

# Streamlining Water Governance in Kenya for Sustainable Development

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## ***Abstract***

*Good governance is not only important for the national government but also for the various sectors in discharging service to the people. One such area is the provision of basic needs such as water which is critical for human survival and securing of livelihoods. Water sector governance is an area that involves various state laws, regulations, and formal and informal players. It involves balancing the conflicting interests and needs of various stakeholders through clearly defined responsibilities, transparency and accountability of formal and informal players. Water resources governance has to consider and balance various interests which range from cultural, economic, social, legal and political contexts. This paper approaches water governance in this perspective and affirms the need to accommodate the various users and their diverse needs as far as water is concerned. To assess the current measures and attempts by the state to achieve the constitutionally guaranteed right of access to clean and safe water in adequate amounts, the paper offers an overview and analysis of the provisions of Water Act 2016 in light of the international best practices in water governance and the sustainable development agenda.*

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## Streamlining Water Governance in Kenya for Sustainable Development

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### 1. Introduction

Good governance frameworks are said to embrace the relationships between governments and societies, including laws, regulations, institutions, and formal and informal interactions which affect the ways in which governance systems function, stressing the importance of involving more voices, responsibilities, transparency and accountability of formal and informal organizations associated in any process.<sup>1</sup> The concept of good governance as used in this paper is informed by the foregoing definition of the term due to the important elements such as stakeholders' voices, responsibilities, transparency and accountability.

Water governance may be defined as the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society.<sup>2</sup> It comprises mechanisms, processes, and institutions through which all involved stakeholders, including citizens and interest groups, articulate their priorities, exercise their legal rights, meet their obligations and mediate their differences.<sup>3</sup> It is, however, noteworthy that different people and institutions use the concept in different ways, and within varying cultural, economic, social, legal and political contexts.<sup>4</sup> This paper approaches water governance in this perspective considering that the discussion looks at the various users and their diverse needs as far as water is concerned.

The current law, <sup>5</sup> was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.<sup>6</sup>

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<sup>1</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' *International Journal of Water Resources Development*, Vol. 26, No.2, 2010, pp.297-307, p. 298.

<sup>2</sup> K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' *Water Policy*, Vol. 9, 2007, pp.529–543 at p. 530.

<sup>3</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' op cit, p. 299.

<sup>4</sup> Ibid, p. 299.

<sup>5</sup> No.43 of 2016, Laws of Kenya.

<sup>6</sup> Ibid, s. 3.

This paper offers an overview and analysis of the provisions of this law in light of the international best practices in water governance and the sustainable development agenda.

## **2. Water Governance in Kenya**

Water Resources governance in Kenya has come a long way from the colonial times when, as it has been observed, in many African states, colonial water laws, which have largely been continued by the independent states, emphasised the use of water for commercial agriculture and provision of water services to the settler population and largely ignored the local population's need for water for domestic and productive purposes.<sup>7</sup> Even in the independent African states, most laws on water governance and management have been adopting a top-down approach to governance, effectively sidelining communities and their water needs.

Over the years, the State has attempted to come up with laws, rules and regulations aimed at addressing issues related to water governance and curbing mismanagement of water resources. However, these objectives may not have been adequately realized and this has often led to a critical situation in many parts of the country with many communities suffering from acute water shortages. Kenya is often classified as a water-scarce country with renewable fresh water per capita standing at 647m<sup>3</sup> against the United Nations recommended minimum of 1,000m<sup>3</sup>.<sup>8</sup> They have difficulties accessing safe water for drinking and other domestic needs.

The right to water is recognised internationally and this has been captured in many international documents, as well as regional legal instruments on basic human rights. The right to water is the fundamental human right of access to water of a quality and quantity sufficient to satisfy basic human needs: consumption, hygiene and sanitation (e.g. bathing or laundry), cleaning, cooking, and subsistence agriculture.<sup>9</sup> The *General Comment No. 15 on the Right to*

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<sup>7</sup> Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' in Hellum A., et al (eds), *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, (Weaver Press, Harare, 2015), p. 10.

<sup>8</sup> Concern Worldwide Kenya, 'Five year ASAL Water Hygiene and Sanitation Strategy for Marsabit County 2013 – 2018,' (Dublin Institute of Technology), p.4. Available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwjm5YbYvMXPahVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdtc%2Fmedia%2Fditdtc%2FConcern%2520%2520Year%2520WASH%2520Strategy%252010%2520December%25202012\\_draft1.doc&usg=AFQjCNHUDMk Jrzy1fsQnCsUm47prfTDsBQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwjm5YbYvMXPahVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdtc%2Fmedia%2Fditdtc%2FConcern%2520%2520Year%2520WASH%2520Strategy%252010%2520December%25202012_draft1.doc&usg=AFQjCNHUDMk Jrzy1fsQnCsUm47prfTDsBQ) [ Accessed on 5/10/2016].

