Decentralization and the Delivery of Water and Sanitation Services in Kenya

Draft 2, June 2, 2017

Table of Contents

Acronyms

CBO	Community-based organization
CEC	County Executive Committee
CEO	Chief Executive Officer
CG	County government
DP	Development partner
GNI	Gross National Income
GoK	Government of Kenya
JMP	Joint Monitoring Program
KANU	Kenya African National Union
Ksh	Kenyan Shilling
LG	Local government
NGO	Non-governmental organization
PEFA	Public Expenditure and Financial Accountability
PPP	Purchasing power parity
RS	Rural sanitation
RW	Rural water
SDU	Service Delivery Unit
UACA	Urban Areas and Cities Act
US	Urban sanitation
UW	Urban water
W&S	Water and Sanitation
WASA	Water and Sanitation Authority
WASREB	Water Services Regulatory Board
WSP	Water and sanitation provider
WSS	Water supply and sanitation
WSTF	Water Services Trust Fund

1 Introduction

1.1 Study Introduction and Rationale

Over the last two decades, Kenya's water and local government institutions have evolved in two main phases. Water sector reforms in the early 2000s led to the establishment of nationally-owned regional asset development and holding companies for water services, as well as local-level, commercially-oriented operating companies for water supply in cities and towns (notionally owned by the local government). Rural provision was overseen by the deconcentrated District Water Offices, under national government auspices. Constitutional reforms following the adoption of a new quasi-federal Constitution in 2010 led to the establishment of devolved county governments with responsibility for water supply and sanitation in 2013.

The introduction of a new Constitution in Kenya provides a rare opportunity to compare two different approaches to decentralization in the same country. Given the changing intergovernmental context, how well have these two different approaches — involving different forms of decentralization for the provision of water and sanitation services — served ordinary Kenyans, particularly the poor? Has one approach to decentralization resulted in better outcomes than the other? The country continues to pursue its new, devolved government structure. What are the binding constraints to improving and sustaining reliable water and sanitation services in Kenya in the context of decentralized provision under the new constitutional arrangements?

The limitation to the study is that it is still too early to assess the effectiveness of decentralization undertaken as a result of and in response to the constitutional reforms.

This case study on Kenya is part of an international comparative study on the decentralized provision of water and sanitation services, each using a common methodology set out in section 1.3 below.[1]

1.2 Overview of Water and Sanitation Provision in Kenya

Progress in the provision of water and sanitation services

Access to improved water services has increased significantly in rural areas over the period from 1990 to 2015, specifically from 33 to 57 percent. However, access to water in urban areas has declined from 92 to 82 percent over the same period — *mainly as a result of rapid urbanization* (figure 1.1). The urban population increased threefold during this period, whereas the rural population doubled. Although access to improved water in urban areas grew at 4.1 percent per year over the 25-year period, this was not sufficient to match the rate of urban population growth of 4.6 percent per year over the same period.

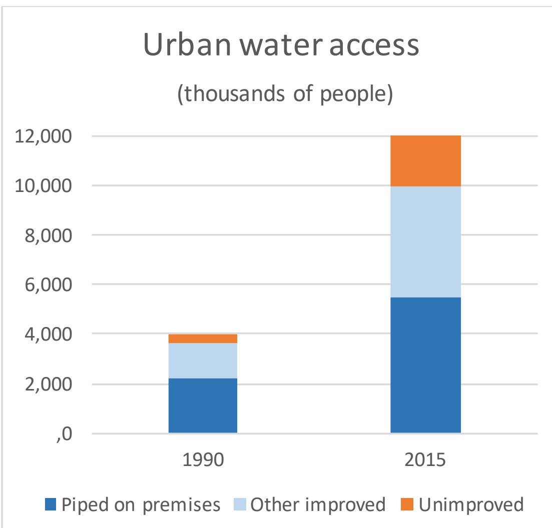
Access to sanitation improved modestly in both urban and rural areas over this period. However, it is still low at about 30 percent in both urban and rural areas. See table 1.1.

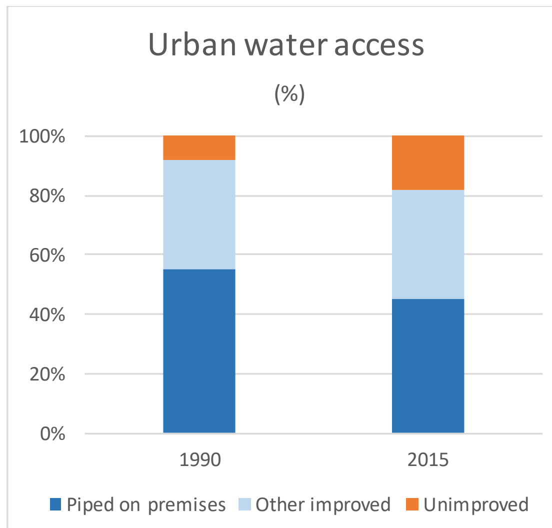
[1] See World Bank. 2017. "Decentralized delivery of water and sanitation services: An Overview of Selected Country Experiences". Washington, DC: The World Bank.

Table 1.1: Access to Water and Sanitation in Urban and Rural Kenya				
	Urban		Rural	
	1990	2015	1990	2015
Improved water (%)	92	82	33	57
Piped on premises (%)	55	45	10	14
Improved sanitation (%)	27	31	24	30

Source: Joint Monitoring Program. 2015.

Figure 1.1: Change in Access to Water Services in Urban Areas – 1990 to 2015

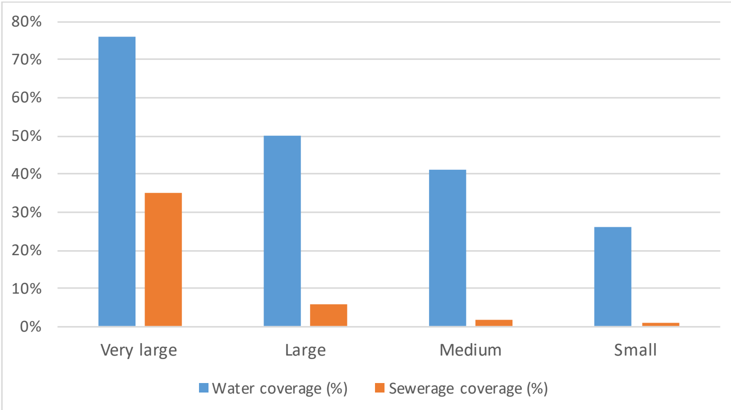




Source: Joint Monitoring Program. 2015.

Access to urban water and sewer services by the size category of the water services provider is shown in figure 1.2. There appears to be a clear relationship between the size category of the service provider and the percentage of the population in the service area with access to both piped water and a sewer connection. The likely explanation for this is that large urban centers have been able to attract greater investments in proportion to their size as compared to the smaller urban centers.

Figure 1.2: Access to Water and Sanitation by Size of Water Services Provider (2014-2015)



Source: Data from WASREB, the Kenyan Water Services Regulation, Impact Report #9. (Size categories are provided in table 3.2.)

1.3 Methodology

A common approach and report template has been used for the international case studies in selected countries. The methodology for assessing the decentralized delivery of water and sanitation services in a country hypothesizes that the *nature and effectiveness of decentralized institutional arrangements* has an important impact on service delivery performance. This report seeks to examine these arrangements in a systematic way, using a structured narrative form. It is guided by a series of leading questions for different dimensions of decentralized governance and service delivery to assist in inter-country comparison and inference.

The working hypothesis is that weaknesses in the institutional framework—in terms of both vertical and horizontal relationships between institutions and between governance and service delivery systems—can have a negative impact on sector outcomes. Furthermore, resolving these institutional weaknesses will strengthen the enabling environment and result in better sector performance.

Specifically, the study seeks answers to the following questions:

- What is the role of decentralization in the local delivery of water and sanitation (W&S) services?
- What are the special characteristics of the W&S sector that make decentralization a (more or less) feasible policy option for improving service delivery?
- What is the role of subnational governments vis-à-vis water utility companies in a decentralized system of W&S service delivery?
- What are the institutional (that is, the organizational and political) arrangements necessary for the effective decentralization of W&S services?
- What are the fiscal and financial arrangements necessary for the effective decentralization of W&S services?
- What are the enabling policies that national governments should put in place for decentralization of W&S services?

- How can the contradictory demands for local accountability be matched with the need for high levels of technical expertise and financing required for W&S services?
- What are the potential risks in the decentralization of W&S services, and how can they be mitigated?

In answering these questions, this study is interested in identifying the binding constraints that impede or prevent improvements in access to and sustained reliable provision of both water and sanitation services — particularly as these are related to the institutional arrangements.

1.4 Tentative Conclusions

It is still too early after the constitutional reform of 2010 to draw definitive conclusions about the effects of the reforms on sector outcomes. Nevertheless, it is possible to draw some tentative conclusions that can be tested and confirmed or negated over time as new evidence emerges.

The very centralized system of government that developed in Kenya after independence was not effective at equitably distributing government resources at a regional and local level because of the capture of the state at the national level through corruption and patronage. Intensive competition over access to resources at the national level led to violence. Ultimately, it also led to significant political pressures to deconcentrate political control and develop mechanisms for the more equitable allocation of resources. People living in outlying and rural areas were particularly affected by the centralization of control and the capture of resources by the political elite. In this context, they are the expected beneficiaries of the new constitutional arrangement.

Reforms to decentralize the provision of water services started in 2000, and predated the constitutional reforms in 2010. In urban areas, commercial water operating companies were established. Investments were undertaken by nationally-owned regional asset-holding entities, financed by the national government and development partners. In rural areas, District Water Offices were established, but these were still managed and controlled by the national government. In both cases, there was no governance connection between the water sector and the elected local government authorities (although some water assets were notionally owned by the urban local government). National financing was provided to both urban and rural areas. The urban areas were, in theory, expected to pay their own way, recovering the operating and depreciation costs and contributing to capital for expansion. In practice, urban areas were also subsidized, primarily through capital subsidies and concessional loans, However, there was a failure to provide adequately for depreciation.

The constitutional reforms in 2010 created an entirely new layer of elected government at the county level. It gave responsibility for water and sanitation to this new tier of government. This quasi-federal structure is unusual because it effectively eliminated elected local government. Instead of a three-tiered structure (national, regional, and local), Kenya has a two-tier structure with the 47 counties functioning as a hybrid between regional and local government. Nevertheless, a relatively vibrant and competitive political space has emerged at the county level.

To date, the urban water institutions created following the water reforms in 2000 have been largely unaffected by the new constitutional arrangements. This could be partly due to the fact that a new Water Act (intended to bring the water sector into alignment with the new Constitution) was only approved in 2016, and has yet to be implemented. Governance of the urban water companies has moved to the counties. They now appoint the boards of the companies. However, appointment processes are strictly regulated by the national regulator, the Water Services Regulatory Board (WASREB).

Despite persistent concerns that County Governors might raid the water company bank accounts, there appears to have been no major collapse in the management of urban water systems. National financing of urban water systems (by both the national government and development partners) has continued through the Water Services Boards. However, the role of these nationally owned and controlled Water Services Boards is contested by counties. They, in turn, assert the right to invest in urban water systems themselves. This appears to be a contest over who will control the resources used to finance urban water infrastructure. The size of the resource flow is considerable – about Kenyan shilling (Ksh) 20 billion (US$200 million equivalent) per year. The Council of County Governors contend that the Water Act is unconstitutional and have taken the matter to court.

Changes have been more fundamental in the case of rural water and sanitation. Counties are expected to finance both the investment and operations of these services from their own revenue and/or with the help of development partners. There is little or no national government involvement, except for the availability of some funds (about Ksh 2 billion – US$ 20 million equivalent) through the Water Services Trust Fund. There is no national reporting about how much counties are spending on water and sanitation, or about the outcomes of these investments.

The national government appears to have abrogated its constitutional responsibility to both regulate and support counties in the fulfilment of its obligation to progressively realize the universal right to water and sanitation. Therefore, there is no consolidated information about what the counties are actually doing with respect to the investment and management of rural water and sanitation. There is also no recent consolidated data regarding outcomes. Anecdotal evidence suggests there is a wide range in county responses and activities from doing very little to being proactive in developing and implementing investment and related programs. For example, in some counties, county politicians are seeking to be more responsive and improve public services, and have prioritized water and sanitation provision.

Overall improvements for water and sanitation access in rural areas and for sanitation in urban areas have been modest. Access to water has not kept pace with growth in the urban areas. Much better institutional performance will be required in order to significantly improve and change these trends. In this regard, it will be essential to monitor the impact that the constitutional devolution of responsibility for water and sanitation to counties will have on sector outcomes over time. Further, it will be particularly important to trace the relationships between financial allocations, government performance and sector outcomes (specifically, access and quality of service) across counties, as well as in urban and rural areas.

2 Overview of the Public Sector Structure

2.1 Country Background Information

The Republic of Kenya has a population of 47 million (2015), of which about 26 percent live in urban areas.[2] Five million people (11 percent) live in the two major cities of Nairobi and Mombasa. Kenya has a gross national income (GNI) per capita of Ksh 3,050 (purchasing power parity - PPP, current international dollars, 2015). It has a land area of 0.57 million square kilometers ($km^{2)}$ and an overall population density of 75 people per square kilometer (2015). Ninety percent of the country is arid or semi-arid. The dry north and north-eastern half of the country is sparsely populated, and population density in rural areas is highest in the west. Kenya is a water scarce country with less than 500 kiloliters (kl) of renewable internal fresh water resources per person per year. Rainfall patterns are highly variable, and this trend is expected to be exacerbated by climate change.[3]

Prior to the constitutional reforms of 2010, Kenya had a highly centralized system of government, based on a strong presidential system. The powers of the regional and local governments had been considerably eroded from the 1960s to the 1980s (box 2.1). Consequently, fueled by patronage and corruption, competition for the control and distribution of national resources was fierce. Election-related violence in 2007, linked to regional ethnicity issues, led to constitutional reforms to diffuse the contest for political power and find a more equitable way to allocate resources (box 2.2).

Following the adoption of a new Constitution in 2010, Kenya transformed its public-sector structure into a quasi-federal constitutional democratic system with two tiers of elected government, namely national and county.[4] Functions are assigned across the two tiers of government by the Constitution. Importantly, county governments enjoy constitutional protection and a guaranteed share of national revenue. Counties also have rights to raise local revenues, but these are limited to typical local government functions (such as property taxes, licensing fees, service charges, and so on).

The national government has significant powers to regulate the affairs of county governments. In exceptional circumstances, the President may suspend a county government, but only for a limited period (Kenya Constitution, Clause 192). The national government may also intervene, including assuming responsibility for relevant functions, if a county government is unable to perform its functions It can also intervene in cases in which a country government does not operate a financial management system that complies with the requirements prescribed by national legislation.

County governments are responsible for "ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level". (Constitution 2010). County governors have the power to confer the status of municipality on towns, and the President may confer the status of a city after a resolution of the Senate.[5] Municipalities and cities that have been conferred this status are managed by appointed boards that are accountable to the county government. The existing

[2] Country data from World Bank http://data.worldbank.org/country/kenya.
[3] Water Resources in Kenya: Closing the Gap (2030 Water Resources Group 2015).
[4] The extent to which Kenya is a federal or quasi-federal state is contested. See, for example, Boex and Kelly (2011).
[5] The Senate represents the interests of the counties at the national level. The national government has legislated the criteria for the establishment of cities and towns.

municipalities and city and town councils were abolished when the counties were established, and no new boards have been appointed to date.

Kenya's administrative tradition is British in origin. However, the President and county governors are directly elected, and have the power to appointment the national and county executives respectively.

The Kenyan legal system consists of a mix of Kenya statutory (written) law and Kenyan and English common law, mixed with elements of tribal and Islamic law.[6]

The 2010 Constitution resulted in a very significant reconfiguration of local government. (See box 2.1 for historical context.) The County governments were essentially established from scratch, exercising authority over newly configured jurisdictions from the year 2013 onwards. The existing local government bodies were abolished. Their functions were then taken over by the newly established county governments that were also assigned additional functions by the Constitution.

There are 47 county governments. No legal distinction is made between urban and rural counties. In practice, two counties are effectively metropolitan governments (Nairobi and Mombasa counties) because the boundaries of the county correspond, more or less, with the metropolitan boundaries. All other counties, except for one, have a majority rural population.

County governments receive a constitutionally guaranteed share of national revenues (the equitable share). This involves an unconditional transfer of national funds, and must comprise a minimum of 15 percent of national revenues. In addition, the national government may provide further unconditional and/or conditional grants to county governments.

Box 2.1: Decentralization in Kenya – A Brief History

Colonial local government (1950s). Kenya's system of local government was established during colonial rule and was originally race-based – with African District Councils in 'traditional' areas and County Councils in the white settler areas and towns. These authorities had formal legal status. They had a majority of elected councilors, power to employ staff, and a system for collecting their own revenues. They also benefitted from limited intergovernmental transfers. This two-tier system was combined in the 1963 Local Government Act, which gave the new councils significant responsibilities and revenue-raising powers.

Post-Independence conflict between law and practice (1960s). The 1963 Constitution provided for a system of devolution that established regions with elected assemblies and executive authority over roughly a third of government functions including health, education, agriculture, part of the police forces, and local government. However, in practice, devolution was not supported by the national government. This resulted in greater central exercise of control over regional civil servants (than envisaged in the Constitution), delayed implementation of decentralization provisions and limited transfer of functions to the regions. The system was abolished in 1964, and replaced by provincial and district administrations controlled by the national government. Local authorities continued to exist, but their powers were administratively assigned by the national government.

