

# The Impact of Devolution Policy on Water Service Delivery in Kenya

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**Abstract:** Various institutional models for the governance of water services have been implemented in different nations with varying degrees of success. Devolution is one such model, in which both political policymaking authority and fiscal resources are decentralised to subnational government units. Assigning specified responsibilities to various levels of government is a crucial design future of the institutional arrangements enacted through devolution policy. This article examines how the assignment of functions within Kenya's existing institutional structure, in accordance with devolution policy, has impacted the country influenced the provision of water services. The article is based on qualitative data drawn from twenty-six semi-structured interviews with policy actors from the national and county levels of government, as well as non-governmental water sector actors. Transcribed data were analysed using thematic coding through *Dedoose*, a tool for qualitative data processing. The article establishes that a lack of clarity on functional assignment in the devolution institutional arrangements has led to opportunistic actors, primarily from the national government, exercising their powers to assert a dominant position in water services delivery, even in functional competencies assigned to the county governments, thereby impeding the achievement of optimal outcomes in water supply services. The article concludes that when designing institutional arrangements for public service delivery in multilevel governance regimes, it is crucial that the adopted configuration recognises and adequately addresses the political complexity inherent in the distribution of authority and attendant fiscal resources through a clear definition in the legal framework, of explicit functions assigned to each level of government and concurrent functions to be undertaken jointly by both levels and how these should be coordinated. To make devolution policy more effective, the assignment of functions should also be proportional to the scale of the policy issues being addressed at what level in order to avoid situations of institutional mismatches that could undermine the desired governance outcomes.

**Keywords:** Devolution, Institutions, Functional Assignment, Water Services Delivery

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## 1. Introduction

The institutional structures as a configuration of the governance system for accomplishing the mandated functional assignment between multiple governing entities in a devolved governance regime, have significant influence on the outcomes of water governance [13, 19]. Globally, various forms of institutional structures have been used in the water sector by various countries, with varying degrees of success. In sub-Saharan Africa, corporatization, and commercialization of water utilities, establishing

public-private partnerships, decentralizing service delivery, and formalizing community management approaches to water governance are the dominant institutional arrangements for water services delivery. Around 40% of African countries have some form of subnational governments, whether provinces, counties, local councils, or municipalities, that are responsible for water provision [1]. While community management remains the most widely used institutional approach to rural water access in most African countries, its lack of formal recognition and institutional support has resulted in non-functional infrastructure and low financial sustainability [7, 29]. The assignment of roles and

responsibilities between multiple levels of government is one of the most significant design elements of a well-functioning decentralized political-administrative system [14]. The literature on institutional structures for various public including water services has connected the effects of the overarching centrally directed policies on water outcomes to the concept of subsidiarity, emphasizing the tensions between harmonization, maintaining order through hierarchy, and the need to allocate jurisdictional competencies based on the locality of a policy issue. There is conflicting evidence from different countries regarding how successfully the existing overall institutional framework of norms has managed these tensions in order to yield positive outcomes in water services. In Chile, the existing centralized institutions constrained regional water agencies' operations at the local government level, resulting in poor infrastructure investment overall and rural areas in particular [24]. Local governments had limited authority to adjust water policies to make them more of their communities due to the unequal distribution of political power inherent in the overarching institutions. Particularly in developing countries in the global south, the lack of clarity in assignment of responsibilities between municipalities and higher-level government organizations has resulted in ineffective communication and coordination between subnational municipalities and the central level, resulting in wide disparities in water access levels [39]. Similarly, design flaws in the overarching institutional of rules resulted in a scale mismatch in the institutional setup, with those most directly impacted by water allocation being left out by those with greater authority over how water allocated among different users [15]. On the other hand, despite their disproportionate economic advantage over locally organized irrigation associations (service providers), the central governments did not employ coercive strategies that contributed significantly to the successful self-organization and development of endogenous institutions to fit context in Japan [35].

In Kenya after several years of operating without a water-specific substantive policy and legislative framework, Kenya's water sector underwent significant reforms in redefining its institutional arrangements for water service delivery following the passage of the Water Act 2002 [26, 28]. The new law resulted in significant structural changes to the sector's institutional landscape, the most notable of which is the separation of sector governance functions into distinct institutions including the provision of water services from sector regulation. Later on in 2010, Kenya adopted a new Constitution resulting in further institutional restructuring, with the provision of water services being decentralized to subnational governments. The Constitution of Kenya of 2010 established Kenya as a unitary state with a multilevel two-tier government that decentralizes policy-making power and resources from the central national government to 47 newly created county governments. Schedule 4 of the Constitution Kenya establishes water services delivery as a concurrent function with some roles such as water resources and development of cross-county bulk water services

to the national government while the county governments are assigned the functions of county public works which includes water and sanitation services delivery within county.

Despite adopting and implementing this devolution policy in water services delivery over a decade since 2013, the performance of water services sector in Kenya has improved erratically and inconsistently, with two predominant patterns. First, the access disparities between rural and urban areas, cities with varying utility sizes, and counties are widening. While there have been some improvements in the financial and operational performance of government-owned water service providers, coverage, service quality, and technical performance, especially non-revenue water levels, have stalled [39, 18, 40]. Additionally, contestation and disagreements over critical water services functions such as the establishment and approval of water tariffs, role of the national government vis a vis the role of the county governments and ownership and liability for water supply assets remain unresolved governance issues that stymies the sector's growth. A recent sector analysis concluded that the challenges in the implementation of the devolution institutional framework for water services delivery and an unsustainable sector financing model are the main impediments to Kenya's progress towards achieving its universal access objectives [43].

This article argues that the observed sub-optimal performance in the provision of water supply services is attributed to deficiencies in both the design and implementation of the institutional structures in place under devolution policy. Because of the unresolved governance challenges in the sector, a siloed dual system for delivering water services, one that operates through national government institutions and another that operates through county government institutions, has created separate policy centres and investments approaches that operate independently with minimal consultation and cooperation in processes of water services delivery, resulting in mismatch in the allocation of limited resources and unsustainable services thus constraining the country's progress towards the set targets in water services delivery.