<sup>9</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 25.

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*Water* provides that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>10</sup>

Principle 4 of the Dublin Conference Water Principles states that “... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price”.

With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.<sup>11</sup> Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. Section 37(l) provides that a permit is not required- for the abstraction or use of water, without the employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for the abstraction of water in a spring which is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of this Act. This exception to the requirement for an operation permit is essential in ensuring that the right of access to water resources for domestic use is not curtailed. This is especially relevant in light of the Constitutional right to right to clean and safe water in adequate amounts for all.<sup>12</sup>

### 3. Institutional and Regulatory Arrangements

#### 3.1 Institutional Framework on Water Governance

All water resources in Kenya are vested in the state where the Ministry of Water and Irrigation is responsible for creating institutions to manage water resources and provide water

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<sup>10</sup> United Nations, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), para. 2.

<sup>11</sup> S. 9, No.43 of 2016, Laws of Kenya.

<sup>12</sup> Art. 43, Constitution of Kenya 2010.

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services. The Water Act 2016 provides that every water resource is vested in and held by the national government in trust for the people of Kenya.<sup>13</sup>

The Water Resources Authority established in Section 11(l) of the Water Act 2016 is to serve as an agent of the national government and regulate the management and use of water resources.<sup>14</sup> The functions of the Authority include, inter alia, to: formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation; regulate the management and use of water resources; enforce Regulations made under this Act; receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits; collect water permit fees and water use charges; determine and set permit and water use fees; provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies; coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and advise the Cabinet Secretary generally on the management and use of water resources.<sup>15</sup>

Water Act 2016 also establishes the National Water Harvesting and Storage Authority whose functions and powers shall be to- undertake on behalf of the national government, the development of national public water works for water resources storage and flood control; maintain and manage national public water works infrastructure for water resources storage; collect and provide information for the formulation by the Cabinet Secretary of the national water resources storage and flood control strategies; develop a water harvesting policy and enforce water harvesting strategies: undertake on behalf of the national government strategic water emergency interventions during drought; and advise the Cabinet Secretary on any matter concerning national public water works for water storage and flood control.<sup>16</sup>

Section 29(l) of the Water Act 2016 provides that Water Resource Users Associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority. A Water Resource Users Association should be a

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<sup>13</sup> Water Act 2016, s.5.

<sup>14</sup> Ibid, S. 6.

<sup>15</sup> Ibid, s.12.

<sup>16</sup> Ibid, S. 30 & 32.

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community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.<sup>17</sup>

Section 25 tasks the Cabinet Secretary to establish a Basin Water Resources Committee for each respective basin area which shall be responsible for the management of the water resources within a respective basin area.

The Cabinet Secretary may, by notice in the Gazette, establish one or more waterworks development agencies and define the geographical area of jurisdiction of each such agency.<sup>18</sup> The powers and functions of the water works development agency shall be to- undertake the development, maintenance and management of the national public water works within its area of jurisdiction; and operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or water services provider within whose area of jurisdiction or supply the waterworks is located.<sup>19</sup>

Section 69(1) of the Act provides that as soon as possible, following the commissioning of the waterworks, the waterworks development agency should enter into an agreement with the county government, the joint committee or authority of the county governments within whose area of jurisdiction the water works is located, jointly with the water service provider within whose area of supply the water works are located for the use by the joint committee, authority or water services provider, as the case may be, of the water works to provide water services.<sup>20</sup>

Section 70(1) of the Water Act 2016 establishes the Water Services Regulatory Board whose principal object is to protect the interests and rights of consumers in the provision of water services.

Section 64(1) of the Water Act 2016 provides that the Cabinet Secretary should, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a Water Services Strategy. The object of the Water Strategy shall be to provide the Government's plans and programs for the progressive realization of the right of every person in Kenya to water.<sup>21</sup>

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<sup>17</sup> Ibid, S. 29(2).

<sup>18</sup> Ibid, S. 65(1).

<sup>19</sup> Ibid, S. 68.

<sup>20</sup> Ibid, S. 69(1).

<sup>21</sup> Ibid, S. 64(2).

