development Programme *supra* note 104.

¹⁴³ See United Nations Development Programme *supra* note 104.

¹⁴⁴ *Ibid.*

governance embrace good governance practices so as to realise the two objectives of water governance that are stated in the definition provided in the preceding discussion in this chapter. The two objectives are: (i) to ensure the effective development; and (ii) management of water resources and to ensure the delivery of water services to all levels of society.¹⁴⁵ The focus of this study, as enumerated in chapter one, is on the latter objective.

The importance of water governance systems cannot be understated. This is because it is the water governance systems put in place that determine who gets what water, the frequency and time that they get the water.¹⁴⁶ Additionally, while the right to water is constitutionally protected in a number of countries, in practice it is the water governance systems that have been adopted that determine who has the right to water, water related services and their benefits.

While good governance is also a broad topic, there are certain tenets that must be present if good governance is to be established. Four tenets are of particular importance to water governance systems that are aimed at delivering water services to all levels of society. First, there is need for quality leadership in the institutions that provide water services.¹⁴⁷ Quality as used in this study connotes individuals who from the outset possess the requisite competences to provide leadership in institutions that provide water services. Additionally, such individuals must enjoy institutional and individual independence. They must be free from any encumbrances that may hinder them from effectively discharging their duties. Second, in order to ensure good governance in the water sector and especially in the provision of water services, there is need to establish strong robust institutions to spearhead various initiatives in the water sector.¹⁴⁸ It is immaterial whether a country adopts a centralized or decentralized approach to water governance. What

¹⁴⁵ See Thomson and others supra note 97.

¹⁴⁶ See United Nations Development Programme supra note 104.

¹⁴⁷ Johnson W and Minnis H, Towards Democratic Decentralisation: Approaches to Promoting Good Governance (Research Triangle Institute 1996) 43

¹⁴⁸ Ibid.

is required is that the institutions established, whether in a centralized or decentralized system, must possess adequate institutional ability to discharge their mandate. Third and perhaps most importantly, good governance in the water sector requires that the concerned institutions manage the resources that are allocated to them in a manner that is efficient, effective, sustainable and transparent.¹⁴⁹

This arguably requires that such institutions must put in place mechanisms that allow for the evaluation of their operations as well as holding them accountable. Given that the public is the main recipient of the services that are provided by these institutions, there is need to ensure that such institutions not only provide for ways in which the public can participate in their decision making, but that at all times, members of the public are able to access information about the various activities of the institutions. Additionally, given the essential nature of water, institutions that are involved in its provision must be responsive to the concerns of various stakeholders.

4.2.1 Dimensions of Water Governance

According to Tropp, there are four dimensions of water governance.¹⁵⁰ These are the social, economic, political empowerment and environmental sustainability dimensions.¹⁵¹ The social dimension is concerned with equitable use of water resources.¹⁵² It deals with ensuring that each member of the society is able to access adequate quantities of water for their desired use. The economic dimension moves to the broader issue of a country's economic growth. The environmental sustainability dimension posits that improved water governance systems facilitate sustainable use of water resources and ecosystem integrity.¹⁵³ The political empowerment dimension ensures that all water stakeholders and the public are

¹⁴⁹ *Ibid.*

¹⁵⁰ Tropp H, 'Building New Capacities for Improved Water Governance', Paper Presented at the International Symposium on Ecosystem Governance (Council for Scientific and Industrial Research 2005).

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

granted equal opportunities to influence and monitor political processes and outcomes in water governance.¹⁵⁴

With regard to this study, the social and political empowerment dimensions are of particular importance. This is because it is these two dimensions which directly touch on the provision of water services. The economic dimension and the environmental sustainability dimension, while also touching on the provision of water services, arguably fit better in a broad discussion of both utilization of water resources and provision of water services. However, the concern of this study is only on the latter thus more emphasis is given to the social and political empowerment dimensions.

4.2.2 Principles of Effective (Water) Governance

The principles of effective governance were developed by the United Nations in 2003.¹⁵⁵ Given that water governance is a facet of governance, the principles are directly applicable as far the governance of institutions that are involved in provision of water services is concerned. The principles are discussed below with the requisite modifications to illustrate their application and relevance to water governance systems.

a) Participation

According to the principle of participation, all stakeholders in the water sector and the citizens at large should have a say, either directly or indirectly through use of intermediary organizations that represent their interests, in the policy and decision making processes of institutions that are involved in the provision of water services.¹⁵⁶ The institutions must seek to promote the principle of participation through the use of inclusive approaches in their governance.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *United Nations-World Water Assessment Programme, World Water Development Report: Water for People: Water for Life (United Nations 2003) 32.*

¹⁵⁶ *Ibid.*

b) Transparency

The principle of transparency is hinged on the twin tenets of information flow and accessibility.

