CUSTOMARY LAW SYSTEMS FOR WATER GOVERNANCE AND THE HUMAN RIGHTS BASED APPROACH TO WATER: A CASE OF THE MARAKWET OF KENYA

ELIZABETH GACHENGA

ABSTRACT

In many common law jurisdictions, legal systems for water resource governance are conceived primarily in the context of statutory law. However, in many cases water resource development and management, particularly at the local level, is governed by informal norms, practices and institutions developed by the resource users. Many indigenous peoples and local communities use customary law systems to govern their natural resources. The importance of customary systems for water resource governance is particularly evident in Sub-Saharan Africa where land and water resources are regulated by plural normative systems including statutory law and customary laws of different ethnic groups. For example, Kenya has a long tradition of customary governance as demonstrated by the Marakwet customary water governance system, which dates back to approximately 400 years ago. These customary institutions play a vital role in water resource management particularly in rural areas where two-thirds of the country's population lives. In spite of this, water reform in most of these countries has focused primarily on the statutory legal systems, with little attention given to customary law systems. Kenya's water law, as the case with most modern water law, contains limited provisions for the recognition of customary law and the accommodation of customary law institutions.

The failure to accommodate or integrate customary law systems with statutory systems of water governance adversely affects the capacity of society to attain sustainable development. Various models for recognition of customary law systems of water governance such as land rights and native title approaches as well as agreement-making have been debated in environmental law scholarship. Using a case study of the Marakwet, this paper critically evaluates the utility of these models in the context of non-settler countries with an indigenous population such as Kenya. The paper explores the potential of using the human right to water and the recognition of the rights of indigenous peoples as a basis for the application of the HRBA to the recognition of customary law systems for water resource governance in the context of a case study of the Marakwet of Kenya.

I 'MODERN' LEGAL FRAMEWORKS FOR WATER GOVERNANCE

The term 'customary law' is mistakenly associated with traditional practices or norms from a time past and consequently, its relation to water resource governance is often not appreciated. In fact, in, in many jurisdictions, legal systems for water resource governance are considered solely in the context of statutory law, that is, laws enacted by state organs. Nonetheless, in many of these countries, certain aspects of water resource development and management, particularly at the local level, continue to fall outside the scope of statutory frameworks. In spite of the statutory frameworks for water, users continue to develop informal norms, practices and institutions to govern the management of their shared resources.

In this paper, the term 'customary law' is used to refer to these informal or non-statutory norms and institutions developed by users for the governance of their resources. Understood in this context, customary normative systems continue to exercise an important role in water resource governance and are particularly prevalent in Sub-Saharan Africa where land and water resources in the rural areas and informal urban and peri-urban settlements are often regulated by customary law.

The resilience of these customary governance regimes of water resources have led water law practitioners and researchers in the last two decades to acknowledge that they constitute a factor to be reckoned with when preparing 'modern' legislation for water resource governance.[1] Further, research on these systems has shown that in some cases their resilience is the result of an inherent adaptive capacity which makes the systems more sustainable than state developed systems.[2] It has also been argued that, as these customary governance forms are self-developed, they represent a more democratic process of development of law and thus are more likely to be successful at attaining sustainable development.[3]

Despite this growing appreciation for their potential role, most water legal frameworks are primarily statute based and state-centric, with minimal provisions for recognition of customary governance systems.[4]The limited space for recognition of customary systems in

[1]Eastern and Central Africa Programme for Agricultural Policy Analysis, 'Accommodating Customary Water Management Arrangements to Consolidate Poverty-focused Water Reform: A Policy Brief' (ECAPAPA, 2007) <http://hdl.handle.net/10625/42486>

[2]Elinor Ostrom and Roy Gardner, 'Coping with Asymmetries in the Commons: Self-Governing Irrigation Systems Can Work' (1993) 7(4) *The Journal of Economic Perspectives* 93