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The Water Strategy should contain, among other things, details of-existing water services; the number and location of persons who are not provided with a basic water supply and basic sewerage services; standards for the progressive realisation of the right to water; and a resource mobilization strategy for the implementation of the plans.<sup>22</sup>

The Cabinet Secretary should in consultation with county governments, provide a national water sector investment and financing plan aggregated from the county government plans which should include, among other details, the time frames for the plans and an investment programme based on the investment plans.<sup>23</sup>

The basin area water resources management strategy should facilitate the establishment and operation of Water Resources Users Associations.<sup>24</sup> The Basin Water Resources Committees may contract water resource users associations as agents to perform certain duties in water resource management.<sup>25</sup>

Upon the designation of a basin area, the Basin Area Water Authority is required to prescribe requirements and a time frame for resources the formulation of a basin area water resources management strategy.<sup>26</sup> The basin area water resources management strategy should be formulated by a basin water resources committee in consultation with the Authority and the county governments whose areas of jurisdiction lie within the basin area.<sup>27</sup>

A basin area water resources management strategy should-be consistent with the national water resources policy; put in place measures to fulfill the water resource quality objectives for each class of water resource in the basin area; describe the measures to be put in place for the sustainable management of water resources of the basin area; contain a water allocation plan for the water resources of the basin area; provide systems and guidelines to enable the users of water resources within the basin area to participate in managing the water resources of the basin area; and provide a strategy for financing the management of the water resources of the basin area.<sup>28</sup>

A basin water resources committee should consist of- not less than four and not more than seven members appointed by the Authority in consultation with the Cabinet Secretary; and a

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<sup>22</sup> Water Act 2016, S. 64(3).

<sup>23</sup> Ibid, S.64(5).

<sup>24</sup> Ibid, S. 29(3).

<sup>25</sup> Ibid, S.29(4).

<sup>26</sup> Ibid, S. 28(1)

<sup>27</sup> Ibid, S. 28(2).

<sup>28</sup> Ibid, S. 28(3).



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representative of each county government whose area falls within the basin appointed by the appointing authority after approval by the county assembly.<sup>29</sup>

The persons appointed to the Basin Water Resources Committee must be residents of the respective basin area and should include- a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a public benefits organisation engaged in water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.<sup>30</sup>

The powers and functions of the Basin Water Resources Committee shall be: to advise the Authority and county governments, at the respective regional office, concerning- conservation, use and apportionment of water resources; the grant, adjustment, cancellation or variation of any permit; protection of water resources and increasing the availability of water; annual reporting to the users of its services and the public on water issues and their performance within the basin area; collection of data, analyzing and managing the information system on water resources; review of the basin area water resources management strategy; facilitation of the establishment and operations of water resource user associations; flood mitigation activities; information sharing between the basin area and the Authority; the equitable water sharing within the basin area through water allocation plans; and any other matter related to the proper management of water resources.<sup>31</sup>

The Water Act 2016 also provides that it shall be the duty of a licensee receiving trade effluent into its sewerage system to ensure that it has in place measures for the receipt and handling of the effluent without causing- pollution of the environment; harm to human health; damage to the sewerage system: or a contravention of applicable laws or standards set by the Regulatory Board.<sup>32</sup> A person should not discharge any trade effluent from any trade premises into the sewers of a licensee without the consent of the licensee.<sup>33</sup>

In order to deal with disputes, the Act also establishes a Water Tribunal<sup>34</sup> and the same is empowered to exercise the powers and functions set out in this Act and in particular to hear and

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<sup>29</sup> Water Act 2016, S. 26(1).

<sup>30</sup> Ibid, S.26(3).

<sup>31</sup> Ibid, S. 27.

<sup>32</sup> Ibid, S. 108(1).

<sup>33</sup> Ibid, S. 108(2).

<sup>34</sup> Ibid, S. 119(1).

determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.<sup>35</sup> In addition to the powers set out in subsection (1), the Tribunal has the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.<sup>36</sup>

A person aggrieved by a decision of the Tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environmental Court, established under article 162(2) of the Constitution on an issue of law.<sup>37</sup> A decision of a water basin organization, the Authority, the Regulatory Board or the Tribunal against which no appeal has been preferred within thirty days from the date on which the decision was made, becomes binding on all parties.<sup>38</sup>

### **3.2 Establishment of Protected Areas and Ground Water Conservation Area**

Section 22(1) of the Water Act 2016 provides that where the Authority is satisfied that in order to conserve a vulnerable water resource, special measures are necessary for the protection of a catchment area or a part thereof, it may by Order published in the Gazette declare such catchment area to be a protected area.

Section 23(1) of the Water Act provides that the Authority may declare the area to be a ground water conservation area, where it is satisfied that, in any area, special measures for the conservation of ground water are necessary in the public interest for- the protection of public water or water supplies used for industry, agriculture or other private purposes; the conservation of the water resources of the aquifer of the ground water resources; or ecological reasons.

Section 24(1) requires the Water Resources Authority, in consultation with the Cabinet Secretary, may designate a defined area from which rain water flows into a watercourse to be a basin area for the purposes of this Act.<sup>39</sup>

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<sup>35</sup> Water Act 2016, S. 121(1).