Centralization of political and economic power (1960s-1980s). Over the following two decades, the powers of local governments were gradually eroded. Although there was a proposal

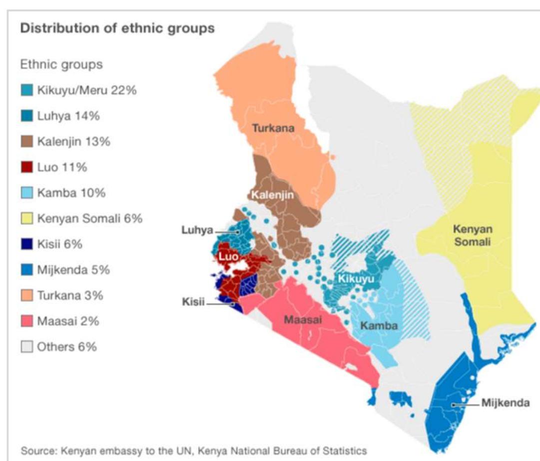
[6] www.kenya-advisor.com/kenya-law.html (accessed December 2016).

to strengthen local governments in 1967, the government reversed course with the Transfer of Functions Act in 1969. This Act transferred many of the local governments' functions back to the center, along with their main sources of local revenue. Consequently, local governments were considerably weaker than before. Constitutional amendments in 1982 further concentrated power in the central government. At the same time, a district-based rural development program was introduced, motivated as a means of involving local people in development and sharing resources more equitably. However, this program ultimately became a vehicle for presidential political patronage and undermined the role of local governments. As such, it resulted in little meaningful redistribution of economic resources.

Piecemeal decentralization (2000s). Fiscal reforms following financial difficulties in the 1990s saw the introduction of devolved (geographically earmarked) funds in an attempt to address spatial inequality. The most notable were the Local Authority Transfer Fund (1998), the Road Maintenance Levy Fund (2007), the Rural Electrification Fund (2006), and the Constituency Development Fund (2003) — all created through laws. Despite these piecemeal efforts to address inequality in resource distribution, political tensions remained high. Indeed, tensions spilled over into the 2007 election crisis and subsequent unrest, which proved to be the tipping point. This led ultimately to a political settlement and the adoption of a new Constitution in 2010. At the time of the constitutional reform in 2010, there were 175 local authorities.

Source: Adapted from "Decentralization in Kenya: Overcoming post-independence concentration of power" in Special Focus – Kenya's Momentous Devolution, December 2011. Edition No. 5. (World Bank, 2011).

Box 2.2: The Political Origin of County Governments in Kenya – A Brief Overview



Kenya is comprised of a number of regionally distributed ethnic groups. Ethnicity has had salience in Kenyan politics from at least the colonial era. Kenya's Constitution at independence provided for devolved governance with regional assemblies. This arrangement arose out of a fear that a single ethnic group might dominate a unitary state. However, the victorious Kenya African National Union (KANU) quickly centralized power into a unitary state with a de facto one-party system in 1966.

Kenya returned to a multi-party system of politics in 1991 in response to growing pressure both locally and internationally. Elections became more contested and violence related to political contestation occurred. However, the closely fought 2007 elections resulted in over 1,000 deaths and the displacement of over 60,000 people.[7]

A National Peace Accord, brokered between the political protagonists through an international intervention, mandated a constitutional review process with strict timelines. This resulted in a new Constitution being endorsed in a national referendum in August 2010. A very significant aspect of this new Constitution was the creation of constitutionally guaranteed devolved government through the establishment of 47 counties. These counties corresponded to the reduction of the powers of the President and national government. Article 174 sets out the objectives of devolution, as follows:

(a) to promote democratic and accountable exercise of power;

[7] Kenya National Commission for Human Rights (2008).

(b) to foster national unity by recognizing diversity;

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognize the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalized communities;

(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya;

(i) to enhance checks and balances and the separation of powers.

The number and boundaries of the 47 counties were based on the existing legal districts, established in 1992. For reasons of practicality, and possibly expedience, the Committee of Experts on the Constitution avoided the rationalization of county numbers and boundaries at the time the Constitution was crafted.

Source: Devolution in Kenya's new Constitution (Nyanjom, 2012).

2.2 Public Sector Structure

The basic structure of the public sector in Kenya is provided in table 2.1.

Table 2.1 Vertical Structure of the Public Sector: Three Tiers of Government

	Tier	**Number of jurisdictions**	**Total population** (millions)	**Average population** (millions)	**Share of national government budget (%)** [1]
	National government	1	47		80%
1.	County government	47	47	1	20%
2.	Urban boards/committees [2]				
	City boards	*0*	*0*	*0*	*0*
	Municipal boards	*0*	*0*	*0*	*0*
	Town committees	*0*	*0*	*0*	*0*

Sources: Prepared by author based on published data.

Note: [1] Excludes own revenues at county levels. [2] At the time of this writing, no city boards, municipal boards or town committees had been established by the counties. The previous municipalities ceased to exist with the creation of the counties.

Two tiers of government (national and county) are constitutionally defined and protected. There is no constitutional provision for local governments, although *urban local bodies*[8] (city and municipal boards, and town committees) are defined in legislation.

County government

There are 47 county governments each with its own legislature. Counties are assigned functions in the Constitution. In addition to classic local government functions (water, sanitation, solid waste, local roads), counties have also been assigned responsibility for devolved health services and agriculture support, among other functions. Counties obtain the large majority of their funds from

[8] The term "urban local government body", shortened to "urban local body", is used in this report instead of the more ordinary term "urban local government" due to the possible confusion of local government with county government in the Kenyan context. County government is the lowest tier of constitutionally-defined elected government.

the national government in the form of unconditional and unconditional grants (88 percent in 2014). The former is the constitutionally guaranteed equitable share of national revenue, which must be at least 15 percent of national revenue.

Urban local government bodies (below county level)

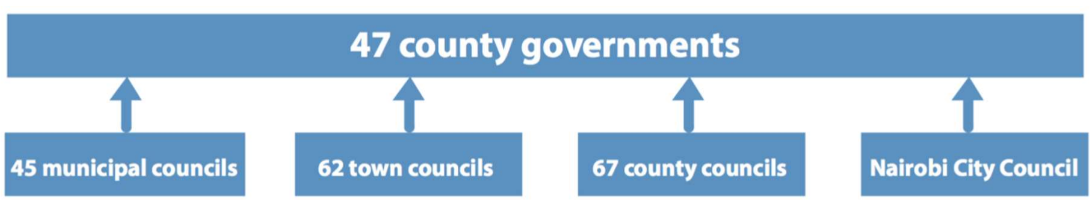
There is no constitutional or legal requirement at the national level that counties establish elected local governments below the county level. Counties are constitutionally and legally obliged to operate in a "decentralized" manner, although this is largely understood to mean that counties should operate through deconcentrated administrative units. The Urban Areas and Cities Act (2011) permits counties to establish cities, municipalities and towns and appoint urban boards and town committees. They can do so based on a "principal and agency relationship between the boards of urban areas and cities and their respective county governments". These urban entities would be appointed by the county leadership, and would have limited decision-making power or administrative autonomy.[9] Furthermore, counties are not obliged to establish such urban bodies.

At the time of this writing (April 2017), no official city/municipal boards or town committees have been chartered or appointed by any county. However, some counties have established town administration offices and appointed informal town advisory committees. County governments have little, if any, political and financial incentive to established delegated urban bodies because the main sources of local revenue to the counties comes from typical local government functions. Delegation of local government functions and responsibility (with the associated revenue) by the county to appointed bodies would diminish the direct control over the few sources of local revenue available to a county.

An urban governance deficit

Kenya's devolution process is somewhat unique because the process of devolving power from the center coincided with the eradication of the local level of government (figure 2.1).

Figure 2.1: One Hundred Seventy-five Local Political Entities Dis-established; and 47 Counties Created



Source: Kenya Urbanization Review. World Bank. 2017.

The World Bank, in its Urbanization Review, noted that "the absence of directly elected representation at the urban level is unusual internationally. Most countries provide for a third tier of government for jurisdictions with populations of at least 30,000-150,000." (World Bank 2017).

Kenya inherited a relatively strong system of local government in the 1950s. Notwithstanding the political centralization that took place in the 1960s to 1980s and beyond, the larger urban areas still had some local administrative capacity. When the counties were established (and local government abolished), the counties inherited the human resources and administrative systems present within the existing local governments in their area. Thus, counties with large urban

[9] As such, the term "devolved local governments" would really be a misnomer. Following Rondinelli's (1981) definitions of decentralization (devolution, deconcentration, delegation), urban boards in Kenya could more properly be referred to as delegated urban bodies or delegated urban management entities because powers and functions are fully delegated to them by the county government, based on a principal-agent relationship.

settlements began with a much stronger administrative basis as compared to counties where there were no large urban settlements. On the extremes, two counties (Nairobi and Mombasa) inherited strong city governments as the basis for the county government. However, some very rural counties began from an almost zero administrative base.

Decentralized structures for the provision of services within the County

The County Government Act requires counties to decentralize the provision of services (deconcentration) to urban areas and cities, sub-counties, wards, and/or village units. The responsibility for service provision is delegated to a sub-county, ward and/or village unit administrator. The county may decentralize further.

The Act requires the county to establish a County Public Service Board with the powers to: establish and abolish offices in the county public service; appoint persons to hold or act in offices of the county public service, including in the Boards of cities and urban areas within the county and to confirm appointments; and exercise disciplinary control over, and remove, persons holding or acting in those offices.

Capacity in rural areas

It can be expected that county government capacity at the local level in rural areas is weak because services, where provided, were typically administered by a regional administrative entity functioning under national auspices.

Consequently, in the post-2010 political environment, there is a strong tendency for the national government to want to continue to lead services provision at the county level (for instance, through national organizations, such as the Kenya Urban Roads Authority or through regional Water Services Boards as their instrument) — even through constitutional responsibility to deliver local functions clearly rests with the county government. Furthermore, in areas where county governments are stronger, there is greater contestation concerning the role of the nationally-owned Regional Water Services Boards.

2.3 Urban Settlements in Kenya and the Classification of Urban Areas

Urban local government bodies are distinguished in law by the size of the urban population. However, none of these have been established to date.

Urban local bodies may be established by counties based on population criteria and processes set out in the 2012 Urban Areas and Cities Act (UACA) (table 2.2). The UACA was modified in 2016 to adjust the size distribution of different types of urban areas.

Table 2.2: Categorization of Kenyan Urban Settlements

Urban category	Population criteria	Number eligible	Power to establish and appoint; Status
Metros	Nairobi county (4.2 million) Mombasa county (1.1 million)	2	**County-city**. Status conferred by the Constitution. The county government is effectively a metropolitan local government.
Cities	Other urban settlements with more than 250,000 people.	3	**City board**. A corporate body with the power to sue and be sued, acquire property, enter into contracts, borrow money and make investments. Status must be conferred by the President on resolution of the Senate. The Board of 11 part-time members is appointed by a

			county executive committee. The City Manager is appointed by a county public service board. Status: No City Boards have been established to date.
Municipalities	Urban settlements with more than 70,000 people.	66	**Municipal board**. Corporate body with power to sue and be sued, acquire property, enter into contracts, borrow money and make investments. Status conferred by governor on resolution of county assembly. A board of 9 part-time members is appointed by the county executive committee. The Municipal Manager is appointed by a county public service board. **Status**: No Municipal Boards have been established to date.
Towns	Urban settlements with more than 2,000 people.	151	**Town committee**. Not a corporate body. The Town Administrator is appointed by a county public service board. **Status**: No Town Committees have been established to date.

Sources: Prepared by author based on World Bank population census figures.

2.4 Organizational and Governance Structure

County governments are fully devolved government entities. Counties are corporate bodies, and have functions assigned them by the Constitution or legislation. They also have their own elected political leadership. Elections take place every five years. In addition, counties develop and pass their own budgets annually.[10]

The County Governor and members of the County Assemblies are directly elected. County Assembly representatives are voted in on the basis of wards, with a proportional representation top-up system designed to meet gender and disability criteria at the county level. The governor appoints a County Executive Committee with the approval of the assembly. The Governor is the chief-executive of the county.

2.5 The Assignment of Functions and Expenditure Responsibilities

Assignment of legal responsibilities

The Constitution assigns the responsibility for the provision of the service (the assignment of expenditure responsibilities) for **public health and outpatient services**, **agriculture extension services and solid waste services** to county governments.

The national government retains the responsibility and expenditure authority for **primary education**.[11]

County governments are also responsible for **county public works,** which are defined as including storm water management systems in built-up areas; and water and sanitation services.[12]

[10] The definition of devolved regional and local government typically includes the requirements that: (i) it is a corporate body; (2) that it performs one or more public functions within its territorial jurisdictions; (3) it has its own (often elected) political leadership; and (4) it prepares and approves its own budgets (Public Expenditure and Financial Accountability Assessment - PEFA, 2013).

[11] The Constitution states that the national government is responsible for: "education policy, standards, curricula, examinations and the granting of university charters; and universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions" (Kenya Constitution, 2010).

[12] Kenya Constitution (2010).

While the constitutional assignment is generally adhered to, as noted, there is some contention about the national government's role in the delivery of certain frontline services. For instance, in the health sector, the Ministry of Health has actively engaged in procuring and distributing medical equipment to local health facilities. Similarly, the Kenya Urban Roads Authority continues to be funded, although its responsibility has effectively been assigned to the county level (table 2.3).

Table 2.3. Assignment of Functions and Expenditure Responsibilities: Selected Local Functions

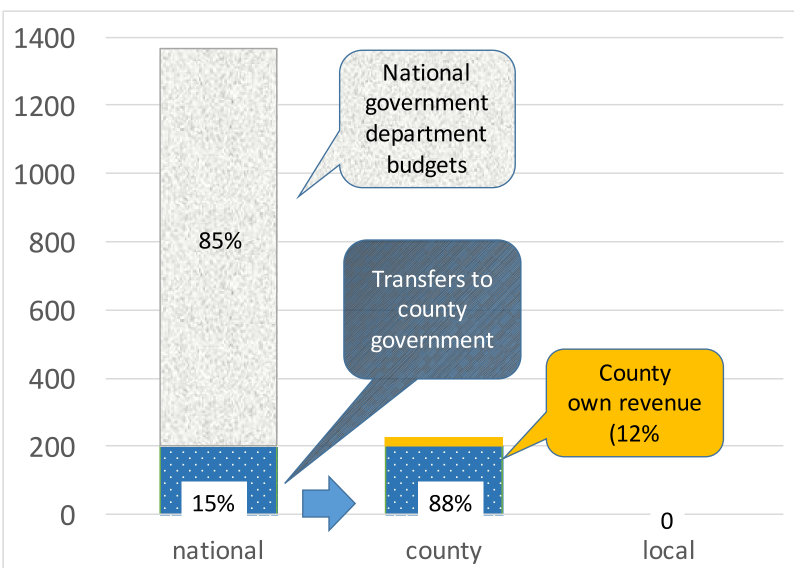
	Personnel	O&M	Supplies	Capital
Primary education (70912)	National Government			
Public health and outpatient services (7072,7074) • National referral facilities • County health services	 National government County government			
Agricultural extension services (70421)	County government			
Solid waste management (70510)	County government			
Construction and maintenance of local public works (70451)	County government			

Source: Prepared by the Author.
Note: O&M= operations and maintenance. Code numbers are from the Government Finance Statistics Manual. 2014. IMF.

Distribution of expenditure responsibilities

The overall division of expenditures between the tiers of government is shown in figure 2.2.

Figure 2.2: Division of Expenditures across Government Tiers (Ksh billion, 2014)



Source: Prepared by Author based on published financial data.

Of the nearly Ksh 1400 billion (US$ 14 billion equivalent) national government budget (2014), 15 percent was transferred to county governments and nothing to local governments, leaving 85 percent for national government departments.[13]

Eighty-eight percent of the Ksh 200 billion (US$ 2 billion equivalent) in actual expenditures by the county governments came from national government transfers, and 12 percent from their own revenue sources. The major budget items of county governments are health, infrastructure and public administration which comprise 80 percent of total county expenditures.

No local urban bodies have been established with a board or committee, and no functions have been delegated by counties to such urban bodies.

[13] *Kenya Decision Time: Spend More or Spend Smart? Kenya Public Expenditure Review,* World Bank, December 2014. While the budgeted national expenditure allocates a larger percentage to the counties, actual expenditures accounted for a little less than 15 percent of national expenditures due to incomplete expenditures of the budget.

3 Organizational Structure of Water and Sanitation Services

3.1 Overview

The organizational structure of water and sanitation services in Kenya is in a period of transition. Responsibility for the provision of the water services function was devolved by law to county governments in Kenya in 2012. This was done as part of the constitutional assignment of functions between the new levels of government (national and county). Although the counties were functionally established in 2013, the sector's overall organizational structure still largely corresponds to the pre-constitutional disposition, particularly with respect to how water is provided in urban areas. The main adjustment that was made due the implementation of the new Constitution was that the ownership of urban water providers—which were previously owned and managed by the national government through the Water Services Boards—was legally transferred to the ownership of their respective counties. (In some cases, assets that were previously owned by municipalities, prior to the 2002 Water Act reforms, had not yet been transferred to the Water Services Boards, although *de facto* control had changed to these Boards.)

The Ministry of Water and Irrigation is the sector leader and is responsible for sector policy, national planning, oversight and financing of capital investment for both water resources and services.

A national water services regulator, WASREB, sets standards and regulates water services providers through a licensing system.

Investments in water and sanitation have been financed primarily by donor and central government funds (approximately 50 percent each from 2011 to 2015). Donor investments were comprised of 80 percent in loan finance and 20 percent in grants.