[3]Peter Ørebech, 'Customary Law and Sustainable Development' (Paper presented at the Workshop in Political Theory and Policy Analysis, Bloomington, Indiana, 6 March 2006)

[4] This is evident from the analysis of modern legal and institutional frameworks of water governance across jurisdictions. See for example Hodgson in Stephen Hodgson and FAO, *Modern Water Rights: Theory and*

legal frameworks for water governance is not a problem specific to the water sector, but rather is reflective of the status of customary law in the wider context of the legal systems of the respective countries. While various models for recognition of customary law and by extension customary rights to water have been adopted in several jurisdictions, their effectiveness in articulating these rights is disputable.

Using a case study of the Marakwet of Kenya, this paper explores the features of a resilient customary water resource governance system and the extent to which such a system is recognised by or integrated into the statutory legal framework for water governance. Further, the possibility of extending the human right to water and the human rights based approach to the realm of customary rights to water is explored.

II THE CASE OF THE MARAKWET

The area of Elgeyo Marakwet County under study lies to the North West of Kenya bordering on West Pokot. Most of the inhabitants in this area belong either to the Elgeyo or Marakwet ethnic community.[5] The community living along the Marakwet Escarpment of the Kerio Valley have the oldest customary managed irrigation system in Kenya.[6] Irrigation occurs along more than 40km of the Marakwet Escarpment from south of Arror to north of Tot.[7] The irrigation furrows of the Marakwet are the main source of freshwater resources for the community both for agriculture and domestic use. The Marakwet community have a tradition of customary law and governance that predates colonial rule.[8] This customary law constitutes the primary regulatory framework for their water resource governance regime and thus constitutes a good example of a customary law water resource governance system.

This paper is based on data collected during field work conducted in the area of Sambalat, from November 2010 to February 2011.[9] Data was gathered using semi-structured interviews

---

Practice (FAO, 2006) and Dante Augusto Caponera, *Principles of Water Law and Administration: National and International* (Taylor & Francis, 2007)

[5] The term 'Marakwet' is a corruption of the original term 'Marakweta' a sub tribe of the Kalenjin. Benjamin Kipkorir and Frederick Welbourn, *The Marakwet of Kenya: A Preliminary Study* (East African Educational Publishers, 2008) xvii

[6] Ssennyonga Joseph, 'The Marakwet Irrigation System as a Model of a Systems Approach to Water Management' in Benjamin Kipkorir, Robert Soper and Joseph Ssennyonga (eds), *Kerio Valley: Past, Present and Future* (University of Nairobi, Institute of African Studies., 1983) 96

[7] Elizabeth E Watson, William M Adams and Samuel K Mutiso, 'Indigenous Irrigation, Agriculture and Development, Marakwet, Kenya' (1998) 164(1) *The Geographical Journal*

[8] This is evidenced by the early accounts of the Marakwet's law and custom. For example Mervyn W H Beech, 'Sketch of Elgeyo Law and Custom' (1921) 20(79) *Journal of the Royal African Society*

[9] Elizabeth Gachenga, *Integrating Customary and Statutory Law Systems of Water Governance for Sustainable Development. The Case of the Marakwet of Kenya* (PhD Thesis, University of Western Sydney, 2012)

conducted with; a cross section of water users in the community; government officials; and a representative from a non-governmental organisation. Further insight was gained through three focus group discussions with; clan elders - the custodians of customary law; a group of senior women in the community and another group of younger women. The researcher also used observation.

An analysis of the data collected demonstrated some of the salient feature of Marakwet's customary water resource governance system and the extent to which the system is integrated within Kenya's statutory framework for water resources.

A *Features of the Customary Law System*

The main source of water for both agriculture and domestic use for the Marakwet community living around Sambalat is the furrow system, which is governed by the community's customary law.[10] The focus group discussion with the representatives of the elders reaffirmed the centrality of customary law in the governance of the community's water resources.[11] This fact was also corroborated by an administrative officer working in the area.[12] Although there is no written record of the customary law on water, the respondents explained that its existence is not disputable as, since its inception, it has been passed on orally from one generation to the next.