<sup>36</sup> Ibid, S. 121(2).

<sup>37</sup> Ibid, S.124.

<sup>38</sup> Ibid, S. 125.

<sup>39</sup> Ibid, S.24(1).

### 3.3 Operational Permits

One of the characteristics of privatisation and commercialisation of water resources is the need for operational permits for various uses of water. Section 36 of the Water Act 2016 provides that a permit is required for any of the following purposes- any use of water from a water resource, except as provided by section 37; the drainage of any swamp or other land; the discharge of a pollutant into any water resource; and any other purpose, to be carried out in or in relation to a water resource, which is prescribed by Regulations made under this Act to be a purpose for which a permit is required.

Further, Section 42(1) provides that the conditions on a permit may require that on the issue of the permit and at prescribed intervals thereafter, the permit holder shall pay charges to the Authority for the use of water in accordance with the terms of the permit and the Regulations prescribed by the Authority. The charges are to be determined by reference to a schedule of charges published in the Gazette by the Authority following public consultation.<sup>40</sup>

Where there is an agreement between the Authority and a water resources users' association, the Authority may make available a portion of the water use charges to be used for financing such regulatory activities as the water resources users association has agreed to undertake on behalf of the Authority.<sup>41</sup>

Section 43(1) provides that in issuing a permit, and in fixing any conditions to be imposed on a permit, the Authority shall take into account such factors as it considers relevant, including- existing lawful uses of the water; efficient and beneficial use of water in the public interest; any basin area water resources management strategy applicable to the relevant water resource; the likely effect of the proposed water use on the water resource and on other water users; the classification and the resource quality objectives of the water resource; the investments already made and to be made by the water user in respect of the water use in question; the strategic importance of the proposed water use; the quality of water in the water resource which may be required for the reserve; and the probable duration of the activity or undertaking for which a water use is to be authorised.

The water Act 2016 provides that where, in the opinion of the Authority, it is desirable that water use in respect of one or more water resources, including ground water, within a specific geographic area be rationalized or reviewed so as to- achieve a sustainable allocation of

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<sup>40</sup> Water Act 2016, S. 42(2).

<sup>41</sup> Ibid, S. 42(3).

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water from a water resource which is under stress; achieve equity in allocations; promote beneficial use of water in the public interest; facilitate efficient management of water resources, or protect water resource quality, the Authority may issue a notice in the Gazette requiring all water users, including permit holders, to apply or reapply for permits for one or more types of water use.<sup>42</sup>

The Act requires that the proposed allocation schedule must be subjected to public consultation, after which the basin water resources committee should prepare a preliminary allocation schedule and ought to, by notice published in the Gazette advertise the times and places at which a copy of the schedule may be inspected.<sup>43</sup> A person dissatisfied with the preliminary allocation schedule may appeal to the Water Tribunal within thirty days of the publication under subsection (3).<sup>44</sup>

The Authority may also in the case of an inter basin water transfer cancel or vary a permit if such cancellation or variation is necessary for the accommodation of additional water users of a water source.<sup>45</sup>

### 3.4 Privatisation and Commercialisation of Water Resources

The United Nations estimates that over one billion people across the world do not have access to safe, clean drinking water, although this is a basic human need.<sup>46</sup> This may be attributed to different problems and challenges which may range from water availability, supply and access, amongst others. Water, being mainly a public good commodity, is mostly vested in the state and hence public institutions are tasked with its management and distribution. However, over the years this has changed internationally, with more private players entering the scene in order to enhance efficiency. It has been observed that when public companies entrusted with the supply of water in the vast majority of developing countries failed to make the infrastructural investments required to provide water services to all, reforms involving commercialization of water services—the application of principles of cost recovery and profit maximization—and private sector participation were proposed as a way to increase investment in water delivery

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<sup>42</sup> Water Act 2016, S. 47(1).

<sup>43</sup> Ibid, S. 47(3).

<sup>44</sup> Ibid, S. 47(4).

<sup>45</sup> Ibid, S. 48(1).

<sup>46</sup> United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA) [Accessed on 5/1/2017].

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networks, improve access for all sectors of the population and reduce the burden of public services on government finances.<sup>47</sup>

It has been argued that water should be treated “as an economic good”, a proclamation that originated in the International Conference on Water and the Environment (Dublin Conference 1992).<sup>48</sup> Managing water as an economic good is said to be an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.<sup>49</sup>

It has however been argued that water’s characteristics that make it difficult to marketize include its status as a public good, a natural monopoly, a merit good and/or basic (human) right and a scarce resource.<sup>50</sup> The UN Committee on Economic, Social and Cultural Rights, in their publication, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*<sup>51</sup>, asserts that water is a limited natural resource and a public good fundamental for life and health. Furthermore, the human right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realization of other human rights.<sup>52</sup> According to the Committee, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.<sup>53</sup>

The right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for

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<sup>47</sup> Ibid.