## 2. Theoretical Framework

Governance Theory was applied in this study. Governance theory is primarily concerned with the development, maintenance, and evolution of collective decision-making arrangements over time, resulting in a variety of outcomes [35]. Polycentric governance theory, a subfield within the wider governance discourse, was applied as the primary lens through which data was organized, analyzed, and interpreted in this study. The theoretical logic is founded on the definition of a polycentric governance system as one characterized by the presence of multiple decision-making centers with overlapping areas of responsibility (jurisdictionally and functionally) over a policy arena nested within an overarching institutional structure. Polycentric governance theory was used for this study because it

provides a valuable framework for deconstructing the intricacies inherent in multi-institutional and multi-level governance regimes such as Kenya's devolved structure. Kenya's constitutionally established decentralized government system reflects the fundamental elements of the institutional arrangement outlined in the theoretical constructs of institutional polycentricity. The existence of an overarching set of institutional rules is asserted to be a critical feature of polycentric systems, and it can have a beneficial effect on governance outcomes depending on the extent to which lower-level actors are involved in their formulation, the extent to which the rules recognize lower-level autonomy, and the extent to which higher-level actors exert control over the lower levels [4, 7].

The study argues that the existing institutional structures for water services provision, through its model for intergovernmental functional assignment, continue to reinforce a centralism that has limited the role of county governments in providing water supply services, thereby stymieing realization of the normative benefits of devolution in public services delivery. In order to advance the argument, Kenya's devolution structure has resulted in an institutional architecture for water governance in which service delivery functions are delegated to numerous independent actors at the national and subnational levels, but with functional interdependence. The fundamental reason for this structure is to promote scale matching, in which those directly impacted by the provision of water services take the lead in planning and organizing the provision. The institutional decentralization which provides county level policy actors a degree of autonomy to act at county levels enables more contextually appropriate water service delivery by allowing for adaptation to actual and changing local conditions and institutional bricolage than more centralized service delivery would. The other critical aspect of how the polycentric institutional arrangement facilitates water service delivery is its nested structure, in which subnational institutions, while operating autonomously, are embedded within a national-level overarching system of rules designed to address institutional fragmentation, coordination issues, and to ensure enforcement of a minimum level of service.

### 3. Methodology

The study obtained data that sought to address the research question about how the existing institutional structure under the devolution system had affected water supply service

delivery in Kenya. The largely qualitative data was collected using semi-structured interviews with 26 respondents drawn from the national government, the county government, and non-governmental actors. The respondents were purposively sampled based on their intimate knowledge and close interactions in the governance of water supply services in Kenya. The respondents were asked to explain: the assignment of functions between the 2 levels of government with regard to whether how the current institutional structure assigns functions favor national government over county governments in terms of water service delivery considering that it is constitutionally a devolved function; the major contested issues/areas in the assignment of water sector functions between the 2 levels of government; and finally, the source of those contestations.

To this end, a qualitative interpretivist epistemology was adopted as the most appropriate research approach in this empirical study. In a systematic manner, contents of the interview transcripts were analyzed and synthesized using qualitative thematic analysis. *Dedoose*, a software programme for qualitative data analysis complimented with MS Excel-based analysis, was used to code, categorize, and analyze transcribed interview recordings.

## 4. Data Analysis and Discussion of Results

The data analysis and discussion are based on the synthesis of results collected through the interviews. Two themes have guided the presentation, analysis, and discussion of the data. The first theme concentrates on the assignment of functions between the two levels of government and explains, based on the data, whether the institutional arrangements under devolution policy reinforce centralization, as argued in the previous section. The second theme focuses on explaining the contested issues in the assignment of functions and the sources of these contestations.

### 4.1. Assignment of Functions for Water Services Delivery Between the Two Levels of Government

To establish the perceptions and *de facto* experiences regarding the assignment of functions between the two levels of government, the respondents were asked to explain how the current institutional structure assignment of functions for water services provision favors the national government over county governments. The responses are as shown in Table 1.

**Table 1.** Perceptions on whether the institutional structure favors the national government over the counties by actors.

Category of respondent interviewed	Current Structure favors National Government	Current Structure does not favor National Government
County government actors		
Water service provider company officials	3	3
County executive water department officials	1	2
Council of governors' officials	2	
National government actors		
Ministry of water officials	2	1
Water Works Development agency officials		1

Category of respondent interviewed	Current Structure favors National Government	Current Structure does not favor National Government
Other national water sector parastatal officials	4	
NGOs/Civil Society organizations	1	2
Development partners (WB, USAID etc.)	3	
Totals	16	10

(Source: key informant interview transcripts)

Table 1 shows that more than 60 per cent of the respondents expressed an affirmative response that the current provisions of intergovernmental functional assignment as defined in schedule four of the Constitution of Kenya for the water sector still largely reinforces the role of the national government over the counties.

There was no consensus among all respondents within any category regarding whether the current institutional framework favors the national government over county governments. The only exceptions were the Council of Governors, national parastatals, and development partners, who were unanimous in their opinion that the current system favors the national government. However, there was no consensus among the responses from county governments' respondents, Ministry of water officials, and NGOs in the water service sector, indicating that, in the view of the actors, roles between the national and county governments are unclear. The respondents who were of the perception that the assignment of functions does not favor the national government attributed the observed challenges to implementation issues rather than a flaw in institutional design, with the majority being of the view that the roles and responsibilities of the two levels of government as presently established in the institutional structure is sufficiently clear to enable water services delivery as envisioned under the devolution policy.

