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## The political ecology of water commercialisation in Kenya

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O.A. K'Akumu

School of Architecture and the Built Environment,  
University of Westminster,  
35 Marylebone Road,  
London, NW1 5LS, UK  
E-mail: owiti\_kakumu@yahoo.com

**Abstract:** Water is an essential commodity for human life. It is also a political and environmental good. The latter attribute makes it a suitable candidate for analysis in the context of political ecology. This is what this paper does for Kenya's transitory period of water reforms. This paper considers conceptual issues concerning political ecology before proceeding to the empirical analysis. At the empirical stage, it discusses the actors, their interests and actions in the reform process. In this case, the state emerges as a predominant actor whose interest is only to consolidate its ownership and control of water resources and infrastructure to the detriment of other actors and legitimate reform objectives such as service improvement, efficiency, sustainability, conservation and inclusiveness.

**Keywords:** Kenya; water commercialisation; political ecology.

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**Biographical notes:** O.A. K'Akumu is a Research Fellow in the School of the Built Environment of the University of Nairobi, Kenya. He is also a Lecturer on the Urban Management Program of the school. Currently, he is a Doctoral student at the School of Architecture and the Built Environment (SABE), the University of Westminster, London. His research and teaching interests are mainly in urban environmental management and urban economics where he has a number of academic publications.

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### 1 Introduction

In Kenya, water supply infrastructure is a technology that is only available for the urban areas. Hence piped water supply and sewerage service is mainly confined to urban areas. Talking of water services implies the urban water supply and sewerage. The privatisation of the urban water supply in Kenya has generated an interesting political controversy (K'Akumu, 2004). In this politics water is put in the context of an environmental good or material whose use has serious environmental consequences. It is in this context that the concept of political ecology becomes relevant.

In the urban context, Smith (2001) has decried the isolation of development from environment in the urban management debates noting that in developing countries

emphasis is on development while in developed countries emphasis is on the environment. She therefore prefers political ecology to provide a theoretical framework that can address “the problematic ways in which urban landscapes have been treated in sustainable cities literature while also addressing the power relations that determine the distribution of environmental services that are vital to life” (Smith, 2001, p.206). On the other hand, Bakker (2003a) has recommended political ecology as a framework for analysing the process of paradigmatic change in the water sector. Political ecology is particularly seen as a framework that would enable the identification of winners and losers as well as address questions of social and environmental justice in the privatisation process. Secondly political ecology presents a vantage point from which the role of the state in the restructured social and economic order can be evaluated.

This paper therefore uses a theoretical framework of political ecology to analyse the intentions of the state and other actors in the whole process of water reforms in Kenya. The actors’ decisions and actions are analysed in order to give meaning to their intentions and conclusions are drawn on the environmental implications of their deeds and misdeeds. It comes out that the state institutions are less concerned with water conservation or environmental management. Instead their concerns are so much with the ownership and control of water resources and infrastructure.

## **2 The concept of political ecology**

Greenberg and Park (1994) in their inaugural preface to the *Journal of Political Ecology*, indicated that the term political ecology could be dichotomised into: political economy “with its insistence on the need to link the distribution of power with productive activity” and ecological analysis “with its broader vision of bio-environmental relationships”. However, the task is more into explaining the integrative, other than the derivative attributes of political ecology. The concept of political ecology has been dogged by debates since it first came into use. Marangudakis (1998), Bryant (1998), Page (2003) and Walker (2005), among others have wrought summaries of these debates.

The debate has generated both consensus and controversy. The common ground is that political ecology involves the interface of politics and ecology to the extent that politics influence human decisions on environmental issues or environmental knowledge influences political decisions and actions. Ecology in this case takes the biophysical attribute. On the other hand, scholars tend to disagree on the appropriate balance between the two fields of politics and ecology in constituting the hybrid discipline of political ecology. The basic question is just how much ecology is needed to compose political ecology? This debate has been taking place on a temporal scale thereby evolving traditions of political ecology. At present two distinct traditions can be identified, according to Walker (2005): the structuralist political ecology (involving more biophysical ecology than politics) and contemporary or post structuralist political ecology (involving more politics than biophysical ecology).

Page (2003) on the other hand has managed to isolate five distinct meanings in the use of the concept of political ecology. These include structuralist and post-structuralist traditions. The structuralist tradition concerns itself with empirical studies of specific environmental problems in developing countries such as deforestation and land degradation. Examples of these include the work of Hecht (1985), Watts (1985), Blaikie

(1985) and Blaikie and Brookfield (1987). In Page's typologies, the post structuralist political ecology can be divided into two: the Marxist and non-Marxist. The Marxist political ecology involves the extension of the concept of historical materialism to the environmental realm and its application to environmental problems associated with capitalist production systems (Benton, 1998). The Marxists are not concerned with the balance of the political ecological content. Instead the Marxists view society and nature as a hybrid reality that is inseparable and irreversible (Swyngedouw, 1997, 1999). Nature does not exist in a pristine sense; what exists in the wake of human intervention is produced socionature. Society and nature are dialectically integrated through social and biophysical metabolism to the extent that the resulting 'hybrids' or 'quasi objects' cannot be reduced to their derivative components (Swyngedouw, 1999). The contemporary non-Marxists political ecology on the other hand can be linked to the strand of economic anthropology. The 'ecologists' in this tradition have eschewed the Marxist as well as these Structuralist paths. This typology is more entrenched in the political economy other than the biophysical process (Page, 2003). Thus, so far, three distinct typologies of political ecology have been identified according to Page (2003).