<sup>48</sup> Perry, C.J., et al, *Water as an Economic Good: A Solution, or a Problem?* Research Report 14, (International Irrigation Management Institute, Colombo, 1997), p. 1.

<sup>49</sup> Ibid.

<sup>50</sup> Akech, J.M.M., ‘Governing Water And Sanitation In Kenya: Public Law, Private Sector Participation And The Elusive Quest For A Suitable Institutional Framework,’ *Paper prepared for the workshop entitled ‘Legal Aspects of Water Sector Reforms’ to be organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the Research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF)*, p. 6. Available at [http://www.ielrc.org/activities/workshop\\_0704/content/d0702.pdf](http://www.ielrc.org/activities/workshop_0704/content/d0702.pdf) [Accessed on 5/01/2017].

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11. Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11).

<sup>52</sup> Ibid, para.1.

<sup>53</sup> Ibid, para. 2.

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survival.<sup>54</sup> It is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.<sup>55</sup> Priority in the allocation of water must be given to the right to water for personal and domestic uses, and also to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.<sup>56</sup>

The foregoing assertions by the UN Committee on Economic, Social and Cultural Rights have been captured in the Constitution of Kenya which provides that every person has the right— to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities.<sup>57</sup>

Section 43(2) of the Water Act provides that the use of water for domestic purposes shall take precedence over the use of water for any other purpose, and the Authority may, in granting any permit, reserve such part of the quantity of water in a water resource as in its opinion is required for domestic purposes. These are important provisions considering that providing access to water not only for domestic uses, but also for growing, preparing and selling food and other products that are vital for family welfare and food security is a key element in the realisation of the right to water as a part of the right to food, the right to health, and the right to an adequate living standard.<sup>58</sup> The Act also provides that nature and degree of water use authorized by a permit should be reasonable and beneficial in relation to other persons who use the same sources of supply or bodies of water.<sup>59</sup>

The International Conference on Water and the Environment which resulted in the Dublin Statement on Water and Sustainable Development<sup>60</sup> came up with four guiding principles which should inform water governance at both international and national levels. The fourth Dublin

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<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), op cit. Para. 3.

<sup>55</sup> Ibid, para. 3.

<sup>56</sup> Ibid, para. 6.

<sup>57</sup> Article 43(1), Constitution of Kenya 2010.

<sup>58</sup> Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' op cit., p. 23.

<sup>59</sup> Section 43(2), Water Act 2016.

<sup>60</sup> United Nations, The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment. Dublin, Ireland, International Conference on Water and the Environment, available at <http://un-documents.net/h2o-dub.htm> [Accessed on 05/10/2016]

principle on water is that water has an economic value in all its competing uses and should be recognized as an economic good. The argument has been that this principle should be interpreted to mean that water should be provided by private companies and that consumers should pay the full cost of water provision (full-cost recovery), signaling a radical shift from the subsidized public provision of water that had previously been the norm in many parts of the world.<sup>61</sup>

In the water sector, one of the most common ways of bringing in the private sector is through concession agreements, via which the state, while retaining ownership, transfers the right of operating the water utility to a private company.<sup>62</sup> Section 93(1) of the Water Act 2016 provides that a water services provider may enter into a public private partnership or public partnerships for the exercise and performance by another person of some or all of its functions as a licensee with respect to a part or the whole of its area of water service provision.

The advocates for private sector participation on the water and sanitation policy agenda for the South saw it as a means of achieving greater efficiency and expansion in the water and sanitation sector.<sup>63</sup> This is because there is general agreement that public utilities have been too slow in extending access to services and that they can be inefficient and corrupt, and increasing private sector involvement was meant to address these problems.<sup>64</sup>

It has been argued that under the right circumstances, it may well be possible for private sector participation to improve efficiency and increase the financial resources available for improving water and sanitation services.<sup>65</sup> However, it can also direct finance to urban centres and neighbourhoods that are already comparatively well served, further polarize the politics of water and sanitation (especially when prices increase) and create new regulatory problems. Much depends on the way privatization is developed and the local context.<sup>66</sup> This seems to be the approach that was adopted by the water Act 2016, with much emphasis being on the provision of water to the urban areas and extension to the rural areas only being a matter left to the licensing authorities.

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<sup>61</sup> Miroso, O. & Harris, L.M., 'Human Right to Water: Contemporary Challenges and Contours of a Global Debate,' *Antipode*, Vol. 44, No. 3, 2012, pp. 932-949 at p. 935.

<sup>62</sup> United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA)

<sup>63</sup> Budds, J. & McGranahan, G., 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America,' *Environment & Urbanization*, Vol. 15, No. 2, October 2003, pp. 87-114 at p. 87.