The fourth schedule of the Constitution of Kenya of 2010 and subsequent legislations, such as the Transition to Devolved Governments Act of 2012, outline the exclusive and concurrent lists of functions and powers assigned to the

national and county governments. The functions of water services assigned to the national level include water protection, water storage, dams, hydraulic engineering, and other water service functions classified as national public works, although this is not explicitly defined. Water services delivery functions assigned to county governments are classified under the category of county public works and services, in which water and sanitation services are mentioned exclusively, including rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting, and urban water and sanitation services with formal service provision, including water, sanitization, and drainage services.

The respondents' responses to the question of whether the assignment of functions favors the national government over the counties, which indicate parity in the responses, indicate that the constitutional jurisdictions of each level of government require further clarification and elaboration. An analysis of the constitution and subsequent legislation reveals that the ambiguous definition of the extents of national government functions, such as hydraulic engineering and what constitutes national public works, relative to the clearer detailing of the text for county level functions creates the potential for overlapping mandates, causing confusion that may have contributed to the parity of the interviewees' responses.

The respondents were then asked to explain why they thought there was favoritism, either way and responses summarized as shown in table 2.

**Table 2.** Respondents' perceptions on why the institutional arrangement favors the national over county governments in water services delivery.

Areas where the current institutional structure favour national government over county governments in terms of water service delivery	Category of respondent who gave this response
Yes, Resources allocation has not followed functions and has been done largely in favour of the national government	Council of Governors, NGOs/Civil Society organizations, Development partners, County executive department officials,
Yes, the counties lack technical capacity and qualified personnel, a situation which has compelling the national government to assume devolved water service functions in some areas	Water service provider companies, Water Works Development Agency, NGOs/Civil Society organizations, Development partners
Yes, the assignment of functions is such that counties need the approval and are under the oversight of national government thus favouring the national over the counties	Ministry of water official, Water Works Development Agency
Yes, the national government has established "middlemen agencies" between them and the counties to take on county water functions thus hindering the counties from executing their constitutional functions	Council of Governors
No, the intergovernmental functional assignment is clear, but the transition process has been rushed, which negatively affects its implementation	Water service provider companies, County executive department officials, Ministry of water official, Development partners

(source: key informant interviews transcripts)

Table 2 shows that the current institutional structure favors the national government over county governments in terms of water service delivery in primarily four (4) areas: (i) through

patterns of resource allocation, (ii) deployment of technical staff, (iii) requirement of national government's approvals of certain processes within the county governments'

jurisdictions, and (iv) through the establishment of middlemen agencies by the national government. These are explained in turns as follows.

#### 4.2. Resources Allocation Has Not Followed Functions

Some respondents, primarily from the county level, are of the view that while intergovernmental functional assignment as established in the current institutional arrangement makes it clear who is responsible for what in the delivery of water services, the allocation of financial resources has not followed functions. This is because actual implementation practice in the water sector is still such that the national government performs most water services delivery functions, including those devolved to counties. Some of the county functions cited by respondents as being carried out by national government agencies include the development of small-scale infrastructures such as stand-alone boreholes within a county, which are not cross-county water services that the national agencies are expected to carry out. A respondent from the council of governors observed that despite water services delivery being a devolved function, the pattern of budget allocation in the last decade has been such that majority of funds for the water sector has been appropriated at the national level. This perception is supported empirically by a World Bank report which shows that the relative share of water sector expenditures by national government ministry of water and its agencies increased slightly during the period from 2014 to 2020, while the relative share of expenditures at the county level decreased. The report indicates that at the national level, water expenditures increased from 76% in 2014 to 82% in 2020 [43]. In the same period despite coinciding with the start of the implementation of devolution which assigns to the counties the functions of water and sanitation services delivery, the counties, on the other hand, had their share of water sector spending decrease from 24% to 18%.

Respondents, both from the counties and from the national level, were of the view that the county governments' ability to fully carry out their assigned functions under the current structure of functional assignment is further constrained by the fact that, even though most counties were expected to generate sufficient local revenue to expand water services, they have not been able to do so due to limited economic activity at the county level.

*The constitution envisaged that the counties would raise revenue, but the issue is from what, what are the economic activities in those counties that can allow them to raise the revenue....So, most of them are limited to the exchequer releases. (council of governors [CoG] secretariat official)*

The counties have thus been compelled to rely on transfers from the equitable share of national revenue from the national government for more than 70% of their expenditures, making them much more fiscally dependent on the national government and consequently less autonomous to exercise their subsidiarity in water services delivery. [44, 8]

(a) Technical staff capacity to deliver assigned functions

The second area highlighted by most respondents as an

area where institutional structures favored the national government over the counties in water services delivery was the availability of competent technical personnel to execute assigned functions, a situation that has, according to some respondents, primarily from the national government, compelled the national government to assume devolved water service functions due to the absence of the same at the county government levels. According to several interviewees, county governments have not yet fully established their civil service structures and, as a result, lack the technical capacity to perform assigned water services functions, such as the development of complex infrastructure and the formulation of local policies. Consequently, these responsibilities are assumed by the national government, whose personnel are more capable to deliver. It is quite intriguing that some of the respondents who raised this concern about the lack of competent staff in county governments are from the counties themselves.

*The national government has the technical capacity and equipments to ensure water provision and also the financial capacity. the truth is that Kenya is still where most federal governments were in their early years of formation. the counties have little expertise and sophistication in public policy development and implementation, the county bureaucracies are small and immature relative to the national bureaucracy, this has had a significant impact on how citizens experience the benefits of devolution, because of this, it seems like hope is diminishing and the national being more profound, but this shouldn't be seen as a problem, it is a developmental state that I believe we shall overcome soon if there is good will from all policy actors at both levels....(county government official)*

This lack of capacity hinders the counties' ability to execute the functions assigned to them, resulting in delays and inefficiency in service delivery. Consequently, most counties continue to rely on the devolved government to carry out their designated responsibilities. This gives the appearance that the structure favors the national government, but it is merely ensuring that the government as a whole remains accountable to citizens regarding service delivery.

