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Behind the Tap: An Analysis of Kenya's Water Act 2016

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Behind the Tap: An Analysis of Kenya's Water Act 2016

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Abstract

The overall aim of this thesis is to analyze Kenya's 2016 Water Act and to describe the tensions and conflicts that have emerged from the launch and implementation of the Water Act 2016. More specifically the thesis highlights what the Act represents and defines as the major problem(s) with regards to how Kenya's water resources, supply and services should be managed, developed and regulated. This thesis discusses the tensions and conflicts the Act has spurred in the administration of Kenya's water sector. In order to address what the Act represents as the primary problem(s) as to how Kenya's water resources, supply and services should be managed, developed and regulated, the thesis draw on Bacchi's (2009) *What's the Problem Represented to Be?* (WPR) approach. In order to address what tensions and conflicts the Act have generated in Kenya's water sector, this thesis will draw on the concept of discourse. Drawing on the evidence from the Act and debates surrounding it, this thesis reveals that the Act is about reorganising the whole water sector into a devolved structure to fit Kenya's new constitution from 2010. The Act describes the transfer of the state organs and their functions and services from the national government to the local governments. The focus on the transfer of state organs to governments has strong implications for the design of the water sector, policy dialogue and efforts to achieve water scarcity in Kenya.

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Acronyms

COFEK - Consumers Federation of Kenya

CoG - Council of Governors

MWI - Ministry of Water and Irrigation

NPWRMD - National Policy on Water Resources Management and Development

NWWSA - National Water Harvesting and Storage Authority

NWMP - National Water Master Plan

WASREB - Water Services Regulatory Board

WPR - What's the Problem Represented to Be?

WWDA - Water Works Development Agency

2030 WRG - 2030 Water Resources Group

1 Introduction

Achieving water security and sustainable use of our water resources are critical challenges of the 21st Century. According to Water Aid's (2018) annual report, about 60% of the world's population live in areas of water stress and one out of nine people worldwide do not have access to clean water close to home. The report ranks Kenya among the ten countries with the lowest access to water close to home in relation to population. Close to half of Kenya's population of 46 million is estimated to live under such circumstances.

Kenya is also one of the countries categorised by the United Nations as a chronically water-scarce country, with an estimated freshwater supply of only 647 cubic meters per capita as compared to the universal minimum of 1,000 cubic meters per capita (UNDP, 2012 p. 23). Moreover, the country's water resource base is estimated to decrease by the year 2025 as the population is expected to increase, thus affecting the water supply capacity (Krhoda, 2006; UNEP, 2008 see Ogendi, Ong 'oa and Ong ', 2009 p. 183; Otieno, 2016).

Sound operational policies, legislation, laws and strategy papers that guide the governance of water resources are central for achieving provision of safe water and sanitation. Similar to other African countries, the Kenyan government undertook a series of water sector reforms including the 1974 National Water Master Plan to ensure the provision of potable water to all households by the year 2000. In 1999, the Water Master Plan was replaced by a National Policy on Water Resources Management and Development. The National Policy from 1999 aimed at improving Kenya's water supply by handing over water service delivery systems from the government to local and private actors (Ogendi, Ong 'oa and Ong ', 2009).

In 2002 the Kenyan Government launched a new Water Act in which local authorities were required to form autonomous water and sewerage companies with independent Water Boards of Directors to provide water supply services. The local authorities were required to reinvest financial returns acquired from water supply services into service delivery (Ogendi, Ong 'oa and Ong ', 2009). Another important feature of the 2002 Act was the encouragement of a "bottom-up approach" that emphasised the role and active participation of local communities in the decision-making process and implementation of local water projects (ibid).

When Kenya changed its Constitution in 2010, there was a need to update and change the 2002 Water Act. The Constitution of 2010 changed Kenya's political governance into two tiers comprising of one central national government and 47 decentralised county governments (ibid). The year 2016 marked the time when the constitutional arrangements of the political governance were to take full effect (ibid).

In October 2016, a new Water Act 2016 was gazetted (Government of Kenya, 2016).¹ The Act states that its fundamental purpose is “to provide for the regulation, management and development of water resources, water supply and sewerage services, and related purposes” (Kenya Water Act, 2016). The Act recognizes that the responsibility for the provision of water-related functions is a shared obligation between the national government and decentralized county governments and gives priority to the use of water for home consumption over irrigation and other purposes (ibid). Its launch has spurred a number of tensions and controversies within Kenya's administration of justice. The Council of Governors (CoG)², have moved to court with a desire to stop the implementation of the new Act, arguing that it is “unconstitutional”, as it omits county (local) governments from decision making and creates a centralised framework for provision and regulation of water services (ConstructionReviewOnline, 2016).

The overall aim of this thesis is to analyze Kenya's 2016 Water Act and to describe the tensions and conflicts that have emerged from the launch and implementation of the 2016 Water Act. More specifically the thesis explores the following research questions:

- a) What does the Act represent and define as the major problem with regards to how Kenya's water resources, supply and services should be managed, developed and regulated?
- b) What tensions and conflicts have the Act generated in Kenya's water sector?

² Council of Governors (CoG) is a group that represents heads of the county (local) governments in Kenya

2 Background

2.1 *Reforms in Kenya's Water Sector from 1963-2002*

To explore what the 2016 Water Act represents as the major problem as well as the tensions and conflicts that have emerged from the launch and implementation of the new Water Act, one has to understand the historical background of water laws in Kenya and the underpinning arguments behind them. When Kenya became independent in 1963, its water sector policy was focused on channelling water resources to communities which had not received support during British rule. This was done in the spirit of *Harambee* (i.e., pooling resources together for the country's social and economic development) (Ogendi, Ong 'oa and Ong ', 2009). Despite the good intention of the Government, this effort was not enough due to limited financial resources and lack of a skilled workforce in local communities (ibid).

The current institutional framework for water management can be traced back to 1974 when the Government rolled out the National Water Master Plan (NWMP) to ensure the provision of potable water to all households by 2000 (ibid). However, due to a number of factors such as budgetary constraints, rapid population growth and haphazard human settlements in the 1980s, demand for water outstripped supply (ibid). In order to meet the increased water demand, the Government started to hand over the water supply systems to local actors and the private sector. After consultations between the Government and other water sector stakeholders on how to transfer the water supply, a decision was reached to revise the NWMP. The consultations gave birth to the National Policy on Water Resources Management and Development (NPWRMD), which came into effect in 1999.

In 2002 a new Water Act was launched with the aim of making it easier to invest in water-related infrastructure (Beyene and Luwesi, 2018). In the 2002 Act, the Ministry of Water and Irrigation (MWI) had the legal obligation of running Kenya's water sector. Among the key responsibilities that fell under the Ministry's mandate were sector coordination, monitoring and control, and policy formulation, amongst others. The responsibilities the Ministry was mandated to undertake fell under two umbrellas, one being water resources management and development and the other water services provision. According to Beyene and Luwesi (2018), the desired outcome from the separation of policy and regulation from service provision and water resources management was

to improve the mechanisms of accountability and transparency in the water and sanitation services and resources management subsectors. The 2002 Act also aimed to commercialize the Water and Sanitation Services (WSS) and to encourage the participation of different stakeholders in the management and decision-making processes in the water sector.

