

RIGHT TO USE CUSTOMARY LAW SYSTEMS FOR WATER GOVERNANCE & THE HRBA

A CASE OF THE MARAKWET OF KENYA



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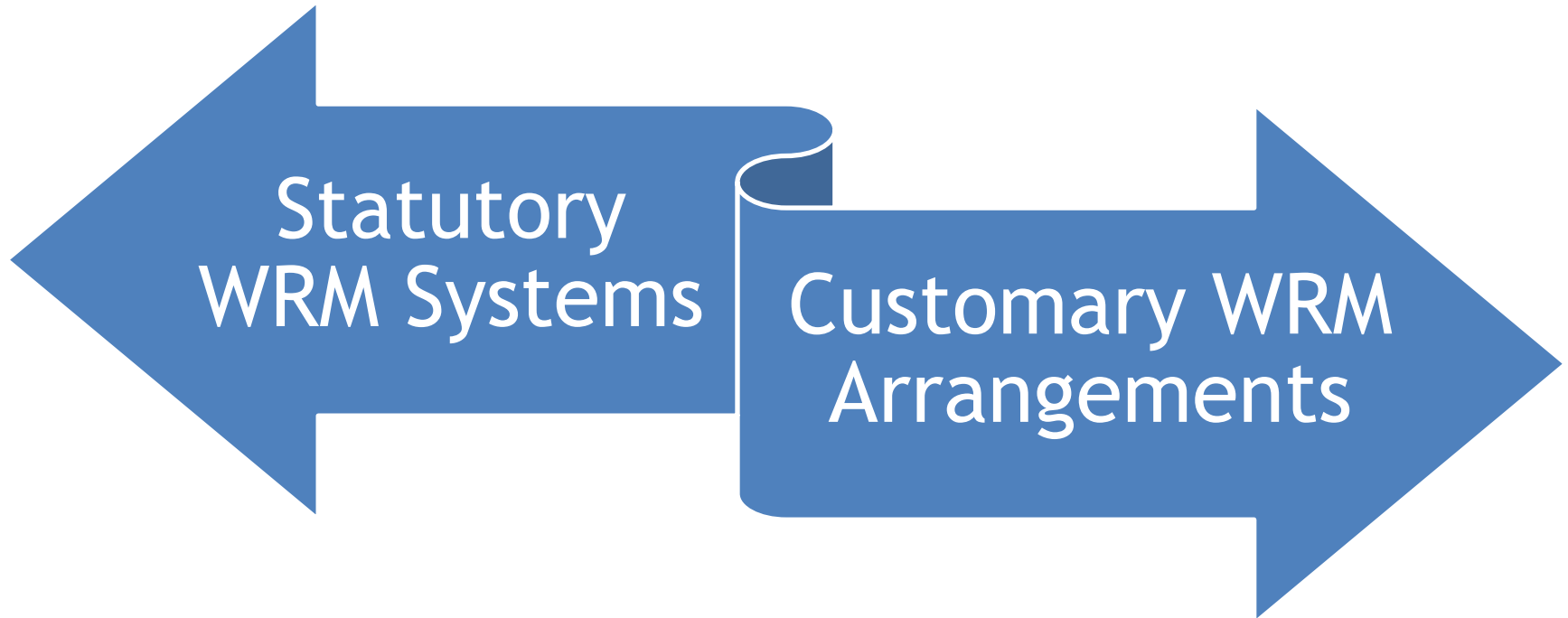
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PRESENTATION OUTLINE

- The Problem
- Case Study of Marakwet's Customary Water Governance System (CWRG)
- Integration with Kenya's Statutory Legal Framework for Water Governance
- The Human Rights Based Approach (HRBA) and the Right to Customary Water Governance
- Conclusion

THE PROBLEM

Disconnect between statutory law & customary arrangements for water resource management (WRM)



THE PROBLEM

- Statutory WRM frameworks with no reference to customary WRM systems
- Poor integration of CWRG in statutory frameworks
- Inadequate space for participation of customary institutions



The Task:

Finding legal strategies for recognition/integration of customary law in statutory frameworks for water governance

Solutions Explored

The legal basis for customary rights to water has been sought in:

- a. Native Title (E.g. Australia, Canada)
- b. Land laws recognising indigenous/customary rights e.g. Community Land Laws,
- c. Contractual Agreements
- d. Community participation provisions in water law