(b) National government's oversight over county governments' areas of competencies

The assignment of functions such that counties require the approval and are under the regulatory oversight of national government in certain functions assigned to them was raised as a key area in which respondents are of the view that the institutional structures favor the national government over the counties. This perception was strongly expressed by several county level interviewees. The nature of this oversight and need for the national government's prior approval manifests in practice in two ways, according to the respondents, both from the national and county levels. First is that the counties' ability to negotiate directly with external partners for funds to support water services is constrained by the requirement that they must obtain national government approval for such efforts, indicating that functional

assignment continues to favor the national government in this regard.

*The national government is in better position to negotiate with external investors into the water sector because even if the county government was to negotiate with an external investor, they would still need to go through the national government... (waterworks development agency official)*

Secondly, the institutional structure assigns national regulatory oversight, such as licensing of county-owned water companies, setting of water services standards, and approval of water tariffs to the national government, which, in a sense, gives the national government a preminent position in the sector relative to the counties. The counties view this oversight and the need for consent from the national government for functions they believe to be within their functional competencies as a violation of their subsidiarity, as they view themselves as equal governments and would prefer to be completely independent from such oversight. Since they are required to comply with nationally established standards, they believe that these overarching regulations limit their ability to tailor services to local circumstances.

*....aspects such as setting water tariffs are decided by the National Government.*

*Water services are under county government and management of water resources is under National Government. Areas that favor County Government is 100% ownership of water services at county level. County governments viewed water service providers (WSPs) as their own entities that should be under their total control. No one was supposed to get in their way in managing them... (WASREB official)*

On the other hand, according to interviewees from the national government, this view of counties as independent governments parallel to the national government requiring no national regulatory oversight is incorrect since Kenya is constitutionally a unitary state but with multiple levels of government under one overarching institutional structure as opposed to a federation of independent states. because of this, he emphasizes that it is the responsibility of the national government to ensure that water services are properly regulated and standardized, with the counties' roles being to domesticate national laws, policies, and standards within their jurisdictions rather than having their own independent set of regulations and standards.

*Our understanding at maji house (Ministry of water headquarters) is that the national as the principle policy maker holds the residual rights of control and authority in the sector thus when the minister seems need for, can declare even within county systems as public assets to ensure they are working in cases where the county fails such was the case in Nairobi. The counties don't agree with this but it's the fact of the institutional arrangement we have in place, Kenya is not a federal state, we are still unitary state and the national holds the final authority. That's why we send our WWDAs many times to undertake functions within counties..(national government ministry*

*of water official)*

(c) Establishment of middlemen agencies by the national government

The fourth reason cited by the respondents as to why the current institutional structure favors the national government over county governments in terms of water service delivery is that the national government has established "middlemen agencies" between them and the counties and assigned them functions that should be performed by the counties, thereby preventing the counties from carrying out their constitutional responsibilities for water and sanitation services delivery.

Respondents from county governments believe that the national government extends its functions beyond what is stipulated in the institutional arrangement by establishing intermediary agencies, primarily the water works development agencies, which are allocated resources that should go to the counties. The counties view these intermediaries as unconstitutional.

*I agree that's its clear who should do what roles in the water sector but still this are not implemented so. The national government is supposed to provide sector policy, regulations but they still retain most of the sector money and give these to the water works agencies and not to the counties. that's where the big issue is. county has water service delivery functions, but they don't get the full money, they have to operate at the mercy of the agencies even for functions they should be doing directly, these agencies are middlemen who are not needed at all, let maji house (ministry of water) give counties and WSPs the money then provide the support directly even through the agencies if that's what they want, they don't have to give large funds through them..(county government official)*

#### **4.3. Rushed Transition of Intergovernmental Functional Assignments**

Some interviewees are of the view that the way in which the current institutional structure assigns functions to the two levels of government does not necessarily favor the national government over the counties, but they highlighted that a rushed transition of the devolution policy has negatively impacted its implementation, resulting in the national government continuing to perform most sector functions constitutionally assigned to counties. Several interviewees are of the view that, although the institutional arrangement clearly allocates water service functions between the two levels, the actual implementation of the new arrangement has been hampered by the rapid devolution of water services, which prevented actors from fully comprehending the new institutional arrangement and led to a misunderstanding of functions between the national and county governments. In the early years of implementing devolved institutional structures, newly elected governors were adamantly opposed to any national government involvement in county-level water services. However, a better understanding of the sectoral division of functions between national and county government actors has resulted in improvement in services over the subsequent five-year devolution term, according to

one county level respondent.

*The genesis of this problem is that the roll out of water sector devolution been faster than it should be; sufficient time should have been allowed to provide for a better understanding; this was particularly evident in the period 2013-17 during the first term of county governments; most county players misunderstood the provisions in the institutions thus disrupting service delivery quite adversely. This is evident in the sudden plummeting of KPIs for WSPs as evident in the WASREB data; by the time new governments were established in 2018, there was evidence of a better understanding of institutional provisions as it relates to allocation of sector functions; actors at county level appeared more willing to engage in substantive dialogue based on a better understanding. This led to an improvement of service delivery as measured across several indicators.... (county water service provider company official)*

Similar view was expressed by a chief officer from a county government that:

*I think while clarity is provided in the constitution on the different functions for each level, the problem has been that the transition was hurried hence creating lots of grey areas and duplication of roles. governors have this feeling that they are small presidents in their counties hence they can't take directions from national government; the fact is that the new constitutional order no longer permits national government officials to provide instructions or commands to the county governments as they were able to do previously. this has created a big conflict, the national still want to force their way to do things within counties which the counties feel should be done by them...(county government water department chief officer)*

Majority of the policy actors interviewed from both levels of government in Kenya and form non-government organizations concur that, even though water services delivery is a devolved function, the current institutional structure under devolution policy favors the national government over the counties in how it assigns functions in four ways outlined above. While the need to allocate financial resources for service delivery based on assigned functions is highlighted as a major determinant of the success of devolution policy, respondents noted that in the current institutional structure for water services in Kenya, the allocation of funds to the county governments has been insufficient for them to effectively carry out their responsibilities. Additionally, the counties have not been able to mobilize revenue from their own sources to carry out these responsibilities. This has created a loophole for the national government to continue performing devolved water services functions in a manner that encroaches into the counties' autonomy.