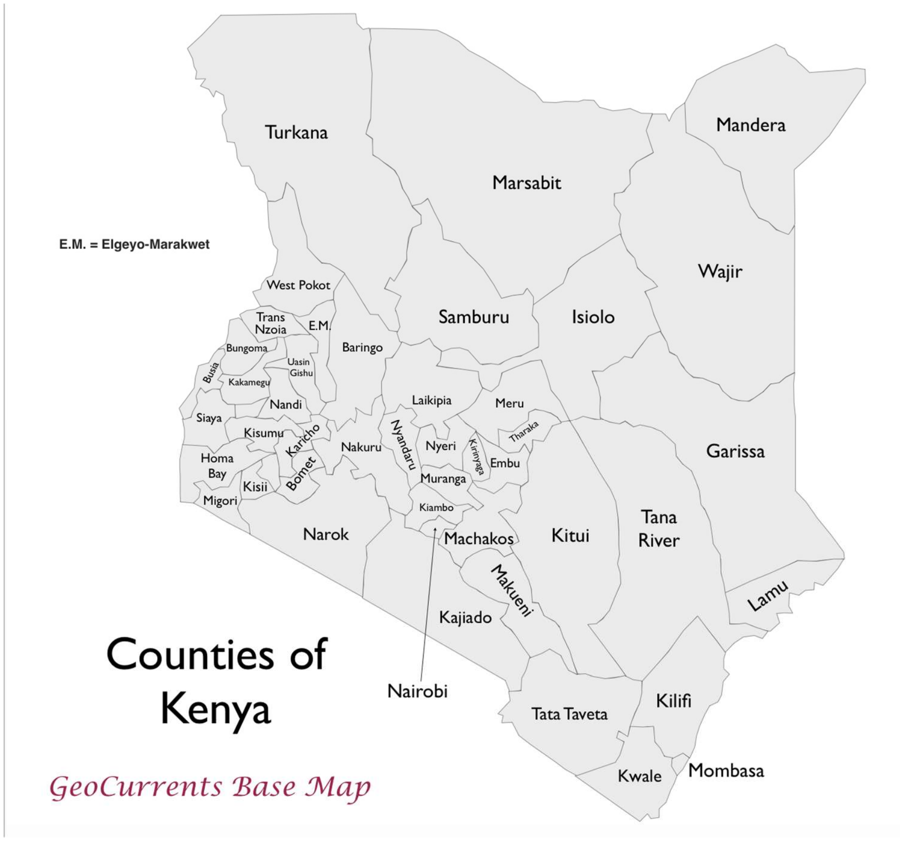
Regional water infrastructure financing and development agencies (called Water Services Boards in the 2002 Water Act; to be reestablished as Water Works Development Agencies in the 2016 Water Act) develop water services infrastructure and transfer the management and operations of this infrastructure to water service providers. In the 2016 Water Act, ownership is also to be transferred once the asset has been developed.

With the creation of 47 county governments and the election of County Governors and County Assemblies in 2013 (figure 3.1)[14], counties received a guaranteed 15 percent of national revenues. However, information on how much of this revenue was used for funding water services capital and operating costs is not available.

Water service providers are licensed by the national water regulator and operate water services, primarily in urban areas, on a commercial basis on behalf of county governments according to the terms of the 2016 Water Act.

[14] http://www.geocurrents.info/gc-maps/geocurrents-maps-by-country/geocurrents-maps-of-kenya. Accessed 21 January 2017.

Figure 3.1: Forty-seven County Governments Responsible for Water and Sanitation Services



Source: GeoCurrents. 2017.

Evolution of policy and institutions

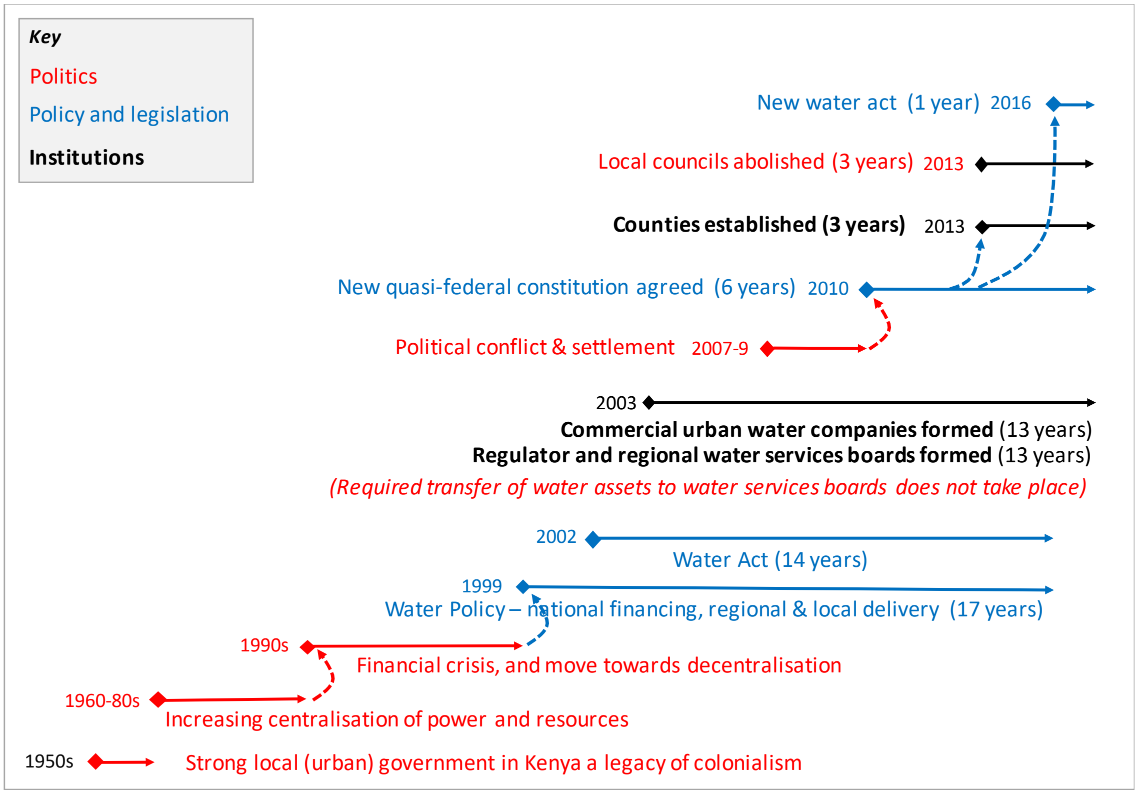
Major events in the institutional and sectoral reforms in Kenya are outlined in table 3.1.

Table 3.1: Key Events in the Development of Kenya's Water Policies and Institutions	
1950s	Local government inherited from colonial era.
1960-80s	Centralization of resources and control.
1990s	Fiscal crisis and move toward administrative decentralization of provision of services
1999	Water Policy.
2002	Water Act.
2003	Establishment of WASREB (national water services regulator), regional water services boards (financing and asset holding companies) and commercial operators (urban water companies).
2007-9	Political conflict and settlement.
2010	A new Constitution, creating a new tier of government, 47 counties, with responsibility for water and sanitation services.
2013	County governments are established and local government councils are abolished. The power to establish urban bodies is given to Counties, but this power has not been exercised to date.
2016	Water Act intends to align water sector institutions with Constitution. Envisages continued existence of one of more national agencies to finance and develop water services infrastructure to replace the water services boards. The Act has been contested in court by county governments that regard the Act as unconstitutional.

Source: Adapted and updated from draft County Status Overview – Kenya (World Bank, 2011).

A timeline of major events is shown in figure 3.2.

Figure 3.2: Timeline of Major Events in Evolution of Water Policy, Legislation and Institutions in Kenya



Source: Prepared by Author.

The regional water services boards and many of the commercially oriented urban water companies have been in existence for about 13 years. By contrast, the counties were only established in 2013 and have been functional for only three years.

Key stakeholders in the sector

Key sector stakeholders are listed and their roles described in table 3.2.

Table 3.2 Key Stakeholders in the Water and Sanitation Sector by Level

Stakeholder	**Level / Type**	**Number of entities**	**Main responsibilities**
Department of Water and Irrigation	National government, under the Ministry of Water and Irrigation	1	Oversees urban and rural water and sanitation policy; national planning and reporting; finances investments in water and sanitation. Also, responsible for water resources management.

Water Services Regulatory Board (WASREB)	National water services regulator	1	Sets national standards; evaluates and recommends tariffs; sets license conditions and accredits water service providers; monitors, regulates and enforces license conditions; monitors compliance with standards.
Water Services Boards (existing)/ Water Works Development Agencies (proposed)	Regional public utility with national government shareholding	8	To "undertake the development, maintenance and management of the national public water works" and to "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". Currently an asset holder.
County governments	Local government	47	Full water services responsibility (financing, investment and operations) for 'county water services'; only established in 2013.
Licensed water services providers	Local commercial-oriented urban providers (water companies) *of which*	86	Undertake the production function (operations) on behalf of county governments. Boards are appointed by county governments, subject to national legislation. Entity shareholding vests with the county. Some have been operating for more than 10 years.
	Very large (> 35 000 registered water and sewer connections	*8*	
	Large (10,000 to 34,999)	*28*	
	Medium (5000 to 9999)	*19*	
	Small (< 5000)	*31*	
	Private utilities	*2 (out of 86)*	
Local government bodies	Established city, municipal, town councils, rural authorities	0	Previous local government bodies were dis-established in 2013 when counties were created.

Source: Prepared by Author.

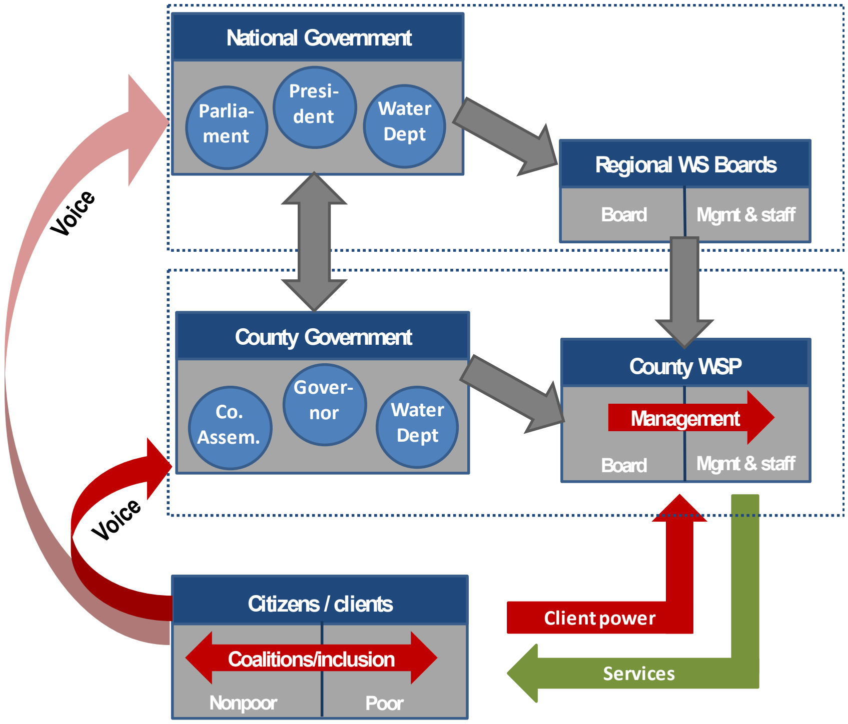
3.2 Provision of Piped Water and Sewerage Provision (urban)

3.2.1 Organizational Structure and Accountabilities (urban)

County governments are responsible for water and sanitation services at the county level.

The basic organizational structure of the sector for piped water supply systems and sewerage in urban areas is shown in figure 3.3.

Figure 3.3: Organizational Structure of Water Sector in Kenya (for provision of piped water supply and sewerage - urban)



Source: Prepared by Author.

Note: WS= water and sanitation; WSP=water and sanitation providers. Co. = County.

In urban areas, and in the case of some piped water systems in rural areas, these services are provided by water and sanitation providers (WSPs), established as water companies according to company law. These companies are typically wholly-owned by the county. (There are a couple of privately-owned WSPs.) The WSPs have their own board, appointed by the county governor. County governments are required by law to provide the service through regulated and licensed WSPs in areas that are deemed by the regulator to be commercially viable, that is, urban areas.

The sewage network, and related treatment, is managed in the same way as the piped water systems. Sewage networks typically exist only in the center of the larger urban areas.

The contested role of the water services boards

The Water Services Boards are national government entities, with their own boards appointed by the Cabinet Secretary (Minister) responsible for water.

There is a conflictual and contested relationship between national and county governments (that has its origins in the political history of Kenya). This conflict is also reflected in a difficult and contested relationship between the water services boards and county governments (and their county water services providers). The national government has, and intends in future, to use the Water Services Boards (and their proposed replacement, the national Water Works Development Agencies), to finance and develop water services infrastructure. It then intends to hand this infrastructure over to county governments. The role of the Water Services Boards (and their proposed replacement according to the 2016 Water Act) was being contested in court at the time of this writing. County governments are of the view that this function should be performed by the counties themselves according to the country's Constitution.

Citizens engage with the country water services providers (water companies in urban areas) as customers, and with county and national governments as voters. The relative strengths of these accountabilities are discussed later in this section and again in Sections 5 and 8.

3.2.2 Direct Provision of Water and Sanitation Services at the County Level

County governments are responsible for the provision of water and sanitation services in Kenya. Although counties may provide water services themselves in areas where the service is not deemed commercially viable (that is, in rural areas), they *must* provide the service through a licensed water services provider where the service is deemed to be commercially viable, that is, in urban areas (discussed in the next section). In practice, some rural *piped* schemes are also managed by WSPs.

Counties are therefore *not* directly involved in the provision function of water supply and sewerage facilities in urban areas.

Budgets and revenues

Budgets are approved by the elected politicians for their respective counties. Counties provide reports on their budgets and actual expenditures against the budget of the national government. There is, at present, little analytical reporting of disaggregated county expenditure data. There is no uniform reporting of county spending by functional classification. Therefore, it is not possible, with any accuracy, to determine what has been budgeted and spent on water supply and sanitation functions.

WSPs report on revenues and expenditures, and it is possible to track this data for piped water systems that are managed by WSPs (that is, urban water and sewerage provision).

In practice, it is unlikely that counties have allocated any money to the WSPs because WSPs are expected to recover their own costs. In the past, WSPs were financed by the Water Services Boards and this arrangement appears to be continuing. Information about the allocation of capital budgets to water (and to WSPs specifically) by counties is not available.

Subsidies

The national government provides subsidies to county governments in the form of a formula-driven *unconditional grant* (for a constitutionally-required equitable share of national revenues). The intention is for this to be used by county governments to fulfil their constitutionally-assigned functions. In addition, the national government may provide county governments with other conditional or unconditional grants for capital and/or operating expenditures.

In practice, the national government also invests directly in water services infrastructure through the regional Water Services Boards (primarily but not exclusively for water and sewerage services in urban areas). It is not clear to what extent this practice is constitutional. In theory, county governments ought to assume responsibility for (or have control over) the investments in water services within their county. (See discussion regarding the Water Works Development Agencies below.)

The Water Services Trust Fund, established to promote improved access to water and sanitation by poor households, provides subsidies for both urban and rural areas. In urban areas, it focused on extending connections in poor areas. In rural areas, it funds rural piped water systems and on-site sanitation. The fund requires counterpart funding from county governments, and works closely with the counties.

3.2.3 Provision through Licensed, Commercially Viable Water Services Providers

The 2016 Water Act defines a water services provider as "a company, public benefits organization or other person providing water services under and in accordance with a license issued by the Regulatory Board for the service areas defined by the license" (Section 2).

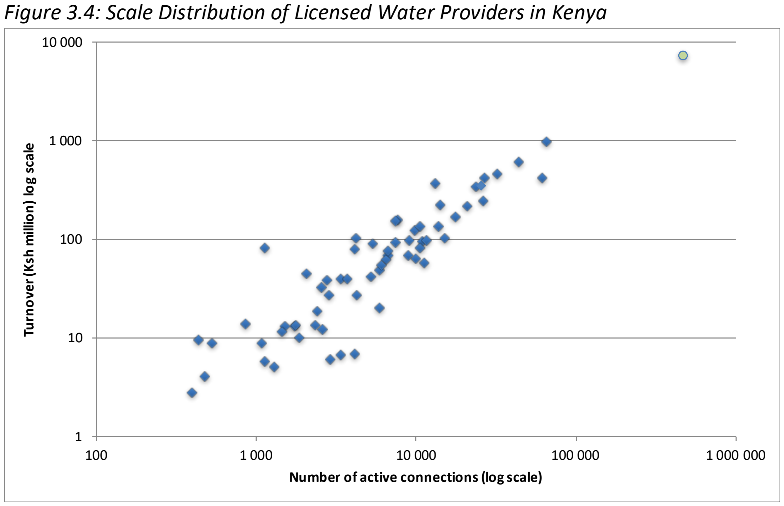
According to this law, counties are required to establish water service providers that conform to standards of commercial viability established by the regulator. These should be public limited liability companies established under the Companies Act of 2015.[15] Water services may only be provided by licensed water services providers.

The new law is a formalization of the status quo whereby, in the majority of urban areas, water services are provided by licensed, commercially-oriented water services providers established as public limited liability companies. There are 86 licensed urban water services providers, of which only two are private; another 8 are considered to be rural. These companies were intended to be owned by the Water Services Board (in terms of the Water Act of 2002). However, the transfer of the existing assets to the Water Services Boards (from local governments) had not taken place in many instances before the new Constitution was approved in 2010.

All new assets created by the Water Services Boards were owned by the Water Services Boards and leased to the water services providers (water companies) to operate the assets. According to the new Constitution and the Water Act of 2016, the water companies are, for the purposes of governance and management control, *de facto* owned by county governments — irrespective of the status of the asset registers (that is, whether these are with the Water Service Boards or were with local governments at the time of the constitutional reform).

There is a wide range in the scales of the licensed water companies, as figure 3.4 shows.

Figure 3.4: Scale Distribution of Licensed Water Providers in Kenya



Source: Prepared by Author based on WASREB data.

Organizational set up and board

The licensed water companies are legal persons, with an appointed board of directors and shareholding by county governments. (Previously, ownership of assets was with the Water Services Boards). The board is appointed by the county government, subject to a process and conditions

[15] Or other body providing water services, as may be approved by the Regulatory Board.

as defined in the national Water Act (2016). Board members must be suitably qualified. They must not serve as an elected member of a county government, or hold political office. In addition, they should not be a serving member of national parliament.

Prior to the 2010 Constitution, the national water services regulator, WASREB, had an important say in the process of appointing company directors. Although this power was also given to the regulator in the Water Act of 2016, it is possible and likely that this power may be contested by county governments. (The constitutionality of the Water Act is being contested in court by the county governments.) County governments are likely to want to have unfettered authority to appoint the board members of the water companies.

Staffing

In terms of the Companies Act, the senior executive appointments are made by the company's board. In practice, county governors (who may not sit on the board) play an influential role in the appointment of senior management.

Budgets, revenues and reporting

Budgets are approved by the company board. Annual revenues and expenses are required to be reported in company annual financial statements. These are sometimes made available on the websites of the water companies, but this practice is not routine.

Subsidies

Operating subsidies are not provided by county governments to licensed water services providers. The national government invests directly in water services infrastructure through the existing Water Services Boards in the form of grants and loans.

Enforcement

Enforcement of legislation (and related norms and standards regulations) is done, in theory, by the Ministry of Water and Irrigation. In practice, enforcement has been in limbo since 2010, given the uncertain constitutional status of the 2002 Water Act. Enforcement has also been hampered by the new act, that was only passed late in 2016. In addition, the new act is currently being contested in court.