In Section 3, the 2002 Act states that all the water resources are vested to the state, subject to any rights of the user granted by or under the Act. The 2002 Act introduced new institutions within the WSS, including the Water Services Regulatory Board (WASREB or WSRB), mandated to set standards, monitor and enforce water services standards for the subsector; the Water Appeal Board (WAB), designated to solve disputes concerning water resources or water services. Thus the 2002 Act as a consequence of this established Eight water services boards³ (WSBs - responsible for the efficient and economical provision of water services, the Water Services Trust Fund (WSTF - formed to finance pro-poor investments; and water services providers (WSPs - licensed as agents for the provision of water and sewerage services. Figure 2.1 shows the institutional structure of the water sector under the Water Act from 2002.

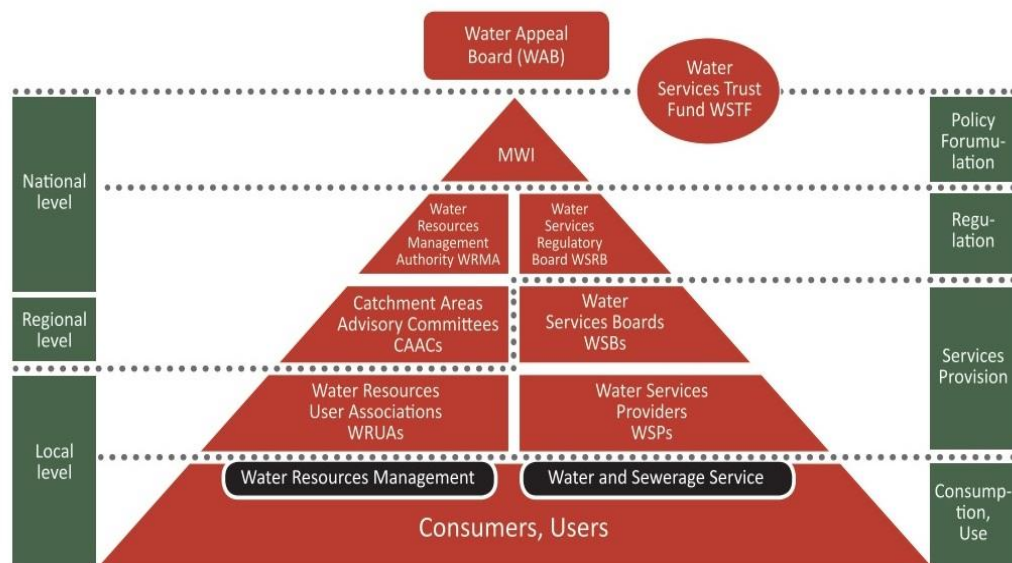


Figure 2.1 Legal and institutional set-up of the 2002 water sector reforms in Kenya (Beyene and Luwesi, 2018). Copyright by the Nordic Africa Institute (2018)

³ The political governance in the former constitution of Kenya consisted of one central national government and eight regional governments

When Kenya changed its Constitution in 2010, the Government saw a need to update and change the 2002 Water Act (ibid). In April 2014, the 2014 Water Bill⁴ was introduced in the National Assembly, giving leeway for involved stakeholders to submit their memoranda, which highlighted differences in perspectives on what the Bill should contain (Construction Review Online, 2016).

July 2014 marked the end of consultative meetings between the Nairobi City Council Assembly Water and Sanitation Sectoral Committee and several civil society organisations such as Hakijamii (Economic and Social Rights Centre) during which a joint memorandum was signed, paving the way for the 2014 Water Bill to replace the 2002 Water Act (StandardDigital, 2014). In April 2016, Parliament enacted the Bill which was approved in September 2016 by President Uhuru Kenyatta (Construction Review Online, 2016). The 2014 Water Bill was gazetted as a law (2016 Water Act) in October 2016.

3 Method of Data Collection

In addition to analysing the Water Act, I have explored a summary report from the 2030 Water Resources Group⁵ titled *Understanding the Water Act 2016*. It was selected because of its contribution to the improvement of the understanding of the problematization(s) of Kenya's 2016 Water Act. To support the evidence found in the Water Act and the summary report, I have also examined the Civil Society Organisation Annual Water and Sanitation Performance Report of the Financial Year 2015/2016 released in February 2017.

In order to explore the tensions and conflicts that have emerged from the launch and implementation of the Water Act 2016, I have selected a website article from the Consumers Federation of Kenya (COFEK)⁶ entitled *Why the water Bill 2014 is generating boiling point temperatures as stakeholders jostle to either retain or drop the watered down final draft*. The article discusses the perspectives of a group who claim to represent consumers' interests in

⁴ A bill refers to a written document containing a proposal for a new law.

⁵ 2030 WRG is a public-private-civil society collaboration hosted by the World Bank since 2012.

Kenya. I chose the article from COFEK due to its potential to establish a rich picture of contentious issues emerging from the launch of the Water Act of 2016.

In addition I have also examined an article from the Water Integrity Network⁷ titled, “*New Law is Changing Power Dynamics and Governance Hot Spots in the Kenyan Water Sector*” (Water Integrity Network, 2017). The article contributes contextual understandings of how the relationships amongst actors were a few months after the Act was launched. The article was written by the network as part of the proceedings of Kenya’s water sector annual conference in November 2016.

In order to situate the Act in broader debates, I have also analysed Kenyan media articles, e.g., *Proposed water law to give residents relief* (StandardDigital, 2014), *Governors challenge implementation of Water Act in Kenya* (Construction Review Online, 2016), *CoG says water bill ignored their views* (The Star, 2015), and *Citizen sues to stop implementation of new Water Act* (TheStar, 2017).

The media articles were an important source of information as they provided an overview of different positions taken by stakeholders about the new Water Act and the tensions and conflicting discourses surrounding it. I have purposefully selected media articles that highlight the tensions and conflicts surrounding the new 2016 Water Act, based on the expectation of their contribution to the improved understanding of the problematization(s) of the Kenyan 2016 Water Act.

In addition to analysing the Act, the 2030 Water Resources Group summary report, the CSO annual report, the website articles by COFEK and Water Integrity Network and various media articles, I have collected secondary data from different sources such as literature on opportunities and challenges for devolving Kenya’s water sector. This has made it possible to create a rich picture and to triangulate various sources of information. Collection of secondary data from different sources has also helped me to explore cases of contradictions in the different sources.

I have made comparisons between statements from the Act, the summary report from the 2030 Water Resources Group, the Constitution of Kenya and media debates surrounding the new

Water Act. The comparisons were made in order to analyse problematisation(s) in Kenya's Water Act along with exploring the tensions and conflicts that have emerged in relation to its launch and implementation. In order to enhance the validity of this study, I used other online resources such as documents and media statements related to or describing the 2016 Water Act before and after it was launched. This has helped me to contextualize the Water Act from a historic point of view.

4 Theoretical and analytical framework of the study

In order to analyse what the 2016 Water Act represents as the major problem as to how Kenya's water resources should be managed this thesis draws on the *What's the Problem Represented to Be?* (WPR) approach and discourse. The WPR approach was developed by Carol Bacchi, a professor of political science at the University of Adelaide, Australia. The WPR approach contains a series of analytical phases for understanding policy as a means of exploring governmentality and governance. This study is framed within the field of policy studies that study how policy discourses regulate knowledge of the world and our shared understandings of events and social relations.