1 *Ownership and Integration of Water with Other Resources*

Water is considered a sacred resource by the Marakwet. According to the community, water resources are not owned by anyone as water is a naturally occurring resource provided by God. However, they believe that every member of the community has a right to use the waters of the Embobut River given the proximity of the resource to their land. Customary law rules on allocation of water, management of the furrows and preservation of water quantity and quality regulate water use and management in the community.

The Marakwet customary law system does not consider water resources independently of land in terms of governance. As a result, furrow or water laws include norms governing land access and use. The community members interviewed and clan elders indicated that land in the area is subject to customary tenure which recognises community land and also

[10] This was confirmed by 100% of the respondents. Interviews with water users from Kaben location, (Marakwet District- Kenya, November-February 2010)

[11] Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010)

[12] Interview with Joseph Yego Lokanda, Chief of Kaben Location (Marakwet District-Kenya, 22 November 2010).

individually owned land.[13] On observation of the area identified as privately owned, no beacons or clear fences demarcating boundaries were evident but the respondents explained that each clan is aware of the respective owners of land and this is respected by the entire community.

2 *Home-grown*

One of the primary features of the customary law governing water resources in the community is that it is home-grown. All the participants interviewed associated the origin of their customary law on water with their ancestors.[14] While conceding that the water rules have evolved and are changing, they explained that the changes are effected through a consultative process that is inclusive. All clans are represented in the council of elders in charge of furrow issues. They clarified that though government administrative officials, such as the Chief, have been included in the council; their role is merely advisory. The autonomy in design of the rules is considered sacrosanct as evident from a remark from one of the respondents: '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'[15]

A further feature of the Marakwet customary governance systems is that it is not only user developed but it is also implemented and enforced by its users. Water resource management is the responsibility of the clan elders or council members charged with furrow issues. The clan elders allocate water to the various users and ensure compliance with the rules on allocation. They are also responsible for imposing sanctions for non-compliance. Nevertheless, the implementation of rules and imposition of sanctions is discussed in community meetings. Sanctions imposed range from social sanctions such as peer remonstration to monetary fines, curses and in severe cases destruction of the offender's property and that of other clan members.[16]

[13]Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010)

[14] Ibid; Focus Group Discussion with a group of younger women on the customary water goveranance system (Marakwet District-Kenya, February 10 2010); Focus Group Discussion with a group of older women on the customary water goveranance system (Marakwet District-Kenya, February 10 2010); Interviews with water users from Kaben location, (Marakwet District- Kenya, November-February 2010)

[15] Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010).

[16] One of the water users interviewed, explained that in the past, incorrigible offenders would be punished by a form of 'death penalty' and it was the responsibility of the offender's relatives particularly his uncles to implement the punishment. He clarified that this form of punishment is no longer used

3 *Living and Dynamic*

The community members' description of their laws demonstrated that it is closely linked with traditional customs, which in some way confirms the argument that customary law consists primarily of antique rules of immemorial usage. However an investigation of the prevailing water rules on allocation and management as well as of the structure of the institutions for governance, demonstrated that changes have been made to the system to adapt it to contemporary circumstances.[17] Further, due to the fact that the rules are not written, their implementation is subject to consultation and discussion among community members and so is often adapted to the environment. Consequently, customary practices though retaining some essence of the past are reflective of changing conditions in community.

4 *Sui generis property governance system*

The Marakwet customary law system demonstrates a complex mix of property rights. Land is held both communally and privately. Communally held land is found lower in the valley floor and is cultivated communally for subsistence crops. However, the classification of the land as communal land does not preclude individual ownership and despite the lack of individual formal title, the customary system has a clear system of demarcating boundaries and community members respect these boundaries. Apart from the communal land, each household privately owns the land in which their homestead is located. The participants reported that most of the owners do not hold title as they have not undertaken the process of having the land surveyed and titles issued.[18] However, this does not present problems for the community, they explained, as there is consensus on ownership.