Persistent Challenges



- Limits of Native Title and Land Laws extend to water rights e.g. customary as traditional, non-economic
- Nature of customary rights: 2nd order rights, subordinate to other statutory rights

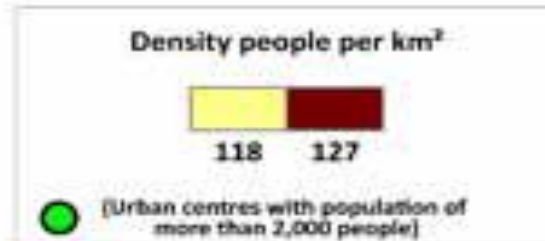
Need for alternative solutions

Illustration using case study of the Marakwet

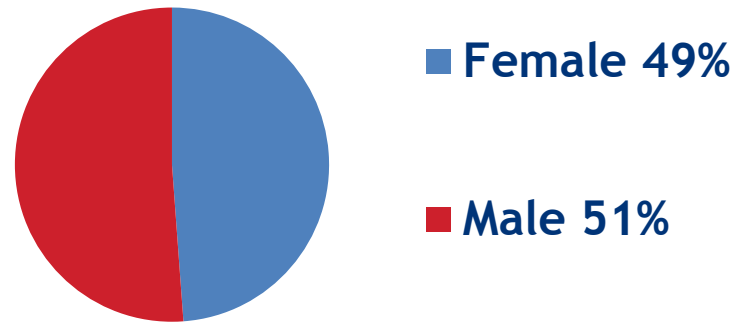
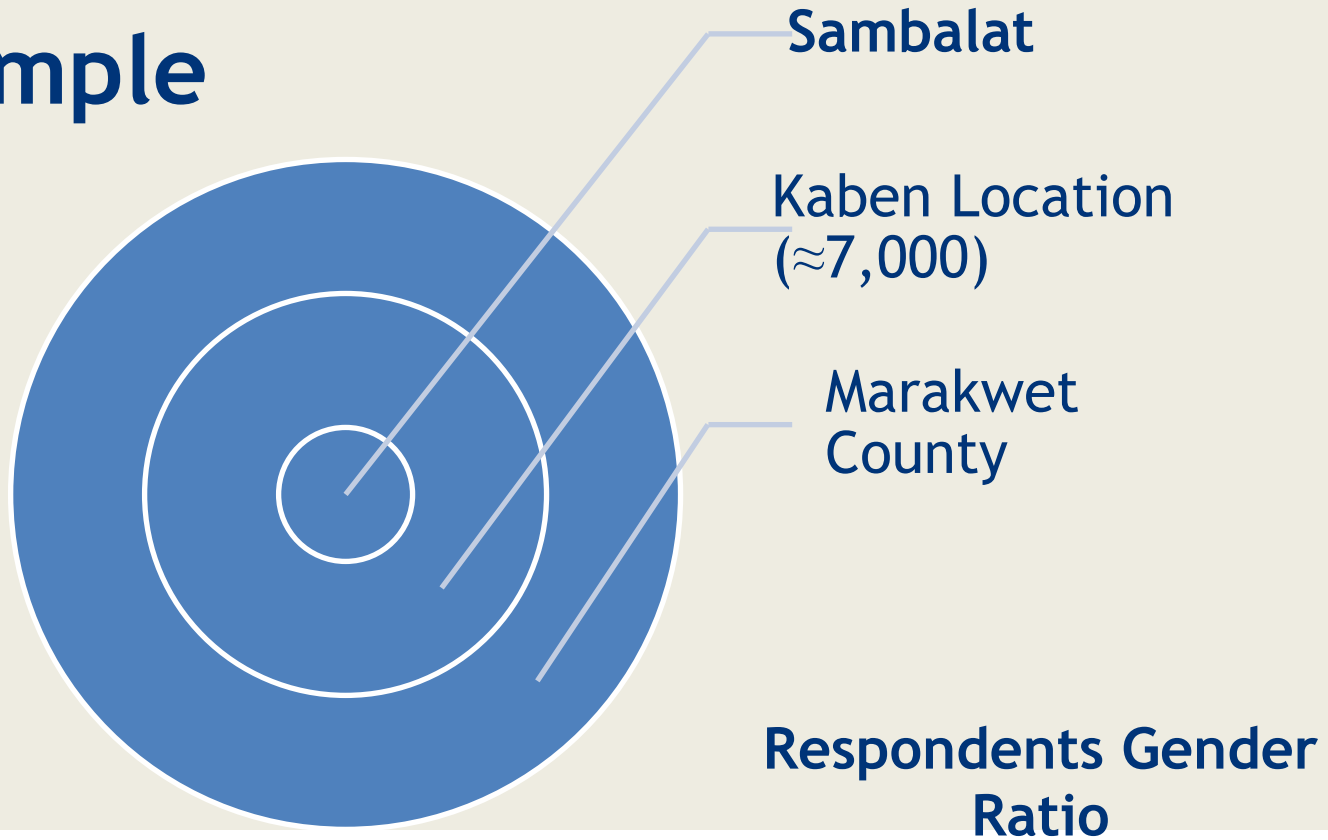
CASE STUDY OF MARAKWET'S CWRG