The remaining two of Page's five typologies concern: the use of the term to refer to the political wing of pure ecologists; and the metaphorical application that sees social institutions and how they relate as organisms that should be understood in the context of ecology. Both cases are applicable to this paper. The former include the use of environmental movements in lobbying for environmental issues and interests in the political forum or using political tactics like formation of societies, civic education or protests and demonstration to champion the course of the environment. Although Page (2003) has dismissed it as insignificant, this is a very pertinent tradition of political ecology. Environmental movements that ask political questions are useful especially in the developed world (Latour, 2004; McCarthy, 2002). They are also taking root in the developing world. This paper is also founded on the perspective of political ecology as being "concerned with a far broader notion of the political dimension of the interaction between the state and other actors" (Page, 2003, p.359) concerning the economics of environmentally sensitive resources like water.

## 2.1 *The political ecology of developing countries*

Political ecology is a significant paradigm for the analysis of development and environment nexus in developing countries. Zimmerer and Bassett (2003) have pointed out the fact that most political ecological research has a developing world focus. Overall, the body of political ecology could be defined as "the ecology of developing countries". This is because the work that has been done in this field has been done mainly in developing countries and the issues involved are to do with the ecological consequences of economic development or modernisation. Economic development is the millennium desire of developing countries while the environment is causing worries especially after the Rio Summit and its call for sustainable development.

Although there have been calls to expand the outreach of political ecology to embrace the global North (see e.g. Smith, 2001; Zimmerer and Bassett, 2003) political ecology would still remain a useful tool of analysis mainly for developing countries. The developed world has stabilised in many of the areas of concern for political ecology. The developing world, for example, is characterised by: industrialisation process, rapid

population growth, high levels of poverty, rapid rate of urbanisation and inequitable distribution of income or resources.

The industrial base of developing countries is still very low. The process of industrialisation, which is necessary for improving low economic base of these countries, is taking place. But this places a high demand for raw materials that have to be obtained from the environment and natural resources. This establishes the link between economic growth that is the social objective in these countries and environmental degradation.

Rapid population growth is also taking place in developing countries. Population growth means increased demand for basic necessities like food, water, shelter and health. These again have to come from the environment and natural resources. Population increase therefore means increased exploitation of the environment and natural resources, which have implications for degradation.

The incidence of poverty is also higher in developing countries in comparison to the developed countries. Poverty itself is closely linked to environmental degradation. For example, the poor would not afford facilities that are necessary for environmental management especially in settlement areas. Such facilities for example, would include adequate water and sanitation that is necessary for controlling environmental pollution. Secondly, poverty reduction strategies would involve increased exploitation of the environmental and natural resources with implications for degradation. According to Bryant (1997), poverty is so widespread in developing countries to the extent that environmental conflicts are predominantly livelihood-based.

Developing countries are also characterised by rapid rates of urbanisation. Urban areas create more demand on natural resources like water, energy, food and construction materials more than it can produce. They therefore trigger environmental imbalances as needs for such resources must be met by relocating them from the hinterland to the urban areas. Massive relocation of such goods from one geographical point to another may imply serious environmental consequences. Secondly, urbanisation is taking place at a rate that the capital, financial and technical resources may not cope with. This implies lack of vital social and economic infrastructure and services like piped water, sewerage, housing hence populations concentrate in squalid environments that constitute a threat to the overall environment.

Great disparities of income and wealth also exist between population segments of developing countries. These disparities arise due to political, regional, structural, historical, racial or ethnic conditions obtaining in these countries. The disparities raise social, economic, legal and political questions of equity that may also have environmental implications.

Political characterisation is another important factor. Bryant (1997) has reiterated that environmental problems in developing countries are linked to political processes, and it is only through political means that a solution to these problems can be found. Political systems of the developing world are unfair or unjust leading to inequitable distribution of power. The distribution of power on the other hand determines access to natural and environmental resources like water. Inequitable distribution of political power therefore implies inequitable distribution of resources. As Bryant (1997) noted, the unequal power relations condition the human-environment interaction in these countries.

Political ecology is therefore expected to consider the issues discussed above in the developing world. It acts as a framework for balancing development against the environment, economy against ecology and society against nature.

## 2.2 *The political ecology of neo-liberalism*

Apart from the characteristic socio-economic factors that have been discussed in the foregoing part, one of the characteristics of developing countries is their transitional economic status. The transition is in many aspects: but of particular concern here is transition from welfare to market oriented economic management paradigm initiated by development partners. The latter paradigm is otherwise known as neo-liberalism. According to Brenner and Theodore (2002), neo-liberalism refers to open, competitive and regulated markets liberated from all aspects of state controls. This view however denies the ideology its historical value, as it ties it only to the recent feat of liberation from government controls of the socialist and welfarist regimes. This view does not explain the 'neo' component of the term. Why call it new as opposed to old liberalism?