With respect to irrigation, the furrow system has clear ways of withholding access to water for those who do not contribute to furrow management. The furrow system is designed in such a way that the managers can start or stop the flow of water, thus controlling access. However, the clan elders explained that no restriction is placed on water for domestic use.[19]All households are expected to send male representatives to help with the management and repair of furrows when required. The households whose male members fail to contribute to furrow maintenance and repair are not entitled to irrigation water and may be subject to other sanctions imposed by their peers, including public humiliation.

[17] For instance, rules on contribution of labour in construction and repair of furrows have been substituted with monetary compensation. The council of clan elders includes younger community members who may have important networks with potential donors and financiers

[18] Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010)

[19]Ibid

The elders explained that the rules of allocation may in some cases be altered to cater for families with no male members, or households with new-borns etc. Further, this requirement to provide labour for maintenance of the furrows at present can be substituted for money. This modification of the rule is based on the appreciation of the changing circumstances. Young male clan members may at times be unavailable for furrow work due to their attending school or work outside the community. The balance of rights and responsibilities is achieved through a consultative process.

5 *Quantity and Quality*

The current furrow system of water supply does not include the infrastructure necessary to determine the volumetric quantities of water supplied to each individual or family per day. Nevertheless, most of the water users interviewed confirmed that the water supply system catered for their basic needs. From the interviews, there was no indication of problems related to physical or economic accessibility under the existing furrow system. However, most of the respondents agreed that the quality of water supplied from the furrow system was inadequate.

Subject to these problems of quality, the community members interviewed all evaluated the performance of their customary water resource governance system favourably.

B *Integration in the Legal Statutory Framework for Water Governance*

Kenya's 2002 Water Act is the primary statute regulating water resource governance in the country.[20] However, efforts are underway to reform the Act so as to ensure its conformity with the provisions of the Constitution of Kenya 2010.[21] The statutory legal framework established under the Water Act is premised on certain principles which are fundamentally distinct from the principles underlying customary law systems of water governance. The effect of this incongruence is to create a disconnect between statutory and customary legal systems for water governance. Some of the main features of the statutory legal framework for water resource governance under the Act are highlighted below and contrasted with the main features of the customary water resource governance system.

The policy and law formulation process leading to the Water Act was, to a large extent, a top-down exercise. Marakwet community members participating in the field work indicated that they were not neither aware nor involved in the process. There was little evidence of appreciation among resource users and managers of the statutory systems for water resource

[20] *Water Act 2003* (Kenya)
[21] See *Draft Water Bill 2012* (Kenya)

governance. Most of the users interviewed had neither heard of the Water Act nor of its provisions. The custodians of the customary law system interviewed were of the view that there ought to have been more consultation in the water law reform process, particularly where reforms had implications on their water resources. In the absence of such consultation, they believe it unlikely that the laws developed would cater for their interests. One of the discussants expressed his frustration with statutory water laws as follows "…the laws are written by people who live far away and have never been here in Marakwet and so do not understand how things work."[22]

Apart from the Water Act, the Constitution of Kenya 2010 also includes provisions regulating water resources in the country.[23] The process of drafting the new Constitution took the country close to ten years with great efforts taken to make the process consultative. The drafts of the Constitution were disseminated throughout the country and civic education imparted so as to create awareness and collect feedback on the provisions of the law. Further, the document was subjected to a national referendum twice. The Constitution has provisions relating to water resources and during the field work we sought to establish the extent to which the Community members were aware of the provisions relating to water resources. The respondents of the focus group discussions with Clan Elders indicated that they were aware of the promulgation of the Constitution and had been involved in the civic education programmes before its promulgation. Nevertheless, these sessions did not in their opinion deal with issues of water resource management in great depth.[24]

The data collected from the various respondents confirmed that the community members are to a large extent unaware of the provisions of the Water Act and those of the Constitution regulating the use of water resources. Further, an analysis of the features of the customary water governance system demonstrated certain significant differences in notions of ownership and property and institutions of management between statutory provisions and the customary law.