Map of Marakwet County



The Sample



Data Collection Methods

Observation



Focus Group Discussions



Interviews

Main Findings

- Predominance of customary law
- Irrigation furrows are the main source of water for domestic & agricultural use



SALIENT FEATURES OF MARAKWET'S CWRG

- 1. Ownership & integration of water with land & other Resources**
- 2. Autochthonous/Home grown**
- 3. Living & Dynamic**
- 4. Sui generis property governance**
- 5. Quantity & quality**

Ownership & Integration of Water with other Resources

- Water governance system extends to land & other resources
- Distinct notion of ownership
- Management by the community

Who owns the different water sources in Marakwet?

88%: Community/Nobody/God

7%: Clan Elders

2%: Government

3%: Others

Who determines allocation of furrows to clans?

65% Male clan elders

35% Community (53% of these were women)

Autochthonous/Home-Grown Normative System



- Norms are user developed
- Law is implemented & enforced by the community
‘There is no law that will come to tell us who will or how we will use the water. The water is for us and for our children from our elders. No one will tell us how to use it’- Clan Elder

Living and Dynamic Law

Blend of traditional customs and modern ways of life e.g.

- Institutions of governance made up of elders & youth
- Monetary compensation for labour



Sui Generis Property System

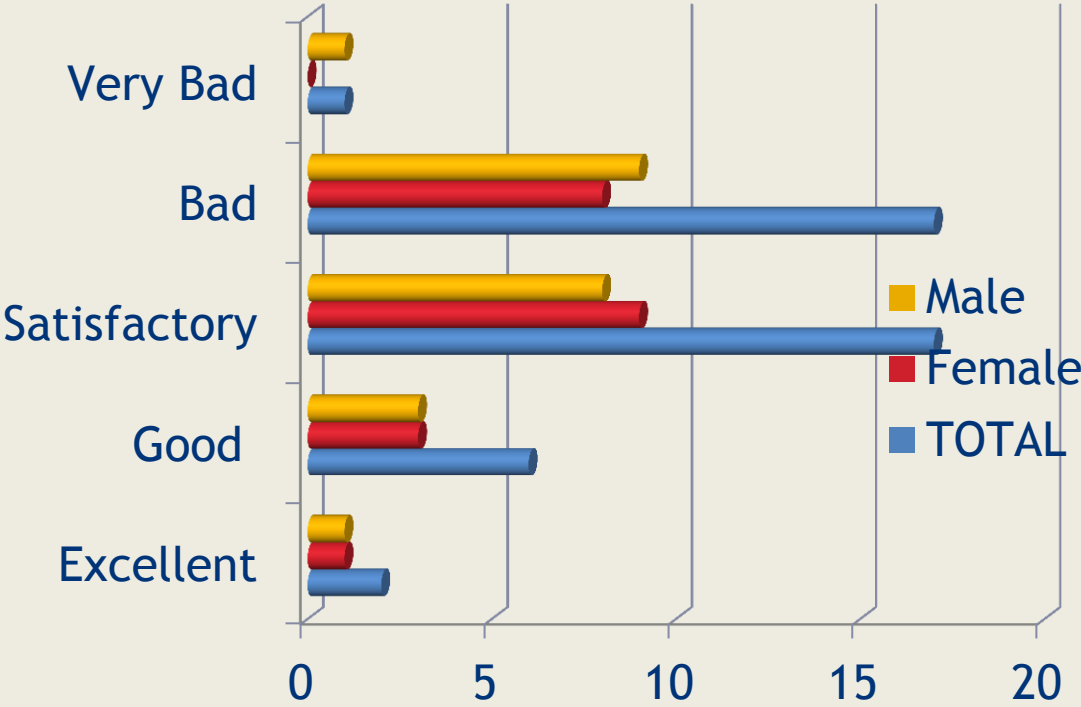
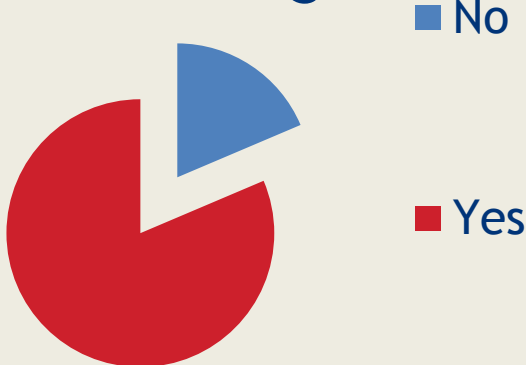
- Mix of private & communal rights
- Communal rights that do not preclude individual ownership
- Notion of ownership distinct from common law bundle of rights
- Universal access to water resources for domestic use & limited access for irrigation