Management of performance

Counties are responsible for establishing and managing their own performance systems, as required by the County Governments Act (2012) and the Public Financial Management Act (2012). These systems are still under development, and it is still too early to describe actual practices.[16]

3.2.4 Water Services Boards (existing)

Status and company structure

Water Services Boards are national state-owned entities whose primary role is to finance and develop water services infrastructure. They were created by legislation (Water Act of 2002). They are corporate bodies, and are also subject to the Public Finance Management Act of 2012, as national government entities. As of April 2017, the Water Services Boards continued to exist and operate (although the intention is that they be dis-established), and no Water Works Development Agencies (their intended replacement provided for in the 2016 Water Act) had been established.

[16] See, for example, the guideline for the development of performance management systems by counties: *County Performance Management System and Stakeholder Engagement Handbook*, Council of Governors, March 2016.

Mandate

The mandate of the Water Services Boards was to finance and develop water services infrastructure, and to act as asset holding companies. The thinking at the time was that asset separation into a public holding company could facilitate private involvement in the operation of these services. It was intended that existing assets held by local government be transferred to the Water Services Board after the 2002 reforms. However, this had not taken place in many cases at the time of the 2010 constitutional reforms, when ownership was effectively vested with the county governments.

Governance

The 2002 Water Act gave the Minister of Water the right to appoint the board members. It appears that the various Presidents of Kenya had an influence over these appointments, and that these appointments were at least partly based on political interests rather than the skills needed to govern these boards.

Reporting and regulation

In terms of the 2002 Water Act, the Water Services Regulatory Board (WASREB) licensed the Water Services Boards. However, the regulator found it difficult to establish practical regulatory control over the Water Services Board whose performance, including reporting requirements, was mixed.

Services provided and funding/revenues for these services

Water services boards receive funding from the national government (as grants and loans, including donor funds) to invest in water services infrastructure. Repayment of the loans was made possible by payments from the commercial water companies to the Water Services Companies in the form of the water tariffs and lease fees.

The operating costs for water services boards accounted for about 12 percent of the investment flow in 2014, decreasing from close to 30 percent in 2011 because of larger investment flows.

The relationship between Water Services Boards and the newly established counties

There is a conflictual relationship between Water Services Boards and the county governments. County governments consider the Water Services Boards to be undertaking a function that constitutionally belongs to the counties. County governments have been reluctant to make or facilitate payments to the Water Services Boards, and have contested the 2016 Water Act.

3.2.5 Water Works Development Agencies (proposed)

Company structure

The Water Act of 2016 provides for the establishment of national Water Works Development Agencies. These are corporate bodies that are also subject to the Public Finance Management Act of 2012 pertaining to national government entities.

Mandate

The mandate of the proposed Water Works Development Agencies is to finance and develop "national public water works", as designated by the national Cabinet. It is also based on considerations included in the Act, including the fact that the water services assets are financed from the national share of revenues.[17] The intention is for the assets to be transferred to the country water services providers after they have been developed by the Agency.

[17] Water Act, 2016, Section 8(1).

Status

As of April 2017, no Water Works Development Agencies had been established. County governments have contested the constitutionality of the Water Act (2016) in court, with particular reference to the centralization of service provision through the existing Water Services Boards and the proposed national Water Works Development Agencies.[18]

Governance

The Cabinet Secretary appoints the board members of the Water Works Development Agencies according to the Water Act of 2016. No appointments have yet been made.

Reporting and regulation

Beyond the more general type of public finance regulations and the monitoring of compliance with national standards by the Water Services Regulatory Board, the Water Act of 2016 is silent about how the national Water Works Development Agencies are to be regulated.

Services provided and funding/revenues for these services

The intention is for the Water Works Development Agencies to be financed by the national government from the national share of revenues (and donor funds), and for any loans to be repaid by the users through loan and tariff agreements with the counties and the county water services providers.

The relationship between the water works development agencies and counties

The lawfulness and constitutionality of the establishment of the national Water Works Development Agencies have been contested in court by the county governments (See Status section).

3.2.6 Variation in capability and roles across counties (urban)

For the two metropolitan counties (Nairobi and Mombasa), the two corresponding Water Services Boards (the Athi Water Services Board and the Coastal Water Services Board) play a role in financing and developing bulk water infrastructure. In the case of Coastal Water Services Board, it also operates this infrastructure.

For smaller urban centers, the regional Water Services Board finances and develops water services infrastructure. However, it delegates the operating of this infrastructure to the commercially-orientated water companies.

3.2.7 Summary (urban)

A summary of the decentralized nature of water services provision is provided in table 3.3.

Table 3.3 Decentralized Organizational Structure of WSS (UW, US)

	Leading Questions	Summary
1.	Is there a public entity responsible, in practice, for WSS within local jurisdictions? To what degree do residents rely on (regulated or unregulated) self-provision?	County governments have responsibility for water and sanitation provision in their county areas. Actual provision in the urban areas takes place through water companies.

[18] http://www.nation.co.ke/news/Governors-challenge-implementation-of-Water-Act/1056-3486738-vv0i98z/ (accessed 12 January 2017).

2.	Is the organizational status of the WSS provider local in nature? If so, does the provider cover a single local jurisdiction, or does a single SDU cover multiple local jurisdictions (or even an entire region or the nation as a whole)?	The entity responsible (county government) is regional (47 regions in the country), and the producer of the service (water services providers) is local in nature (one or more per county) for specified urban areas.
3.	Is the WSS provider a department of a local government? Alternatively, is the provider a corporate body? In the latter case, who legally owns the WASA?	County-level water providers are predominantly commercial public companies servicing urban areas. Local governments have not been established.
4.	In practice, is the WSS SDU executive (and/or board) appointed (and does it work under the guidance) of the LG?	The boards of the water companies are appointed by county governments and work under the authority and guidance of the county governments, but are regulated by a national regulator (for licenses, standards)
5.	Does the LG have authoritative decision-making power over key aspects of the WSS SDU's operations, including staffing decisions (establishments, hiring/firing/promotions, pay)?	The water companies make their own staffing decisions. High-level staffing decisions are likely to be strongly influenced by county governments.
6.	Does the LG have authoritative decision-making power over key aspects of the WSS (UW, US, RW, RS) provider's finances, including budgetary decisions and tariff-setting authority?	Responsibility for financing and infrastructure investment is contested between the national and county governments, with both asserting the right to do this. Operating budgets are under the control of the water providers (water companies), overseen by county governments.

Source: Prepared by Author.

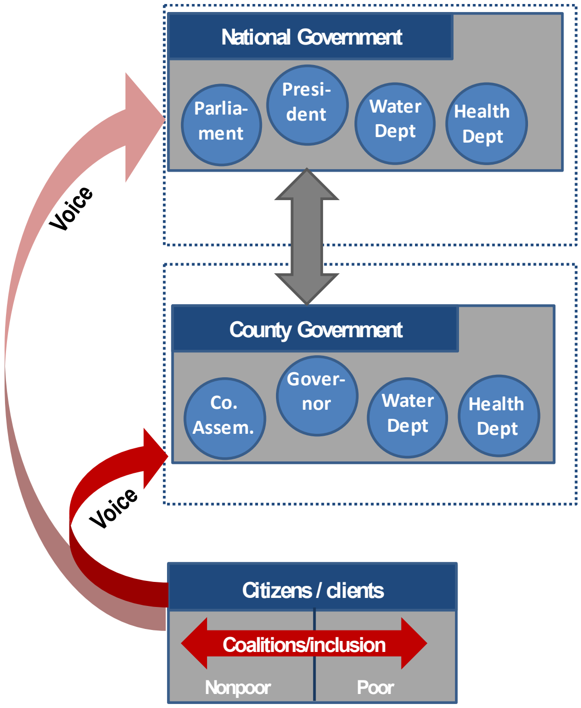
Note: LG= local government; RS= rural sanitation; RW= rural water; SDU= service delivery unit; US= urban sanitation; UW= urban water; WSS=water supply and sanitation.

3.3 Provision of Water Supply and Sanitation in Rural Areas (non-piped systems)

3.3.1 Organizational Structure and Accountabilities (rural)

The basic organizational structure of the sector for rural, non-piped water supply systems and on-site sanitation is shown in figure 3.5. In this case, counties are directly involved in the provision, working with communities, non-governmental organizations (NGOs) and community-based organizations.

Figure 3.5: Organizational Structure of Water Sector in Kenya (for provision of piped water supply and sewerage)



Source: Prepared by Author.

Note: Co. Assem. = County Assembly.

Non-piped water and on-site sanitation is the responsibility of county governments. Investments in rural boreholes (and other non-piped systems), and on-site sanitation facilities have been historically made by the national government (through the District Water Offices), development partners and NGOs. Regarding various water and sanitation rural programs, the responsibility for operating and maintaining these facilities typically fell on the communities or households. Investment responsibility has now been devolved to county governments, who may also set up arrangements for the ongoing maintenance and upkeep of these facilities. There is little detail available regarding how this is working in actual practice. It is likely that previously existing practices (community or household management of facilities) will persist.

The Water Services Boards play a relatively small role in the development of rural water supply and sanitation services. Only 8 of the 94 WSPs licensed by the regulator are considered to be rural. Their size in terms of turnover and number of connections is small relative to the other WSPs.

3.3.2 Direct Provision of Water and Sanitation Services at the County Level (rural)

Rural non-piped water systems and on-site sanitation are typically managed by communities and households. In the past, investment in new facilities (or the rehabilitation or upgrading of facilities) was undertaken by the national government through its District Water Offices, and through or with development partners and NGOs. Investments are being undertaken by the Water Services Trust Fund (funded primarily by development partners), with development partnerships working independently of the Water Services Trust Fund (WSTF) and NGOs. These mechanisms are increasingly involving the county governments, at least with coordination, and sometimes through county counter-part funding requirements. Practices vary by funding source and by county. It is not yet possible to present a comprehensive picture of what is happening across all counties in practice because of the absence of national level reporting.

Consistent information does not exist regarding the organizational set up within counties with regard to water and sanitation, and whether or not a specific water supply department and/or a sanitation department has been established. In some (possibly many) counties, it seems that sanitation falls under the County Health Department. Therefore, water and sanitation activities are separated at the county level, although their activities are intended to be coordinated through the integrated planning process at the county level.

Budgets and revenues

Budgets are approved by the elected politicians for their respective counties. Counties provide reports about their budget and actual expenditures against the budget of the national government. There is, at present, little analytical reporting of disaggregated county expenditure data. There is no uniform reporting of county spending by functional classification. Therefore, it is not possible to determine with any accuracy what has been budgeted and spent for water supply and sanitation.

Subsidies

The national government provides subsidies to county governments in the form of a formula-driven *unconditional grant* (a constitutionally-required equitable share of national revenues). The intention is for this to be used by county governments to fulfil their constitutionally-assigned functions. In addition, national government may provide county governments with other conditional or unconditional grants for capital and/or operating expenditures.

The Water Services Trust Fund, established to promote improved access to water and sanitation by poor households, provides subsidies for both urban and rural areas. In rural areas, it funds rural piped water systems and on-site sanitation. The fund requires counterpart funding from county governments and works closely with the counties.

3.3.3 Variation in Roles and Capabilities across Counties (rural)

Counties have fully devolved responsibility for the provision of both water and sanitation services. However, there is an asymmetry in capability across counties, which affects service outcomes.

The provision of non-piped water systems and onsite sanitation services is the responsibility of the county governments. Implementation mechanisms vary greatly depending on how the investments are funded, and who is involved. There is a large diversity of arrangements across counties. There is no overall picture available as to how much is being spent, by whom, and how management arrangements are structured. The WSTF and development partnerships are influential in this space. Indeed, this funding is likely to be a large share of total investments in the rural water and sanitation sector.

3.3.4 Summary (rural)

A summary of the decentralized nature of water services provision for rural areas is provided in table 3.4.

Table 3.4 Decentralized Organizational Structure of WSS (RW, RS)

	Leading Questions	Summary
1.	Is there a public entity responsible, in practice, for WSS within local jurisdictions? To what degree do residents rely on (regulated or unregulated) self-provision?	County governments have responsibility for water and sanitation provision in their county areas. Provision in rural areas is managed by the communities themselves, and supported by the county governments.

2.	Is the organizational status of the WSS provider local in nature? If so, does the provider cover a single local jurisdiction, or does a single SDU cover multiple local jurisdictions (or even an entire region or the nation as a whole)?	The entity responsible (county government) is regional (47 regions in country), and the producer of the service in rural areas is also the county government, working with communities, NGOs and CBOs.
3.	Is the WSS provider a department of a local government? Alternatively, is the provider a corporate body? In the latter case, who legally owns the WASA?	Counties are responsible to provide services, but community structures are involved in the management of services in rural areas (and supported by county governments).
4.	In practice, is the WSS SDU executive (and/or board) appointed (and does it work under the guidance) of the LG?	A department within the county government is the SDU, working with community structures.
5.	Does the LG have authoritative decision-making power over key aspects of the WSS SDU's operations, including staffing decisions (establishments, hiring/firing/promotions, pay)?	Staffing structure decisions are made by the County Public Service Commission. Counties make the appointments.
6.	Does the LG have authoritative decision-making power over key aspects of the WSS (UW, US, RW, RS) provider's finances, including budgetary decisions and tariff-setting authority?	Capital and operating budgets are under the control of county governments for rural water and sanitation provision. These are supplemented by development partners and the Water Services Trust Fund.

Source: Prepared by Author.

Note: CBO=community-based organization; LG= local government; NGO= non-governmental organization; RS= rural sanitation; RW= rural water; SDU= service delivery unit; US= urban sanitation; UW= urban water; WASA= Water and Sanitation Authority; WSS=water supply and sanitation.

3.4 Assessment

Key question: Does the vertical organization of decentralized water and sanitation provision contribute to—or detract from—efficient, equitable and sustainable access to water and sanitation services?

The legal status and role of counties with respect to the provision of both water and sanitation services is reasonably clear. According to the Constitution, counties have the right and responsibility to provide county-level water and sanitation services, including financing and infrastructure development. However, at the national level, the Ministry of Water and Irrigation continues to assert the right to both finance and develop water services infrastructure using the national share of revenues. This right is contested by county governments.

This contest plays out primarily in urban areas. It is also a source of contention with respect to the role of the existing regional Water Services Boards and the proposed replacement Water Works Development Agencies. The Water Services Boards continue to finance and develop water services infrastructure, although their right to do so is contested by county governments. The contest between the respective rights and roles of national and local governments may negatively affect the financing (and ultimately the sustainable operation) of water services over time. An assessment of the impact of the devolution on the financing of the sector is provided in Sections 7 and 9.

County governments (with populations ranging from 100,000 to 4 million) occupy a somewhat unusual space within the context of decentralization. They are neither truly regional, nor are they truly local — except for the two 'metropolitan' counties. The functions assigned are predominantly local in nature and most of these would ordinarily be assigned to local government. Their source of *local* revenue is from typical local government functions (property taxes, other local taxes and business permits, parking fees and service fees from solid waste and water). However, the major share of revenue comes from national transfers (88 percent in 2014).[19] It is envisaged that the counties can establish urban local bodies under their jurisdiction (that is, municipal boards and town committees). No urban local governance structures have been established since their dis-establishment in 2013, when the county governments were formed.[20]

For *piped water and sewer systems* (in urban and some rural areas), notwithstanding the significant change in the devolution of government (with new county governments created and local governments abolished), together with an explicit assignment of responsibility for water services provision to the newly created county governments, water services provision has largely been *unaffected* by the devolution of water services to county governments. At least, it is too soon to see and assess any impact. This is largely a result of the fact that the actual organizations undertaking the production function (those actually providing the service) – the water companies and water services boards – have, so far, been largely unaffected by the constitutional changes.

Water Services Boards continue to operate largely as if there has been no change in the Constitution and legislation (notwithstanding the current legal contestation). The water companies have new boards, and are now governed by the counties. However, operational continuity has largely been seamless. It is too early to assess any meaningful trends in the improvement or deterioration of water company performance.

For *non-piped water systems and on-site sanitation*, implementation practices have begun to change. The WSTF (funded largely by development partners but with some national government funding) and development partners are working in this area, and are actively partnering with county governments. The extend of partnering varies from high-level coordination only, to joint planning, project selection and implementation. There is a wide variety of arrangements depending on the funding source, development partner and county. Various capacity-building initiatives are helping counties to develop planning and monitoring capacity and, in some cases, implementation capacity as well. A counterpart funding requirement is also influencing counties to allocate their own budgets to the provision rural water supply and sanitation.

The scale of provision for *piped water and sewer systems* differs widely from metropolitan county water companies serving over 4 million people (largely urban), to small water companies with a population in their service areas of less than 10,000 people. There is a weak relationship between the scale of provision and performance. Nevertheless, the creation of county governments may provide some impetus toward the amalgamation of water companies, where more than one water company operates within a single county. However, at the same time, this may inhibit the clustering of water companies into single companies operating across counties.

The organizational division is between piped water networks and non-piped water systems, rather than between urban and rural areas. Some urban WSPs have had their mandate explicitly expanded to include rural (piped) water systems, and many WSPs already operate rural piped water systems. In time, it is likely that county water departments will be established in most counties. However, it is hard to tell, at this point, to what extent this has already happened, or is in the process of happening. Arrangements appear to be more ad hoc and driven by the availability and conditionality of funding from the WSTF and development partners, as well as the extent to which water and sanitation are prioritized by the County Governor. Management of rural facilities

[19] In South Africa, by contrast, approximately 70 percent of local government revenues are from local sources.
[20] The two counties coinciding with the metropolitan areas of Nairobi and Mombasa are effectively metropolitan governments.

(outside of the piped systems managed by the WSPs) still appears to be largely informal, and done at the community level.

The argument for the new Constitution was that local service delivery outcomes were poor under the centralized system, and would improve under a decentralized system. It is too soon to tell if this is the case. Anecdotal evidence provides some examples of county governments, for example, Nakuru County, that have prioritized improving water and sanitation services and are making progress.

There is, however, a risk of negative impacts arising from the tensions between national and county governments with respect to the role of the water services boards.