The data indicate an ambiguity in the assignment of functions with the institutional structures not clearly defining the extent of exclusivity and concurrency to warrant resources allocation for the functions thus creating a situation where the national government ends up playing a bigger

service delivery role as opposed to its envisioned role of policy, strategy setting and technical assistance to counties who were expected to be undertaking most functions.

The finding related to the county's overdependence on transfers from the national government is consistent with the findings in Brazil where it was determined that devolution was more successful because the states' ability to generate revenue has substantially increased their subnational autonomy, as only 17% of state expenditures are funded by federal fiscal transfers [40]. According to him, this shaped intergovernmental relations in favor of increased subnational authority and decreased federal executive authority over the states in service delivery since the federal did not have significant resource holding powers as is the case in Kenya's water sector.

These perceptions of policy actors that structuring the institutions such that the counties need the national governments approval and oversight over certain water service functions is consistent with conclusions that persistent conflicts over water use were largely the result of central governments imposing stringent and restrictive regulatory conditions on the use of decentralized water management rights, leaving local level actors with limited discretion over how they can actually use their assigned competencies [22]. The threat of over-regulation poses the risk that central government may crowd out the capacities of sub-national units in their constitutional roles and thus advises that the institutional structure should be designed such as to foster complementarity and downward accountability [17, 18].

The findings that the creation of the Water Works Development Agencies (WWDAs) as agents of the national government for water services delivery at the county level, which respondents from the counties labeled "middlemen" agencies owned by the national government that has encroachment into their functions ending up crowding them out rather than complementing their role and enhancing their capacity to carry out effective service delivery is consistent with the conclusions that the encroachment by centralized institutions constrained regional water agencies' operations at the local government level resulting in poor infrastructure investment overall and in rural areas in particular agrees with these perceptions of actors at the county level [24]. This observed pattern of establishing the WWDAs by the national government to carry out functions at the county level is comparable to the strategy employed by the central government in Indonesia to position outpost agencies at the provincial and district levels to carry out services as directed by the central government without delegating authority to the subnational level. In this case, the author [21] concluded that Central government spending at the local level that is co-administered with local governments appears to have a positive impact on local services by building the capacity of local bureaucrats and influencing the efficiency of local government, whereas national spending at the local level with little input from subnational government has a negative impact on local service delivery, primarily as a result of

leaving significant accountability gaps considering their absence at the local level. Similar observations were made [5]. The views expressed by policy actors from the national government justifying their perceived encroachment into county functional mandate due to inadequate capacity is consistent with observation that in cases where there is a perceived lack of sufficient technical capacity to take advantage of subsidiary principle and undertake certain actions at the sub-level, the less desirable centralized models seem to have to come in to fill the gap [23]. However, he posits that one would expect that having noticed this significant gap that negates the benefits of subsidiary, the higher-level actors within the institutional nest would go ahead to build that capacity so that the justification can be validated. This is not the case in Kenya as has been highlighted by respondents mostly from the county level. Instead, the national government ministry and its agencies have taken advantage of the county's capacity gaps to further consolidate its powers further rather than building their capacity to take on the functions assignment to them.

The interviewees' perceptions of the impact of a rapid transition to a devolved institutional structure on service delivery is consistent with previous research. For instance, in most Africa that adopted decentralization, subnational autonomy through devolution was rapidly granted in counties with inadequate governance systems before expenditures or revenues were decentralized to adequately fund the devolved functions, resulting in a delay in the realization of devolution [11]. This study concludes that the most challenging aspect of devolution across Africa is assisting governments through the transition process by influencing the change process in order to reduce transition costs and increase the likelihood of decentralized service delivery mechanisms that are responsive to local requirements. This is also consistent with other findings that during transition periods that do not

provide sufficient time for all actors to fully comprehend the new structure, central government bureaucrats tend to retain control of lucrative components related to service provision, particularly construction functions where large contracts are involved, and in cases where these are decentralized, the bureaucratic behavior of the central government is to limit the activities of subnational actors [4]. Other scholars have also demonstrated that bureaucratic tension between central and local agencies resulting from conflicting rule structures hinders the success of decentralization reforms, as the central tier tends to influence the decentralization process in order to maintain the status quo of centralized service delivery rule structures during periods of rapid transition [33]. These findings highlighted above are consistent with literature that lack of clarity on intergovernmental functional assignment under devolution will result in opportunistic actors, mostly from the central level, using their resource control and supervisor technical capacity to control the policy process and service delivery to align more with central governments interests and assert a dominant position even in competencies that are better delivered by subnational governments.

#### 4.4. Contested Issues in Functional Assignment for Water Services

To further explore the reasons underlying the respondents' perceptions that the current institutional structure on intergovernmental functional assignment for water services delivery favors the national government over the counties, the key informants we asked to identify what in their views are the most contentious issues in the assignment of water sector functions between the two levels of government and how these have affected water services delivery. The responses are summarized as shown in Table 3 and discussed in turns.

**Table 3.** Respondents perceptions on contested issues underlying intergovernmental functional assignment in water services delivery.

Contested Issue	Category of respondent who gave this response	Level of Government of respondent
Clarity on what constitutes concurrent functions	Water service provider companies; ministry of water official; council of governors	County, National
Interpretation of water services functions that fall under the category of national public works to be undertaken by national government agencies	Water service provider companies. ministry of water official; council of governors	County, National
Ownership of water service assets and debt repayment obligation	Development partners; ministry of water official; WWDAs; county government executive official	National, County, development partners
Sufficiency of technical capacity to develop complex water services infrastructures and to lead policy and public investment reforms at county level	county government executive official; WWDAs official; ministry of water officials	County, National

(source: key informant interview transcripts)

Table 3 shows that there are four main contested issues underlying the assignment of functions for water services delivery under the current devolution institutional structures. These include contested understanding on what constitutes concurrent functions, lack of clarity on the interpretation of the limits of "national public works" in water services delivery to be undertaken by the national government, contested ownership of water service assets and debt

repayment obligation, and insufficiency of technical capacity at county level to be able to fully execute their mandates in water services delivery.