It advances the position that there should be free flow of information among all the concerned stakeholders.¹⁵⁷ As applied to water governance, the principle requires water service providers, being the bodies with most critical information as far as provision of water services is concerned, to ensure that the information is readily available to the other stakeholders and the public at large. The institutions that provide water services must also take the necessary steps to ensure that the stakeholders can readily access such information.

c) Equity

According to this principle, all groups in society must have equal opportunity to improve their well-being.¹⁵⁸ This principle urges institutions that are involved in the provision of water services to discharge their mandate in a manner that keeps true to the spirit of the principle. Where such institutions adopt malpractices and especially in their governance, they run the risk of jeopardizing the right of access to water for the citizens and in the process deny certain segments of the population or even the whole population an equal opportunity to improve their well-being.

d) Effectiveness and Efficiency

The principle of effectiveness and efficiency requires institutions to ensure that they use resources that are allocated to them prudently.¹⁵⁹ The second limb of this principle notes that prudent use of resources is not an excuse to fail to produce results.¹⁶⁰ This is one of the principles which are targeted at corruption in the institutions that provide water services. The principle takes cognisance of the fact that corruption not only

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

entails misuse of resources, but also leads to a lack of failure to produce results (ineffective provision of water services if any).

e) Rule of Law

This principle roots for for legal and regulatory frameworks that are fair.¹⁶¹ The rule of law frowns upon arbitrary decision-making processes. It requires institutions to always operate within the confines of the law, and especially laws on human rights. In this regard, it must be borne in mind that the right to water is provided for in the constitutions of a number of countries of the world. Consequently, one of the ways that water governance institutions demonstrate their adherence to the principle of the rule of the law, is by ensuring that they have taken all reasonable steps to ensure the realization of the right to water.

f) Accountability

At the heart of this principle is the fact that all institutions that are involved in the provision of water services do not operate in a vacuum. They are part and parcel of society. They are involved in the provision of an essential commodity to the public and other stakeholders. Consequently, such institutions must be accountable to the public and other stakeholders.¹⁶² Where the institutions that provide water services represent certain specific interests, then they must be accountable to the interests they represent.¹⁶³ The principle of accountability is an appreciation of the fact that being bestowed with the authority or responsibility to provide water services is not a blank cheque to operate as one desires. The provision of the services must go hand in hand with a system of checks and balances.

g) Coherence

The principle of coherency was developed as result of the appreciation that issues touching on water resources are becoming increasingly complex. Consequently, any policies enacted or actions taken in the water governance sector must be coherent, consistent and readily intelligible.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

h) Responsiveness

The principle of responsiveness is closely related to the principle of accountability. However, while the principle of accountability is underpinned by a system of checks and balances to especially guard against misuse of power, the principle of responsiveness requires that institutions involved in the provision of water services should serve all their stakeholders and should respond promptly and adequately to their concerns, changes in demand and preferences where applicable, or any other new circumstances.¹⁶⁴

i) Integration

The principle of integration as applied to water governance appreciates that the attributes of water require a water governance system that embraces and promotes holistic and integrated approaches.¹⁶⁵

j) Ethical Considerations

The principle of ethical considerations requires that water governance systems must be underpinned by the ethical principles of the societies in which the various institutions that are involved in water governance and especially, provision of water services, operate.¹⁶⁶ For instance, a water service provider which operates in an area where water resources and access to water is customarily managed, must ensure that it respects traditional water rights in providing its services.

In concluding the discussion on the principles of effective water governance, it is important to observe that these principles do not operate in mutual exclusivity. On the contrary, institutions that are involved in the provision of water services must endeavour to embrace the principles in their totality. Only then can they realise good governance in their operations and make tangible progress towards the realization of the right to water. Having discussed water governance, the following section undertakes a comparative analysis of water governance systems in Kenya, South Africa, Uganda and Ghana.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

4.3 The Water Governance System in South Africa

The Constitution of South Africa distinguishes between duties of management of water resources and the provision of water services.¹⁶⁷ It provides that the management of water resources shall be a function of the national government while the management of the provision of water and sanitation services shall be a function of municipalities.¹⁶⁸ To give effect these constitutional provisions, different legislative instruments were enacted to address the management of water resources and the provision of water services.¹⁶⁹

In Kenya, it is the Water Act 2002 that first separated the provision of water services from the management of water resources.¹⁷⁰ However, unlike in South Africa where the two functions are addressed by separate Acts of Parliament, in Kenya both functions are addressed by one Act: the Water Act 2002. South African policy and legislative framework is that it clearly separates water resources management and protection from water services provision and management

According to the Constitution of South Africa 1996, provision of water services could be an exclusively national, concurrently national and provincial, exclusively provincial or a local government function depending on what sector and activities are involved.¹⁷¹ As an example, provision of water services for the irrigation sector is performed by both the national and provincial government.¹⁷² On the other hand,

¹⁶⁷ See generally the Constitution of the Republic of South Africa 1996.

¹⁶⁸ See *Thomson and others* supra note 97.

¹⁶⁹ The Water Services Act No. 108 of 1997 was enacted to address water services while the National Water Act No 36 of 1998 was enacted to address water resources.

¹⁷⁰ *Ong'or D*, 'Community Participation in Integrated Water Resource Management: The Case of the Lake Victoria Basin' (2005) 3 FWU 133; *Hepworth N and others*, 'Exploring the Value of Water Stewardship Standards in Africa' (2011) Alliance For water Stewardship Technical Report 27.

¹⁷¹ See generally the Constitution of Republic of South Africa 1996.