1 *Legal Basis for Customary Rights to Water*

A fundamental incongruence between Marakwet's customary law and the Water Act relates to the notion of ownership of water resources. While the Marakwet, regard water resources as

[22] Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010)
[23] *Constitution 2010* (Kenya)
[24] Focus Group Discussion with Clan Elders and Representatives of Furrows Council (Marakwet District-Kenya, February 10 2010)

a God-given resource and thus not subject to ownership in the strict sense, the Water Act vests all water resources in the State. Under the Water Act, the primary right of use is granted to the Minister except where such right is alienated by the Act or by any other law.[25] In the absence of an 'Act' or 'any other law' granting customary rights to water resources, the right of control over all water resources including user rights lies with the State or with those to whom such rights are granted by the Minister.[26]

The effect of the above provisions is to extinguish any pre-existing rights including pre-existing customary rights to water. This raises a fundamental issue regarding the basis of the customary water law of the Marakwet, given that the Water Act contains no provision recognising customary water rights.

Arguably the problem of a legal basis for customary rights to water for the Marakwet stands a chance of being redressed in the new Constitutional dispensation. The Constitution of Kenya 2010 and Sessional Paper No 3 of 2009 provide for the recognition of community rights to land.[27] Provisions on community land under the recently promulgated Constitution, could arguably serve as a basis for customary rights to land and by extension to water resources. This is because under the Constitution, all rivers, lakes, and other water bodies are defined as being part of public land.[28] Consequently, it could be argued that the rivers lakes and other water bodies on community land can be defined as part of community land. However, the country is still in the process of enacting the supporting legislation necessary for the implementation of the Constitution and thus the extent to which provisions on community land can support customary rights to water is yet to be seen.

Such an approach to customary rights of water based on community land rights would be similar to models of recognition of indigenous rights over water resources that have been explored in other jurisdictions. In many settler colonies, the recognition of indigenous rights to water resources is linked to treaties and subsequent laws recognising indigenous rights over land. In Australia, Canada, the United States and New Zealand for instance, indigenous water rights often accompany native title.[29]

---

[25] *Water Act 2003* (Kenya) s 3.
[26] Ibid ss 4-6.
[27] *Constitution 2010* (Kenya) article 61 and 63
[28] Ibid art 63.
[29] Melanie Durette, 'A Comparative Approach to Indigenous Legal Rights to Freshwater: Key Lessons for Australia from the United States, Canada and New Zealand' (2010) 27 *Environmental and Planning Law Journal* 296

While community or customary rights over land may form a basis for the recognition of a customary law water governance system such as that of the Marakwet, the effectiveness of such a model is disputable. Experience from these jurisdictions, has demonstrated some of the challenges faced by these models of recognition of indigenous rights to water. The definition and scope of the indigenous water rights granted by such models is delimited by the nature and content of rights granted by the respective treaties or land rights law. The definition of customary in these models is often associated with antiquity that is traditional practices of long usage. The effect of adopting this notion of the term 'customary' is to restrict the content and scope of customary rights to for instance non-economic rights of use.[30]

Further, the distinction of customary or indigenous rights from other statutory rights over land and water, results in the subordination of the former to the latter. Consequently, indigenous peoples seeking to use customary law in the management of their water resources are often faced with the challenge of how to give meaning to their rights in a statutory legal framework of a narrowly defined rights-based discourse.[31]The statutory frameworks consider indigenous rights as 'second-order rights to be assessed through broad policy objectives after others have been guaranteed or assigned their more concrete rights'.[32] In these circumstances, it is difficult for such rights to contribute to the economic livelihoods of indigenous peoples that hold these rights or facilitate their sustainable use.[33] These models for recognition of customary law thus fail to provide the adequate space necessary for customary arrangements to work effectively. The experience with these models of Land Rights or Native Title as bases for indigenous water rights demonstrates some of the challenges likely to be faced in the attempt to use community land provisions to guarantee customary rights over water in Kenya.