On the other hand neo-liberalism may be attributed to liberal capitalism. The latter existed earlier on but at one time came under the serious challenges of the socialist and welfare states. The socialist states crumbled in the late 1980s and the welfare state has progressively been dismantled thereby making it possible for liberal capitalism to come back as the dominant socio-political economic order. So this new liberal capitalism has been given a user friendly name 'neo-liberalism' to leave out the word capitalism, since capitalism had been demonised by its prime challengers – the socialists and the welfarists statecraft.

The Marxist political ecology, for example, views capitalism as the cause of environmental degradation. The return of capitalism (in the form of neo-liberalism) will therefore face serious interrogation in political ecology especially by the Marxists. Swyngedouw et al. (2002) for example, in constructing the 'The Axioms of Political Ecology' reiterate that:

- 1 political ecology should identify who benefits and who gains from sustaining particular socio-environmental configurations
- 2 political ecology should identify the way in which the relations between social groups (classes, genders and ethnicities) are forged through the processes of socio-environmental change
- 3 political ecology should enhance the democratic content of existing environmental politics by identifying strategies for making the process of producing environments more inclusive.

Bakker (2003a,b) on the other hand has indicated that political ecology deals with questions of social justice and environmental justice and in terms of water privatisation should account for winners and losers of the privatisation process.

## 2.3 *The political ecology of the state*

Bryant (1997) has noted that central to the study of political ecology is the fact that relationships between actors (state, business, NGOs citizens, etc) and the links between actors and the physical environment are conditioned by power relations. He notes that an actor can control the access of other actors to environmental resources such as water. In this political configuration the state always has a monopoly of power over the rest of

the actors in the developing world. The state, for example, with the monopoly over the political mechanism may (Bryant, 1997):

- 1 control the access of other actors to environmental resources such as water so as to control the ensuing economic benefits that may be derived from its exploitation
- 2 decide where polluting industries are to be located thereby controlling the possibility of others to benefit from environmental resources
- 3 exert control over the environment of others through control over the social prioritisation of environmental projects
- 4 regulate the flow of information and ideas to justify environmental actions against other actors.

### **3 The political ecology of water management**

#### *3.1 Water as an economic good*

Water (among other infrastructural services like power, telecommunication and ports), is one of the utilities that has been subjected to neo-liberal policy designs both in developed and developing countries. As the world population rises against the static supplies of water, it has dawned on the world that water is continually becoming scarce. It is for this reason that international forums like the Dublin conference have made recommendations for the conservation of water. The Dublin recommendation popularly known as 'The Dublin Principles' states this under the Fourth Principle: Water has an economic value in all its competing uses and should be recognised as an economic good. The long statement of it is: within this principle, it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognise the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.<sup>1</sup> The term 'economic good' has been contextualised by various international agencies that deal in water to mean privatisation (Budds, 2004; Budds and McGranahan, 2003).

Many works have discussed in detail the transition of water provision from public to market paradigms, including Bakker (2003a) and Budds and McGranahan (2003). The summary of it is that initially, water was considered as a 'public good'. This gave it a set of provision paradigm that involved supply economics in which the public sector was the main producer. Several reasons were used to justify the supply of water by the public sector.

- 1 One was that water production and distribution was a natural monopoly that could not be trusted in the hands of private sector.
- 2 Secondly water was seen more as a welfare product that was not tradable in the market.
- 3 Thirdly, investment in water involved long term capital requirements and the returns were too low that it would not attract private investors.

- 4 Fourthly, water was a product with serious social implications on health and hygiene and hence the market was not regarded as the best instrument for its allocation.
- 5 Finally, in the developing countries, water was seen as an essential input for modernisation including industrial and urban transformations, hence its supply had to be ensured and safeguarded through the public sector.

However, the public sector failed to deliver on water services.

The failure to deliver was characterised by several circumstances as summarised by, for example, K'Akumu (2004, p.214). These included inadequate services both in terms of quality and quantity, inadequate maintenance of infrastructure, inadequate financing for expansion or improvement of infrastructure, poor realisation of revenue, interference by the political system, inadequate human resource that was bloated but technically thin, financial indebtedness – most public water enterprises were financially insolvent and relying on state largesse for survival, corruption was also rife in these institutions, among other things.

To remedy this situation many governments in developing countries saw the need to privatise water enterprises alongside other state enterprises. But privatisation of water was particularly undertaken in the spirit of the Dublin Principles that would attain market conservation.

### 3.2 *The political ecology of water commercialisation*

Commercialisation refers to “a reworking of the management institutions (rules, norms and customs) and entails the introduction of markets as allocation mechanisms, market simulation decision-making techniques and the displacement of Keynesian-welfarist by neo-liberal principles of policymaking” (Bakker 2003b, p.331). Commercialisation therefore means introduction of market principles in the provision of public services. In this market scenario demand is the driving factor in the supply and pricing of goods and services. This is in contrast to the supply led public provision paradigm.

According to Rakodi (2000, p.368), the main objective is “to create quasi market conditions in public services delivery through increased cost recovery and the introduction of performance measurement and reward systems and increased managerial autonomy through the establishment of arms length agencies”. Commercialisation in this case emphasises the retention of public provision but reforming it by introduction of commercial principles and practices through cost recovery, commercial management and institutional autonomy. Cost recovery means market pricing, commercial management means market-based and, competitive procurement of personnel and applications of market-based decision-making criteria while institutional autonomy means elimination of public interference with the functioning of enterprise. This autonomy can be achieved through liberalisation that encourages competition in the product market.