<sup>64</sup> *Ibid*, p. 87.

<sup>65</sup> *Ibid*, p. 88.

<sup>66</sup> *Ibid*, p.88.

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For instance, the Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.<sup>67</sup> A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for water service provision.<sup>68</sup> The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.<sup>69</sup> The Act further provides that nothing in its provisions should deprive any person or community of water services on the grounds only that provision of such services is not commercially viable.<sup>70</sup>

The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.<sup>71</sup> The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community associations, public benefits organizations or a private person under a contract with the county government.<sup>72</sup> Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.<sup>73</sup> The Cabinet Secretary is also to provide technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.<sup>74</sup>

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<sup>67</sup> Water Act 2016, S. 77.

<sup>68</sup> Ibid, S. 78(1).

<sup>69</sup> Ibid, S. 81.

<sup>70</sup> Ibid, S. 94(1).

<sup>71</sup> Ibid, S. 33(2).

<sup>72</sup> Ibid, S. 33(3).

<sup>73</sup> Ibid, S. 33(4).

<sup>74</sup> Ibid, S. 33(5).



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Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.<sup>75</sup> The object of the Fund is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund and to assist in financing the development and management of water services in marginalized areas or any area which is considered by the Board of Trustees to be underserved including- community level initiatives for the sustainable management of water resources; development of water services in rural areas considered not to be commercially viable for provision of water services by licensees; development of water services in the under-served poor urban areas; and research activities in the area of water resources management and water services, sewerage and sanitation.<sup>76</sup>

It has been argued that, in practice rather than in theory, many stakeholders, including water users associations, non-governmental organizations (NGOs) and local communities, may build on local knowledge and networks, but may often lack support, funds, institutional and technical capacities or even membership to significantly contribute to the management of water resources.<sup>77</sup> It is therefore a laudable move to have in place a fund that seeks to community level initiatives and ensuring that all persons have access to clean and safe water in adequate amounts, as a matter of right. This is especially important in areas that may have been sidelined on the basis of not being commercially viable for provision of water services by licensees. The fund however needs to be scrupulously guarded against misappropriation and diversion by self-seeking stakeholders, if the above objectives are to be realized.

It is noteworthy that most of the institutions established under this law comprise of professionals and even where the Act provides for consultations, the same is provided for in simplistic terms. The main players in the water governance matters are the government organs and private sector players, with little or no role for communities who may usually be the most affected by policies and state actions on water. It has been suggested that by directly involving users of water in the governance of the resource, the knowledge on which this participation is based may be more meaningful than otherwise may have been possible since local stakeholders may often be more familiar with the peculiarities of local economic, social, cultural and environmental situations.<sup>78</sup> Further, it might also mean that users involved may accept the

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<sup>75</sup> Water Act 2016, S. 113(1).

<sup>76</sup> Ibid, S. 114.

<sup>77</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' *op cit*, p. 300.

<sup>78</sup> Ibid, p. 300.

regulations as appropriate and consistent with their values and interests and may also be more willing to comply with them.<sup>79</sup>

#### 4. Bridging the Gap

It has been posited that the basic principles for effective water governance include open and transparent, inclusive and communicative, coherent and integrative, equitable and ethical approaches while in terms of performance, the basic attributes include accountable, efficient, responsive and sustainable operations.<sup>80</sup> The degree of integration of the principles and attributes in any system serve as good indicators of whether the system will be able to achieve effective governance or not.<sup>81</sup>

##### 4.1 A Human Rights Approach to Water

It has been acknowledged that one of the problems believed to contribute to inequitable access to water is a perception among community members that there are cartels comprising of powerful politicians, employees of water service providers, water vendors, and government employees, among others who are out to ensure that the status quo of the existing water problems is maintained.<sup>82</sup> It is estimated that over 50% of Kenya's households do not have access to safe drinking water and the proportion is higher for the poor.<sup>83</sup>

It is noteworthy that the user water rights are different from the human right to water in that while water rights are the legal authorization to use a specified quantity of water “for a specific purpose under specific conditions,” the human right to water focuses on the amount and quality of water required by human beings to meet their basic needs, which should serve as a minimum requirement for water rights to be granted to each individual.<sup>84</sup>

From the Act, it seems that the law places greater emphasis on the water rights while sidelining the human right to water. This is seen from the emphasis on licenses for the various uses of water. There are inadequate provisions placing elaborate responsibility on the various institutions and governance bodies in implementation of the human right to water. The UN

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<sup>79</sup> Ibid, p. 300.

<sup>80</sup> K' Akumu, O.A., 'Toward effective governance of water services in Kenya,' op cit at p. 531.