Contested understanding on what constitutes concurrent functions.

Respondents from both levels of government agreed that the contested definitions of what constitutes "water and sanitation services " and the attendant extent of concurrent



water and sanitation service responsibilities to be undertaken by each level of government has contributed to the asymmetrical patterns of resource allocation in favor of the national government. While the fourth schedule of the Kenyan constitution lists the distribution of functions between the National and county governments, including the assignment of functions related to the delivery of water services to both levels of government, the schedule does not clearly define the extent of concurrent functions to be jointly undertaken by both levels of government, resulting in a dispute among stakeholders over who is responsible for what.

*The biggest error and source of contestation is that there is no clearly defined concurrent list of functions to be jointly administered by the national government and county governments., it is left to interpretation, this lack of clarity is the biggest source of confusion and contestation because the national has taken advantage of this loophole to carry out county functions while at the same time preventing counties from doing critical water resources conservation projects on grounds that water resources is a national function. Theirs is no clarity on what concurrent functions are and how should these be coordinated between the 2 levels, the national takes advantage of this opaqueness and gives itself the counties roles....(county water service provider company official)*

Some respondents were of the opinion that, in the absence of a clear definition of the limits of both levels of government in relation to functions for which both levels are responsible, the national government takes advantage and assigns to itself responsibilities that would be better carried out by the counties.

*the main problem is that the constitution that assigns functions makes water a concurrent role between the two levels without being explicit on the limits of both, national government in particular ....so they (national government) just tend to veer into what the counties see as their role while the counties sometimes also tend to want more powers particularly on water resources management which is defined as national function...(county water service provider company official)*

There is debate over whether the responsibilities for water services provision should be limited to last-mile distribution networks and consumer connections, or whether the responsibility should also include infrastructure development, such as the construction of large dams, bulk pipelines, treatment plants, and reservoirs. Officials from the national government assert that water services provision as defined in schedule 4 of the constitution entails only the provision of last mile services to consumers, and that the counties should be responsible for this, while the national government should develop infrastructure such as bulk supply systems, treatment, and reservoir facilities, etc., and then hand them over to the counties for operation and management. The counties, on the other hand, argue that water supply provision should be interpreted to include development of large infrastructures in addition to last-mile services. This dispute has led to the allocation of budgets for water services in favor of the

national government, since the development of infrastructure requires larger budgets than the provision of last-mile water services, much to the chagrin of the counties. The resolution of this functional definition, according to a CoG official, is necessary to ensure that resource allocation correspond to functional assignment:

*When the constitution was promulgated, it was assumed that resources would follow functions, I doubt if it has been done. I doubt if there is a study that has been done on what water service provision entails, is it development of the infrastructure, then providing water and sustaining that provision of water. Or does it entail production through infrastructure that has already been provided and sustaining the service. That understating will tell us if resources actually follow functions..(council of governors [CoG] secretariat official)*

These findings on contestation of concurrency of functions are broadly in line with conclusions that in several other countries, national constitutions accord concurrent authority among tiers of government [36]. Bolleyer shows that some countries are more specific in the definition of the extent of each tier's roles and the concurrent roles [5]. For example, he presents an interesting comparison of Germany which has 62% concurrent functions, Switzerland with 18%, the United States with a mere 14% and Canada, with a minimal 3%. Comparatively in the Kenya structure as expressed by several interviewees, there is no clear definition and clear-cut boundaries on the role of each level of government on the concurrent functions for water services delivery. Even in regimes where the subnational level has well-defined exclusive functions, monitoring compliance with central legal covenants and technical standards is still needed [34].

(a) Interpretation of the limits of "national public works" in water services delivery

The contested interpretation of which water services functions should fall under the category of national public works to be carried out by national government agencies underlies the respondent's perception that the institutional structure favors the national over the counties in terms of function assignment. According to county interviewees, the national government continues to illegally retain most functions and revenues allocated to those functions by unilaterally declaring certain water services functions as national public works to be carried out by national government water works development agencies (WWDA), without consulting and obtaining concurrence with the counties.

*in terms of functional assignment, there are too many grey areas and overlapping roles, it's not clear what these so called national public works to be done by national government are; this is where the inter county wars come from; it's all about who controls what resources; we have seen the national government choosing to just unilaterally decide what are national public works so that they give the funds to their preferred water works agencies...(county government executive committee member)*

Respondents from the county governments assert that the

national government continues to use the excuse of declaring large water infrastructure functions as national public works coupled with insufficient technical capacity at the county level to abuse its authority and unilaterally withhold funding for several county water services, thereby denying the counties funding to carry out their mandate.

(b) Ownership of water service assets and debt repayment obligation

Related to the contested issue of the mandate of the WWDA on water infrastructure development vis-à-vis county mandate, the transfer of assets held in the books of the WWDAs to the new county governments and WSPs and the related debt repayment obligations incurred by the national government to develop these assets prior to devolution emerged as a major concern in the intergovernmental functional assignment. Interviewees from the national government are of the position that if these assets were to be transferred to the counties, the counties must agree to assume the debt obligation, which is primarily owed to development partners. The county governments, on the other hand, argue that the national government should not transfer the debts with the assets, but rather assume responsibility for them, given that the counties were not present during the development of the assets. The national government, in refuting the counties' push to have the WWDAs declared unconstitutional and thus obsolete, argues that their possession of the assets is based on the fact that the majority of counties have not developed the technical capacity to undertake operation and maintenance of these assets, some of which are of a highly complex nature; thus, the need for the WWDAs to continue to own and operate these complex water supply systems.

