

KEPSA WEEKLY LEGISLATIVE BULLETIN

Issue No. 8

FOCUS ON AN UPCOMING BILL

A draft Climate Change Bill has been prepared for debate before the National Assembly after a previous Bill prepared in 2012 lapsed with the dissolution of the 10th Parliament. Below are the



main discussions of the main legal issues driving the climate change debate and how climate change is addressed under the existing legal and constitutional framework.

Climate change, and in particular, the issues of mitigation and adaptation are now recognized as significant questions

in development discourse. There is a growing focus on developing the right policy and legal framework to govern issues of climate change. While significant discussion has and continues to take place at the global level on climate change, though with difficulty in bridging consensus between developed and developing countries in some of the contested areas, there is a regrettable muted discourse at national level in most African countries on climate change.

Though the impact and effects of climate change are obvious, levels of awareness on climate change are low amongst the public. As a result, the policy and legal dimensions required are often poorly understood.



Currently, Kenya has several laws and policies on environmental issues and which impact on climate change. In addition, there are many other regulations, by-laws and other statutory instruments that address different facets of the environment and which impact on climate change too.

Notwithstanding the presence of these laws and policies, the consensus is that both the legal and policy framework remains weak, inadequate and ineffective in addressing the issues of adaptation and mitigation on climate change. Hence the need to review existing policies but also the urgency to develop an anchor law that comprehensively addresses climate change.

The Climate Change Bill seeks to address these shortcomings and, in addition, secure a legal framework aligned to constitutional provisions on environmental management. It seeks to address the reality of policies and legal provisions that are generally weak, inadequate and ineffective in addressing and responding to the issues of mitigation and adaptation to climate change.

The need for strong legislation on climate change is predicated on the understanding that climate change has potential harmful impacts on various sectors of the economy including, on livelihoods security. It is especially important to the Private Sector in view of the business risks contingent upon climate change including the cost of compliance in climate change mitigation measures.

In developing legislation on climate change, there is need for Kenya to take into account other international legal instruments and protocols such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol which have secured near-universal acceptance. Indeed, Kenya has committed to several environmental policies on climate change. Besides signing the UNFCCC in 1992, Kenya was also among countries that ratified the Kyoto Protocol.

However, it must be noted that though Kenya is currently not under any legal obligation to reduce greenhouse gases pursuant to the Kyoto Protocol, it has nonetheless remained vigilant and active on climate change issues starting with the articulation of the 2008 National Environment Policy.

This Policy sought closer coordination across different line Ministries based on the recognition that climate change is a cross-cutting sectoral issue. This was followed by the subsequent creation and establishment of a coordinating unit on climate change under the office of the Prime Minister in 2009. In 2010, the National Climate Change Response Strategy was developed with an overarching objective of addressing the impact of climate change.



The constitution currently gives recognition to the general rules of international law under Article 2(1) including treaties and conventions ratified by Kenya which automatically become and form part of the laws of Kenya under Article 2(5).

In its preamble, the Constitution has recognized the environment as a public resource and asset that must be preserved for the benefit of posterity. The significant focus on sustainable development and its prioritization as both a national value and governance principle draws a direct reference to environmental stewardship and the need to address climate change.

Climate change has moved beyond mere policy discourse to a matter that creates specific rights and obligations. For instance, the right to sue on environmental matters is now guaranteed under Article 70(1) of the Constitution. This means that climate change matters are justiciable and hence give rise to legal rights; create legal obligations; and, can be contested through the judicial process for legal redress. Indeed, under article 70(2) a court is empowered to “make any order or give any directions it considers appropriate” including, on climate change.

News on KEPSA legislative engagements

KEPSA sees potential in Public Private Partnership Projects

The Kenya Private Sector Alliance (KEPSA) has spoken on the need to use the Public Private Partnership (PPP) Act to leverage private sector participation in setting up public infrastructure projects. At a meeting organized by USAID Kenya Firm, to review the PPP Act to determine its adequacy in enabling PPPs through the structures created on the design, selection, implementation and resolution of disputes, KEPSA noted that PPPs could be used by public entities to leverage on the skills, competencies and efficiencies of the Private Sector.

While noting that well-structured PPPs could secure a win-win for both the public and private sectors and improve provision of services through facilities established under PPPs, KEPSA warned that “the Public Sector was under an obligation to provide for services and PPPs could not be seen as a substitute to the obligation vested in public entities on service provision”.

It was noted that the PPP Act sought to inject an open, transparent and accountable mechanism. However, there was concern that the Act required information on the results of a tender to be published upon execution of a Project, which could not meet the threshold on scrutiny and public accountability. KEPSA recommended a need to re-look this provision on

public participation and make disclosure an essential element across the entire cycle of PPP contracting until the execution stage.

On the flexibility allowed for direct sourcing under Privately Initiated Investment Proposals (PIIPs), KEPSA expressed concern that while there were circumstances under which direct sourcing was the most viable option, the conditions under which to award PIIPs were insufficient to guard against potential abuse which would undermine good governance procedures in contracting.



To safeguard the interest of both the public and private stakeholders, the selection and identification of PPPs must be based on a cost-benefit analysis. It was important to minimize the use of discretion and instead ensure a strong emphasis on due diligence in determining choice of PPPs.

The devolved system of government had opened new opportunities for County governments to develop PPPs in support of service provision. But there was need to review limitations on incurring contingent liability in view of the caveat set out under article 212 of the Constitution which requires the national government to guarantee any liability arising from a loan taken by a County government.

KEPSA was of the view that uptake of PPPs may be limited due to the contingent risks in most PPP Projects. Hence the need to carefully review how such liability was addressed to ensure that counties did not lose out on potential partnerships.

There was need for County governments to look at PPPs as a platform to enhance revenue collection by enhancing service provision as opposed to the current predominant focus on increasing revenues through imposition of new taxes and levies.

While the PPP Act had a clear self-executing mechanism on a range of aspects on PPP contracting ranging from project formulation to dispute resolution, KEPSA highlighted the importance of creating awareness on the PPP Act by Counties. This would improve on compliance with its strict procedures on project formulation, design and execution and minimize disputes arising from non-compliance.



This was especially important because county governments needed to adhere to the PPP Act since County Assemblies could not develop legislation on PPPs. KEPSA saw a need to develop clear guidelines on the basic requirements of PPP contracts as one way of minimizing potential legal challenges to poorly drafted contracts.

On dispute resolution, it was noted that the PPP Act made the decision of the Appeals Review Board final and binding. KEPSA observed that while the Board's decision could be final, it could not be binding since the Board's decisions remained subject to judicial review by any party seeking relief on the exercise of fair administrative justice. While the courts, through judicial review, could not dwell on the merits of a PPP award, the rights of Private Sector entities needed to be secured through due process which would involve subjecting the decisions of the Appeals Review Board decisions to judicial review in court.

While the PPP had created several organs and bodies, there was concern that a multiplicity of



organs overseeing PPP contracting may lead to unduly long approval and decision-making procedures especially in situations of uncertainty over what would follow in cases where the decision of one organ was challenged by another organ during the approval process. KEPSA suggested the need

for a clear oversight mechanisms over the decisions of the various organs involved in PPP contracting.