Quantity & Quality

How would you describe the quality of water for domestic use?

Perception on water shortage



Features of CWRG

- Normative system based on customary law
- Sui generis concept of ownership & property
- Autonomy in norm development, implementation and enforcement
- Management by customary institutions of governance

INTEGRATION WITH KENYA'S STATUTORY WRG FRAMEWORK

Kenya's Statutory Legal Framework for Water Resource Governance

A. Constitution of Kenya (2010)

- Human right to water
- Integration of water resources with public land

*B. Water Act 2002 (*Water Bill 2012)*

- Established elaborate institutional framework for water governance

Legal Basis for Recognition of Marakwet's CWRG in Statute

- Constitution: Recognizes customary law as a source of law but no elaborate provisions
- Community Land Law: Legislation pending but no clear extension to water resources
- Water Act: No explicit recognition nor reference to customary water rights



Incongruences between Statutory and Customary Framework



Distinct notion of ownership of water resources:

- Community: God/community
- Constitution: People of Kenya
- Water Act 2002: Vested in the state (Water Bill 2012 aligns with CoK)

Incongruences between Statutory and Customary Framework

- Institutional frameworks for customary governance not recognised in the Water Act
- Limited scope provided by institutions anticipated for community participation
 - Catchment Advisory Committees (CAACs) &
 - Water Resource User Associations (WRUAs)
- Participation in exchange for custodianship

HUMAN RIGHTS BASED (HRBA)

A conceptual framework for the process of human development that is

- normatively based on international human rights standards and
- operationally directed to promoting and protecting human rights

Context of water governance

- Normative base in human right to water &
- Provides instruments for individuals to enforce the right

Legal Basis for HRBA in CWRG

- Human right to water and sanitation
 - UNGA Resolution A/64/L.63/Rev.1
 - CoK Art. 43 (1)(d)

Strengthened by:

- United Nations Declaration on the Rights of Indigenous Peoples
 - Connects the right to self-determination with the right to maintain their own institutional structures & legal systems in accordance with their customs and traditions
 - Provides a basis for other customary rights

Potential for HRBA

Human Right to
Water &
Sanitation



Rights of
Indigenous Peoples
esp. Right to self-
determination

Right to use
Customary
Law Systems
for Water
Resource
Governance

Advantages/Opportunities

- Provides international legal basis for right to water and self-determination in water governance
- Jurisprudence on human rights is more established than that on customary rights
- Move from right of participation to entitlement in right to develop
- Basis of human rights in natural law
- No distinction between human rights so no 2nd order rights problem

Challenges

- Incompatibility of customary law & human rights. E.g. exclusion and discrimination of women & youth, high risk of elite capture
- Challenges associated with enforcement of economic, social and cultural rights e.g. minimum core, SA Constitutional Court experience (*Mazibuko case*)
- Success of HRBA depends on link of human right to water with the right to use a customary system of water governance. For the Marakwet: quality issues v lack of servicing by the State



CONCLUSION

- CWRG continue to exist
- Integration of CWRG in statutory frameworks for water governance is crucial for sustainable development
- The human right to water and declaration on rights of indigenous peoples provides a basis for the potential use of the HRBA as an avenue for upholding CWRG
- HRBA has potential benefits but also challenges



THANK YOU