¹⁷² See *Thomson and others* supra note 97.

provision of water services to support life and hygiene is exclusively in the province of local governments.¹⁷³ The study focuses on the provision of water services function that is vested in local governments. This position is informed by two reasons.

In Kenya, just like in South Africa, provision of water services was vested in the local governments until they converted their water and sanitation departments into private companies. As such, to that extent, the two countries could be said to have adopted a similar approach to decentralization of water services. Second, in both countries, provision of water services at the local units is the manner through which most of the people, especially in the urban and peri-urban areas access water and sanitation services. Consequently, it would be useful to compare and contrast the systems of water governance that have been embraced by the two countries at the decentralized levels.

As indicated earlier, the Constitution of South Africa 1996 tasks local governments with the duty to provide water services to people for support of life and personal hygiene. However, the constitution vests the national government with the authority to enact legislation to govern the discharging of this function by the local authorities. As such, the Constitution itself grants the national government some supervisory powers over local authorities as far as the provision of water services to support life and for personal hygiene is concerned.

Before 1994, numerous organizations were involved in the provision of water services in South Africa. This was due to the fact that at the time, the country was divided into 11 different administrative units comprising of 6 self-governing territories, 4 national states and the Republic.¹⁷⁴ However, in 1994, there was an amalgamation of the different organizations that provided water services. Of necessity, the amalgamation had to take into account the fact that the organizations discharged their functions according to the territory in which they were based. For example, in the national states and self-governing

¹⁷³ *Ibid.*

¹⁷⁴ *Edward L*, 'Land Tenure on the Arabie-Olifants Irrigation Scheme' (IWMI South Africa Working Paper No 2 1999) 4.

territories, provision of water services was done by government departments while in the Republic, provision of water services was a function of the municipalities.

The amalgamation process had to take into account the acute disparities in the provision of water services among the various groups.¹⁷⁵ The disparities in the provision of water services were not necessarily a function of the many different organizations that provided water services. They were attributable to a number of factors which included *inter alia*: the lack of a coherent policy; the lack of clearly delineated institutional responsibilities; overlap of institutional boundaries; and lack of political will.¹⁷⁶ Reorganizing the water governance system in South Africa therefore meant taking on these challenges head on.

As part of the amalgamation process and to promote the delivery of water services, the Department of Water Affairs and Forestry (DWAFF) established a new Chief Directorate of Community Water Supply to plan the expansion of the provision of water services before they were transferred to appropriate organizations.¹⁷⁷ DWAFF embarked on the development of a Water Supply Policy which was hinged on a number of principles. The policy provided that decision making and control must be devolved as much as possible to the local structures.¹⁷⁸ Secondly, the consumers (citizens) were entitled to a level of services that was adequate to facilitate a healthy living environment.¹⁷⁹

¹⁷⁵ See generally *Mazungu E and others*, 'Emerging Forms of Social Action in Urban Domestic Water Supply in South Africa and Zimbabwe' (2013) 6 *Journal of Sustainable Development* 70, 73. Only about 45% of the Blacks had piped water against nearly 100 percent of the other groups.

¹⁷⁶ See *Thomson and others* supra note 97.

¹⁷⁷ *Department of Water Affairs and Forestry*, *Transfer of Government Water Works: Policy, Guidelines and Procedures to Transfer Government Water Supply and Sewerage Works* (Department of Water Affairs and Forestry 1997) 20.

¹⁷⁸ *Department of Water Affairs and Forestry (DWAFF)*, *White Paper on a National Water Policy for South Africa* (Department of Water Affairs and Forestry 1997).

¹⁷⁹ *Ibid.*

The Water Supply Policy also set a number of goals for the provision of water services. One of the goals provided that the role of the government would be to support institutional development at the local level as well as to provide the requisite assistance for the physical development of water supply and sanitation services.¹⁸⁰ The government would realise this objective through DWAF at the regional level and through organizations such as water boards, private sector players and non-governmental organizations.¹⁸¹ Similarly, the provision of water services should ultimately be a function of competent democratic local governments supported by provincial governments.¹⁸² DWAF was therefore responsible for among others, monitoring and regulatory functions. Additionally, this goal rooted for strong private and NGO sectors that would assist the public agencies in the provision of water services.

The Water Supply Policy also delineated the roles of the various organizations in the water sector as far as the provision of water services was concerned. The roles of local government and the private sector are of particular relevance to the study. According to the policy, the local government was responsible for making access to water and other services possible for all persons residing in its area of jurisdiction.¹⁸³ On the other hand, the policy paper underscored the fact that the private sector represented vast resources which could be harnessed to contribute to the implementation of the policy in a number of areas which, among others, include: training and capacity building; organizational development; and operation and maintenance.¹⁸⁴

Consequently, a legislative framework was put in place to govern the provision of water services to support life and personal hygiene in South Africa. This legislative framework was built on the

¹⁸⁰ *Ibid.*

¹⁸¹ See *Thomson and others* supra note 97.

¹⁸² *Tsibani F*, 'A Literature Review of the Twinning Approach in Supporting Developmental Water Services by Water Service Institutions (WSIs) and Water Service Authorities (WSAs) in South Africa' (2005) 31 *Water South Africa* 335, 336.

¹⁸³ See *Thomson and others* supra note 97.