It is commonly agreed that policies are made up of government processes, for example, laws, policy statements, programs and statements of principle (Du, 2016). However, the specific roles and functions of policies are still debated. The two main lines of thought are that policies shape and regulate the conditions of our entire existence, because they have become entrenched in the organisation of human affairs (Shore and Wright, 2003), whilst others maintain that policies focus on the ideals and actions the government is dedicated to achieve (Fawcett et al., 2010) and thus are not entrenched in current human affairs, but instead in political goals/ambition. Some even contend that policies are fundamentally political and that their ostensible purposes are merely to unite means and ends, in other words, to bridge a gap between goals and their execution (Wedel et al., 2016). Parsons (1992, p. 16) claims that although some readers might think that policies are expressed as neutral ideas, the language and rhetoric of "policy" are in fact the main instruments of political rationality.

The standard way of thinking and the dominant intellectual paradigm about policy is that policies focus on problem-solving. The majority of policy analysis frameworks focus on the role of policy in addressing social problems. However, if one considers a different approach, WPR can offer a means to explore policy as knowledge across which populations are governed and how within policies social problems are characterized. Thus, in order to address the first research question concerning what the 2016 Water Act represents as the major problem as to how Kenya's water resources should be managed, this thesis will draw on Bacchi's (2009) WPR approach.

The WPR approach is a Foucauldian-inspired approach that relies upon post-structural premises; more specifically it focuses on policy as a means of exploring governmentality and governance (Bacchi, 2009). The term governmentality here refers to set boundaries to the conducts of individuals whereas governance refers to any act that ultimately aims at shaping the conduct of individuals (Bacchi and Goodwin, 2016).

Bacchi stresses that we need to "question" claimed intentions and purposes put forward by formulated policy proposals in order to reveal what is problematised and unproblematised in policy texts (ibid). By focusing on problematisations, the WPR approach opens up for identifying implied "problems" and bringing to light the role of policies in formulating social problems rather than just addressing them.

The WPR approach rests upon a simple idea: what we propose to do about something reveals what we think needs to change and hence what we think is the "problem"⁸ or problematic (Bacchi, 2013). In this context "think" is to be understood as a practice (Bacchi, 2009). To illustrate, Bacchi offers a real-life example of the idea on which the WPR approach rests. Assume you are an owner of a gymnasium and your water bills are skyrocketing. If you call in a plumber, you are saying what you think is problematic has something to do with leaking pipes. If in contrast, you decide to install water timers on the showers so that they cut off the water after three minutes, you are saying that what you think is problematic is overuse by your members.

⁸ In the WPR approach and in this study, the term "problem" refers to the kind of change implied in a particular policy proposal (ibid). Policy proposals at times state explicitly the kind of "problem" they aim to address; however, This is not always the case (Bacchi, 2009). The WPR approach intervenes at the point when the problem is not explicit to try and make concealed "problems" visible.

This simple idea – that what you propose to change reveals what you consider problematic – is the foundation of the WPR approach.

The WPR approach argues that one can understand how the problem is represented by examining the proposed solution (ibid). This study will refer to “how the problem is represented” as “problem representation”. Representation means that something or someone is represented by proxy when one is not physically present (Phillips, 2002, p. 45). For instance, all citizens cannot be present in Parliament to discuss political issues, and that is why representative democracy is practical. In Bacchi’s WPR approach and this study, problem representation is defined as a way in which a particular policy “problem” is constituted⁹ in real life.

A key argument in the WPR approach is also that policy proposals can be seen as problematisations because they propose a change (Bacchi, 2009). Since policy proposals propose change, solutions will always be directed towards a particular “problem” that has been identified to be changed (ibid). For example, Bacchi argues that if training courses are offered to women as part of a policy to increase their representation in better-paying occupations, then the “problem” is represented to be women’s lack of training.

As a guiding framework that aims at serving the researcher through the WPR approach, Bacchi (2009) lists six questions that probe how “problems” are represented in policies. They are:

1. What’s the problem represented to be in a specific policy or policies?
2. What deep-seated presuppositions or assumptions underlie this representation of the “problem”?
3. How has this representation of the problem come about?
4. What is left unproblematic in this problem representation? Where are the silences? Can the problem be thought about differently?
5. What effects are produced by this representation of the “problem”?
6. How/where has this representation of the “problem” been produced, disseminated and defended? How could it be questioned, disrupted and replaced?

⁹ The term *constituted* means that things have come into existence without deliberate intent through interactions or via practices (ibid).

The analysis of what the Act represents as the major problem as to how Kenya's water resources should be managed will draw inspiration from the above questions from the WPR approach. This study will use the three first questions from the WPR approach as guiding questions to address what the Act represents as the major problem as to how Kenya's water resources should be managed: (i) what is the problem represented to be in the Act? (ii) What assumptions underlie the specific problem addressed in the Act? and (iii) How has the representation of the problem identified come about?

In order to examine the proposed change in Kenya's water sector suggested by the 2016 Water Act, as well as the character and causes of the "problem" in the sector, I will draw on Michel Foucault's use of the concept of "problematization" and how it is interpreted by Bacchi (2009). Bacchi's WPR approach draws on Foucault's work, especially on his understanding of "problematization" and his inclination to think problematically. The commonsense understanding of the term *problematization* is how something is put forward (represented) to be a problem (Bacchi, 2009).

Bacchi (2009, p. 263) suggests that to identify how a certain "policy problem" is constructed we need to examine the proposed change suggested by the policy. A proposed policy change highlights what policies "think" the problem is. Since policies, such as the 2016 Water Act specify what needs to be changed, they in themselves can be seen as forms of problematization as they contain implicit representation of the character and causes of "problems". The aim of the WPR framework is to "make politics visible" (ibid), and thus to uncover how governments engage in problematizing activity.

In this thesis, I will draw on Bacchi's work to explore governmental practices occurring with the 2016 Water Act and to uncover the implicit assumptions behind their problematisations.

Bacchi's WPR approach recommends "working backwards" from concrete policies, programs and policy proposals to reveal what is represented and defined to be the "problem" within them. This means that it is possible to read backwards from any policy proposal—from the solution offered—what the "problems" is understood—represented—to be in the policy proposal (ibid). It is further suggested that the work of the analyst begins with texts (Goodwin, 2011, p. 171). For example, I have explored the 2010 Constitution of Kenya because it entails a set of fundamental

principles or precedents on how Kenya is governed. The 2016 Kenyan Water Act was established according to the broad guidelines given by the Constitution.

In analysing the data, I took note of the frequency with which certain issues in the study were being mentioned or expressed in the different texts. I clustered the data into themes, e.g., devolution, accountability and capacity in the context of managing administrative responsibilities.

4.1.1 Governmentality

To explore how the problem identified through the concept of problematisation (described earlier) sets boundaries and shapes the conducts of individuals, I will draw on Foucault's concept of governmentality and how it is interpreted by Mitchell Dean (2009) and Bacchi (2009). In a general sense, according to Bacchi the term "governmentality" refers to kinds of thinking associated with particular approaches to governing, e.g. neoliberal, social or authoritarian. Thinking in this context is assumed to be systematic as well as a collective activity which is a representation of knowledge, belief and opinion in which people are immersed.

Foucault defines governmentality as the "conduct of conduct" which refers to how the discourse and implementation of policies frame and create specific forms of interpretations, actions and interactions (Dean, 2009, p. 17). It is further suggested that studies of governmentality mainly have an interest in how thoughts operate within organized ways of doing things.