It could be argued that the fragmentation of responsibility for rural water provision could result in institutionally weak county water departments. The question could be asked: Does the current structure of having a county water department for non-piped water systems in rural areas and on-site sanitation, and a WSP for the piped water systems make the most sense? Would it make more sense for the WSP to cover the entire county (even on a non-cost-recovery basis), as they have the technical expertise?

The author's view is that the financing logic should be determinative. Urban systems can be self-financed and should be. Therefore, urban piped water systems need to recover their costs and contribute to capital financing. The same cannot be expected for rural water and sanitation systems. In this case, it makes sense to have financially autonomous water services providers that can manage urban piped water (and sewer) networks with ring-fenced revenues from water.

The scarce capital subsidies should be directed to the rural systems with an expectation that rural communities contribute only toward the operating and maintenance costs. Mixing these two has the danger of shifting the limited available subsidies to the urban systems (where the politicians live) at the expense of the rural systems Alternatively, having the urban systems subsidize the rural systems (where most voters live) is another possibility. Neither of these outcomes are likely to lead to a sustainable sector over time. The current sector policy (with full cost recovery for urban piped systems with ring-fenced revenues) makes sense. See further discussion in Section 10.

4 The Assignment of Functional Responsibilities in Water and Sanitation Services

4.1 Overview

A clear understanding of the organizational structure of the delivery of W&S services provides the basis for understanding the exact assignment of functional responsibilities. This section addresses the question of "who actually does what?" when it comes to providing water and sanitation services to households and businesses.

In Kenya, there appears to be some important discrepancies between the constitutional assignment of functions, organizational design and what happens in actual practice.

The Constitution allocates the responsibility for county water and sanitation services to the county tier of government, and allocates a minimum share of national revenues to county governments for the purposes of supporting the fulfilment of its responsibilities. However, the national government has retained the *de facto* right to finance and develop water services infrastructure. It has done this by calling any water services infrastructure that is financed by the national share of revenue 'national public works' according to the 2016 Water Act. The constitutionality of this interpretation is contested by county governments who argue that the finances should be transferred to county governments so that they can develop the water services infrastructure in order to properly fulfill their own responsibilities.

The institutional mechanism through which the national government plans to finance and develop water services infrastructure is the newly-established regional Water Works Development Agencies. These are owned and governed by the national government. They are to replace the existing Water Services Boards that historically have fulfilled the same function. However, not one Water Works Development Agency has been created, and the constitutionality of the continued existence of the Water Services Board and the creation of the replacement Water Works Development Agencies are being contested in court by county governments. In the meantime, the Water Services Board continues to function largely as if the new Constitution had not assigned responsibility for water services provision to county governments.

The situation is different in rural areas. Here the responsibility of the previous District Water Offices has moved to the counties. It is the counties that now assume full responsibility for the provision of water and sanitation services (both *de jure* and *de facto*), with little involvement or support from the national government. The exception is the availability of funds through the Water Services Trust Fund, and a relatively small ongoing role by the Water Services Boards.

4.2 Assignment of Functional Responsibilities (urban)

4.2.1 *De jure* and *de facto* Assignment of Functional Responsibilities

A summary of the assignment of functions for the urban areas is provided in table 4.1

Table 4.1 Assignment of Functions for Water and Sanitation at the Local Level: Leading Questions (Urban)

	Leading Question	Summary
1.	According to the **legal framework**, are WSS provided by local governments in line with the subsidiarity principle? If so, which specific responsibilities are assigned to local governments and/or other local entities by the policy/legal framework?	*County* governments are assigned full responsibility for the main functions of providing WSS services within the national policy and regulatory framework, including the right to finance and invest in county water services infrastructure. According to law, county governments are able to devolve responsibility to urban boards (which are created by county governments).
2.	In **practice**, are local governments (or a WASA under the LG) responsible for the **recurrent provision** of WSS (UW/US/RW/RS) in line with the subsidiarity principle? If so, which services do they provide in practice?	*County* governments have assumed responsibility for the operation of water services in urban areas through the existing water companies. These companies are, *de facto*, owned and controlled by the county governments.[21] No *local governments* have been established. Therefore, local governments have *not* assumed responsibility for WSS in practice.
3.	In **practice**, are local governments responsible for **planning and procuring the capital infrastructure** (required for providing WSS) in line with the subsidiarity principle?	In practice, the national government has retained responsibility for planning and procuring capital infrastructure for WSS through the existing regional Water Services Boards (national government entities) — notwithstanding the constitutional assignment of the function to county governments.
4.	Does the *de facto* assignment of functions (authority and responsibility) match the *de jure* functions (authority and responsibility)?	Although the 2016 Water Act provides for the national government, through the Water Works Development Agencies, to plan, finance and procure WSS infrastructure, the constitutionality of this legal provision is being contested in court by county governments. However, in practice, planning, financing and procurement for urban water services are being undertaken by the existing regional (nationally-owned) Water Services Boards.

Source: Prepared by Author.

Note: LG= local government; RS= rural sanitation; RW= rural water; US= urban sanitation; UW= urban water; WASA= Water and Sanitation Authority; WSS=water supply and sanitation.

An elaboration of the *de jure* assignment of functions and responsibilities between the national and local governments is provided below.

De jure functions and responsibilities for local water and sanitation services

These are set out in table 4.2

[21] The *de jure* situation is complicated, if *de jure* means where the assets sit. Although the law intends the county governments to own the water services providers, the actual asset may sit with the national government, pending transfer. This can be a lengthy process. However, practical control has been given to the counties.

Table 4.2: De jure Functions and Responsibilities (urban and rural)			
	National government	**County government**	**Local government (if/when established)**
Determining policy	Yes. (urban and rural)	Yes (within national framework).	No (policy set by county).
Setting standards	Yes (national minimum norms and standards) – for both urban and rural provision of services.	Yes (within national framework).	No (standards set by county).
Monitoring compliance to standards	Yes (urban and rural).	Yes.	No (monitoring by county).
National targets	Yes (urban and rural).	No.	No.
Guidance / regulating cost recovery	Yes (yes, for piped systems).	Yes.	Yes (if delegated by the county).
Financing construction	Yes (direct investment through WSBs and indirect through WSTF).	Yes (from own budget, mainly for rural areas).	Yes (if delegated by the county).
Financing O&M	No.	Yes.	Yes (if delegated by the county).

Source: Prepared by Author.
Note: O&M= operations and maintenance; WSB= Water Service Board; WSTF= Water Services Trust Fund.

De facto functions and responsibilities for local water and sanitation services (urban and rural)

Not one local government has been established. Therefore, the local governments do not have any *de facto* functions and responsibilities (table 4.3).

Table 4.3. De facto Functions and Responsibilities (urban and rural)			
	National government	**County government**	**WSP (urban)**
Determining policy	Yes.	**No**, most counties have not yet written their water policies.	**No.**
Setting standards	Yes.	**No**, most counties have not set their own standards.	**No.**
Monitoring compliance to standards	Yes.	**No**, most counties do not actively monitor compliance with standards. This role is performed by the national regulator.	**No.**
National targets	Yes.	No.	No.

Guidance / regulating cost recovery	Yes (through the national water services regulator).	Yes.	No.
Financing construction	Yes (through the financing of the Water Services Boards).	Yes, (partially) from the county budgets.	Yes (through tariffs).
Financing O&M	No.	Yes (through tariffs and user charges, and county budgets).	Yes (through tariffs).

Source: Prepared by Author.

Note: O&M= operations and maintenance; WSP= water and sanitation provider. Deviation from *de jure* responsibilities is noted in **bold**.

The key differences between *de jure* and *de facto* responsibilities arise in relation to the role of local governments. While the legal framework allows for counties to establish local governments, not one local government has yet been established.

Apart from this, there is a reasonably good correspondence between the *de jure* and *de facto* assignment of responsibilities for WSS. Because counties are new, many of them have not yet fully exercised their rights with respect to policy development, and so on, in the context of the provision of water services.

Comments specific to urban areas

The county-level functional *assignments* are the same across urban and rural areas. Counties are responsible for both urban and rural water and sanitation. However, the mode of production differs.

Piped water networks and sewer systems (mainly but not exclusively in urban areas) are managed by WSPs (separate companies owned by the counties).

The national government can set minimum standards for both urban and rural systems. Subsidiary legislation in relation to the Water Act of 2016 sets out these standards. However, they are still to be developed, and the existing water policy is out of date and in the process of being redrafted.

County governments can also establish their own law governing water and sanitation provision in their respective counties.

In the past, public sanitation facilities (for example, at markets) would have been managed by local governments. This function has now been taken over by the county governments.

4.2.2 Responsibility for Financing Water and Sanitation Infrastructure (urban)

The Kenyan state (including both the national and county governments) has a duty to progressively realize the universal right of providing a basic water supply and safe sanitation. The financing responsibility goes along with this duty. Thus, it can be argued that both national and local governments have the constitutional right (and duty) to contribute funds. However, the financing of urban water and sanitation services is contested between the national and county governments.

Outside of the required equitable share of revenues given to county governments, the Ministry of Water and Irrigation prefers to finance the development of water and sanitation services directly through its own agents (that is, the Water Services Boards and their replacements, the Water Works Development Agencies). This serves patronage interests at the national government level. County governments contest the right of the national government to finance urban water and sanitation services in this way.

4.3 Assignment of Functional Responsibilities (rural)

4.3.1 *De jure* and *de facto* Assignment of Functional Responsibilities

A summary of the assignment of functions is given in table 4.1

Table 4.1 Assignment of Water and Sanitation Functions to the Local Level: Leading Questions (rural)

	Leading Question	Summary
1.	According to the **legal framework**, are WSS provided by local governments in line with the subsidiarity principle? If so, which specific responsibilities are assigned to local governments and/or other local entities by the policy/legal framework?	*County* governments are assigned full responsibility for the main functions of providing WSS services within the national policy and regulatory framework. This includes the right to finance and invest in county water services infrastructure.
2.	In **practice**, are local governments (or a WASA under the LG) responsible for the recurrent provision of WSS (UW/US/RW/RS) in line with the subsidiarity principle? If so, which services do they provide in practice?	County governments are beginning to assume a role in developing and managing rural (non-piped) water and on-site sanitation services, but practices vary widely. Development partner activities appear to be influential in how this is taking place.
3.	In **practice**, are local governments responsible for planning and procuring the capital infrastructure required for providing WSS in line with the subsidiarity principle?	County governments are developing capital budgets for water supply and sanitation in rural areas. Practices vary across counties. The role of development partners is important, and supplementary funds are available from the Water Services Trust Fund.
4.	Does the *de facto* assignment of functions (authority and responsibility) match *de jure* functions (authority and responsibility)?	Yes.

Source: Prepared by Author.
Note: LG= local government; RS= rural sanitation; RW= rural water; US= urban sanitation; UW= urban water; WSS=water supply and sanitation.

An elaboration of the *de jure* assignment of functions and responsibilities between the national and local governments is provided in tables 4.2 and 4.3 for both urban and rural areas.

The key differences between the *de jure* and the *de facto* responsibilities arise in relation to the role of local government. While the legal framework allows for counties to establish local governments, not one local government has yet been established.

Apart from this, there is a reasonably good correspondence between the *de jure* and *de facto* assignment of WSS responsibilities. Because counties are new, many of them have not yet fully exercised their rights with respect to policy development, and so on, in the context of the provision of water services.

Comments specific to rural areas

The county-level functional *assignments* are the same across urban and rural areas. Counties are responsible for both urban and rural water and sanitation. However, the mode of production differs.

Non-piped networks and on-site sanitation are typically implemented through the WSTF or development partner funding. They are managed by local communities or households. The role of the county varies widely between more passive and more active roles in coordination, planning, project selection, site selection, implementation, monitoring, and so on.

The national government can set minimum standards for both urban and rural systems. Subsidiary legislation in relation to the Water Act of 2016, setting out these standards, is still to be developed. The existing water policy is out of date and in the process of being redrafted.

County governments can also establish their own law governing water and sanitation provision in their respective counties.

4.3.2 Responsibility for Financing Water and Sanitation Infrastructure (rural)

The Kenyan state (both the national and county governments) has a duty to progressively realize the universal right to provide a basic water supply and safe sanitation. The financing responsibility goes along with this duty. Thus, it can be argued that both the national and local governments have the constitutional right (and duty) to contribute funds.

Counties have their own budgets to support the capital development and operating costs of rural water supply and sanitation services. This is supplemented by funds from development partners and the Water Services Trust Fund (a national fund).

4.4 Assessment

The assignment of responsibility follows the constitutional assignment, except that the responsibility for financing piped water and sewerage services infrastructure and, more particularly, who controls the allocations of this financing, is contested between the national and country governments. Both assert their right to control the allocation of these funds. This contest plays out with respect to the existing role of the Water Services Boards, and the role of the proposed Water Works Development Agencies.

It is interesting to note that for non-piped water supply and onsite sanitation, there does not appear to be a conflict. The amount of money involved is also considerably smaller.

5 Effective and Responsive Local Political Leadership

5.1 Overview

Decentralized political leadership is considered to exist if there is degree of authority and autonomy vested in subnational leaders who decide the affairs of the subnational jurisdiction. This section seeks to answer the question: Is the subnational political leadership in Kenya given the necessary political space, and is it effective in identifying and responding to the needs of its residents and the local business community? What is the nature of, and how strong are, the respective local and national accountabilities?

In Kenya, subnational political leadership is expressed through the 47 county governors and county assemblies. The typical local-level government political structures (such as municipal and town councils) were abolished when the new Constitution came into effect, and county governments were established for the first time in 2013. The Constitution provides only limited space for sub-county governance entities: the UAC Act (2011) permits counties to establish and appoint urban boards in cities and municipalities (as well as establish town committees in smaller urban areas). However, these boards and committees would be appointed (not elected), and the law clearly notes that these entities would be agents of the county. No urban boards have formally been established to date, although counties now have the power to do so.

There are no separate institutions to facilitate rural political accountability, just the county. Under the previous political arrangement, rural local governments were very weak — with limited functions, resources and accountability. Rural representation is now stronger through the counties because they now have stronger powers and functions compared to the previous rural local government. In contrast, urban residents lost the local level political organs, which represented the interests of the urban community. Political accountability in urban areas is therefore likely to have become weaker. Although there is the possibility for urban boards to be established, these are not directly elected.

There is a related concern that, due to the disproportionate share of rural voters, political economy forces are pushing Governors to tax the urban dwellers and to redistribute the proceeds to the rural areas. This could affect water services in urban areas. It also supports the earlier argument for a policy to ring-fence urban water revenues to be used to contribute to expanding urban water services.

5.2 Political Accountability within County Governments

Members of the County Assemblies are directly elected by registered voters of county wards, with each ward constituting a single member constituency. County Governors are directly elected by the voters in the county in a first-past-the-post system. (Winners do not need an absolute majority.) Elections must take place every five years and coincide with elections for the national parliament.[22] The County Governor nominates the Deputy-County Governor as a running mate.

The County Governor appoints the County Executive Committee (CEC) with the approval of the County Assembly. The Governor and Deputy-Governor act as the Chief Executive Officer (CEO) and Deputy-CEO of the county. The Governor appoints county staff, and the CEC manages and

[22] See the Constitution of Kenya (2010).

coordinates the functions of the county administration and its departments. County Assemblies may develop and pass legislation.

County government elections are competitive. They are monitored and overseen by the Independent Electoral and Boundaries Commission, a body established by the Constitution with independence safeguards.[23] Only one election has been held in 2013 since the adoption of the 2010 Constitution. Another election is due to be held in 2017. A summary of the status of effective and responsive local political leadership in Kenya is provided in table 5.1.

Table 5.1 Effective and Responsive Local Political Leadership: Leading Questions [24]

	Leading Questions	Summary
1.	Does the county government level have meaningful "political" decision-making space (responsibility and authority), separate from higher-level governments?	Yes.
2.	Does the county government have the power to recruit, appoint and hold human resource authority over the core local administration team?	Yes.
3.	What is the local power structure? Is the County Government (CG) Executive directly (or indirectly) elected? Is the Local Government Council directly (or indirectly) elected?	Yes, the County Governor and County Assemblies are directly elected.
4.	Are the county election systems and county elections competitive?	Yes.
5.	Does the County Executive have broad support from the County Assembly and the county's administrative apparatus/staff?	Yes. The County Executive Committee is appointed by the County Governor, but this must be approved by the County Assembly.
6.	Is the County effective in achieving results in the service delivery areas that constituents care about?	It is too early to assess county performance because they were only established (for the first time, and largely from scratch) in 2013.

Source: Prepared by Author.

Note: CG= County Government.

5.3 Political Accountability and Urban Water Services

Political accountability of existing Water Services Boards

Members of the board of the Water Services Boards are appointed by the responsible Minister (Cabinet Secretary). In practice, appointments are influenced by the President and have been used for patronage purposes. The boards are funded by the national government. Although, in theory, they undertake work on behalf of county governments (who are responsible for water and sanitation services), their key direction of accountability is to national government. The role of Water Services Boards is contested by county governments.

Political accountability of proposed Water Works Development Agencies

Members of the boards of the Water Works Development Agencies Boards will be appointed by the Cabinet Secretary. The Agencies are to be funded by the national government. Although, in

[23] The Independent Electoral and Boundaries Commission (IEC) is a creation of the Kenyan Constitution, and its independence is guaranteed. See www.iebc.or.ke.
[24] For the purposes of table 5.1, local is equated with county government. No local government structures have been created by county governments to date.

theory, they are to undertake work on behalf of county governments (who are responsible for water and sanitation services), their key direction of accountability is to the national government. The role of the proposed Water Works Development Agencies is contested by county governments.

A contest over resources – political dynamics between the national government and counties

Politics in Kenya are highly competitive and have been strongly influenced by ethnic affiliations. The regional and ethnic base of party politics is evident in the 2013 election results (figure 5.1). A winner-takes-all approach in the context of a strong centralization of power and regional ethnic power bases was a recipe for conflict (See box 2.1). It is therefore not surprising that public support for the devolution provisions in the Constitution was strong.[25]

However, the implication of the new Constitution is that a strong national government must give up power to the local level. This makes the process more difficult and creates an inherent tension between the newly-created county governments and the national government. "Decentralization comes in many shapes and sizes, but in every instance, it involves changing the institutional rules that divide resources and responsibilities among levels of government. Politicians and bureaucrats thus fight over decentralization for the same reason that they fight over the design of state institutions more generally: their power and authority are at stake."[26]

At a very basic level, national government entities such as the Water Services Boards, and more specifically, employees of the national government and these national entities, will be reluctant to give up roles and responsibilities previously held. Ambiguity in the law, and how this is interpreted, will have major implications for how devolution takes place.