¹⁸⁴ *Ibid.*

provisions of the Water Supply Policy. The first Act of Parliament to be enacted pursuant to the policy was the Water Service Act (WSA) of 1997. The WSA deals exclusively with the provision of water and supply services to support life and personal hygiene. The Act has a number of provisions which are meant to ensure effective governance of the water sector in South Africa especially in the provision of water and sanitation services to support life and personal hygiene. The Act provides for cooperative governance, for capacity building at all levels of governance.¹⁸⁵ Second, the Act provides mechanisms for monitoring and intervention as well the role of DWAF to supplement provincial and local governments.¹⁸⁶

The Act is premised on the fact that everyone has a right of access to basic water supply.¹⁸⁷ Accordingly, the Act places an obligation on all organizations that fall under its purview to take all reasonable steps to ensure the realization of the right. The Act also places a duty on all organizations that are involved in the provision of water services to ensure that all consumers or potential consumers in their areas of jurisdiction have an efficient, affordable, economical and sustainable access to water services. The Act also provides that a municipality may provide water services by itself. Alternatively, a municipality may enter into a written contract with a water service provider to provide water services on condition that before entering into such a contract, it has considered all known public-sector providers that are willing and able to perform the relevant functions. Municipalities may also form joint ventures with other water services institutions to provide water services.

Kenya can draw a number of lessons from the water governance system in South Africa as discussed above. First, the decentralization process in South Africa was preceded by laying down of the

¹⁸⁵ See generally the Water Service Act 1997 (South Africa).

¹⁸⁶ *Ibid.*

¹⁸⁷ “Basic water supply” Is the minimum standard of water supply services necessary for the consistent supply of a sufficient quantity and quality to support life and personal hygiene. Act No. 108 of 1997 Water Services Act, 1997. Available at https://www.environment.gov.za/sites/default/files/legislations/waterservices_act108of1997.pdf accessed on 19th October 2015

requisite institutional and regulatory framework to ensure the efficient and effective provision of water services.

Provision of water services was not privatized even though there are ways through which the private sector could get involved in the provision of water services. Third, the decentralization approach in South Africa entailed delegation of both responsibility and authority while at the same time putting in place a system of checks and balances to ensure that the concerned authorities effectively discharged their mandates. Lastly, the provision of water services was anchored on the fact of provision of water services being a basic right and that all consumers and potential consumers of water had a right of access to water. These were the two base guiding principles for all institutions that were involved in the provision of water services in South Africa.

While South Africa is one of the leaders in the continent as far as decentralization of water governance, including the provision of water services, is concerned, it has nevertheless faced a number of challenges. One of the main problems has been the harmonization of the various legislative instruments governing the water sector to clearly delineate the roles, authority and responsibility of each sector.¹⁸⁸ As Akech notes, the water governance system in Kenya also faces this problem especially in light of the fact that there are institutional overlaps in the provisions of the Environmental Management and Coordination Act 1999 and Water Act 2002.¹⁸⁹ The problem has been manifested in the lack of a clear delineation of functions between the National Environmental Management Authority and the various institutions established under the Water Act 2002. The overlap between the functions of these institutions has at times been exploited especially by water service providers to the detriment of consumers of water services.

Other problems that have faced the decentralization of the provision of water services in South Africa include obscurity in the process of transferring assets to the decentralized units, poor asset

¹⁸⁸ *Ibid.*

¹⁸⁹ See *Akech* supra note 67.

management in the local units and lack of the required competencies among the staff of the local authorities.¹⁹⁰ These are problems which have also characterized the decentralization of the provision of water services in Kenya. This was especially the case when the water and sanitation departments of local authorities were privatised and tasked with the provision of water and sanitation services.

Just like the case in South Africa, the transfer of assets from the local authorities to the newly established water and sanitation companies was not straightforward.¹⁹¹ Additionally, the water and sanitation companies have been characterized by poor management of the assets under their control. Thirdly, most of the water and sanitation companies did not have competent staff, especially at the strategic/boards of directors' level to enable them effectively discharge their mandate of provision of water services.¹⁹² Accordingly, it is arguable that most of the problems that continue to face the provision of water services in Kenya are directly traceable to the hasty manner in which decentralization and privatization of the provision of water services was undertaken.

4.4 Water Governance System in Uganda

Uganda has been hailed as one of the countries that have attained both decentralization and devolution (transfer of decision making authority) of water governance.¹⁹³ Part of the reason for the success of decentralization of water governance in Uganda is the fact that, Uganda first set up the requisite

¹⁹⁰ See *Thomson and others* supra note 97.

¹⁹¹ See *K'Akumu and Appida* supra note 77.

¹⁹² *Ibid.*

¹⁹³ See *United Nations Development Programme* supra note 104.

regulatory and legal framework for decentralization of water governance.¹⁹⁴ Uganda also built the capacity of recipient local institutions.¹⁹⁵

Specific measures during the decentralization exercise developed and implemented policies and an institutional framework delineating the functions, powers and responsibilities of the various institutions in the water sector. This minimized duplication of roles. A detailed legal and regulatory framework ensured that there were no overlaps or gaps which could be exploited to the detriment of the sector. The clear delineation of responsibilities and roles in the water governance system in Uganda provides useful lessons for Kenya. This is because, as has been shown in Chapter 2 which discusses the legal framework governing water governance in Kenya, part of the problem confronting the sector is the fact that the water governance legal and regulatory framework contains various instances of duplication and instances of overlap of functions among the various institutions in the sector. This is a problem which has especially been more acute in the institutions that are involved in the provision of water services.