2 *Institutional Frameworks*

Apart from the fundamental challenges relating to customary rights of ownership over water resources, the statutory legal framework for water in Kenya has also failed to adequately integrate customary institutions of governance. The institutional framework established by

[30]Ibid, 297.
[31]Donna Craig and Michael Jeffery, 'Recognition and Enforcement of Indigenous Customary Law in Environmental Regimes and Natural Resource Management' in Lee Paddock et al (eds), *Compliance and Enforcement in Environmental Law* (Edward Elgar Cheltenham, 2011) 535.
[32]Donna Craig and Elizabeth Gachenga, 'The Recognition of Indigenous Customary Law in Water Resource Management' (2010) 20 *Water Law* 278, 280.
[33]Lisa Chartrand, 'Accomodating Indigenous Legal Traditions in Canada' (2005) <http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>.

the Water Act does not explicitly recognise customary law institutions such as Marakwet's Council of Elders, who are in charge of furrow issues.

Arguably, the provisions in the Water Act allowing for stakeholder participation and particularly for community participation at the local level nonetheless provide an opportunity for the Marakwet to get involved in the development of rules on management and allocation. For instance, the Act establishes Catchment Area Advisory Committees (CAACs) to assist the Water Resources Management Authority with management functions at the catchment or regional level.[34] Membership of the CAACs is drawn from a wide variety of stakeholders including farmers and pastoralists in the catchment area, business communities operating in the area, NGOs and other competent persons.[35] The Council of Elders could thus form part of the area's CAAC. However, none of the clan elders interviewed were members of the relevant CAAC nor were they aware of the existence of such an opportunity.

The Water Act also includes provisions on Water Resources User Associations (WRUAs), another potential vehicle of community participation in statutory institutions of water governance.[36]WRUAs are defined as 'an association of water users, riparian land owners, or other stakeholders who have formally and voluntarily associated for the purposes of cooperatively sharing, managing and conserving a common water resource.'[37] The complexities associated with registration of WRUAs present challenges to community members. Further, the separation in the statutory institutional framework, of water resource management from water service provision, limits the scope of the functions of the WRUAs to water resource management. Consequently, they are inadequate vehicles for integrating the institution of Clan Elders in charge of furrows into the statutory legal framework.[38]

From the above, it is indisputable that the Water Act and the Constitution of Kenya provide opportunities for integration of some aspects of Marakwet's customary law system of water governance. However, the space provided for recognition and integration of customary law water governance systems such as that of the Marakwet is inadequate. This inadequacy is to be expected given the absence of a firm legal basis for customary rights to water in the statutory legal framework.

---

[34]*Water Act 2003* (Kenya) s 16.
[35]Ibid s 16(3).
[36]Ibid s 15(5).
[37]Water Resource Management Authority, *Water Resource Management Rules*, Legal Notice No. 171 (28th September 2007), rule 2.
[38] See Elizabeth Gachenga, 'Kenya's Water Act: Opportunities for Integration of Customary Institutions of Water Governance through Water Resources Users Associations and Water Service Providers' (2011) 22(2/3) *Water Law*

The next section explores the possibility of using the human rights based approach to water to safeguard customary rights to water and the customary law institutions of water governance.

III HRBA & RECOGNITION OF CUSTOMARY LAW SYSTEMS FOR WATER GOVERNANCE

The human rights based approach (HRBA) is '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.' In practice, it represents the attempt to address development problems by analysing and redressing the inequalities and discriminatory practices that are at the root of these problems. The objective of the framework is to bring human rights to the core of development so as to ensure the primacy of human well-being in the determination of development goals.[39]

In the context of water resource governance, the HRBA is described as a paradigm that seeks to direct all water resource management systems towards a guarantee of the basic human need for water and that provides the individual water user with the instruments to enforce this need for water.[40] It is argued that such an approach is more effective at resolving the prevailing global problems of water and sanitation. The Declaration of the Human Right to Water and Sanitation has contributed to the growing interest in the extension of the HRBA to water governance issues.