The theory of governmentality will be used in the analysis to highlight how different assumptions accompanying the 2016 Water Act frame and form the actions of stakeholders within Kenya's water sector and among Kenyan citizens. For instance, in the analysis section of this thesis study I explore underlying assumptions that offer conceptual logic that justifies the Constitution and thus the proposed change in Kenya's water sector suggested by the 2016 Water Act.

The aim of inquiry will focus on how governing takes place in Kenya's water sector through the problematisation process (ibid). Thus at a deeper level, the emphasis will be directed towards

how actions of stakeholders within Kenya's water sector are guided as a result of the problematizing activity.

4.2 The concept of discourse

In order to explore the different understandings, debates, meanings and practices spurred by the tensions and conflicts surrounding the launch of the 2016 Water Act, as well as contradictions in the problem representation identified in the Act, this study draws on discourse analysis.

Bacchi (2009, p.35) defines discourse as:

...socially produced forms of knowledge that set limits on what is possible to think, write or speak about a given social object or practice.

Bacchi's point is that discourses set limits on what is possible to say or think about the objects they create, though they can and do contain tensions and contradictions that open up spaces for challenge and change. Discourse can be seen as an assemblage of statements, signs and practices that create objects and domains they aim to describe, giving these (objects and domains) status as "truth" or "knowledge" (Bacchi and Goodwin, 2016).

Discourses, thus can be seen as powerful fictions that are commonly accepted as truths (ibid). For example, the way proper sanitation, clean water, water permits or flood mitigation are spoken about creates them as forms of social knowledge that make it difficult to speak outside of the context they establish for thinking about people and social relations. However, in this production of normativity there is exclusion of other information. In other words, Bacchi suggests that "things could be otherwise" (Bacchi and Goodwin, 2016). Thus, the process of discourse production involves governance (ibid), hence governing occurs through problematisation (Bacchi, 2009, Bacchi and Goodwin, 2016). Therefore the way in which problems are represented has a huge influence on how people conduct their lives.

The concept of discourse will be used in the analysis to map out the processes where struggles are taking place and to reveal how certain meanings of keywords become so conventionalised ("fixed") that they are thought of as natural (Jørgensen and Phillips, 2002). For instance, this study explores what local management of water resources entails amongst different stakeholders

and how it should be practiced. Thus, the analysis will concentrate mainly on factors that are being given “greater voice” in the Act and the surrounding debates.

5 Findings and Discussions from the study

This chapter is structured in the following way. Firstly, I analyse problematization in Kenya’s Water Act 2016. Secondly, I describe the tensions and conflicts that have emerged from the launch and implementation of the Water Act 2016.

5.1.1 What is the problem represented to be in the Act?

In this thesis writing I argue that the whole 2016 Water Act is framed within devolution. To explore what the representation of the problem in the 2016 Water Act, I begin with what the Act proposes to change. Following Bacchi’s suggestion of “working backwards”, I consider what solutions are proposed to understand where the problem is thought to be and what needs to be changed (Bacchi, 2009; Bacchi and Goodwin, 2016; Pumpo, 2018). As mentioned earlier, the word “think” here is thought of as a practice (Bacchi, 2009, 2012, 2017). The aim of this inquiry is to find an “entry point” (Bacchi, 2009; Bacchi and Goodwin, 2016; Pumpo, 2018), a window on the implicit assumptions that lie behind a defined problem representation. This opening on the problematisation is constituted by the solutions (ibid). Instead of “solutions” and “problems”, Rose (2000) talks about “answers” and “questions”. In this context, it would be “What is the 2016 Water Act an answer to?” That is, what set of questions produces the Water Act as an intelligible answer.

As mentioned earlier, in 2010 when Kenya changed its Constitution (which came into effect in 2013), water supply and sanitation services were declared as basic rights and the provision of these services was assigned to the 47 newly established county governments (also established by the new Constitution) (Patrick and Heymans, 2015). According to Patrick and Heymans (2015), the new Constitution provides a unique opportunity to shift the water and sanitation sector to new scales of improved efficiency in service delivery. All counties were mandated to extend

their water networks to increase service coverage, reduce non-revenue water¹⁰ and water losses, and increase production capacity and cash collection efficiency. However, these concrete upgrades in service delivery were not to be achieved through growth in investment alone; key parties at the county and national levels were to undertake major reforms on the systems and practices within the water sector. In other words all responsible parties at the county and national levels would have to work smart to improve their economic and institutional framework for water utilities and to enhance the enabling environment for attracting sources of finance and reducing investment needs.

The Transition Authority, a statutory body with the authority from the new Constitution was assigned the task to facilitate the transition process in the devolution of water service networks and in the undertaking of the major reforms in the water sector. According to Patrick and Heymans (2015) this transfer of responsibilities to county governments meant that the policy role of national government with respect to water and sanitation services required a level of cooperative governance and consultation with counties which was not the case in the previous governance structure. New legislature which was sector-specific was to be introduced within the water sector, this legislature would allow counties to work with the national government to sustain existing services and to ensure a smooth transition as the legislative framework for the sector was formalized, and new institutions settled in. Thus the 2014 Water Bill (which was later enacted as the 2016 Water Act) was introduced before parliament and stakeholders such as the Nairobi City Council Assembly Water and Sanitation Sectoral Committee and several civil society organisations such as Hakijamii where able to submit their memoranda on what the 2014 Water Bill should contain.

In July 2014 a consultative meeting between the Nairobi City Council Assembly Water Sanitation Sectoral Committee and stakeholders such as the civil society organizations within the water sector on the new legislature that would ensure the smooth transition of the legislative framework in the water sector came to a closure, with the signing of a joint memorandum to replace the 2002 Water Act (the existing law at the time). The signing of the joint memorandum

¹⁰ Water that does not generate revenue. Examples can include water that is lost through leaks, illegal connections, or water that is not paid for by customers because they did not receive a bill or have not paid. (Patrick and Heymans, 2015,p.12)

paved the way for the 2014 Water Bill (once assented into law) to provide the legislative framework in the water sector after the ascension of the new Constitution in 2010. In April 2016, the National Assembly enacted the Bill which was later approved into law in September 2016 by President Uhuru Kenyatta. The Bill was gazetted as a law (2016 Water Act) in October 2016.

The 2016 Water Act states its purpose as:

... to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes¹¹

The Act does not directly state the specific problem(s) it aims to address with regards to management, development and regulation of Kenya's water resources and services. However, when analysing the Act, it becomes clear that it focuses on the problem of incoherence in the administration of water resources and services, which becomes particularly salient when analyzing Section 77 of the Act.

In Section 77, the Act provides the county governments with the mandate to provide water and sanitation services as well as to develop the county waterworks. To exercise this mandate, the county governments are instructed to establish Water Services Providers, which are supposed to be commercially managed and licensed by the Water Services Regulatory Board (WASREB).

The Act states:

(1) A county government shall establish water services providers.

(2) In establishing a water services provider, a county government shall comply with the standards of commercial viability set out by the Regulatory Board.

Furthermore, in Section 68, the Act provides for the establishment of the Water Works Development Agencies (WWDA)¹² whose primary responsibility is to develop “national public works” assets (water assets of national and strategic importance and cross-county water assets) that should be later handed over to the Water Service Providers managed by the county

¹¹ Kenta Gazette Supplement No. 164 (Acts No.43) Republic of Kenya p. 1026

¹² These agencies of the national government are also called Water Works Development Bodies whose primary aim is the development of national public works.

governments. These assets include water storage and water works for bulk distribution of water services. According to the Act the WWDA are also supposed to: *provide technical services and capacity building to such county governments and water services providers within its area as may be requested.*

The Act also states that:

All property, assets, rights, liabilities, obligations, agreements and other arrangements linked to water service provision existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the water services boards and the National Water Conservation and Pipeline Corporation shall, upon commencement of this Act, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf the county water services providers or cross-county water services providers

(Part IX, Section 154, Water Act 2016)

As understood from the above quote all functions of “national public works” assets, agreements and arrangements related to water services provision are being transferred to the county water services providers or cross-county water services providers. The act aims to reorganise the whole water sector into the devolved structure.