The water governance system in Uganda embraced the principle of decentralization as enumerated in the Dublin Agreement.¹⁹⁶ Consequently, the management and provision of water services in Uganda is undertaken at the lowest appropriate level. Additionally, procurement of the equipment and items required for the management and provision of water services has been devolved to district levels. In keeping with the principles of effective water governance, this devolution of authority has been accompanied by checks and balances which include: audits, capacity building initiatives, monitoring, evaluation, enforcement of those findings, and feedback.¹⁹⁷

¹⁹⁴ *David B*, *Local Water Management* (International Development Research Centre [IDRC] Books 2002) 70.

¹⁹⁵ *Ibid.*

¹⁹⁶ See *The Dublin Statement on Water and Sustainable Development* supra note 109.

¹⁹⁷ See *David B.* supra note 168.

As noted earlier in this study,¹⁹⁸ Kenya has embraced decentralization but not necessarily devolution of water services. This has had its own inherent challenges. However, even where there have been creditable attempts at devolution of water governance in Kenya, it is arguable that the steps which have been taken to ensure the success of devolution are inadequate. This is because, unlike Uganda, the devolution of water governance systems in Kenya, including the provision of water services, has not been accompanied by a robust system of checks and balances. The lack of regular audits, capacity building initiatives, monitoring and evaluation and enforcement of findings from the monitoring and evaluation have contributed to the bad governance practices among most water service providers in Kenya.

The legal and regulatory framework governing the provision of water services in Uganda is found in two Acts of Parliament, namely the Water Act¹⁹⁹ and the National Water and Sewerage Corporation Act.²⁰⁰ The preamble of the Water Act provides that “it is an Act of Parliament to provide for the use, protection and management of water resources and supply, to provide for the constitution of water and sewerage authorities and to facilitate the devolution of water supply and sewerage undertakings.”²⁰¹ It is noteworthy that the Act affirms that it seeks to ensure the successful realization of the devolution of provision of water services in Uganda. However, while the Act affirms devolution of the provision of water services, it vests all the rights to investigate, control, protect and manage water in Uganda for any use in the Government.²⁰² This is arguably meant to ensure that the government is able to exercise oversight functions over the water supply services that are provided under the devolved system.

¹⁹⁸ See section 2.3 above.

¹⁹⁹ Cap 152 Laws of Uganda, available at <http://www.ulii.org/ug/legislation/consolidated-act/152> assessed on 20th October 2015

²⁰⁰ Cap 317 Laws of Uganda, available at <http://www.ulii.org/ug/legislation/consolidated-act/317> assessed on 20th October 2015

²⁰¹ Preamble to the Water Act supra note 173.

²⁰² Section 4 of the Water Act Cap 152 Laws of Uganda, supra note 125

The Act vests the Minister responsible for water with the power to appoint any person or public body to be a water authority for any water supply.²⁰³ The functions of such appointed water and sewerage authorities include, *inter alia*, the provision of water supply services for domestic, commercial, recreational and environmental uses.²⁰⁴ Additionally, the Minister performance contracts each authority in provision water or sewerage services. The performance contract defines the scope of the rights and responsibilities of the authority as far the discharging of its mandate is concerned. The provisions highlighted above point to the fact that while the provision of water services may be devolved, the regulatory framework provides for a system of checks and balances to ensure that the delegated and devolved power is not abused by those who are tasked with the provision of water services. This is in keeping with the principles of effective water governance that have been enumerated in preceding sections of this chapter.

The National Water and Sewerage Corporation Act provides for the establishment of the National Water and Sewerage Corporation (NWSC).²⁰⁵ It provides water supply services throughout the country.²⁰⁶ The NWSC Act also establishes a board of directors. The board is the policy-making body of the organization. It is tasked with deciding the policies and strategies to be followed by the corporation in achieving its objects .²⁰⁷

Under the terms of the Act, all the directors save for the managing director are appointed by the Minister and serve for a term of three years renewable once. Also, the directors do not draw any salaries from the corporation except for travelling or other allowances that the minister may approve. A person must have the necessary qualification or experience in any of the following fields: the business of the

²⁰³ Section 46 of the Water Act Cap 152 Laws of Uganda, supra note 125

²⁰⁴ Section 47(1) of the Water Act Cap 152 Laws of Uganda, supra note 125

²⁰⁵ Section 2 of the National Water and Sewerage Corporation Act Cap 317 Laws of Uganda, supra note 126

²⁰⁶ Section 4 of the National Water and Sewerage Corporation Act Cap 317 Laws of Uganda, supra note 126

²⁰⁷ Section 7 of the National Water and Sewerage Corporation Act Cap 317 Laws of Uganda, supra note 126

corporation; public finance, banking or economics; business management, commerce or industry; or environmental management and public health to qualify for appointment.²⁰⁸

The National Water and Sewerage Cooperation Act also places a mandatory obligation on directors to make full disclosure to the board in a meeting where pecuniary conflicts arise.²⁰⁹ Depending on the nature of the pecuniary interest, the director may then be barred from participating in further meetings where the matter is discussed.²¹⁰ The provisions pertinent to the board of the NWSC reflect an appreciation of the principles of good corporate governance. As discussed in Chapter One of the study, one of the problems that bedevils the provision of water services in Kenya is lack of good corporate governance practices in the boards of the water service providers. This is coupled with the fact that there are inadequate mechanisms to hold such boards accountable as mandated by the principles of effective water governance.