A *The Human Right to Water*

In July 2010, the United Nations General Assembly made a formal recognition of the human right to water and sanitation, through a Resolution of the General Assembly.[41]The Resolution recognises the right to water and sanitation as essential to the realisation of all human rights.[42] In September of the same year, the United Nations Human Rights Council, in turn reiterated this right, adding that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and that it is inextricably linked to the right to the highest attainable standard of physical and mental health as well as the right to life and human dignity.[43] This Resolution by the Human Rights Council also reaffirmed the primary

[39]Celestine Nyamu-Musembi and Andrea Cornwal, 'What is the "Rights-Based Approach" All About? Perspectives from International Development Agencies ' (2004) *IDS Working Paper 234* .
[40]Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law*, International Studies in Human Rights (Martinus Nijhoff, 2008) 12.
[41]*The Human Right to Water and Sanitation*, GA Res 64/292, UN GAOR, 64th sess, 108th mtg, Agenda Item 48, Supp No 49, UN Doc A/64/L.63/Rev.1 (26 July 2010).
[42]Ibid [1].
[43]*Human Rights and Access to Safe Drinking Water and Sanitation*, Human Rights Council Res 64/292, UN GAOR 15th sess, 108th plen mtg, Agenda Item 3, UN Doc A/HRC/15/L.14 (30 September 2010) [3].

responsibility for the realisation of all human rights, including the right to water and sanitation.[44] States are thus obliged to put in place the mechanisms necessary for the progressive achievement of the human rights obligations related to this right with an emphasis on the unserved or underserved areas.[45]

The human right to water and sanitation is thus now formally recognised at the international level. The right is also widely acknowledged in the national legal frameworks of water governance of most countries. The Constitution of Kenya includes among the economic and social rights, the right of all Kenyans to clean and safe water in adequate quantities.[46] The Constitution further requires the government to take affirmative action to ensure that minorities and marginalized groups have reasonable access to water.[47] Apart from these explicit provisions relating to the right to water, other Constitutional provisions related to the environment and natural resources may have implications on the right to water.

The potential of using the HRBA to safeguard customary rights to water is further strengthened by the right of indigenous peoples' to self-governance.

B *Indigenous Peoples' Rights*

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 provides the most significant elaboration of the right in the wider context of the rights of indigenous peoples.[48] At its adoption, 144 states voted in favour, 4 voted against (Australia, Canada, the United States and New Zealand) and 11 states, including Kenya, abstained from voting. The four countries that had voted against the Declaration have since endorsed it. As is the case with other declarations in international law, the United Nations Declaration on the Rights of Indigenous Peoples does not bind states in the same way as conventions and treaties would. Nevertheless, it reflects the commitment of states towards the principles set out and to that extent represents the direction in which international law relating to indigenous peoples' rights is likely to develop in future.

Under the declaration, the right to self-determination is recognised as the basis for all other indigenous peoples' rights.[49] The Declaration provides that, by virtue of this right, indigenous peoples 'freely determine their political status and freely pursue their economic, social and

[44] Ibid [6].
[45] Ibid [8].
[46] *Constitution 2010* (Kenya) art 43(1)(d).
[47] Ibid art 56(e).
[48] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
[49] Ibid art 3.

cultural development'.[50] Other provisions in the Declaration connect the right to self-determination of indigenous peoples with the right to maintain their own institutional structures and legal systems in accordance with their customs and traditions.[51] The Declaration thus provides a basis for indigenous communities to defend their right to water.