(c) Sufficiency of technical capacity at county level

Several respondents, primarily from the national government, are of the perception that the inadequacy of the county bureaucracy's technical capacity to carry out assigned functions is one of the primary reasons why the national government continues to perform most water service functions at the county level. Several factors were cited as contributing to county water departments' limited capacity. Some respondents are of the opinion that county governments have not attracted competent personnel to carry out designated responsibilities, thereby limiting their ability to carry out those responsibilities. Respondents at the county level, the majority of whom work for county-owned water companies, noted that most county executive staff appointments are made not on the basis of merit and competence, but rather as a political reward, resulting in low-capability staff who cannot adequately perform complex water service delivery functions, such as policy development and infrastructure services.

*Most appointments of board members of the water companies are political appointees who possess no knowledge in water sector or policy formulation and development. This makes it hard to make any progress, compared to the former system whereby national government appointees possessed some level of*

*competence. (county water service provider company official)*

In addition to the lack of merit in the appointment of water sector staff, several interviewees noted that county administrations frequently make non-procedural changes to water staff. This was highlighted as a source of contention primarily between the water company staff and county government officials due to the fact that it does not provide job security and stability for WSP staff because whenever new county leadership is installed, some of the existing staff are fired and new appointments are made in a non-procedural manner as political rewards to those who supported the governors' election campaigns. This results in a constant turnover in the composition of company boards and the leadership of water companies that does not create a consistency needed to deliver on their assigned functions.

The analysis of the responses to the question reveals that respondents from both the national and county levels raised, in one way or another, all four issues emerging as contentious in how the current devolved institutional structure in Kenya allocates responsibilities for water services delivery between the two levels of government. However, perceptions varied by respondent category, even when addressing the same issue. For instance, while the county government water department official, the WWDAs officials, and the ministry of water officials interviewed all concur that there is insufficient clarity in the definition of exclusive functions for the national government compared to a more detailed definition of exclusive county government functions, leaving concurrent functions as a grey area, the county official disputes the fact that the national level is not working to create this clarity and support a collaborative approach to undertaking the concurrent functions. This, the counties posit, reinforces the status of low technical capacity at the county level. As structural definitions for exclusive and concurrent functions are being clarified, the argument fronted by the counties is that the national ministry and agencies should be more deliberate in developing the capacity of county governments to progressively assume more responsibilities.

Even though there is a degree of disarray in the assignment of functions as pointed out by majority of the respondents, the official of the national government's ministry of water believes that the challenges stemming from a too rapid transition into the devolved institutional structure are more significant. The majority of policy actors from the counties, in their opinion, assumed local governance functions without fully comprehending the weight of responsibility this entails. He attributed this to the insufficiency of technical capacity, noting that the counties have not established a stable system for service delivery at the local level and have not employed a sufficient number of qualified personnel to deliver services. In such a scenario, the national government is justified to steps in to continue delivering services within counties on the rationale of managing the risk that citizens will not receive services due to the incapacity of the counties. This, in the ministry's view, is not necessarily taking over county functions due to a lack of clarity in the definition, but rather

assuming a political responsibility to ensure continuity of services, and the ministry would be pleased to transfer the functions once the counties have developed the necessary capacity to fully carry out their constitutional mandates.

The issue of the absence of a definition of what constitutes national public works, as well as the contested ownership of water services assets, was shared by both levels of government, but each had a different opinion on the subject. Respondents from the county level, both water company officials and county water department officials are of the opinion that national government has unilaterally assigned some water services assets to be under the constitutional category of national public works and appropriated resources to their agencies to execute water services delivery services from these assets as opposed to working with the counties to fully take over these assets. On the other hand, the national government level respondents are of the view that the national government has the duty bearer responsibilities of all water services residual functions, thus are acting within their constitutional mandate to declare assets, even those within county boundaries as national public works if the county is not adequately delivering on their mandate. The allocation of assets is also related to the ownership and debt repayment obligation, which both levels of government cited as a major contentious aspect of intergovernmental functional assignment. While the national ministry of water and the WWDAs are of the opinion that the counties do not have the technical capacity to fully assume responsibility for the operations and maintenance of water infrastructures developed prior to and during devolution, and that the counties must also assume the debt repayment obligations incurred during the development of these essential water service assets, the county government and water service company officials are of the opinion that the counties do have the technical capacity to fully assume responsibility for the operations and maintenance of these water infrastructures. This impasse has remained a significant source of contention in the intergovernmental functional assignment.

Clearly, there are both similarities and disparities in the perceptions of policy actors from various categories and both levels of government regarding these contentious issues. These disputes have had numerous effects on the delivery of water services. Due to a lack of clarity on functions, county-level interviewees opined, the national government allocates and directly appropriates financial resources for water services without coordinating with county governments, which on the other hand expend other allocated and own source resources at the county level, causing duplication of services in the same locations while other, more deserving regions go unserved. The national government's dominant role in performing the majority of functions and controlling a substantial portion of the sector's resources, as compared to the counties, restricts county decision-making on project and investment selection and, consequently, accurate resource allocation to increase access to services. In accordance with the principle of subsidiarity, the local authority is expected to allocate resources more efficiently. The counties are of the

view that the lack of achievement of sector targets for water access, which remains low less than 60% national average, is attributable to this allocative inefficiency due to the fact that this function is primarily performed by the national government which is far removed from local contextual realities.

According to interviewees from the civil society, the continued centralization of functions and resources has created a grey area in which the counties deflect responsibility to the national level due to a lack of funds, thereby creating an accountability gap for the citizens that should be served by both levels of government if government efforts were better coordinated through a whole-of-government approach to water services delivery. Some respondents observed that it is not always clear to citizens whom they should contact for assistance due to the accountability void created by the conflicting views on water service functions. For instance, when some installed water systems fail to function or break down and communities seek assistance from the county to restore functionality, the county refers them to the water works that constructed the system because it was not involved in the construction of the system. In contrast, the WWDA instructs them to return to the counties, as the system has already been transferred to the county.