Unlike in Uganda where the provisions dealing with good corporate governance of the NWSC have legislative force, in Kenya the boards of the water service providers are required to make reference to the Corporate Governance Guidelines 2009. As the name suggests, these are just guidelines which do not have any legislative force and may thus be more easily disregarded. To remedy this, there may be need to ensure that the Corporate Governance Guidelines 2009 are given legislative force. Although this is not a turn-key solution, it is nevertheless a measure that may go a long way in curbing the bad governance practices that have characterized the provision of water services in Kenya.

²⁰⁸ Section 9(1) of the National Water and Sewerage Corporation Act Cap 317 Laws of Uganda, supra note 126

²⁰⁹ Section 13 of the National Water and Sewerage Corporation Act Cap 317 Laws of Uganda, supra note 126

²¹⁰ *Ibid.*

4.5 Water Governance System in Ghana

Of the three countries that inform the discussion on the comparative analysis, Ghana is the only country where the development of the water sector was not initially guided by a national water policy.²¹¹ The management of the water sector was generally guided by a document prepared by the Ministry of Works and Housing titled, “*Ghana’s Water Resources, Management, Challenges and Opportunities*”.²¹² While the document was not necessarily binding, the Government of Ghana has been implementing its recommendations in the development and management of the water sector.

The lack of a policy to guide the water sector may perhaps explain why the developments in the sector appeared to be disjointed. For instance, for many years there was no institution that bore the overall responsibility for the management of the country’s water resources.²¹³ Second, provision of water services was done without regard to the economic value of producing and conserving it.²¹⁴ Third, and perhaps more worrying, is the fact that there was lack of effective regulation of the water sector.²¹⁵ Such an uncoordinated approach did not augur well for the provision of water services. This is primarily due to the fact that the various players in the water sector had a free hand to do as they pleased with no mechanism for holding them accountable where they failed to effectively discharge their mandate.

The *Ghana Water Resources, Management, Challenges and Opportunities* report made a number of recommendations to rectify the above problems. A number of these recommendations are of particular relevance to the present study. First, the report recommended that Ghana should move away from a state

²¹¹ Mensa K, *Water Law, Water Rights and Water Supply (Africa): Ghana-Study Country Report* (Department for International Development (DFID) 1999) 3.

²¹² Osafo, K. *Ghana’s water resources - Management challenges and opportunities*;1998.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Boateng O, ‘Environmental Law: Ghana Water Laws’ (1977) IX Review of Ghana Law 15.

dominated water sector to a private sector led industry.²¹⁶ Second, the report recommended that a single entity coordinate the entire water sector.²¹⁷ It is only in 2007 that Ghana drafted its first National Water Policy. The policy notes that the provision of water services especially in the urban areas is plagued by a number of challenges. These include: poor management in water supply; water supply service incommensurate with the high tariffs; unaccounted water; and inadequate revenue investment.²¹⁸

There are two main Acts of Parliament that govern the provision of water services for domestic consumption in Ghana. These are the Ghana Water and Sewerage Corporation Act and the Community Water and Sanitation Agency Act. The Ghana Water and Sewerage Corporation Act establishes the Ghana Water and Sewerage Corporation (GWSC) as a public corporation to provide and conserve water.²¹⁹ The GWSC also sets the standards for the provision of water and sewerage services. In order to effectively discharge its mandate, the GWSC has 10 regional offices spread across the country mainly concerned with the provision of water to urban areas.

The Community Water and Sanitation Agency Act establishes the Community Water and Sanitation Agency (CWSA) to provide water services to the rural areas in 1994.²²⁰ Subsequent amendments to the law granted it full autonomy from the GWSC.²²¹ In discharging its mandate, the CWSA involves a number of stakeholders. For instance, it supports District Assemblies in promoting sustainable safe water and sanitation services in rural areas²²². The CWSA must find innovative ways to

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Government of Ghana-Ministry of Water Resources, Works and Housing *National Water Policy* (Government of Ghana-Ministry of Water Resources, Works and Housing 2007).

²¹⁹ Section 4 of the Ghana Water and Sewerage Corporation Act 1965.

²²⁰ See generally the Community Water and Sanitation Agency Act, 1998 (Act 564) (Ghana).

²²¹ *Ibid.*

encourage private sector participation in the provision of water and sanitation services. Third, the CWSA must set the standards for the provision of water services; working closely with other relevant agencies as it discharges its mandate.