<sup>81</sup> Ibid, p. 531.

<sup>82</sup> Moraa, H., Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation, (iHub Research, July 2012), p.9. Available at [http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795\\_\\_537.pdf](http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795__537.pdf).

<sup>83</sup> Ibid, p.5.

<sup>84</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 26.

General Assembly Resolution on the human right to water and sanitation<sup>85</sup> formally recognises the right to water and sanitation and acknowledges that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. The implementation of the Act should adopt a human rights approach which would help in addressing the inequitable distribution and access to water resources.

#### **4.2 Opportunities for Public Participation in Water Governance**

Public participation means different things to different people and may take several forms, ranging from information supply—to consultation, discussions with the public, co-decision making—to a situation in which the “public” is in charge of parts of natural resources management, for example, through water users’ associations.<sup>86</sup> Public participation would improve the quality of decision making by opening up the decision-making process and making better use of the information and creativity that is available in society. Moreover, it would improve public understanding of the management issues at stake, make decision making more transparent, and might stimulate the different government bodies involved to coordinate their actions more in order to provide serious follow-up to the inputs received. Management itself would become less controversial, less litigation would take place, and implementation of decisions would be much smoother. Finally, public participation could improve democracy. Public participation would be imperative whenever government does not have enough resources (information, finance, power, etc.) to manage an issue effectively, as is usually the case in water management.<sup>87</sup>

Scholars have argued that inclusiveness requires wide participation throughout the policy chain right from conception to implementation.<sup>88</sup> Furthermore, participation is necessary to make decisions more politically acceptable and to foster accountability and stakeholders should

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<sup>85</sup> The United Nations General Assembly Resolution, The human right to water and sanitation, A/RES/64/292, July 2010.

<sup>86</sup> Huitema, D., et al, ‘Adaptive Water Governance: Assessing the Institutional Prescriptions of Adaptive (Co-)Management from a Governance Perspective and Defining a Research Agenda,’ *Ecology and Society*, Vol. 14, No.1, pp.1-26 at p. 5.

<sup>87</sup> Ibid, p.5.

<sup>88</sup> K’Akumu, O.A., ‘Toward effective governance of water services in Kenya,’ op cit at p. 538.

collectively design and implement policies and management strategies that meet their goals effectively and acceptably.<sup>89</sup>

It has been argued that the community-based water governance systems anchored in unwritten customary norms and values shape perceptions of water rights and water governance at local levels.<sup>90</sup> The Community-based norms and practices often referred to as ‘living customary law,’ have endured in spite of efforts by both colonial and independent African governments to redefine citizen’s relationship to water through state laws and policies.<sup>91</sup>

### 4.3 Effective Water Governance for the Realisation of Sustainable Development Agenda

Water is a finite and irreplaceable resource that is fundamental to human well-being. It is only renewable if well managed. Today, more than 1.7 billion people live in river basins where depletion through use exceeds natural recharge, a trend that will see two-thirds of the world’s population living in water-stressed countries by 2025. While water scarcity can pose a serious challenge to sustainable development, if managed efficiently and equitably, it can play a key enabling role in strengthening the resilience of social, economic and environmental systems in the light of rapid and unpredictable changes. Water is one of the natural resources at the core of sustainable development debate and it is critical for socio-economic development, healthy ecosystems and for human survival itself.<sup>92</sup> Goal 6 of the United Nation’s *Transforming our world: the 2030 Agenda for Sustainable Development* acknowledges states’ obligation to ensure availability and sustainable management of water and sanitation for all. It requires that by 2030, states should achieve universal and equitable access to safe and affordable drinking water for all.<sup>93</sup> States are also required to achieve access to adequate and equitable sanitation and hygiene for all.<sup>94</sup> By 2030, they are also required to substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity.<sup>95</sup>

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<sup>89</sup> Ibid, p. 538.

<sup>90</sup> Helling, A., et al, ‘The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,’ op cit., pp. 6-7; 20.

<sup>91</sup> Ibid, p. 7.

<sup>92</sup> United Nations, ‘International Decade for Action ‘water for Life 2005-2015’: Water and sustainable development,’ available at [http://www.un.org/waterforlifedecade/water\\_and\\_sustainable\\_development.shtml](http://www.un.org/waterforlifedecade/water_and_sustainable_development.shtml) [Accessed on 05/10/2016].

<sup>93</sup> Paragraph 6.1, *Transforming our world: the 2030 Agenda for Sustainable Development*.

<sup>94</sup> Ibid, Para. 6.2.

<sup>95</sup> Ibid, Para. 6.4.