The 2016 Water Act essentially proposes that there should be a change in how water resources and services are managed. This means that it specifies what needs to change in Kenya’s water sector as well as the character and causes of the “problem” in the sector. The 2016 Water Act implicitly suggests that there is a “problem” of incoherence with regards to water administration between national and county governments which needs to be fixed. Therefore, incoherence between functions of the national and county governments is “made to be a problem”.

Viewing the 2016 Water Act through problematisation creates a particular understanding of what the “problem” is. The incoherence between the national government and county governments in

the water sector administration emerges as a challenge, a problem that requires a solution. A Similar conclusion has also been made by the 2030 Water Resources Group¹³ who state that:

The purpose of the 2016 Water Act is to align the water sector with the Constitution's primary objective of devolution.

A similar conclusion is also forwarded by the civil society organisation annual report released in collaboration with Hakijamii (Economic and Social Rights Centre)¹⁴. The report states that:

*The signing of the new Water Act in 2016 was a landmark for Kenya's water sector. The Act aligns water governance to the devolved structure of government established by the Constitution of Kenya 2010 and introduces several important changes to the institutional landscape.*¹⁵

Both the 2030 Water Resources Group and the CSO group Hakijamii (Economic and Social Rights Centre) state that the purpose of the 2016 Water Act is to align the water sector with the Constitution's primary objective of devolution. The 2016 Water Act has the primary responsibilities of transferring functions, "national public works" assets (such as water storage and water works for the bulk distribution of water services), agreements and arrangements related to water services provision from the national government to the decentralized county water services providers. In this context, incoherence between the national and county governments, was accepted as normal and viewed as a challenge needing a solution. Thus, it is problematized. However, by framing that there is naturalization of incoherence between the national and county governments as a problem, I am not implying that the responsible institutions (*Water Ministry*) whilst drafting the 2016 Water Act intentionally manipulated the version of the "problems", but on the contrary, "problems" come into existence without deliberate intent through the simple act of making policy (Bacchi, 2009). In other words, the "problems" are constituted in the simple act of making policy.

¹³ 2030 WRG is a public-private-civil society collaboration hosted by the World Bank since 2012.

¹⁴ Hakijamii (Economic and Social Rights Centre) is one of the stakeholders involved in signing the joint memorandum to repeal the former law (2002 Water Act) and enact the new 2016 Water Act.

¹⁵ KAWASNET, 2017, p. 11

In Section 15 of Chapter 18, the Constitution discusses the provisions for devolution to be developed when the Constitution is fully implemented, stating:

15. Provision for devolution of functions to be made by Act of Parliament

(1) Parliament shall, by legislation, make provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185.

(2) The legislation referred to in subsection (1) shall—

(a) provide for the way in which the national government shall— (i) facilitate the devolution of power; (ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and (iii) support county governments;

(b) establish criteria that must be met before particular functions are devolved to county governments to ensure that those governments are not given functions which they cannot perform;

(c) permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that have the capacity to perform them but that no county is given functions it cannot perform; and

In this Chapter, a timeframe of three years from the date of the first election of county assemblies (first elections held in March 2013) is given for Parliament to provide a legislative framework for a gradual transfer of functions and services to the county governments. It is suggested that through legislative framework the national government shall allow for devolution of powers so as to make county governments independent and self-governing.

5.1.2 What assumptions underlie the specific problem addressed in the Act?

According to Bacchi (2009, p. 263) policies create representations of “problems” that take lives of their own because they affect materially and symbolically how people are governed and how we live. To put it in another way, Bacchi is saying that since people are governed through problematisations, they can be seen as framing mechanisms that determine what is considered to be significant and what is left out of consideration (Bacchi, 2009). In the context of this research I argue that incoherence between the national and county governments is framed as a “problem” that needs fixing, hence by this framing the Act determines what is considered significant.

The 2016 Water Act is engaged in governance, that is, the Act guide individual behavior in a desired direction. This means that as a result of the problematizing activity of incoherence between the national and county governments in the 2016 Water Act, individual conduct is implicitly and indirectly steered in a specific direction. In fact, the ultimate goal of governing as mentioned earlier is to change how people act and in this process governmentalities set boundaries on the conduct of individuals.

Chapter 11 of the Constitution of Kenya from 2010 casts light on the background knowledges, thinking and assumptions that exist behind the different forms of rule (governmental rationalities). In Section 174 the Constitution states:

The objects of the devolution of government are—

(a) to promote democratic and accountable exercise of power; (b) to foster national unity by recognising 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 recognise 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 marginalised 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 decentralisation of State organs, their functions and services, from the capital of Kenya; and (i) to enhance checks and balances and the separation of powers.

The above objectives on devolution can be seen as underlying assumptions that offer a conceptual logic¹⁶ that justifies the provision of “devolution” in the Constitution and hence the 2016 Water Act. The objectives can be seen as forms of governmentality as they aim to foster democracy and national diversity, enhanced participation of Kenyan citizens in governance, and promote the rights and interests of marginalized communities, among other things.

A similar conclusion can be drawn when examining the perspectives of the Consumers Federation of Kenya (COFEK)¹⁷ on the impact of the 2016 Water Act on to Kenya’s water sector. They write:

Devolution is an opportunity to deepen and expand on implementation of the rights to water and sanitation by the creation of a better legislation at national and county level which clarifies the minimum national standards in water and sanitation services and also provides a coherent linkage between the two levels of government to ensure coordinated implementation of the rights and enforcement measures on performance against the water service providers and third parties.

COFEK see devolution as a platform for greater engagement and participation in exercising the powers of the State and in making decisions affecting Kenyan consumers along the two tiers of

¹⁶ Conceptual logic refers to meanings that exist in a particular problem representation for it to make sense (Bacchi, 2009).

¹⁷ The Consumers Federation of Kenya (COFEK) is Kenya’s independent, self-funded, multi-sectorial, non-political and apex non-profit federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeit campaigns and business rating on consumerism and customer-care issues.

governance (national and local). With greater engagement and participation, the anticipated outcomes according to COFEK are an equitable distribution of water resources and services to Kenyan consumers. The above mentioned propositions reveal a number of assumptions: firstly, that the change in approach in developing countries advocated by donors and international NGOs, “devolution” has resulted in determining the structure of Kenya’s water sector future; secondly, that transfer of responsibility (i.e., “devolution”) of provision of water supply and sanitation services to county governments was considered an upgrade to service delivery; and thirdly, that “devolution” ended up being considered fundamental to development in Kenya’s water sector future. These assumptions have become so commonplace that it is difficult to think outside them. This is in line with Bacchi’s (2009) suggestion that problematisations are framing mechanisms that determine what is considered significant, and thus they limit awareness to a wide range of conditions that make up our existence.