The World Bank (2012) predicted these tensions:

> Different interpretations of Schedule 4 of the Constitution lead to vastly different functions for county governments, with huge cost implications. While legislation will clarify some of these ambiguities, the process of devolution will show that other ambiguities remain. Many officials, in this context of ambiguity, will seek to protect their authority (partly out of genuine concern for service delivery continuity and quality), and conflicts could arise in the process between these officials and others who feel that their constitutionally mandated responsibilities (and associated funding) are being denied.

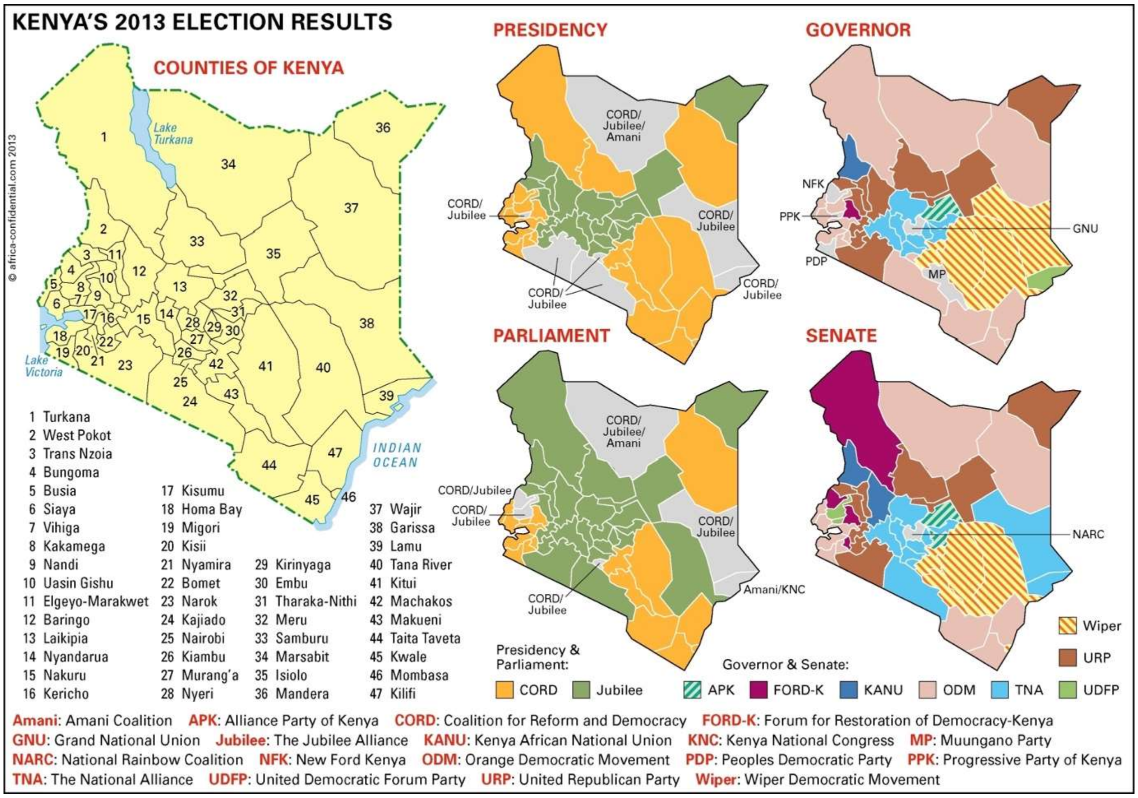
County Governors have taken the national government to court over the constitutionality of the Water Act of 2016.

---

[25] The World Bank reported on survey results according to which "just under 20 percent of supporters of the new Constitution (self-described 'yes' voters) did so because of the strong provisions for devolution; this is the second most common response after a simple desire for change, which measured at just over 20 percent" and concluded that "devolution featured prominently in voters' decision to support the new Constitution, and this support will play a key role in the roll out of the county governments" (World Bank, *Devolution without Disruption*, 2012).

[26] Eaton, K, Kaiser, K and Smoke, P. (2010). The Political Economy of Decentralisation Reforms: Implications for Aid Effectiveness. World Bank. Quoted in World Bank (2012).

Figure 5.1: Kenyan Election Results by County, 2013



Source: Africa Confidential, The closest of shaves. 15 March 2013.

Political accountability – County Water Services Providers (water companies)

The Counties appoint the boards of the County Water Services Providers. Citizens express their voice directly through customer interaction with the companies, and indirectly through voting for the County Governor and the elected County Assembly.

5.4 Political Accountability and Rural Water Services

Political accountability for the provision of rural water supply and sanitation services is directly through the county, as discussed in Section 5.2.

5.5 Assessment

It is too early to answer the question: "Is the local political leadership given the necessary political space, and is it effective in identifying and responding to the needs of its residents and the local business community?" with any confidence in Kenya. County governments are only three years old, and the new Water Act only came into effect in late 2016. However, county governors have been willing to exert political muscle, as demonstrated by their contesting the constitutionality of the 2016 Water Act in court. In doing so, they are attempting to assert and protect the rights of counties with respect to the provision of water services. However, this may have to do with access to control of resources rather than reflecting a genuine responsiveness to voter interests. It is too early to tell.

If elected governors are raiding water service provider funds, do political mechanisms exist to hold them accountable? The county elections due to take place in 2017 are expected to be very competitive, and many governors are expected to lose their jobs. However, it is unclear to what extent service delivery performance will play a meaningful role in voter choice of which governors are re-elected and which are voted out. The expectation or hope is that, over time, there will be a political or civic 'learning curve', and that good governance and more effective service provision will be rewarded by voters. See Section 10.

6 Local Control over Administration and Service Delivery

6.1 Overview

This section considers the extent to which county government officials have administrative powers over local water and sanitation services, as well as which county water and sanitation providers have control over their own operations (as separate from the central authorities).

County governments are responsible for the provision of water and sanitation services at the county level. However, they do not have direct formal administrative control over the service in urban areas. In these areas, commercially-oriented and managerially autonomous water companies (governed by boards) provide such services. Counties appoint these boards, and the board appoints the CEO. However, in practice, counties have an influence over management and staff appointments, as well as procurement and other operational aspects of the water companies. Indeed, this influence may be strong because the water companies represent one of very few opportunities within the county to generate local revenues.

County governments can establish their own service delivery units within the county government itself in cases where the provision of water and sanitation services are not commercially viable.

The WSTF and development partners, who contribute a significant share of investment funds into the sector, may exert influence over the administrative and service delivery arrangements. For example, the WSTF requires counterpart funding by the county. In this context, it encourages the use of the statutory County Integrated Development Planning instrument to inform project planning and selection.

6.2 Local Control over Administration and Service Delivery (urban)

A summary of the main elements of local (county) control over administration and service delivery is provided in table 6.1 (urban and rural).

Table 6.1 County Control over Administration and Service Delivery: Leading Questions (urban and rural)

Leading Questions	Urban (Water company)	Rural (Country SDU)
Does the Governor or County Executive Committee (CEC) appoint the head of the water company/SDU?	No, the head is appointed by the board of the water company, but the Governor or CEC may have a strong influence over the appointment. The board is appointed by the Governor, following a process set out in legislation.	Yes.
Does the County Executive Committee approve the budget of the water company/SDU?	No, the budget is approved by the board of the water company.	Yes.

Does the County Executive Committee determine the organizational structure and staff establishment for the water company/SDU?	No, the organizational structure and staff establishment are determined by the board of the water company.	Yes.
Does the County Executive Committee have control over its human resource decisions with respect to WSS?	No, where this is provided by a water company. However, the company human resource policy must be implemented within national legislative constraints pertaining to government-owned entities.	Yes, where it provides the service itself.
Does the county plan and manage the procurement of capital investments /infrastructure required for WSS?	No. This is done by the company and/or the Water Services Board. This needs to be conducted in terms of the County Water Services Development Plan, part of the County Integrated Development Plan. At present, Water Services Boards are also making investments in water and sanitation infrastructure. This should be done with county consent, but it is unclear if this is always the case.	Yes, from the county budget, and in terms of the County Integrated Development Plan and the County Water Services Development Plan.

Source: Prepared by Author.

Note: CEC= County Executive Committee; SDU= service delivery unit; WSS=water supply and sanitation.

In practice, there is a difference in the administrative structures and controls between urban and rural areas. While the same laws and rules apply equally to all county governments, urban water provision must be done by a commercially-oriented water company licensed by the national water services regulator (by law). County governments can provide services themselves in the non-commercially viable rural areas.

In urban areas, and for piped water and sewerage systems operated by the water companies, administrative control is exercised by independent boards. The political head of the county can influence the WSP board, but does not have direct control over the board. This influence may, however, be strong, as the board is appointed by the county governor.

6.3 Local Control over Administration and Service Delivery (rural)

A summary of the main elements of local (county) control over administration and service delivery is provided in table 6.1 (urban and rural).

The political head of the county (Governor) and the political and administrative lead for water (the CEC responsible for water) have direct control over the provision of water services provided directly by the county. This is typically only extended to non-piped water systems and onsite sanitation.

The extent to which county governments are actually involved in the direct provision of water and sanitation services in rural areas — and how they are involved — is not yet clear due to inadequate reporting at the national level. This can be considered a "system failure" that has arisen with the new Constitution. The national government has appeared to abdicate its policy role regarding rural water. This includes its ability to answer basic questions about how services are being provided, as well as the outcomes in terms of access to services. The national government has the right and duty to monitor progress made by subnational entities (such as counties) toward national policy goals and the fulfilment of constitutional obligations. Specifically, it has the obligation to ensure the universal right to water and safe sanitation. This is true not only in the water sector. In this regard, the national government is still finding its role under the new constitutional arrangements. High levels of distrust between national and county governments, for reasons noted, make the task more challenging

6.4 Assessment

There are three cases to consider:

In most of the urban areas, administrative control over the operation of water and sanitation services is exercised by the water companies owned by county governments, but governed by independent boards. Formally, counties only have indirect control over administration of these services (through the appointment of the board). However, informal influence by county governments may be significant, including in employment and procurement decisions.

Where water services are not provided by a water company, that is, primarily in rural areas, counties can provide the service itself, in which case the county would have full administrative control. The extent that this is happening in practice is not well known at this early stage in the life of counties. The national government needs to develop its monitoring capacity so that it can regulate the requirement for county governments to report in a standard way on matters pertaining to national policy (such as the universal right to water).

The national government continues to play a significant role in the financing and physical development of water services infrastructure through national government entities – that is, the existing Water Services Boards (and their proposed replacements). In this case, administrative control over these investments by county governments is very limited.

7 Local Fiscal Autonomy and Financial Management

7.1 Overview

Access to adequate financial resources—as well as effective public financial management—are important prerequisites for effective local service delivery. This section assesses the degree of local fiscal autonomy and the nature of local (and intergovernmental) financial management as it pertains to local water and sanitation services.

The funding of local water and sanitation services in Kenya is provided through a combination of an unconditional, equitable share grant to county governments, a national grant and loan financing of investment in water and sanitation services infrastructure (typically through the Water Services Boards), and user charges.

Kenya has had to develop a new system of inter-governmental finance following the creation of county governments in 2013. This system is still new and evolving.

While it is possible to track national investment in water services infrastructure (channeled through the water services boards and predominantly for urban areas), it is not possible to track the level of capital investment undertaken by the counties because of the absence of adequate financial reporting and monitoring systems.

Recurrent expenditures for piped water supply and sewerage systems (predominantly in urban areas) can be tracked through reporting by the water services providers (water companies), but cannot be tracked for rural systems for the same reasons cited above.

7.2 Local Financial Management and Fiscal Autonomy (urban)

7.2.1 Local Financial Management (urban)

Urban water finances are largely within the purview of the regional Water Services Boards (investment) and the commercial water companies (operations). These systems are described here. County financial management (which applies predominantly to the rural areas) is described in Section 7.3.1.

Water companies develop budgets that are then approved by their boards. County governments appoint the boards. Counties argue that they have the right to set the tariffs, but the Water Act of 2016 allocates this responsibility to the national regulator. This is another reason that counties have contested the constitutionality of the Water Act.

A summary of key elements related to local fiscal autonomy is presented in table 7.1.

Table 7.1 Local Fiscal Autonomy and Financial Management: Leading Questions (urban)

	Leading Questions	Summary
1.	Does the WSS provider (and/or its parent government entity) have an orderly and participatory annual budget process?	WSP (water company) budgets are approved by the WSP board. Tariffs are approved through a regulatory process at the national level for WSPs, but without a strong participatory process.
2.	Are expenditure out-turns for local WSS providers consistent with the original approved budget?	WSP company performance is variable.
3.	What is the quality and timeliness of annual financial statements for the WSS provider?	Unknown. Annual financial statements are not available on most of the WSP websites.
4.	To the extent that LGs have functional responsibilities for WSS, are LGs free to define their own local revenue instruments (for example, specifying user fees, adopting new revenue instruments, or modifying existing local revenue instruments)?	County governments must have water tariffs approved by the national water services regulator.
5.	To the extent that LGs have functional responsibilities for WSS, do LGs have the right to set the tax base or tax rate for all local revenue instruments?	Yes.
6.	Does the WSS provider (or its parent government entity) take into account full-cost recovery (including the user cost of capital) when setting W&S user fee rates?	Yes, water companies are required to be financially sustainable. Water tariffs are set by the company (approved by the board), and must also obtain approval from the national regulator.
7.	Does the WSS provider (or its parent government entity) effectively and equitably collect water and sanitation user fees?	The Water Companies collect substantial revenues, although performance varies across the companies.
8.	Does the WSS provider (or the LG, if owned and controlled by the LG) have access to borrowing from financial institutions to fund local capital infrastructure expenses?	A few water companies in Kenya have been able to access commercial loan finance, with the assistance of development finance institutions, but this is the exception.

9.	Does the WSS provider (or the LG, if owned and controlled by the LG) receive (conditional or unconditional) grants/transfers from a higher-level government to support local government operations, as well as to support water and sanitation services to the poor?	County governments receive an unconditional grant (equitable share) from the national government. It is unclear to what extent any of these funds are passed on to the water companies.
10.	Does the WSS provider (or the LG, if owned and controlled by the LG) receive formula-based grants/transfers from the higher-level government in a complete and timely manner, and without unnecessary administrative impediments?	The timing of grant payments is unknown, but amounts should be predictable.

Source: Prepared by Author.
Note: LG= local government; WSP= water and sanitation provider; WSS=water supply and sanitation.

The regulated and commercially-oriented water companies managing piped water systems (mainly in urban areas, but also in some rural areas) have local financial autonomy with respect to operations of water and sanitation infrastructure. However, they rely on financing from the national government through the existing Water Services Boards (and proposed replacement, the Water Works Development Agencies). The companies do not actually receive funds from the Water Services Boards. Instead, the Water Services Boards invest in the infrastructure and then hand over the assets and operations to the county-owned water companies. Counties contest the role of the national government in financing county-level water and sanitation infrastructure through this mechanism. Instead, many would prefer to have control over these resources.

7.2.2 Financing Water and Sanitation Services (capital investment) - urban

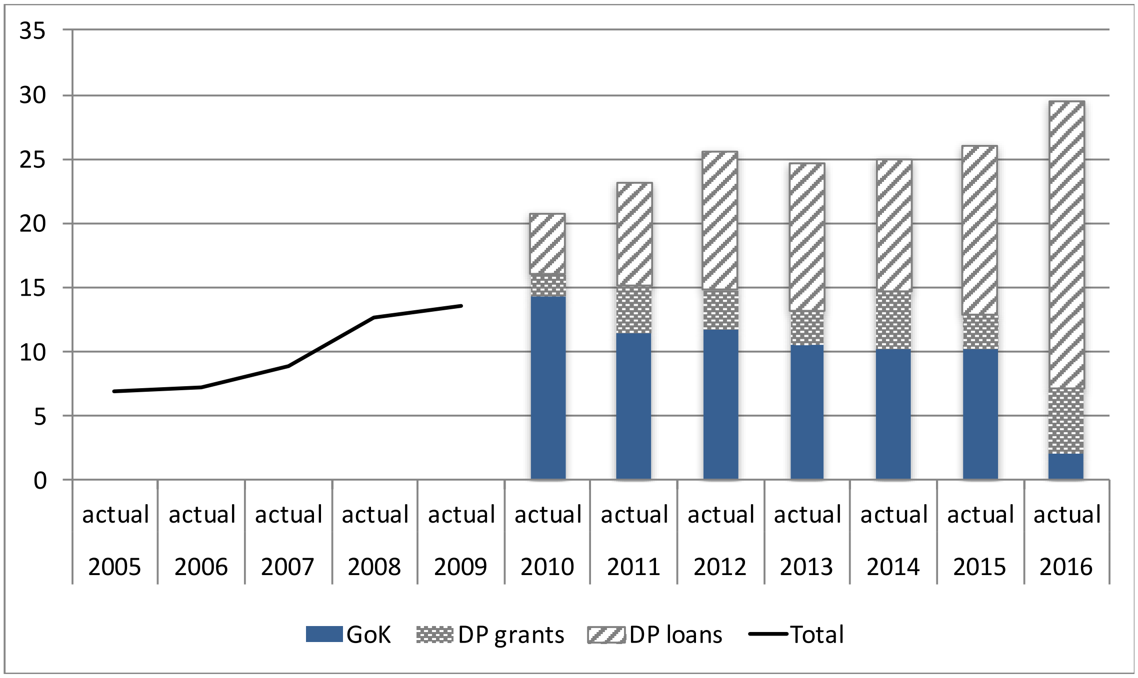
Improvements in access to water and sanitation in urban areas have been financed primarily by the central government through grants and loans, with repayments of loans through tariffs.

Data is not separately reported for urban and rural investments. Therefore, aggregated data is reported here with some comments about its likely allocation to urban and rural areas respectively.

Total investments for the water sector at the national level increased substantially over the period FY2006 to FY2012, stabilizing at about Ksh 25 billion (US$ 250 million equivalent) from 2012 through to FY2015, and increasing again in FY2016 (figure 7.1). [27]

[27] From financial data reported by the Kenya Ministry of Water and Irrigation. *The Annual Water Sector Review*. 2014/15-2015/16.