Additionally, respondents from the civil society and development partners group noted that delays in enacting crucial policies to expand water services were also attributable to ongoing disputes over functional assignment. Among these are the failure to formally adopt a national water sector investment plan, the failure to formally establish the intergovernmental water sector coordination framework to operationalize institutional coordination in processes of water services delivery between the two levels, and a protracted debate on the adoption of cost-reflective water levies.

The preceding section presented and analyzed whether and how the assignment of functions for water services delivery under the current institution arrangement under Kenya's devolution policy impacts water services delivery. In the present section, the analysis of the data collected from the interviews with key informants focuses on the perceptions of policy actors regarding why most respondents believe that the current institutional arrangement for water services delivery under Kenya's devolution policy reinforces centralization over effective decentralized service delivery as envisioned in the governance reforms. As presented, the analysis identifies several underlying sources of this contestation. Comparatively to other nations with similar devolved governance administrations, the institutional structures for water services in Kenya create ambiguity in terms of intergovernmental functional assignment which has led to the contestation, as evidenced by the findings on the perceptions of the respondents. The Kenyan Constitution borrowed heavily from the South African devolution structure [27]. In South Africa, there is a clearly defined list of concurrent functions shared between the national and

provincial governments and a clearly defined list of exclusive provisional Powers and Functions, on which the national government has no authority to legislate except in cases relating to national security, national standards, or minimum requirements. According to the Constitution of South Africa of 1996, water is defined as a concurrent responsibility of both levels of government, with each level's competencies clearly delineated. Since the national government in Kenya retains ultimate legislative authority over the functions listed under schedule four for counties and the counties can only domesticate national legislation, water policies, laws and regulations at the county level cannot be formulated independently of the national water law as is the case in South Africa. Similarly in India, the central union government's national water policies and regulations are not binding on the states, which have the constitutional authority to develop their own water policies, regulations, and strategies for water services delivery. For example, in India, the states rejected the National Water Policy of 2002 because it did not align with their own state level objectives [9]. As in South Africa, the constitution of India clearly delineates a list of exclusive functions for the union government and the states, as well as functions for which both levels of government are responsible and can enact laws, thereby removing any ambiguities that could lead to functional contestation (Constitution of India).

The findings from this study are also consistent with observations Haiti's institutional structures defining the nature of their decentralization in water management were ambiguous, frequently failing to specify how policies should be implemented, by whom, and the nature of institutional relationships [37]. This resulted in many water sector functions continuing to be carried out at the national level, notwithstanding decentralized water resource management.

When the case of water services delivery in Kenya is compared to findings in India that despite the fact that water is designated as a state responsibility, the central union government continued to implement the larger share of water services expenditures through what is known as Centrally Sponsored Schemes (CSS), for which Central funds are provided to States but implementation is handled by each State Government, the observations in Kenya point to the state where comparatively similar centrally sponsored scheme water projects are still implemented by the national government agencies, not the county administrations showing that India's implementation of decentralized institutions is more effective than in Kenya [9].

Observations that the notional claim by most central government actors that a specific responsibility cannot be delegated to a lower tier because it lacks sufficient financial resources to adequately carry out the responsibility [34] is reinforced by the data presented in this article explaining the contestations arising out of resources not following functions and adequacy of technical capacity at the county level. He argues that the local resource mobilization capacity of subnational governments should not be a factor in determining whether or not to assign functions; rather,

functions should be assigned based on the rationale of efficiency, responsiveness, and local accountability, and then the national government is responsible for ensuring that the corresponding resources are transferred. This is the counter argument that can be presented against the national governments claim that they continue not undertake decentralized water service functions at county level because the counties have not been able to build a sufficient technical competence in addition to not being able to mobilize own source revenue to undertake their roles.

## 5. Conclusion

This study examined the effects of institutional structure under the devolution policy in Kenya on the delivery of water services, with a particular focus on how the institutions assign functions to the two levels of government. The study found that the existing institutional structures for intergovernmental functional assignment for water services provision continue to reinforce centralism in a variety of ways despite devolution. The findings show that even in functional competencies assigned to county governments, the national government continues to encroach through exercising its superior fiscal powers and technical capacity. As a result, there is a great deal of mistrust between the two levels, as the counties view the national government as impeding on their constitutionally mandated responsibilities.

The study found that the underlying cause of this contestation is a lack of clarity in the existing constitutional and legal frameworks to define the explicit functions for each level of government, specific concurrent functions to be jointly undertaken, and the mechanisms for undertaking these. This has resulted in two parallel policy planning strands, one administered by the national government and the other by the counties, with minimal coordination and frequently conflicting positions. This has not only led to the duplication of water services and the emergence of an accountability gap on who is responsible to the citizens for what services, but also to significant delays in the implementation of coordinated investment programmes required to expand water services to reach more citizens in accordance with national service delivery goals and objectives.

In conclusion, the findings of this study indicate that the design of institutional arrangements for public service delivery in multilevel governance regimes should take into account the political complexities inherent in the distribution of authority and attendant fiscal resources and make adequate provisions accordingly. This should be accomplished through a clear definition in the constitution, legal framework, and regulatory frameworks of the explicit functions and competencies assigned to each level of government, concurrent functions to be undertaken jointly by both levels, and how these functions should be coordinated in a manner that is legally enforceable. The findings of the study also lead to the conclusion that, in order for devolution policy to be more effective, the assignment of functions through whichever institutional configuration is adopted should be

proportional to the scale of the policy problems being addressed and should take into account the characteristics of the public services being provided to prevent institutional mismatches.

The study's findings are also relevant to the broader scholarly work and future research on multilevel governance and devolution. The study's findings provide empirical evidence to support the theoretical arguments that the design of institutional arrangements for public service delivery can have a significant impact on the effectiveness of multilevel governance systems.

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