A demonstration of these framing mechanisms can be examined by exploring the establishment of WWDA within the 2016 Water Act. The findings in this study reveal that through the 2016 Water Act, the national government established the WWDA to gradually create and develop “national public works” assets (such as water storage and water works for the bulk distribution of water services) and then later hand the assets developed to the water service providers located at county or cross-county levels. The position that WWDA is given in the 2016 Water Act is important for governing, because ultimately the assets belong to the national government and it decides on the creation and development of assets in Kenya’s water sector. Under this framework the county and the cross-county water services providers end up being executors.

The WWDAs are responsible for the operation of the public water works, until the responsibility for the operation, rehabilitation and maintenance of the water works is handed over to the county government when they prove that county governments are capable to undertake the responsibility. The 2016 Water Act states in Section 69(3) that in the event that the county government defaults in the maintenance of the public water works, the WWDA can petition the Regulatory Board (WASREB) to declare a default and order back the transfer of the water services provider’s functions to the WWDA. This is a form of governing that entails the exercising of power by using withdrawal of functions from local actors as a form of threat or punishment. Another illustration can be seen in Section 106 where the Act states that it shall be

the duty of every county government executive to monitor and enforce the applicable regulations made under the Act, and any county government executive who fails to do so shall be liable to an order by the Regulatory Board (WASREB) to take such action to enforce such regulations as shall be specified in the order.

A key element in governing of the water services providers at the county and cross-county levels is that WWDA decides on development, maintenance and management of the public water works. However, the 2016 Water Act does not provide clear legislative linkages that would ensure the supervision of WWDAs' water development works (COFEK, 2014). Frustration has been expressed by COFEK over lack of clear legislative linkages between the WWDA and a regulatory body (WASREB) that approves tariffs, and monitors and enforces water services standards (ibid). COFEK feared that the work of WWDA will affect to a great extent the replacement and provision of new "national public works" assets (such as water storage and water works for the bulk distribution of water services). More specifically, their concern is towards the transfer of accountability from the person who develops assets to the one who operates them. COFEK feared that in case there is no monitoring or supervision of the assets that are being developed, there is a risk of developing poor quality of assets which will invariably drive up the cost of providing water services as they will have to be repaired. The costs of these repairs and replacement may have to be generated from consumers or taxpayers in the form of water tariffs.

Under the new 2016 Water Act, WSPs must apply again for new licenses to WASREB. However, it is the responsibility of county governments who have the mandate to provide water services (2030 WRG, 2016). County and cross-county water services providers can also be said to have a strong influence on provision of water and sanitation services. However, national institutions such as WWDA and WASREB have a majority influence on regulation and policy formulation. County and cross-county water services providers are more linked to consumption, use and water services provision.

5.1.3 How has the representation of the problem identified come about?

A way forward after revealing the background knowledges, thinking and assumptions that exist behind the different governmental rationalities within the 2016 Water Act and the different underlying arguments that exist to justify the governmental rationalities is to identify key practices underpinning these assumptions and to trace their origins (Bacchi, 2009). This study reveals that the central focus in debates from Kenya's water sector is on devolution and how it should be designed to optimally reward the Kenyan population with its associated benefits.

According to Ribot (2002), while the decentralisation "discourse" (transfer of powers to actors and institutions at local levels) has rarely been translated into law or practice, almost all developing countries are undertaking decentralisation reforms. It is further suggested that these changes in approach in developing countries have been advocated by donors and international non-governmental organisations (NGOs) who may have varying motives, seeing decentralisation as a means for increasing access, use, management, voice and claims over natural resources. However, according to Larson and Soto (2008, p. 218), the evidence from numerous case studies carried out on decentralization in resource governance contexts reveal that the benefits associated with devolution have often been elusive to achieve, because the institutional changes are rarely achieved in practice. Similar views are shared by Ribot (2002), who states that the potential benefits of decentralisation remain unrealized because the government discourse has not resulted in the enactment of necessary laws, or where decentralisation laws do exist, they have not been implemented.

As mentioned earlier, Bacchi and Goodwin (2016) state: "Following Foucault, discourses are understood as socially produced forms of knowledge that set limits upon what it is possible to think, write or speak" about a defined thing. Thus, an investigation of the articulation of the discourse of decentralisation and its effects within Kenyan society is among the purposes of this thesis. The question that arises then is why devolution is being promoted in Kenya's water sector despite evidence in the literature which seems to disprove the decentralisation framework.

According to Bird et al. (1998), attempting to define decentralisation as good or bad is unproductive and misleading because the impact of decentralisation depends on the design of the process. Bird et al. instead suggest that focus should be directed to the rules that influence the

behavior of actors at different levels of government, in the private sector, and in civil society during the decentralisation process.

Along a similar line of discussion as Bird et al., Ribot (2002) suggests that decentralisation reforms are often accompanied by insufficient transfer of powers to local institutions and even these are often accompanied by tight supervision from the national government. This idea of tight supervision from the national government in decentralisation reforms lies behind the proposition by the new Act to establish the WWDA. The findings of this thesis study reveal that the national government established and empowered the WWDA to gradually create and develop assets (such as water storage and water works for the bulk distribution of water services) and to hand them to the water service providers located at county or cross-county levels. It is my interpretation that, due to the fear of inadequate accountability and capacity within the local governments, accompanied by some reluctance within the national government, the WWDA was established to gradually create and develop assets on behalf of local governments. The assets developed through the WWDA are later to be handed to the county governments when they have developed and proved their capacity to manage the assets.

5.2 Tensions and conflicts surrounding the 2016 Water Act

In order to explore the tensions and conflicts spurred by the launch of the 2016 Water Act, this study has focused on different arguments by stakeholders (such as the Council of Governors, COFEK, and the national media) in Kenya's water sector.

5.2.1 Struggles between competing discourses.

As mentioned earlier, while the decentralisation “discourse” (transfer of powers to actors and institutions at local levels) has rarely been fully translated into law or practice, almost all developing countries are undertaking decentralisation reforms (Ribot, 2002). Decentralisation in developing countries has been advocated by donors and international NGOs who may have varying motives, such as a means for increasing access, use, management, voice and claims over natural resources (ibid).

When the 2014 Water Bill was introduced in the National Assembly, tensions and controversies emerged surrounding the Bill. These have continued even after the launch of the Act. Water Integrity Network¹⁸ (WIN) undertook observations from the annual sector conference and Kenya's water week in November 2016, which took place two months after the 2014 Water Bill was assented into a law (2016 Water Act). WIN explained that the conference provided a perfect opportunity for stakeholders in the water sector to discuss their views on the Act. In addition, WIN stated that the conference was an essential step in bringing both the county and national government executives responsible for water to the table, but tensions remained high. Observations by WIN are evidence of existing tensions and controversies that existed before and after the launching of the 2016 Water Act.

The criticisms towards the 2016 Water Act from the stakeholders in Kenya's water sector can be summarized as follows. As compared to the 2002 Water Act, it (i) reversed legislative provisions for the management and development of water resources and services, (ii) focuses on many national institutions which could easily be merged or removed, (iii) low public participation in developing the new Act, and (iv) low-level emphasis on the devolution of water services as provided for by the Constitution of Kenya from 2010 (i.e., transfer of options such as power, functions, authority and resources from the central government to the county governments). Importantly, it should be noted that the different stakeholders had varying arguments and perspectives related to the 2016 Water Act.

The Act opened up new spaces for the above mentioned stakeholders to make demands as well as foster expectations among local communities and governments in which they expressed their dissatisfaction and disappointment with the manner in which the Act provided legislation for devolution. A common feature from the critics of the new Act was that it maintained decision-making and use of power at the national government level while devolving the task of water services provision to the local governments (COFEK, 2014; TheStar, 2015, 2017).