Figure 7.1: Total Water Sector Investments at National Level and Sources of Funds (Ksh billion)

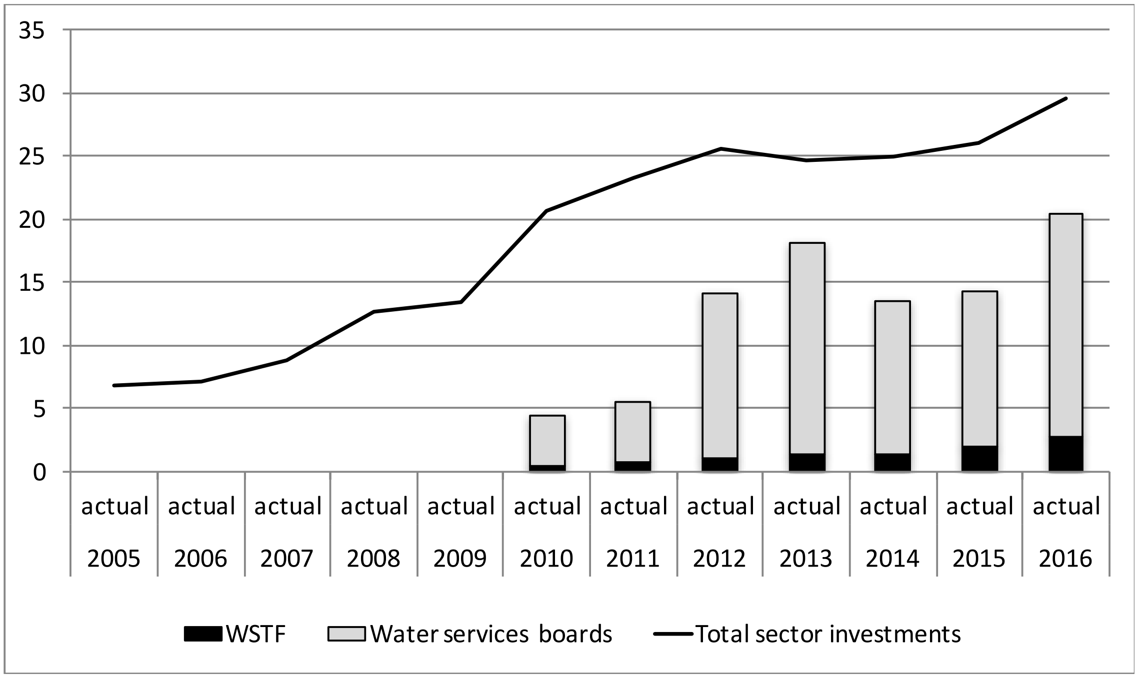


Source: Prepared by Author based on published reports.
Note: DP=development partner; GoK= Government of Kenya.

Development partner grants and loans comprised between 50 and 60 percent of the total investments from FY2011 to FY2015, and 93 percent in FY2016.

A large share of these investments is directed toward water services through two mechanisms, namely, the Water Services Boards and the Water Services Trust Fund (figure 7.2).

Figure 7.2: National Investment in Water Services in relation to total water sector investment (Ksh billion)



Source: Prepared by Author based on published data.
Note: WSTF= Water Services Trust Fund.

The investments by the Water Services Boards are for piped water and sewerage services, and can therefore be assumed to be predominantly for the urban areas. A break down between urban and rural investment is not available.

The large investments through the **Water Services Boards**, which are institutions controlled by the national government, could explain why the role of the Water Services Boards are contested. Counties argue that these resources should be controlled by the counties because water services are the responsibility of county governments — and not the national government.

The **Water Services Trust Fund** funds water supply and sanitation services in both urban areas (focused on connecting poor households to the piped network and improving sanitation) and rural areas. A break down in investments in urban and rural areas is not available, and the approximate breakdown between the two is not known.

This fund could be considered as a source of funding available to the counties. There are various programs within the Fund. Some funding programs are competitive (based on competitive applications for funding from the local level), whereas others are programmatic (in areas in which the Fund itself chooses to work). The Water Services Trust Fund provides funding to both urban and rural WSPs. It also coordinates funding with county governments, often requiring counterpart funding from them. The fund has grown both in size and significance over time, from 2 to 8 percent of total sector expenditures recorded at the national level.

Much of this investment is ultimately controlled by the national government, which appears to be counter to the intent of the devolution process.

There is no available data regarding the level of local government (pre-2013) and county (2013 onwards) investment in water supply and sanitation.

Regarding **county financial reporting**, water supply expenditures are aggregated together with those for the environment, natural resources, irrigation and/or public works. Spending on sanitation is aggregated with other health expenditures. Therefore, it is not meaningful to analyze or interpret county expenditure reporting to determine how much was actually spent just for water supply infrastructure and sanitation.

County governments receive a minimum of 15 percent of national revenues as constitutionally-guaranteed unconditional transfers. This amounted to Ksh 228 billion (US$ 2.3 billion) in 2014/15, accounting for over 80 percent of county revenues. Local county revenues amounted to Ksh 34 billion (US$ 340 million equivalent) in 2014/15. The total county development budget in 2013/14 was Ksh 161 billion (US$ 1.6 billion equivalent). However, there was a large difference between the budgeted amount and what was actually spent. Actual expenditures on assets by counties was Ksh 80 billion (US$ 800 million equivalent) in 2014/15. The proportion of this amount spent on water and sanitation infrastructure is not known.

7.2.3 Recurrent Expenditures (urban)

The 94 regulated country water companies, serving predominantly urban areas, reported a total annual revenue of Ksh 16.5 billion (US$ 165 million equivalent) in 2014/15.[28] This is revenue from the water tariff and service charges, and is used to cover the operating costs of the water companies, as well as to repay loan finance. It can be assumed that this number is fairly representative of the total water and sanitation recurrent spending in urban areas.

7.3 Local Financial Management and Fiscal Autonomy (rural)

7.3.1 Local Financial Management (rural)

To the extent that rural water supply and sanitation services are provided by the government, these are managed by county governments.

The basic elements of Kenya's evolving public financial management system are as follows:

- Counties must approve and publish an annual budget.
- County governments must prepare and publish annual financial statements, and consolidated statements (including county entities) within three to four months of the end of the financial year.[29]
- The Auditor-General audits and expresses an audit opinion about the county financial statements.[30] These reports are available on the Auditor-General's website.
- The county governments can also impose charges for any services they provide in accordance with the stipulated laws. In the case of water, these tariffs must be approved by the national water services regulator in terms of the Water Act of 2016. The constitutionality of the Water Act is being contested by the Council of Governors.
- Counties may set their own property tax rates and structure these within nationally defined norms and standards.

[28] Impact report #9, Water Services Regulatory Board (WASREB).
[29] Section 164 of the Public Finance Management (PFM) Act, 2012.
[30] See Public Audit Act, 2015.

- County governments are empowered to bill customers and collect revenues, but not all county governments have the administrative systems and capability to undertake this function.

A summary of key elements related to local fiscal autonomy is presented in table 7.2.

Table 7.2 Local Fiscal Autonomy and Financial Management: Leading Questions (rural)

	Leading Questions	Summary
1.	Does the county have an orderly and participatory annual budget process?	Yes, county governments must follow an annual national calendar with key budget milestones and dates.
2.	Are expenditure out-turns for counties (as rural providers) consistent with the original approved budgets?	No, there is a wide variance between county budgets and actual out-turns.
3.	What is the quality and timeliness of annual financial statements for the counties (as rural providers)?	Consolidated reporting is not yet available, but anecdotal evidence suggests the overall quality of county annual financial statements is poor.
4.	To the extent that counties have functional responsibilities for WSS in rural areas, are counties free to define their own local revenue instruments (for example, specifying user fees, adopting new revenue instruments, or modifying existing local revenue instruments)?	Yes.
5.	To the extent that counties have functional responsibilities for WSS, do LGs have the right to set the tax base or tax rate for all local revenue instruments?	Yes.
6.	Does the county (as the rural WSS provider) take into account full cost recovery (including the user cost of capital) when setting W&S user fee rates?	No. Revenue is extremely limited.
7.	Does the county (as the rural WSS provider) effectively and equitably collect water and sanitation user fees?	Performance is mixed. Revenue collected by counties is very small.
8.	Does the county (as the rural WSS provider) have access to borrowing from financial institutions to fund local capital infrastructure expenses?	No.
9.	Does the county (as the rural WSS provider) receive (conditional or unconditional) grants/transfers from a higher-level government to support local government operations, as well as water and sanitation services to the poor?	County governments receive an unconditional grant (equitable share) from the national government. It is unclear to what extent any of this is used for water and sanitation services due to the absence of reporting.
10.	Does the county (as the rural WSS provider) receive formula-based grants/transfers from the higher-level government in a complete and timely manner, and without unnecessary administrative impediments?	The timing of grant payments is unknown, but amounts should be predictable.

Source: Prepared by Author.

Note: LG= local government; W&S= water and sanitation; WSS=water supply and sanitation.

For non-piped water systems and on-site sanitation (predominantly in rural areas), counties are responsible for the provision of services. They have local financial autonomy, with resources coming from the national share of revenues (equitable share). **The overall extent to which counties are fulfilling this responsibility is not known due to the absence of reporting**. There is, however, evidence of the WSTF and development partners working directly with counties to coordinate planning, project selection, implementation and monitoring, including requirements for county counterpart funding. This occurs to varying degrees across programs and between counties. However, a national picture of this is not yet available.

7.3.2 Financing Water and Sanitation Services (capital investment) - rural

Overall known capital expenditures (urban and rural) are reported in Section 7.2.2. The breakdown in this expenditure category between urban and rural areas is not available. There are four main sources of capital investment for rural areas:

- The Water Services Trust Fund (Ksh 2.5 billion — US$ 25 million equivalent — in 2015/16 for urban and rural).
- County capital budgets (amounts for water and sanitation unknown).
- Development partnership funding direct to counties (amounts unknown).
- Water services board funding for piped water systems and sewerage; amounts spent on rural water supply and sanitation are not known, but are likely to be a small share of the total.

7.3.3 Recurrent Expenditures (rural)

The amount of recurrent spending by county governments on water supply and sanitation services is not known. Reported county income from water and sanitation services was Ksh 0.2 billion (US$ 2 million equivalent) in 2014/15, amounting to only 0.1 percent of the equitable share of revenues from the national government.[31] This is very small compared to the revenues reported from the 94 regulated county water companies, serving predominantly urban areas. In that case, the amount totaled Ksh 16.5 billion (US$ 165 million equivalent) in 2014/15.

7.4 Assessment

Arrangements for the financing and financial management of water services in Kenya are still evolving, following the adoption of the new Constitution in 2010.

For piped water and wastewater systems (predominantly in urban areas), known financing flows at the national level appear to have continued largely as before, with a strong role for the national government and little involvement by the county governments. The modest but growing flows through the WSTF (less than 10 percent of sector investments) offers a potential model for demand-responsive funding at the county level.

County governments are contesting the role of the Water Services Boards in court. Counties argue that the large investments being made through the Water Services Boards, about Ksh 20 billion (US$ 200 million equivalent) per year, should be controlled by county governments — and not by the national government.

For non-piped water systems and onsite sanitation, responsibility rests more clearly with county governments. **National reporting on the extent to which counties are fulfilling this role in aggregate has not yet been developed. This remains a key information gap. It could be argued that the national government has a constitutional obligation to monitor progress toward the progressive realization of the right to water and sanitation for all. It can and should require counties to report on this, including how money has been spent**.

[31] Government of Kenya County Governments Consolidated Financial Statements for the year ending June 30, 2015. The reported income does not include income from water companies.

8 Local Participation and Accountability

8.1 Overview

The assessment of local participation and accountability mechanisms seeks to broadly consider their impact across political, administrative and fiscal systems. Are participation and accountability mechanisms in place, and are they effective in ensuring that W&S services are delivered in a responsive and accountable manner?

Counties are required by law to consult residents and affected parties through a public participation process. This is to occur during the key planning and budget approval steps in providing services (including water and sanitation). Indeed, counties must report on progress and present annual financial statements related to what was achieved and spent. These processes and practices are evolving, and compliance with legislation is still relatively weak.

8.2 Local Participation and Accountability (urban)

Key elements of participation and accountability with respect to urban water supply and sanitation are described in table 8.1.

Table 8.1 Participation and Accountability: Leading Questions (urban)

Leading Questions	Summary
Is a local performance framework in place and being applied to water and sanitation services (for example, through a Service Charter)? Is this performance framework adopted by the elected local government (or imposed by the national government)?	Counties are required to develop an integrated development plan (including for water services) with clear goals, as well as means for monitoring and reporting on them. While water companies (predominantly operating in urban areas) develop their own business plans, these would need to comply with the county water service development plan and the county Integrated Development Plan. It is not clear to what extent this accountability takes place in practice.
Who monitors the performance of the urban WSS provider? An elected local government? The central government?	The county can monitor performance. The national water services regulator monitors the performance of licensed water companies.
Are local budgets and finances (for WSS) managed in a participatory and transparent manner?	Counties are required to establish budget preparation and validation fora involving citizens. Water companies would ordinarily not undertake participatory budgeting, but could be made to do so by the county government. (County governments own the water companies.)
Does the local urban WSS provider have its own effective participatory planning / social accountability / oversight mechanisms (separate from its parent government entity? What is the frequency of public interaction between the WSS provider and citizens?	This is not required by law. See above.

Does the parent government (separate from the WSS provider) have an effective mechanism in place to receive and resolve complaints about services?	No. Licensed water providers must establish a customer complaints mechanism.

Source: Prepared by Author.
Note: WSS=water supply and sanitation.

The main points of citizen engagement with county governments regarding urban water supply and sanitation services are as follows:

County policies. Counties are required to provide reasonable access by citizens to "the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards."

Planning. Counties are required by law to develop a County Integrated Development Plan and a Sectoral Plan. In this regard, counties are required to consult with the public. The plans must also be approved by the Council Assembly. In theory, business plans by the water companies need to be aligned to the county's integrated development and sector plans, but it is unclear to what extent this is taking place.

Budgeting. Counties are required to establish budget preparation and validation fora involving citizens. The budget must be approved by the County Assembly. In theory, water company budgets need to be aligned with these budgets, but it is unclear to what extent this is taking place

Performance management plan. The county executive committee is required to design a performance management plan to evaluate performance of the county's public services and implementation of its policies. In theory, water company performance needs to be aligned with these county performance management plans, but it is unclear to what extent this is taking place.

Reporting on expenditures. Counties are required to account for and evaluate the county government's budgeted revenues and expenditures. In theory, water company reports should be included as part of county reporting on expenditures. However, at present, counties do not report on water and sanitation expenditures.

These processes are still evolving and practices vary across the counties. There are some encouraging initiatives within counties —and also at the national level —to increase transparency and participation. One example at the national level is the open data portal (kenya.opencounty.org).[32]

In urban areas, where services are provided by water companies, accountability occurs primarily through customer voice (directly to the water company) and indirectly through citizen voice (through the county). The county could also insist that the water company undertake participatory processes related to the development of its business plans, budgets and tariffs.

8.3 Local Participation and Accountability (rural)

Key elements of participation and accountability with respect to rural water supply and sanitation are described in table 8.2.

[32] See, for example, www.cipe.org/publications/detail/journey-towards-effective-citizen-participation-kenya.

Table 8.2 Participation and Accountability: Leading Questions (rural)	
Leading Questions	**Summary**
Is a local performance framework in place and being applied to water and sanitation services (for example, through Service Charters)? Is this performance framework adopted by the elected local government (or imposed by the national government)?	Counties are required to develop an integrated development plan (including for water services) with clear goals and means of monitoring and reporting.
Who monitors the performance of the rural WSS provider? An elected local government? The central government?	The county undertakes the provision function itself, or it is undertaken by NGOs, CBOs and communities. The national government does not currently monitor rural water and sanitation provision.
Are local budgets and finances (for WSS) managed in a participatory and transparent manner?	Counties are required to establish budget preparation and validation fora involving citizens.
Does the local WSS provider have its own effective participatory planning / social accountability / oversight mechanisms (separate from its parent government entity)? What is the frequency of public interaction between the WSS provider and citizens?	The county is involved in the provision of rural water and sanitation services.
Does the parent government (separate from the WSS provider) have an effective mechanism in place to receive and resolve complaints about services?	No.

Source: Prepared by Author.

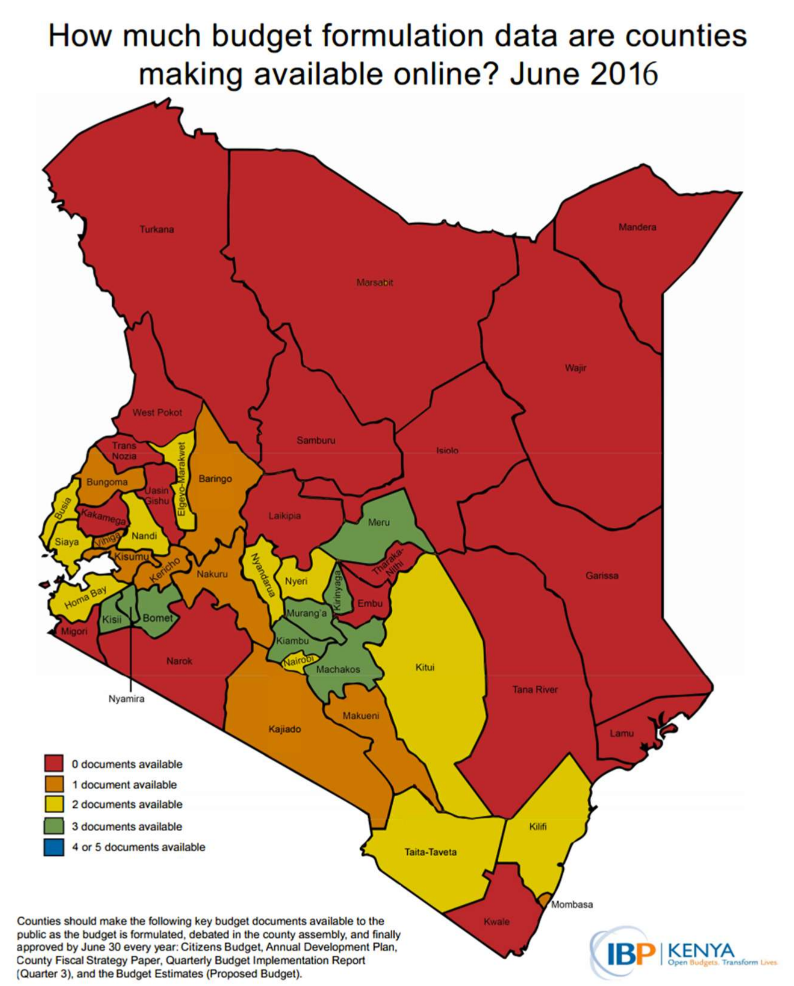
Note: CBO= community-based organization; NGO= non-governmental organization; WSS= water supply and sanitation.