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In order to protect the water sources and guarantee supply, states are also required to protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.<sup>96</sup> This is besides the obligation to achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.<sup>97</sup> They are also required to ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements.<sup>98</sup> It is worth pointing out that focus should not only be on the water resources and their access and use, but there should also be the responsibility to ensure that the resources are not depleted. Hence, there should be an integrated approach to water resources governance.

Access to safe water and sanitation are crucial for human survival and are believed to be essential considerations when addressing socioeconomic development, poverty, and health problems.<sup>99</sup> The United Nation's 2030 Agenda on Sustainable Development affirms that social and economic development depends on the sustainable management of our planet's natural resources. As such, it captures the determination to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife, and also to promote sustainable tourism, to tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.<sup>100</sup> To achieve this, the 2030 Agenda requires the states to implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.<sup>101</sup>

Scarcity and misuse of fresh water is believed to pose a serious and growing threat to sustainable development and protection of the environment.<sup>102</sup> This is because, human health and welfare, food security, industrial development and the ecosystems on which they depend, are all

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<sup>96</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, para.6.6.

<sup>97</sup> *Ibid*, Para. 12.4.

<sup>98</sup> *Ibid*, Para. 15.1.

<sup>99</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' *op cit.*, p. 25.

<sup>100</sup> Target 33, United Nation 2030 Agenda on Sustainable Development.

<sup>101</sup> *Ibid*, Para.6.5.

<sup>102</sup> United Nations, *The Dublin Statement on Water and Sustainable Development*, 1992, *op cit.*

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at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past.<sup>103</sup>

The United Nations affirms that water is also at the heart of adaptation to climate change, serving as the crucial link between the climate system, human society and the environment.<sup>104</sup> It is vital for reducing the global burden of disease and improving the health, welfare and productivity of populations.<sup>105</sup> This is affirmed in the 2030 Agenda on Sustainable Development which obligates states to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.<sup>106</sup>

It is notable that Kenya's Water Act 2016 has provisions covering these areas, by mainly obligating licensed water providers and users to take particular measures. However, this Act does not have clear provisions on the role of local communities in water provision, use and conservation measures. While it is notable that a number of provisions provide for consultations and public participation, there is the risk of communities being sidelined in governance issues and having them reduced to mere spectators and recipients of institutional policies and decisions. This would be against the constitutional principles and values of governance including democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>107</sup> It is imperative to ensure that these principles and values are implemented in water resources governance for realisation of the human right to water and sustainable development agenda.

The 2030 Agenda on Sustainable Development tasks states to support and strengthen the participation of local communities in improving water and sanitation management.<sup>108</sup> Arguably, sustainable use of resources such as water requires the meaningful participation of all. This is

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<sup>103</sup> Gorre-Dale, E., 'The Dublin Statement on Water and Sustainable Development', *Environmental Conservation*, Vol. 19, No.2, 1992, p. 181. Available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/843EB9B98E0F63A3DA36041F7BF3BF16/S0376892900030733a.pdf/div-class-title-the-dublin-statement-on-water-and-sustainable-development-div.pdf> [Accessed on 05/10/2016].

<sup>104</sup> United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' op cit.; See generally, UN Water, 'Climate Change Adaptation: The Pivotal Role of Water,' available at [http://www.unwater.org/downloads/unw\\_ccpoL\\_web.pdf](http://www.unwater.org/downloads/unw_ccpoL_web.pdf) [Accessed on 05/2/2016].

<sup>105</sup> Ibid.

<sup>106</sup> United Nation 2030 Agenda on Sustainable Development, Para. 6.3.

<sup>107</sup> Art. 10(2), Constitution of Kenya 2010 (Government Printer, 2010, Nairobi)

<sup>108</sup> United Nation 2030 Agenda on Sustainable Development, Para. 6.b .

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alongside the obligation to expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.<sup>109</sup> Kenya should ensure that local communities are actively involved in water resources governance in the country for realisation of sustainable development agenda. This will ensure that policy measures adopted by the state agencies incorporate the unique but useful knowledge of these communities in conservation measures.

### 5. Conclusion

From the highlighted provisions in this paper, the Water Act 2016 mainly seeks to address depletion, inefficient consumption and pollution of water resources in the country, through a number of measures, as discussed. While this law can be hailed as a positive step towards addressing the ever worsening problem of access, use and governance of water resources, there is need for periodic review of the performance especially as far as the implementation of provisions on the access, use and public participation are concerned.

Under the current constitutional dispensation, the right of access to clean and safe drinking water is recognised as significant in the quest for realisation of the human right to economic and social rights such as the highest attainable standard of health, reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality. This reflects the international human rights law position on the issue. Arguably, these rights cannot be reasonably achieved without first securing the right to clean and safe water in adequate amounts. Streamlining water governance in Kenya for sustainable development is thus urgent and necessary.

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<sup>109</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, Para. 6.a.

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