The legal framework governing the water sector in Ghana also establishes a number of regulatory institutions. A key institution that was set up in this respect is the Water Resources Commission (WRC).²²³ The WRC was established pursuant to Article 269 of the Constitution of Ghana 1992. The principal function of the WRC is the regulation, management and coordination of policy in connection to water. However, the WRC was mainly tasked with the management of water resources as opposed to the provision of water services. It shall thus not form the basis of further discussion in the present study.

Another key regulatory institution which was set up is the Public Utilities Regulatory Commission (PURC). PURC was set up in 1997 under the Public Utilities and Regulatory Commission Act 1997. Its principal function was to regulate the tariffs charged by utilities and to protect both consumers and utility companies.²²⁴ This was also to address some of the complaints that were being raised against GWSC, including that it charged high fees for its services yet the water services it provided were deteriorating. The mismatch between the cost charged and the services provided was occasioned by a number of institutional challenges within the GWSC.

The first is the fact that the GWSC was subject to external interference especially by politicians.²²⁵ Politicians were more focused on using GWSC to satisfy political objectives rather than ensuring the corporation was efficiently managed so as to ensure effective provision of water services.

²²² These are the highest political and administrative authorities in the District. They would form the basis on which decentralization of provision of water services would be anchored.

²²³ *Mensa supra* note 185.

²²⁴ See generally the Public Utilities Regulatory Commission Act 1997.

²²⁵ See *Mensa supra* note 185.

Second, GWSC was characterized by high levels of fraud.²²⁶ This has had a serious detrimental effect on the provision of water services to consumers. This is especially compounded by the fact that most people in urban areas in Ghana rely on piped water supplied by GWSC. The setting up of the PURC was thus aimed at stemming this rot.

The problems facing the water sector in Ghana are similar to those that confront the water sector in Kenya. First, a number of the boards of the water service providers have also been subject to external political interference, especially through appointment of politicians to the boards of the WSPs despite such politicians not having the requisite qualifications.²²⁷ Second, the water service providers are also characterized by high levels of corruption.²²⁸ Corruption has denied water service providers the funds that would have been used to improve service delivery to consumers.²²⁹ Additionally, it has resulted in consumers paying high charges while receiving poor quality of services.

However, a key distinction between Ghana and Kenya is that while Kenya is at quite an advanced level of decentralizing its water services, the provision of water services in Ghana is still highly centralized. It is, however, noteworthy that the provision of water services in both countries faces similar problems. It is also important to point out the fact that Kenya is ahead of Ghana as far as the embracing of the principles of effective water governance is concerned. In this respect, while the experiences of both South Africa and Uganda provide some best practices that Kenya may borrow in its water governance system, Ghana provides some useful lessons on the pitfalls to avoid if Kenya is to attain an effective governance system for its water sector.

²²⁶ *Ibid.*

²²⁷ See *K' Akumu and Appida* supra note 77.

²²⁸ *Ibid.*

²²⁹ See *Akech* supra note 67.

3.6 Conclusion

This chapter has provided a comparative analysis of the water governance systems of South Africa, Ghana and Uganda. The chapter has also discussed water governance so as to provide a background against which the comparative analysis was undertaken. The comparative analysis has highlighted best practices that Kenya can adopt and pitfalls to avoid as it seeks to improve its water governance system. The following chapter discusses the specific challenges facing the water governance systems in Kenya as far the provision of water services is concerned.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a conclusion of the findings of the study. It also makes recommendations on the way forward with respect to the challenges that face the governance of institutions that are tasked with the provision of water services.

5.2 Conclusion

The overall objective of the study was to investigate the challenges that face the governance of the water sector generally. In so doing, correlations were made between the situation in Kenya and other countries. The purpose of this exercise was to show that Kenya's problems are not isolated and that solving them involves the discipline of a multi-sectoral approach. The provision of water services in many areas is dependent on the governance mechanisms that are in place over the water resources of the authorities.

Based on the hypotheses, water was adjudged to be central to the achievement of socio-cultural and economic-political development policy aspirations of Vision 2030. To this end, the legal reactions of the government were put in context. The paper began on the premise that the shortage of comprehensive research meant that research cannot accurately target to cover all pertinent aspects. The discourse in this paper was intended to create the will and avenue for further future research, that canvasses all areas of corporate governance in WSPs in Kenya.

The paper highlighted the challenges that the Kenyan legal and policy framework faces in the area of governance of the WSPs. Comparative studies were done in the process of determining the most appropriate course of action. Good practices and governance solutions from countries that are in a contextually similar position helped to give perspective to the analysis of WSPs in Kenya. Even in those

instances that there was no direct measure that could be contextualized, the analysis of the paper pointed to new areas that could shed more light on WSP governance issues.

5.3 Recommendations of the Study

1. Clearly delineation the functions of each body so as to avoid conflict of roles

Based on the research questions, this paper ascertained that one of the key contributors to inefficiency in the water sector is the fact that the legal framework creates corporate governance frameworks whose mandate overlaps and often conflict leading to confusion and duplicity of roles. To remedy this, there is need to reduce the number of entities or establish a single entity that will spearhead the governance of the water sector in Kenya. In this regard, it is commendable that the Water Bill 2015 establishes the Water Services Regulatory Authority and the National Water Harvesting and Storage Authority.