In Kenya, privatisation was not intended but rather commercialisation. Distinction can be made between privatisation and commercialisation (see e.g. Bakker 2003b), however, commercialisation is a subset of privatisation (K'Akumu, 2006). In terms of political ecology, privatisation/commercialisation or de-regulation cannot be perceived as an act of inactivity of the state in the water market, rather the state only re-positions its allegiances and commitments (Bakker, 2003a).

#### 4 Actors in the commercialisation process

K'Akumu and Appida (2006) have explained in detail the process of water commercialisation in Kenya. The process started with experimental or pilot commercialisation schemes then progressed to a comprehensive national commercialisation initiative. This progress was coincidental rather than logical. Pilot commercialisation schemes were trial or experimental commercialisation schemes that involved a selection of municipal councils that were involved in the provision of water and sewerage services. The political ecology of this period is well documented in K'Akumu and Appida (2006) and Onjala (2002) although the said works are not specifically written within the context or concept of a political ecology. Nevertheless, in order to avoid unnecessary repetitions, this paper will concentrate on the political ecology of the comprehensive period. The comprehensive commercialisation process involved a nationwide commercialisation of all water utilities in all urban areas.

In this main commercialisation process, there were four actors. These included the international agencies, the state, municipalities and the civil society as given in Table 1.

**Table 1** Actors in the commercialisation process

<i>Actor</i>	<i>Interests</i>	<i>Action</i>
International agencies	<ul style="list-style-type: none"> <li>• Reformed water sector</li> <li>• Investment opportunities</li> <li>• Security of sector financing</li> <li>• Business possibilities</li> </ul>	<ul style="list-style-type: none"> <li>• Preliminary studies</li> <li>• Realisation of legal structures</li> <li>• Technical advice</li> </ul>
State	<ul style="list-style-type: none"> <li>• Ownership of infrastructure</li> <li>• Ownership of water sources</li> <li>• Control of water resources</li> <li>• Water for power</li> </ul>	<ul style="list-style-type: none"> <li>• Nationalisation of water sources</li> <li>• Creation of state institutions for ownership of infrastructure</li> <li>• Creation of state institution to regulate water market</li> <li>• Consolidation of state power through Minister and President</li> </ul>
Municipalities	<ul style="list-style-type: none"> <li>• Ownership of infrastructure</li> <li>• Operation of infrastructure</li> <li>• Control of infrastructure</li> </ul>	<ul style="list-style-type: none"> <li>• Transformed water departments into public PLCs</li> </ul>
Civil society	<ul style="list-style-type: none"> <li>• Social justice</li> <li>• Environmental justice</li> </ul>	<ul style="list-style-type: none"> <li>• Remained inactive in the process</li> <li>• Agreed to be incorporated in the boards of resulting public enterprises</li> </ul>

*Source:* Compiled by author.

##### 4.1 International agencies

Privatisation or commercialisation of water services has been championed at the international level. The IMF and World Bank particularly have been at the forefront of



championing the reforms in the water sector of developing countries (Grusky, 2001). In Kenya, the exercise started with a National Water Master Plan Study in which JICA played a key role (ROK, 1992). The outcome of the study led to the publication of a water sector reform policy document known as Sessional Paper No. 1 of 1999 on National Policy on Water Resources Management and Development (ROK, 1999). The content was mainly influenced by the Dublin statement on Water and Sustainable Development adopted at the International Conference on Water and the Environment (ICWE) which was a prelude to the United Nations Conference on Environment and Development (UNCED), popularly known as the Rio Summit, whose most memorable attribute is the championing of sustainable development. We have already appreciated the Fourth Principle of this statement.

Following the Rio Summit, the Kenyan government came up with its own strategies for sustainable development. Also, following the Dublin conference the Kenyan government came up with its own version of integrated water resources management policy in terms of the sessional paper. Earlier on, the international community particularly GTZ and KfW had attempted to promote commercialisation and decentralisation of water services in Kenya (K'Akumu and Appida, 2006; Onjala, 2002). GTZ and JICA are still involved in the current implementation of water market reforms as proposed in the Water Act of 2002 with SIDA also playing significant role in the implementation process.

After the legislation of the water Act of 2002 the Kenya government had been reported to be negotiating with a French company with a view to handing over the operations of the water services to the latter to operate on a private basis (Wambua, 2004). However, the legal mechanism is crafted in such a way that it gives less incentive to multinational water companies hence the latter have been edged out of the water market in Kenya.

For the IMF and World Bank the main interest would be to secure their financial interests being the main sponsors of public investments in the water sector. The public sector was not performing and a new paradigm had to be tried.

#### *4.2 The state*

The state is the principal actor in the water sector. It came to assume this role principally because water was seen as a public good, secondly being a developing country for which water is a very important factor for industrial and urban development, it was deemed prudent to bring water services under the control of the state. In the initial arrangement, the state rarely participated directly in water service provision except in rural areas. The main work was left to the National Water Conservation and Pipeline Corporation (NWC&PC), a water parastatal, and municipal council. But in both the cases the agencies were under the direct control of the state through various statutory provisions. In most cases the state, through executive authority, would overturn some of the decisions made by these agencies.