¹⁸ The Water Integrity Network (WIN) supports and connects an open network of partner individuals, organizations, and governments promoting water integrity to reduce corruption and improve water sector performance worldwide. WIN was founded by [IRC](#), [SIWI](#), [Swedish Water House](#), [Transparency International](#) and the [World Bank Water and Sanitation Programme](#) in 2006 to respond to increasing concerns among water and anti-corruption stakeholders regarding the impact of corruption in the water sector. Formerly an entity of Transparency International, 2014 saw WIN become an independent association (legally WIN e.V., or eingetragener Verein—registered association)

More specifically, the stakeholders expressed frustration towards the responsible offices for formulating the Water Act (Water Cabinet Secretary) and the responsible offices for legal adviser and representative of the government (Attorney General) for establishing the WWDA. Under the new Act, the WWDA will gradually create and develop “national public works” assets (such as water storage and water works for the bulk distribution of water services) and then later on hand the assets to the water service providers located at county or cross-county levels. The Act is presented by the Council of Governors, COFEK, some sections of the national media and a Kenyan citizen as having the interest of the national government at heart (COFEK, 2014; StandardDigital, 2014; The Star, 2015, 2017; ConstructionReviewOnline, 2016). The Kenyan citizen (an environmental activist), also accused the new law of establishing illegitimate and uncertain duties (through establishment of WWDA) which they feared would result in waste of public funds (ConstructionReviewOnline, 2016; The Star, 2017).

The following sub-sections presents more detailed arguments and debates from each of the four main stakeholders identified in this thesis study.

a) Consumers Federation of Kenya (COFEK)

COFEK wrote on their website that:

The Water bill 2014 is causing silent ripples in the manner the water sector will be run even as the annual water sector stakeholders conference is called for March 27-28, 2014 in Nairobi (ibid).

The above statement by COFEK was released leading up Kenya’s annual water sector stakeholders conference in March 2014 in Nairobi. In addition, COFEK expressed their dissatisfaction with the manner in which the Bill was formulated, stating:

... the Bill [Water Bill from 2014] does water down what exists in regulation and in governance and will not as currently drafted lead to an orderly sector. Some issues are poor draftsmanship, some issues are on clawback on what currently exists [former Water Act 2002] and some issues have been omitted

even though the sector has discussed them and are required under due to the fact that water and sanitation are human rights.

The quote above reveals that COFEK warned about dangers of disorder in the water sector if the proposed legislation (2014 Water Bill) was going to be implemented the way it had been drafted. They accused the Bill of being of “low quality” and that their views were not taken into account in spite of a consultative meeting taking place. In some cases, COFEK accused the 2014 Water Bill of reversing the legislative provisions for the management and development of water resources and services under the 2002 Water Act.

b) Council of Governors (CoG)

As mentioned earlier, in April 2014 consultative meetings were underway and stakeholders were allowed to submit their memoranda on what the 2014 Water Bill should contain. The Council of Governors (the leaders of the county governments) gave a different account of the consultations that took place when developing the proposed legislation (2014 Water Bill). The CoG accused the Water Ministry of ignoring or not heeding their inputs on the Bill (The Star, 2015). Through their representative, the CoG stated that they had signed a memorandum of issues that they wished to amend in the Bill. However, they accused the Water Ministry of going ahead and submitting the Bill to the National Assembly without incorporating their input. Their representative released a media statement declaring that:

“There are serious flaws in the bill. We had more than 12 meetings with the ministry but unfortunately they did not incorporate our proposals ... It is unfortunate that and very mischievous of the ministry to disregard the views of the governors. We may have to do a complete overhaul of the bill.”

In April 2016, the Parliament of Kenya enacted the Bill and in September 2016 when the Bill was assented into law, the CoG filed a court petition to stop the implementation of the new law (ConstructionReviewOnline, 2016). They sued the Water Cabinet Secretary (responsible officer in formulating policies and overseeing effective coordination of government operations) together

with the Attorney General (responsible offices for legal adviser and representative of the government, who promotes, protects and upholds the rule of law and defends public interest) (ibid). The CoG argued that the Act was “unconstitutional” as it excluded the county governments and sets up a centralized framework for regulation and provision of water and sanitation services (ibid). The Council also threatened to amend the Bill and make it better by incorporating their views. They feared that unless devolution efforts provided for in the Constitution are not adhered to, developmental challenges faced by many Kenyans may linger. In a media statement the Council’s Chief Executive, said that:

“I earnestly believe that Kenyans will suffer irreparably if this Act is implemented because it seeks to effectively repeal several provisions of the Constitution through the backdoor.” (Construction Review Online, 2016)

The Council’s representative added that:

... the constitution says that the national and the county governments be distinct and that they should run independently but conduct themselves with mutual cooperation ... the previous centralised approach kind of government which ruled the country since 1897 to 2010 left many Kenyans without access to basic services and amenities ... that previous governments resulted to marginalization and deep rooted socioeconomic as well as political problems ... that is why devolution is the only way such ills of the past could be forgotten yet the enactment of the new Act appears to take Kenyans several steps backwards.

While the CoG is probably right that the Water Ministry undermined the county governments and their leadership by going ahead and submitting the Bill to the National Assembly without incorporating their input, the CoG seems on more dubious ground when they claim that the 2016 Water Act was “unconstitutional”.

When it comes to maintaining a centralized framework for regulation and provision of water as well as sanitation services, the CoG accused the 2016 Water Act of diverting funds that were meant for county governments to unnecessary multiple institutions at the national government's level. My interpretation is that these allegations of diverting funds to unnecessary multiple institutions were aimed at the national government establishment of the WWDA. CoG stated that it would be suitable for the county governments to carry out the functions of monitoring, regulating licenses and enforcing license conditions:

... the bill [Water Bill from 2014] disregarded the existence of the county governments ... it has retained more responsibilities at the national government despite water services being devolved ... functions of Water Works Agency [WWDA] which the bill is proposing to be established ... the agency should not be mandated to monitor, regulate licences and enforce licence conditions ... the function is best performed by the county governments.

The argument by the Council in the above quote is similar to the arguments by COFEK, and also the argument by the Council when the law was still a Bill before it was passed into an Act. Both the CoG and COFEK have the opinion that the establishment of multiple institutions (such as WWDA) were unsustainable and maintained a non-devolved decision-making framework.

In addition, the Council also maintained the same argument as earlier: that county governments input were not heeded when the new law was developed. The media article describing the Council's argument stated that:

The council also claimed that the Water Act was enacted without consulting adequately the concerns raised by the regional governments; hence it is against the principal of unilateral access to clean, safe and adequate water provision.

Both the CoG and COFEK critique seemed to be about sentiments of not being able to influence the drafting of the Water Bill 2014 (which was assented into law as the 2016 Water Act).

c) A Kenyan citizen

In February 2017, four months after the Bill was assented into an Act, a Kenyan citizen (Mr. Martin Guya, an environmental activist) also moved to the Kenyan court to stop the implementation of the 2016 Water Act (The Star, 2017). The citizen accused the Act of giving only the national government the powers to decide water conservation and management methods. The citizen feared that the new law excluded the county governments from water management and this subdued devolution efforts. The citizen argued that environmental conservation, water provision and management should be done by both the national government and the decentralised county governments. In a media statement, the citizen expressed dissatisfaction with the new 2016 Water Act by stating that:

The law threatens the realization of the obligation to protect and promote the right to water and sanitation.