There is no difference in the local participation and accountability frameworks between urban and rural areas at present — except for accountability with respect to the urban water companies already described in the previous section. However, counties can establish urban boards in urban areas, and this could increase accountability at the urban/town level. The Constitution and the law do not make provisions for local level accountability structures in rural areas.

8.4 Assessment

While adequate legal frameworks exist to promote and facilitate local citizen participation and accountability, actual practices are still evolving. As of June 2016, transparency with respect to the budget process was still poor (figure 8.1).

Figure 8.1: Kenyan Budgetary Transparency at the County Level, June 2016



Source: International Budget Partnership. 2017.

Transparency on the part of the water companies can also be improved. Recent annual reports and financial statements are typically not available on the company websites, nor are their business plans and budgets.

9 The Vertical Composition of Water and Sanitation Expenditures

9.1 The Overall Vertical Composition of Water and Sanitation Expenditures

A vertical expenditure profile for water and sanitation services is shown in table 9.1.

Table 9.1 Vertical Expenditure Profile of Water and Sanitation Services (Ksh Billions)

	Personnel Exp.	O&M Exp.	Capital Exp.	Total Exp.
National government expenditures at the central level[1]	0.01	-	-	0.01
National government expenditures at the county level [1]	-	-	27	27
of which Water Services Board expenditures [1]	2.5	-	25	
Devolved expenditures (county government) [2]	?	?	?	?
County water companies' expenditures [3]	8	8.5	?	16.5
Total Expenditures	10.5	8.5	27	46

Sources: [1.] Financing water services in Kenya – towards a framework. Draft, 2015. [2.] Consolidated financial statements for County governments 2014-15. [3.] Water company turnover from WASREB Impact Report 9, which gives Turnover for 2014-15. Assume this is 50 percent for personnel.

Note: O&M= operations and maintenance.

National transfers to county governments

The national government provided Ksh 228 billion (US$ 2.3 billion equivalent) to counties in 2014-15 from the equitable share of national revenues in the form of an unconditional grant (all functions).

County expenditures – actual and budget

County governments spent Ksh 269 billion (US$ 2.7 billion equivalent) (2014-15), of which Ksh 100 billion (US$ 1 billion equivalent) was spent on personnel and Ksh 81 billion (US$ 810 million equivalent) on capital assets (actual). Budgeted capital expenditures for 2013-14 for natural resources and the environment (including water services) was Ksh 12 billion (US$ 120 million equivalent), of which just over half was for infrastructure development. However, in the same year, actual expenditures by counties were only 63 percent of the amount budgeted, and the capital investment component was only one-third. **Actual capital expenditures by counties on water and sanitation services are not known**.

National financing of water services dominates

The national government provided about Ksh 25 billion (US$ 250 million equivalent) for the financing of water and sanitation services, about 50 percent of which came from development partners. At present, this money is going largely to the Water Services Boards. However, counties argue that this function has been delegated to the counties by the Constitution. As such, they have contested the Water Act of 2016, which perpetuates this role through the proposed Water Works Development Agencies, in court.[33]

[33] "Governors want Ksh38 billion (US$ 380 million equivalent) allocated to the Ministry of Water to be given to counties. They argued that the ministry was duplicating roles by using regional water boards to perform functions counties are responsible for." Daily Nation. January 2016. http://allafrica.com/stories/201601131318.html.

9.2 Assessment

Operational expenditures for water and sanitation are substantially devolved in Kenya. They go to the counties and water companies operating at the local level. However, the financing of infrastructure (including planning and construction), particularly for piped water and sewerage systems, is still controlled by the central government through the regional Water Services Boards. This is a key area of contestation between national and county governments, and is one of the main reasons the 2016 Water Act is being contested in court by the county governments.

Tensions between the national and county governments were predicted, given the nature of the devolution process and its political origins (See box 2.1). It is still too early to tell how these tensions will play out.

10 Summary and Tentative Conclusions

It is still too early after the constitutional reform of 2010 to draw definitive conclusions about the effects of the reforms on WSS sector outcomes. Nevertheless, it is possible to draw some tentative conclusions that can be tested and confirmed or negated over time as new evidence emerges.

Governance and resource distribution concerns were a key driver of constitutional reforms

The very centralized system of governance that developed in Kenya after independence was not effective at equitably distributing government resources at the regional and local levels because of the capture of the state at the national level through corruption and patronage. Intensive competition over access to resources at the national level led to violence. The closely fought 2007 elections resulted in over 1,000 deaths and the displacement of over 60,000 people. This ultimately led to significant political pressures to deconcentrate political control and to develop mechanisms for a more equitable allocation of resources. Consequently, a new constitutional settlement created an entirely new elected tier of government at the county level, with constitutional protections and a clear assignment of powers and functions — including the provision of water and sanitation services.

People living in outlying and rural areas were particularly affected by the centralization of control and the capture of resources by the political elite under the old system. They are now the expected beneficiaries of the new constitutional arrangement.

Urban water decentralization reforms predated the constitutional reforms

Reforms to decentralize the provision of water services began in 2000, predating the constitutional reforms in 2010.

In **urban areas**, commercial water operating companies were established to manage piped water and sewer networks. Investments were undertaken by nationally-owned, regional asset-holding entities – the Water Services Boards – and were financed by the national government and development partners.

In **rural areas**, deconcentrated District Water Offices continued to be funded and managed by the national government, which provided funding and limited back-stopping support for the development and maintenance of rural water supply and sanitation. This occurred despite the intention to create autonomous rural water and sanitation providers financed and supported by the Water Services Boards.[34]

In both cases, there was no **governance** connection between the water sector delivery institutions and the elected local government authorities (although some water assets operated by the water companies were notionally owned by urban local governments).[35] Water Services Boards were appointed by the national government. The appointment of the boards of the water companies was regulated by the national water regulator, the WASREB.

National **financing** was provided to both urban and rural areas. The urban areas were, in theory, expected to pay their own way, recovering the operating and depreciation costs and contributing

[34] Only 8 of the 94 'commercialized' utilities reporting to the national regulator, WASREB, were considered to be not urban (WASREB Impact Report #9/2016).

[35] The intention was for the assets to move to the Water Services Boards, but 10 years after the start of the reforms in 2000, many of these assets had yet to be moved.

to capital for expansion. In practice, however, most urban water companies did not recover their full operating and maintenance costs.[36]

The responsibility for water and sanitation provision was devolved to county governments

The constitutional reforms in 2010 created an entirely new layer of elected government at the county level. It assigned the functional responsibility for water and sanitation to this new tier of government, including the right to make any laws that are necessary for, or incidental to, the effective performance of this function.

This quasi-federal structure is unusual because it effectively eliminated elected local government. Instead of a three-tiered structure (national, regional, local), Kenya has a two-tier structure with the 47 counties being a hybrid between regional and local governments. Nevertheless, a relatively vibrant and competitive political space has emerged at the county level.

Urban arrangements have been largely unaffected to date by the constitutional changes

To date, the urban water institutions created following the water reforms in 2000 have been largely unaffected by the new constitutional arrangement. This could be partly due to the fact that a new Water Act (intended to bring the water sector into alignment with the new Constitution) was only approved in 2016, and has yet to be implemented. Governance of the urban water companies has moved to the counties, who now appoint the boards of the companies. However, appointment processes are still regulated by the national regulator, the WASREB. Despite persistent concerns that county governors might raid the water company bank accounts, there appears to have been no major collapse in the management of urban water systems.

The national financing of urban water systems (by both the national government and development partners) has continued through the Water Services Boards. The role of these nationally-owned and controlled Water Services Boards is, however, contested by the counties who assert their own right to invest in urban water systems. This appears to be a contest over who gets to control the resources used to finance urban water infrastructure. The size of the resource flow is considerable – about Ksh 20 billion (US$200 million) per year. The Council of County Governors contend that the Water Act is unconstitutional and have taken the matter to court.

Development partner funding may be perpetuating the status quo in urban areas

The ongoing role of the nationally-owned Water Services Boards in the planning, financing and investment in water supply and sanitation infrastructure would appear, at face value, to be unconstitutional – as they are fulfilling a role clearly assigned to the counties. This role persists, in part, because development partner funds (comprising a significant share of sector funding) continue to be channeled through the national government to the Water Services Boards. A question ought to be asked in this context: How should development partners be engaging with both the national and county governments in relation to the financing of the sector and the ongoing conflict over the current role of Water Services Board and the proposed Water Works Development Agencies (their replacement national bodies)?

Counties appear to be assuming responsibility for rural water and sanitation provision

Changes have been more fundamental in the case of rural water and sanitation. Outside of the small involvement of the Water Services Boards in investing in rural systems and the activities of the Water Services Trust Fund, there is little or no national government involvement. Counties

[36] In 2014/15, the proportion of water companies able to cover their operating and maintenance costs was 75 percent for very large utilities, 54 percent for large utilities, 37 percent for medium utilities and 29 percent for small utilities (WASREB Impact Report #9/2016).

are expected to finance both the investment and operations of these services from their own revenues and/or with the help of development partners.

There is no national reporting about how much counties have spent on water and sanitation, or on the outcomes of these investments. The national government appears to have abrogated its constitutional responsibility to both regulate and support counties in progressively realizing the universal right to water and sanitation. Therefore, there is no consolidated information on what counties are actually doing with respect to the investment and management of rural water and sanitation, and no recent consolidated data on outcomes.

Anecdotal evidence suggests there is a wide range in county responses and activities from doing very little to being proactive in developing and implementing investment and related programs. For example, in some counties, county politicians are seeking to be more responsive and improve public services, and have prioritized water and sanitation.

It is too early to assess the impact of constitutional devolution on sector performance

The devolution process in Kenya involved two countervailing dynamics – the decentralization of power away from the central government to the newly-created 47 county governments, and the centralization of power at the local level from 175 local political entities to the 47 counties. Political representation at the local (urban settlement) level was effectively abolished. Within the urban water sector, while ownership-control has moved to the counties and the county governors now appoint the boards of these companies, the day-to-day provision of water by the licensed water companies has been largely unaffected. Financing has continued through the pre-existing channels, namely the Water Services Board, although their role has been contested by the counties.

Over a twenty-five period from 1990 to 2015, overall improvements have been modest for water and sanitation access in rural areas and for sanitation in urban areas. Access to water has not kept pace with growth in the urban areas. It is, however, too early to assess the impacts of the constitutional devolution process on service provision. County governments were established in 2013 and had only been through three full budget cycles and one political term at the time of this writing. The second round of county elections is due in August 2017. **Nevertheless, it is clear that much better institutional performance will be required in order to significantly improve sector outcomes**.

It is important to improve reporting in order to understand sector performance over time

There is very little information about trends in the provision of services in rural areas, although WASREB has done a reasonably good job tracking sector performance over time for the urban water companies through its monitoring and enforcement of the water service provider license conditions. While the provision of water and sanitation services is very clearly the responsibility of the county governments, **according to the Constitution, the national government also has an obligation to monitor and report on progress with respect to the progressive realization of the universal right to water and sanitation.** As such, it can require county governments to report on water and sanitation progress, as well as on how much has been spent to realize this right (both capital and operating expenditures).

It will be important to monitor the impact that the constitutional devolution of responsibility for water and sanitation to counties will have on sector outcomes over time. In particular, it will be necessary to trace the relationships between financial allocations, spending (capital and operating), revenues, governance performance and sector outcomes (access and quality of service) across counties and in urban and rural areas respectively. **Improved reporting on all of these aspects at the county level (consistent across counties) as well as on aggregated levels is needed**.

The political tensions over the control of resources need to be resolved

The political tensions between the central and county governments resulted in a five-year delay in the promulgation of the new Water Act of 2016. This created uncertainty in the sector. Key areas of uncertainty included the future role of the national water services regulator and the future of the Water Services Boards. These uncertainties could affect sector financing. The promulgation of the 2016 Water Act has not ended these tensions nor the uncertainty. County governments have taken the national government to court, contesting the role of the proposed Water Works Development Agencies (the proposed replacements of the Water Services Boards).

It would be better for the central and county governments to reach a political settlement first. This could be achieved by setting out a framework agreement that details their respective roles in the water sector. This could then to be translated into policy and legislation. There is scope for give and take. The central government might forgo the role of physical development of infrastructure through the proposed Water Works Development Agencies in return for an agreement on an ongoing strong role for the regulation in protecting the managerial autonomy of the licensed water companies, including their ability to use revenues to continue to improve sector outcomes.

Incentives against devolution to local government may inhibit accountability at the local level

The primary sources of own revenues for the county governments are the typical local government revenues sources – namely property taxes, business licenses and service charges, including revenue from the sale of water. This means that there is little incentive for county governments to effectively devolve functions to a lower tier of elected local government, as this would reduce their control over their own limited revenue streams.

Revenue incentives may pose threats to autonomous management of the water companies

The counties' limited access to local revenue sources also creates incentives for county governments to want to gain control over water revenues, although there is no evidence of this taking place to date. Although the Water Act of 2016 protects the licensed water companies, it remains to be seen how county governments might exert influence over these companies over time. This includes their possible dissolution in favor of direct management and control.

Divergence in outcomes at the county level may spur improvements in governance

The premise of the constitutional settlement is that, overall, diffuse political power and accountability will yield better outcomes, and will be more stable compared to a highly centralized political system. County governments should be responsive to their voters, although there is, of course, the risk of capture of county resources at the county level. The 47 counties offer the opportunity for a comparative assessment of performance. If good governance leads to the improved use of resources and better outcomes in some counties, then this should become evident (and measurable, compared to other counties). This could, in turn, spur voters in less well performing counties to demand and expect better accountability and governance from their elected representatives. In theory, this should translate into better outcomes over time, including in the water sector. It will be important to put in place the necessary systems to monitor and report on governance, inputs and outcomes and measure progress over time.

Will the central government hamper devolution in the urban water sector?

While the urban water sector had already undergone significant decentralization in the *operation* of water services from the early 2000s and prior to the new Constitution, the system of financing and investment was still controlled by the national government. This included implementation through the national government-appointed Water Services Boards operating at a regional level. This system appears to have survived the constitutional devolution process largely intact, contrary to expectation. The conflict between the counties and national government on this matter appears to be fundamentally about a conflict over control of resources.

Although the national government retains control over the allocation of finance for the urban water sector, it cannot be said that the provision of water and sanitation has been fully devolved. This also creates a situation in which poor performance can be mutually blamed on the other tiers of government. As such, it is likely to lead to low levels of accountability and poor outcomes. In the author's view, it is fundamentally important to resolve this conflict in order to create the conditions for improved urban water sector performance. Development partners, who contribute a significant share of investment finance to the water sector, can surely play a constructive role in helping to resolve this conflict.

References

Boex, J and R. Kelly. 2011. "Fiscal Decentralization in Kenya: A Small Step or Giant Leap." IDG Policy Brief, The Urban Institute. May 2011.

Council of Governors, Kenya. 2016. *County Performance Management System and Stakeholder Engagement Handbook*. March.

Eaton, K, K. Kaiser, and P. Smoke. 2010. *The Political Economy of Decentralisation Reforms: Implications for Aid Effectiveness.* Washington, DC: World Bank.

Government of Kenya. 2016. Kenya Water Act.

_______. 2014/15-2015/16. Kenya Ministry of Water and Irrigation. The Annual Water Sector Review.

_______. 2015. Kenya Companies Act.

_______. 2015. Kenya County Governments Consolidated Financial Statements.

_______. 2015. Kenya Public Audit Act.

_______. 2012. Kenya County Government Act.

_______. 2012. Kenya Public Finance Management Act.

_______. 2011. Kenya Urban Areas and Cities Act.

_______. 2010. Kenyan Constitution.

_______. 2008. Kenya National Commission for Human Rights. 2008.

_______. 2002. Kenya National Water Act.

Joint Monitoring Program. 2015. *Joint Monitoring Program 2015 Update*.

Kenya National Commission for Human Rights. 2008. *On the brink of the precipice*.

Nyanjom, Othieno. 2011. "Devolution in Kenya's New Constitution." Constitution Working Paper Series No. 4. Society for International Development, Nairobi, Kenya.

Public Expenditure and Financial Accountability (PEFA) Assessment. 2013. "Public Expenditure and Financial Accountability. Framework Enhancement for Better Measurement of Country PFM Systems." European Union.

Rondinelli, Dennis A. 1981. "Government Decentralization in Comparative Perspective: Theory and Practice in Developing Countries." *International Review of Administrative Science* 47(2): 133-45.

Water Services Regulatory Board (WASREB). 2016. Impact Report 9. Nairobi, Kenya.

2030 Water Resources Group (WRG). 2015. *Water Resources in Kenya: Closing the Gap.*

World Bank. 2017. "Decentralized delivery of water and sanitation services: An Overview of Selected Country Experiences". Washington, DC: The World Bank.

_______.2017. Republic of Kenya: Kenya Urbanization Review. Washington, DC: World Bank.

_______. 2014. *Kenya Decision Time: Spend More or Spend Smart? Kenya Public Expenditure Review.* December. Washington, DC: World Bank.

_______. 2012. *Devolution without Disruption: Pathways to a Successful New Kenya.* Washington, DC: World Bank.

_______.2011. "Decentralization in Kenya: overcoming post-independence concentration of power" in Special Focus – Kenya's Momentous Devolution." December. Edition No. 5. http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/KEU-Dec_2011_Momentous_Devolution.pdf

________. 2011. *Water Supply and Sanitation in Kenya. Turning Finance into Services for 2015 and Beyond. Kenya Country Status Overview.* World Bank, Nairobi.