In reorganising the water market, the state made bold moves to secure its interests over other actors. These interests included ownership and control of water resources; as well as ownership and control of water infrastructure thereby retaining political power through control of a vital resource. In order to do this the state performed certain actions. First is the nationalisation of all water resources. This meant eliminating competition from society or social groups who may lay a claim to water resource especially in certain

geographical areas such as river basins. This move is not entirely inappropriate because it may also result into equitable distribution of water resources within or without various geographical enclaves. The state has also ensured ownership of water infrastructure by creation of regional state agencies, the Water Services Boards (WSBs), for that purpose. In doing this, the state has divested the municipal councils of such rights. The state has also acted to retain control of the water market by creation of a regulatory body; the Water Services Regulatory Board (WSRB). This body will control even private actors in the market like service providers; Water Service Providers (WSPs). The state has also consolidated its executive powers through the Minister who is given wide-ranging powers over control of the water market. The Minister is in control of all actors whether state or non-state. Although the state proclaims that it is retracting from the water business and only retaining the responsibility of policy formulation (Republic of Kenya, 2005), it has moved to remain a key participant in the provision of water services under various conditions. Hence there is not an area that is left absolutely for non-state actors.

#### *4.3 Municipalities*

Initially, municipalities were major water undertakers. They provided water to their civic populations and in these cases owned water infrastructure. They acquired such infrastructure with the help of the state or international development partners. In most cases the international development partners found it difficult to deal with them due to excessive interference by the state (Central government) (K' Akumu and Appida, 2006). This occasioned the need to commercialise the water enterprises in order to make them autonomous from the state (Onjala, 2002). However, on detecting this move by the other actors, the state eliminated the Municipalities from this area of operation and gave the rights to local/ regional state enterprises (WSBs). This is a move that has far reaching consequences given that the Municipal governments were elected to office by the local people to manage local resources and provide local services. The state enterprises on the other hand have no local representation; they are just handpicked by an individual – the Minister on behalf of the state. This is a move that unempowers the local people/actors. Since the Municipalities were not keen to relinquish the water business they have gone ahead to accept the state's offer given through the 'Draft Transfer Plan' to turn their water enterprises into WSPs in the form of public limited companies. As WSPs, of course, they will be under the control of WSBs and WSRB.

#### *4.4 Civil society*

Turton (2000) noted that there is a growing desire among the population of a given political entity to be allowed to question the decisions made by political decision-makers about the environment. Such institutions include NGOs, CBOs or in general the civil society. The civil society is a formidable group of actors in the process of water privatisation worldwide. In places like Bolivia, Ghana and South Africa, the civil society has been vocal in opposing and transforming the process of water privatisation (K' Akumu, 2006). In Kenya, however, the civil society was dead silent. No single NGO or CBO came up to stand against the privatisation process in Kenya. Hence the poor who are most likely to be disadvantaged or deprived by the privatisation process had no one to advocate for their rights. A few notable voices rose to be heard on behalf of the poor

including the 2004 Nobel Peace Laureate Professor Wangari Mathai (a government Minister in charge of Environment) and an Environmental Journalist with the Nation Newspapers Mr John Mbaria. But these were individual rather than collective voices. Else the civil society movements were happy being incorporated into the Boards of Directorships of the water companies being formed.

## 5 Reorganisation of the water market

The water Act of 2002 has made some radical departure from the past in terms of institutional organisation. These include nationalisation of water resources, creation of new institutions and licensing rules.

### 5.1 Nationalisation of water resources

The reform of the water law gave the state the opportunity to appropriate the water rights. The Act declares in Section 3 that 'every water resource is hereby vested with the state', (ROK, 2002, p.946). The Act then gives control of water resources to the Minister in Sections 4 and 5. Section 5 reads: "The right to the use of water from any water resource is hereby vested in the Minister" (ROK, 2002, p.946). In this way the state has put itself as the primary stakeholder in water resources ahead of other actors. Although the state may then grant rights to other actors like users associations, such rights are subject to the state's superintendence.

### 5.2 Institutional structure

The water Act of 2002 has also established a new institutional structure that puts the Minister in charge of water at the executive helm of water services management as given in Table 2.

Table 2 indicates the several institutions that have been created by the Act. These are WSRB, WSBs, WSPs, Water Services Trust Fund (WSTF) and Water Appeals Board (WAB). The President does not wield executive powers in the water sector. The President is mandated to make only two appointments to chair the WSRB and WAB. The executive powers of state are directly wielded by the Minister through appointment of members. For the WSRB and WSBs, the Minister directly influences their decisions by giving directives and approving decisions. In terms of appointment of members to these important institutions, the Minister is given absolute discretion. In this legal construct, the Minister is the primary agent of the state as an actor in the management and consumption of water resources. The state has also retained powers to construct water infrastructure (under Section 22) and operate water schemes through NWC&PC as its agent. The state is also allowed to invest in, acquire and control water infrastructure through the Minister in order to provide water in cases where:

- 1 no applicant has come up to apply for a licence to provide water services
- 2 a licensee has defaulted according to the licensing rules
- 3 an emergency situation has arisen
- 4 or where the WSRB for any reason has advised that the Minister should provide water.