In addition, the citizen also accused the new law of establishing illegitimate and uncertain duties which the citizen feared would result in wastage of public funds. His statement is similar to the Council of Governor's which claimed that the Act focuses on the national government and does not acknowledge the existence of county governments.

d) The national media

In anticipation of the new law, Standard Media (one of Kenya's national media groups) praised the 2016 Water Act for providing legislation in management of water resources aligned to the provisions by the Constitution of Kenya from 2010 (StandardDigital, 2014). Specifically the media group complimented the 2016 Water Act for providing legislation on the manner in which inspectors of the Water Resources Regulatory Authority can enter onto private land (ibid). It is suggested by the group that the new law required land owners to be given a reasonable verbal or written notice at a reasonable time before inspection. The media group stated that:

Residents across the country are warming up to a new law that seeks to provide for management of the resource in line with the Constitution. Water and sanitation have been a nightmare especially in Nairobi where over 60 per

cent of residents live in informal settlements. However, there could be light at the end of the tunnel as the run-up to a new Water Act shifts to top gear as economic and social rights organisations strive to ensure equity.

Another article produced by Standard Media was in contradiction to their earlier article as it raised concerns about the 2016 Water Act (Standard Media, 2015). The media group accused the 2016 Water Act of maintaining a centralised decision-making framework (dominant national government) in management of water resources and provision of water services (ibid). Although the media group in this second article praised the new law for acknowledging the Kenya citizens' rights to water, the group immediately accused the law for belittling the task of developing the standards for achieving the rights to water by assigning the Ministry of Water dual roles of being both a player and the referee in defining the degree of its obligations in achieving the rights to water for the Kenyan people. The StandardMedia (2015) statement read:

One of the most glaring flaws in the proposed water law [2016 Water Act] is that while it recognises the citizens' rights to water but omits sanitation, the function of developing the standards for the realisation of these rights will be undertaken by the ministry itself – essentially making the minister a referee and player in determining the extent of ministry's own obligations to the public ... A second flaw in the water bill is the centralisation of decision making system with an overly dominant national government in all apex bodies – the Water Resources Authority, the Water Harvesting Authority, the Water Services Regulatory Board and Water Works Boards which coordinate and control the resources and water services development. This governance approach does not allow for sufficient demand-side input during the key sector decisions...

The debates surrounding the launch of the 2016 Water Act can be seen as a negotiated arena, where different discourses, tensions and controversies compete in regard to what kind of legislation should prevail and who should have the power to define these regulations. In other

words, one can view the debates as multi-sided conversations among different stakeholders trying to persuade each other to agree or at least to take their position seriously (Graff and Birkenstein, 2010). In the midst of these struggles about the new Act, different meanings and practices emerge, such as shared understandings of what local management of water resources entails and how it should be practiced. Such debates from the Council of Governors, COFEK, the national media and the environmental activist contributed to the construction of discourses on “local water governance” that were of different kinds than those that were promoted in the Act from 2016 by the national government. The different understandings of (local or national) management of water resources can be seen as opposing and defining reality in different ways. This is in line with Laclau and Mouffe’s suggestion that no discourse can be fully established; it is always in conflict with other discourses that define reality differently and set other guidelines for social action (Phillips, 2002).

The provision of regulation on management and development of Kenya’s water resources and services is accepted by almost all (if not all) stakeholders as a necessity. The conflict arises over the definition of what kind of legislation should prevail and who should have the power to define these regulations. These acceptances of provisions on regulation on management of water resources and services can be seen to correspond to Foucault’s concept of “discursive formation” (Phillips, 2002). Phillips (2002) defines the concept of “discursive formation” as a frame of different and potentially conflicting discourses that operate in the same social terrain. In the Kenya water sector context and current research the concept of “discursive formation” is equivalent to the provision of regulation on management and development of Kenya’s water resources and services.

Importantly, discourses can provide resources for making particular kinds of demands (Bacchi, 2009). For example, the discourses on “local management” of water resources have drawn upon the narratives on decentralisation reforms which have been advocated in developing countries by donors and international NGOs to make important political claims for recognition. The court petitions to stop the implementation of the new law can be seen as resources provided by different discourses to make political claims for recognition and in some cases make specific demands. According to Patrick and Heymans (2015), under devolution a number of stakeholders at local government level such as the Council of Governors were not satisfied with the

assumption that assets should belong to the national government alone, and there has been a strong call for the transfer of assets to counties.

The arguments and debates surrounding the development and the launch of the Act can be tied to the struggle of competing discourses trying to convince the Kenyan population on certain points of views concerning the superiority of national or of local management of water resources. COFEK and the Council of Governors as stakeholders have criticized the Act of ignoring key provisions from the Constitution of 2010 and even in some instances labelled the law as “poor draftsmanship”(COFEK, 2014). Such statements from COFEK and the Council of Governors were aimed at questioning the national government’s potential to administer Kenya’s water resources while at the same time supporting the views that local governments were more suited to taking care of water resources and water services provision.

6 Conclusions

This thesis has analysed problematization in Kenya’s Water Act 2016 and discussed the tensions and conflicts spurred by the Act’s launch and implementation. The thesis reveals that the Act at the most basic level proposes that there has to be a change at the administrative level in how water resources and services are managed. The textual material analysed in this study shows that the Act was formulated to fulfil the constitutional provision for devolution. Thus this study argues that the Water Act implicitly suggests that there is a “problem” of incoherence with regards to water administration between national and county governments which needs fixing. Similar views have been forwarded by the 2030 Water Resources Group and a CSO group Hakijamii (Economic and Social Rights Centre) in relation to the meaning of the Act for Kenya’s water sector. Both state that the purpose of the 2016 Water Act is to align the water sector with the Constitution’s primary objective of devolution.

Importantly, the study shows that almost all developing countries have been undertaking decentralisation reforms (i.e., devolution) which have been advocated by donors and international NGOs with varying motives, such as a means for increasing access, use,

management, voice and claims over natural resources. However, literature evidence from numerous case studies carried out on decentralization in resource governance contexts reveal that the benefits associated with devolution have been elusive to achieve, not least because the institutional changes are rarely achieved in practice.

The thesis further shows that the change in approach (i.e., decentralisation reforms) means different things to different stakeholders, and it opens up new spaces for stakeholders to make demands from the national government as well as foster expectations among local communities and governments. A common feature in the critiques was that the new 2016 Water Act maintained decision-making and use of power at the national government level while devolving the task of water services provision to the local governments. These debates surrounding the launch of the 2016 Water Act can be seen as a negotiated arena, where different discourses, tensions and controversies compete with regards to what kind of legislation should prevail and who should have the power to define these regulations. In the midst of these struggles about the new Act, different meanings and practices emerge such as shared understandings of what local management of water resources entails and how it should be practiced.

In conclusion, the findings in this thesis indicate that a single process such as decentralisation cannot capture the full complexity of issues in water resources decentralisation. It is more complex than other resources such as forest decentralisation for a variety of reasons, including its direct, daily importance to livelihoods as well as the interests of corporate users, such as for irrigated agriculture; the distinction between the resource itself and service provision; and its fluidity through space. Despite these complexities, the central issues discussed in this study remain relevant in providing insights and lessons into natural resources decentralisation processes and efforts in the context of Kenya as a developing country.

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