While the proposed establishment of these two bodies is welcome, there is need to clearly delineate the functions of each body so as to avoid instances of conflicting roles. Additionally, the authorities must be adequately equipped in terms of human and physical resources to enable them to effectively play an oversight function in the water sector. More importantly, the Minister should wield very limited, if any, control of the two authorities. Water consumers should also have a say in the appointment of the directors of the two authorities. Also, the water consumers should, to the greatest extent possible, be consulted and their views taken into account and given meaningful effect.

2. Reconcile the provisions of the Water Act 2002 and the Environmental Management and Co-ordination Act 1999

In as far as the legal framework is concerned, the paper established that the Water Act 2002 and related policy documents conflict with those of the Environmental Management and Co-ordination

Act 1999, particularly as regards the role of the institutions established under the respective statutes. In light of this, there is need to make necessary amendments to the various Acts of Parliament to ensure that there is a clear delineation of functions among the various institutions that are established by the different Acts of Parliament. Specifically, there is need to reconcile the provisions of the Water Act 2002 and the Environmental Management and Co-ordination Act 1999 to ensure that there are no instances of overlap between the functions of the various institutions established by the two Acts of Parliament.

3. The legislative framework should include more participatory approaches in the establishment and operation of Water Service Boards.

This study has shown that bad corporate governance practices that inevitably lead to corruption constitute the primary cause for the poor performance of the Kenyan water sector in general and WSPs in particular. It has also shown that bad corporate governance practices are promoted by the deficient provisions of the Water Act 2002, which fails to institutionalize principles of good corporate governance. There is therefore need to incorporate the principles of effective water governance in the legislative framework on the governance of institutions that provide water services. For example, the legislative framework governing water service providers should provide for both top-down and bottom-up accountability approaches to holding water service providers accountable. Also, the legislative framework should include more participatory approaches in the establishment and operation of Water Service Boards.

4. The Corporate Governance Guidelines should be given legislative force

This study has also made clear that while the content of the Corporate Governance Guidelines have an important role to play in the management of the water sector in Kenya, their binding effect is limited because they lack the imperative force of law. This creates a scenario whereby some actors

in the water sector may choose to ignore it or conduct themselves in a manner that is contrary to it. Therefore, in order to ensure uniformity in the management of water resources in Kenya, the Corporate Governance Guidelines should be given legislative force. The fact that they are merely guidelines has led to them be disregarded. In addition, the qualifications of directors of the various water service providers must be laid down in statute rather than simply being provided for in the guidelines. This will give it the legislative imprimatur and the attendant binding force of law.

5. Developing mechanisms of self-regulation

This study has shown that current institutional arrangements for the management of water resources in Kenya are characterized by weak accountability mechanisms. It has also shown that this has contributed in large part to the entrenchment of an institutionalized culture of corruption and patronage in the management of water resources in Kenya. As one of the ways to eradicate this, all institutions in the water service sector should be compelled to develop mechanisms of self-regulation. This will be in addition to the external oversight that will be exercised by the concerned government agency.

7. Increased Government Involvement in the Regulation of the Sector to Protect Consumers from the Market System

This study has shown that one of the challenges facing the water sector in Kenya is the lack of a complementary approach to water management between the public regulator and the private service provider. While the private sector has taken the lead in the provision of water services and the government has largely been left as a regulator of the services, there is need to ensure that the regulatory framework is aligned to the operations of the private sector. This will help to reduce instances where the regulatory framework and the operations of the water service providers are diametrically opposed. The government should be more involved in the regulation of the sector so as

to protect consumers from the vagaries of a market system that came about as a result of the decentralization and ultimate privatization of the provision of water services. As an example, there is need for the government to play a bigger role in setting of standards for the water sector and in developing elaborate procedures for the pricing structure in the water sector.

7. Adopting of innovative strategies in the provision of water services

This study has demonstrated, using systematic historical analysis, how the role of government in the management of water resources has continued to diminish over time. However, it has also shown that there still remains an instrumental role to be played by government in conjunction with the private sector, but there has been little sustained effort to develop workable strategies for joint engagement. The study therefore recommends the adoption of innovative strategies in the provision of water services. Such approaches as the delegated management model (DMM) that have successfully been used to provide higher quality water services at affordable prices should be replicated in different parts of the country.

8. The legislative framework governing the water sector in Kenya must take into account the devolved structure of government

This study has shown that certain provisions of the Water Act 2002 do not align with the content of the Constitution of Kenya, 2010 which, among other things, sets out the principles of good governance and the conditions for holding public office. Such discordance may hinder efforts to implement comprehensive corporate governance reforms in the water sector. In order to prevent this, there is need to align the relevant legislation governing the water sector with the provisions of the Constitution of Kenya, 2010. Provision of water services must be guided by the need to ensure the realization of the right to water which is provided for under Article 43(1)(d) of the Constitution of Kenya, 2010. More importantly, the governance of the water sector in Kenya must adhere to article

10 of the Constitution which enumerates the national values and principles of governance. The legislative framework governing the water sector in Kenya must also take into account the devolved structure of government which was introduced by the Constitution of Kenya, 2010. In this regard, there is need to enact sector-specific policy and legal frameworks to operationalize devolution. The laws governing the water sector must be aligned with the constitutional provisions on devolution while at the same time guarding against bad governance in the water sector.

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