In this way, the state has not completely disengaged itself from the ownership and control of water services.

Under the Minister, the WSRB is the most powerful state actor in the management and control of water resources. It is a national institution that issues and administers licences to water undertakers, it determines, monitors and enforces water standards, it is in charge of fixing water tariffs, regulates agency relationships between WSBs and WSPs and it is in charge of information (a handy tool of the state for dominating other actors) among other duties. It is also in charge of the promotion of water conservation and demand management measures that is the central concern of the political ecology of water service provision.

**Table 2** Water institutions and responsibilities

<i>Institution</i>	<i>Core Responsibility</i>
President	<ul style="list-style-type: none"> <li>• Appoints chair of WSRB</li> <li>• Appoints chair of WAB</li> </ul>
Minister	<ul style="list-style-type: none"> <li>• Appoints 10 members of WSRB</li> <li>• Gives directives to WSRB</li> <li>• Approves the terms and conditions of employment for the CEO of WSRB</li> <li>• Approves licensing fees proposed by WSRB</li> <li>• Creates and names WSBs</li> <li>• Specifies qualification of members of WSB</li> <li>• Appoints members to WSBs</li> <li>• May verify the number and qualification of members of a WSB</li> <li>• Approves WSBs investment in water infrastructure</li> <li>• Approves terms and condition of employment of the CEO of a WSB</li> <li>• Retains the residual power to provide water services to consumers with the assistance of NWC&amp;PC</li> <li>• Appoints members of WSTF</li> <li>• Appoints 2 members of WAB</li> </ul>
WSRB	<ul style="list-style-type: none"> <li>• Issuance and administration of licences</li> <li>• Determination and monitoring of standards</li> <li>• Development of guidelines for the fixing of tariffs</li> <li>• Development of guidelines for management and operation of water services</li> <li>• Supervision and monitoring of service provision agreements between WSBs and WSPs</li> </ul>

**Table 2** Water institutions and responsibilities (continued)

<i>Institution</i>	<i>Core Responsibility</i>
	<ul style="list-style-type: none"> <li>• Development of guidelines on regulations for the provision of water services to be adopted by WSBs</li> <li>• Dissemination of information about water services</li> <li>• Promotion of water conservation and demand management measures</li> <li>• Monitoring and reassessment of the National Water Services Strategy</li> <li>• Determination of fees, levies, premiums and other charges to be imposed for water services</li> <li>• Collection and storage of statistics on water services</li> <li>• Coordination of the management of water services</li> <li>• Advisory to the Minister</li> </ul>
WSB	<ul style="list-style-type: none"> <li>• Ensure provision of water services in efficient and economical way</li> <li>• Ownership of water infrastructure</li> <li>• Acquisition or procurement of water infrastructure</li> <li>• Acquisition of land for water infrastructure</li> <li>• Licensees for water service provision</li> <li>• Master of WSPs through delegation of licence</li> <li>• Protection of water resources from degradation</li> <li>• Conservation of water resources</li> </ul>
WSP	<ul style="list-style-type: none"> <li>• Agent of WSB</li> <li>• Provision of water services under WSB's licence</li> <li>• Management and operation of water infrastructure</li> </ul>
WSTF	<ul style="list-style-type: none"> <li>• To assist in financing the provision of water services to areas without adequate water supply</li> <li>• To mobilise finances from public and non-public sources for provision of water services to needy areas</li> <li>• To act as public champion of the disadvantaged in terms of water service provision</li> </ul>
WAB	<ul style="list-style-type: none"> <li>• To provide justice to those aggrieved by the functioning of the water services institutional machinery</li> </ul>
NWC & PC	<ul style="list-style-type: none"> <li>• Agent of state, to manage state schemes</li> <li>• Provision of water on behalf of the Minister</li> </ul>

*Source:* Constructed by author from provisions of Water Act of 2002.

The WSBs on the other hand are local/regional state institutions that are the actors of the state in terms of ownership of water infrastructure. They are the only institutions allowed by the law to own water infrastructure. They may also enter into partnerships with public or non-public institutions to own water infrastructure. The licensing rules give them monopoly as licensees for water service provision. However, the law

does not allow them to operate water infrastructure. This right is reserved for the WSPs as their agents. Exception is granted to them to operate water infrastructure where they cannot procure an agent to undertake this role. They are also responsible for conservation of water resources at local/regional levels.

The law defines a WSP as a company, non-governmental organisation or other person or body providing water services in a specific licence area. As has been noted it is an agent of the WSB to whom the latter would delegate its licence for provision of water services. It is mandated to operate and manage water services. The WSPs case forms the tiny opening for access to water resources the state has allowed for the participation of other actors like the private sector, non-governmental, quasi-governmental and local governmental institutions in the provision of water services.

WSTF operates as a state-run NGO that would placate those actors that are not catered to by the mainstream institutions involved in the provision of water services. These would include those who are not financially or geographically favoured for water distribution networks in a commercialised environment. It is constituted by the Minister and is mandated to draw funds from both public and non-public sources. It can therefore be useful in networking with development partners to bring water to the actors who are deprived through privatisation (K' Akumu, 2004).

The WAB will perform more or less the same function of WSTF; that of taking care of those who feel deprived in one way or another through the functioning of a commercialised water economy. However, instead of distributing equity in the form of physical resources to the deprived, WAB will be distributing equity in the form of legal justice to the deprived. It will hear and decide appeals against decisions of various state actors in the water economy.

The NWC&PC on the other hand is a carry forward state institution from the previous institutional set-up. It is responsible for management of state water schemes according to Section 22 of the Act. It is also mandated to provide water where the Minister is required to do so under Section 67 of the Act.

### *5.3 The role of licensing rules*

The licensing rules are instrumental in ensuring state monopoly of water infrastructure and control of water provision. The rules first outlaw provision without a licence (S.54) then grants the right to issuance of licences to WSBs only (S.57). The WSBs on the other hand are state enterprises that are incorporated by the Minister through the statutory provisions of the Water Act of 2002. The state has therefore used the licensing requirements to outlaw competition by other actors especially the private sector in the water market.

## **6 Economic good and market conservation**

Going by the international trend and conventional practice in the water market reform, the main intention of reforming the water sector is to achieve economic efficiency in the provision that would lead to water conservation through market pricing. Market pricing is expected to achieve efficient use of water resources by reducing uneconomical/unnecessary usage and wastages. But how does the new structure achieve this? There is no route map to this in the resultant operational machinery as put in place

by the Act. The legislation only provides hints to this. Such hints occur from time to time without any clear interconnection as discussed in the following paragraphs.

The functions of the WSRB are listed to include the following (ROK:977): “to develop guidelines for and provide advice on the cost-effective” and “efficient management and operation of water services” and “to promote water conservation and demand management measures”.

How the WSRB is going to do this is not clearly provided for in the Act. The Act should have provided a framework as to what constitutes ‘cost-effective and efficient management’ as these are very relative terms. Leaving it to the discretion of the WSRB is therefore not helping much. This being a matter of law, it is subject to litigation and legal controversy. Promoting conservation and demand management measures on the other hand is put as if it is an optional goal.

It can be assumed that the WSRB can implement these requirements through the licensing process. In Section 57(2) an applicant for a licence is to furnish certain details in the application documents including (ROK:986): “...plans for the provision of efficient, affordable and sustainable water services”.

This will be presumably based on the WSRB’s guidelines on what constitutes ‘efficient, affordable and sustainable’ water services. But how does the WSRB develop these guidelines? Are water services efficient, affordable and sustainable simply because WSRB can say so? A framework for development of guidelines is lacking. The law simply assumes that the WSRB shall know and perhaps has absolute knowledge on this.

Section 5 of the same Section 57 declares that a licence shall not be granted unless the WSRB is satisfied that (ROK: 987): “the applicant has presented a sound plan for the provision of an efficient, affordable and sustainable service” and “the applicant ... will provide the water services authorized by the licence on a commercial basis and in accordance with sound business principles”.

The first requirement has been considered in the foregoing discussion. The second requirement is the only phrase in the Act mentioning commercialisation of water services. Again it does not define what commercial basis is. This is also subject to the discretion of the WSRB.

In summary therefore, it becomes apparent that in this political ecology of water commercialisation, the state concentrated more on the ownership and control of water resources and infrastructure to the detriment of the main ecological issue of water conservation. But the Act was not drawn by the state alone; hence the other actors are guilty of omission. The legal framework does not provide any indication of commercialisation, nor does it indicate any possibility for conservation.

## **7 Transfer of water services plan**

Section 113 of the Act provides for the formulation of a Transfer of water services plan. This section gives the WSBs legal rights to (Ministry of Water and Irrigation, 2004):

- 1 assume overall administrative and legal, responsibility for provision of water services that was previously directly under the Central government, that is, the Department of Water Development except the direct operation of facilities that the Act reserves to the WSPs

- 2 assume ownership of water services facilities owned or used by the Central Government (Department of Water Development and its parastatal – NWC&PC)
- 3 access water services facilities owned or operated by local government service providers
- 4 influence the use of water services facilities owned or operated by NGOs, CBOs, community self-help groups and other local water undertakers.

The exception under (1) is not absolute since the law allows the WSBs to act as WSPs where suitable WSPs cannot be found. Finding a WSP on the other hand will be a preserve of the WSB itself, hence giving it the chance to fail to get one and hence double up the roles. Ownership transfer at (2) involves transfer of fixed assets including land and buildings, water plant and networks, operational assets, equipment, books and records.

The Draft Transfer Plan has allowed for (Ministry of Water and Irrigation, 2004):

- 1 formation of partnership between a local authority and a WSB in the provision of water services
- 2 a WSB to gain control of a respective local authority's infrastructure or facilities through lease or outright purchase or any other legal arrangements
- 3 creation of autonomous legal entities by local authorities to act as WSPs.

By suggesting partnerships between WSBs and respective local authorities, the plan is moving to allay the fears of the local authorities that the reforms would lead to the loss of their long term investment in water infrastructure. Alternatively the WSBs would compensate for the assets acquisition through purchase price or rental fee. To placate the local authorities further, the plan allows them to transform their previous water enterprises into WSPs. This is how the Water and Sewerage Departments (WSDs) of water undertaking local authorities have transformed themselves into WSPs by forming public PLCs (K'Akumu, 2006). The situation is made more complex in cases where WSBs and respective local authorities have formed partnerships concerning the ownership of water infrastructure. In such cases the WSB officials also sit in the Boards of the WSP formed by a respective local authority. This extends the presence of the Central government miles ahead into the ownership and operation of the water infrastructure.

For water facilities owned or operated by the local communities such as NGOs, CBOs and self-help groups, the plan does not give right of ownership to a WSB. But a WSB is given supervisory role over them and their investments in such facilities must go by the approved plans of the respective WSB. Like the local authorities, the plan has also given them the option of transforming into WSPs.

The main drawback of the plan is that it does not recognise any water providers outside the traditional ones, that is, the local authorities and the local communities. The Central government (Department of Water Development and NWCP), according to the plan, have to transform into 'interim WSPs' expected to continue providing services up to 30th September 2006. The plan does not recognise or provide for private individuals or companies in the supply of water services. This means the spirit of decentralisation for the benefit of the market was never there *ab initio*.



## 8 In-built systems of political ecology

The Act has also done some good by providing internal systems which can engage other actors in making decisions about the use and management of water resources. These include the National Water Services Strategy (S.49), National Monitoring and Information Systems (S.50) and public consultation (S.107).

### 8.1 *National water services strategy*

The Minister is supposed to formulate the WSS following public consultation. It is also the Minister's duty to review the National Water Services Strategy (NWSS) from time to time. Its objectives are:

- 1 to institute arrangement to ensure that at all times there is water supply to all areas
- 2 to design a programme for provision of sewerage services to urban areas.

It has to take into consideration the existing water services, the number and location of people who are not being provided with basic water supply and sanitation, plans for the extension of water services to underserved areas, the time frame for the plan and an investment programme. This would enable deprived consumers to express their needs for purposes of incorporation into the water service development strategy.

### 8.2 *National monitoring and information systems*

The NWSS shall also put in place a monitoring system known as National Monitoring and Information Systems (NMIS). This would have the overall responsibility of collecting and managing information on water services. The same information would be disseminated to the public. The intention is to help other actors in monitoring the progress of the NWSS and the overall performance of the water market. Section 50 (5) requires the WSRB to prepare an Annual Report of its work and activities. Section 50 (6) gives members of the public the right to access any national information system or the WSRB's Annual Report. The only drawback is that the NMIS would be the responsibility of the WSRB which is a state actor being put in charge of informing the other actors. As already noted, information is a tool of state dominance and may therefore be used to the disadvantage of the other actors.

### 8.3 *Public consultation*

Section 107 provides for public consultation on applications or actions proposed to be taken within the operations of the water market. Applications for licenses for example, are subject to public consultation as well as the NWSS. The transfer draft plan has also already been subjected to public consultation (Ministry of Water and Irrigation, 2004). Public consultation ensures that the views of all actors are taken into account in making decisions about water resources. Public consultations are also a plus for good governance in the management and operations of the water sector in Kenya (K'Akumu, 2007).

## 9 Conclusion

This paper has constructed a narrative of the implicit and explicit decisions and actions of various actors in the transitional process of the commercialisation of water in Kenya. The narrative has been worked within the political construction of economic and environmental objectives of water commercialisation. As Bakker (2003a) had noted, commercialisation in this case did not mean the state's withdrawal from the control of the water economy but rather a rearrangement of the state's instruments for the effective control of the water market.

In the Kenyan situation the state has made overt moves to own and control both the water's natural and capital water resources to the disadvantage of the other actors. The state has taken ownership of the natural water resources by nationalising all water sources. After gaining ownership of these sources, control and management has been vested with the Minister or state agencies. In terms of ownership of water capital, the state has moved the ownership from Municipalities and vested the rights on its corporations. Control is also vested in the corporations with operations being left to other actors known as WSPs. The state has also created an institutional set-up that is dominated by its own actors. International investors have very little practical chances in this scenario hence they have been weeded out. Local privateers also have little chances since the only slot available, that of WSPs, has been taken by Municipalities in practice.

Although the principal move on commercialisation was to reduce control and public participation and to achieve the environmental goal of conservation through market mechanism, chances of market principles and practice are nigh. The public sector remains to dominate the water market through state and quasi-state actors. The state has assumed that its actors in the market would achieve some sort of cost-effective pricing of water without the market mechanism of demand and supply. In essence privatisation and conservation has lost. In calculating its policy moves, the state left conservation or other benefits of privatisation out of the equation. Instead it concentrated on the ownership and control of resources.

Concerning civil society as actors, the Kenyan situation is lacking in the positive activism of such actors. In Kenya, no member of the civil society raised a voice of comment on the goings-on in the transitional water sector. Instead members of the civil society have been incorporated in the resultant institutions where they have remained quiet without raising any issue regarding water business in the country. This is so in spite of the fact that the commercialisation outcome has made far-reaching changes that may require more of civil society assistance.

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## Note

The Dublin statement on Water and Sustainable Development. Available at: <http://www.gdrc.org/uem/water/dublin-statement.html> or <http://www.wmo.ch/web/homs/documents/english/icwedece.html>.