The attempt to seek a legal basis for the customary right to water in the Declaration on the Rights of Indigenous Peoples has a basis in law, as demonstrated by similar laws in the Philippines. Although, the Water Code in that country does not recognise the customary right to water, the 1997 Indigenous Peoples Right Act grants customary water rights to indigenous communities.[52]

The international recognition of the human right to water coupled with the recognition of the rights of indigenous peoples provides a basis for the use of the HRBA to safeguard customary rights to water resource governance in jurisdictions where models of recognition of customary law are lacking or ineffective.

C *HRBA and the Legal Basis for Customary Rights for Water Governance*

The suitability of connecting customary law systems of water governance and the human rights based approach can be justified on various grounds.

Customary systems of water governance, as demonstrated by the case study of the Marakwet, often focus on the protection of local water needs. These systems are prevalent among marginalized and under-serviced communities or the rural poor emphasizing further the connection between these systems and the human rights based approach to water governance. Where customary law systems constitute the sole means for the provision of water to communities, it may be argued that the human right to water includes the right of individuals or communities to safeguard their customary governance system for water resources.

The elaboration on the content of the human right to water justifies this argument:

> *The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast,*

[50] Ibid art 3.
[51] See ibid 20, 33-35.
[52] UNESCO, 'Outcome of the International Expert's Meeting on the Right to Water' (2009) <http://unesdoc.unesco.org/images/0018/001854/185432E.pdf>

the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[53]

On the basis of the above, it can be argued that the minimum core of the human right to water includes the freedom of individuals or communities to maintain access to existing water supplies, where such supplies are necessary for the realisation of their right to water.

Applying this to the case study, the furrows of the Marakwet constitute their primary source of water supply. The furrow system therefore, provides the means for their realisation of the human right to water. This arguably, grants the Marakwet a basis for maintaining that their customary law system of water governance is crucial for maintaining their access to water supply. Further, the community could argue that a failure to recognise their customary law governance system would in effect result in the collapse of the furrow system thus affecting their access to safe water and sanitation.

Such an argument could be further strengthened through recourse to laws recognising the rights of indigenous peoples. Nonetheless, in the case of the Marakwet, the success of such an approach would depend on the interpretation of the term indigenous community and the extent to which they could be regarded as such.

The HRBA provides a promising avenue for the defence of customary rights to water in jurisdictions such as Kenya, as the legal framework surrounding human rights is more established than that of customary rights to water resources. Although the potential of effectiveness of HRBA in securing the human right to water is largely untested in Kenya, some challenges in using the HRBA as a legal basis for justifying customary rights to water can already be anticipated.

The compatibility of customary law systems with the HRBA has been questioned on the basis that customary law systems often institutionalize violations of human rights. It is argued that customary law governance models such as that of the Marakwet are at a high risk of elite capture and corruption. This occurs when a small percentage of the population with customary authority take advantage of the vague and ambiguous nature of the rule system to sustain or change rules so as to obtain personal gain.[54] Customary law systems may thus

[53]Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (29 November 2002) 4.

[54] Problems of elite capture and corruption have been experienced in India see Diya Dutta, 'Elite Capture and Corruption: Concepts and Definitions' (2009) <http://www.ruralgov-ncaer.org/images/product/doc/3_1345011280_EliteCaptureandCorruption1.pdf>. In Kenya, control of water supply systems in informal settlements has also demonstrated the risk of corruption and capture by a minority.

undermine the very objective of the HRBA by protecting existing social hierarchies and minimizing the influence of marginalized groups or women. This risk of marginalization is apparent in the case of the Marakwet, where the customary law excludes women from the institutional structures for governance of furrows.

While the risk of elite capture among customary law systems is indisputable, it is important to note that the risk is not limited to these systems only but it threatens all normative frameworks including formal state systems. Just as statutory frameworks seek to guard against this risk through checks and balances of institutional authority, customary governance systems can also incorporate safeguards to avoid elite capture.

A further challenge arises in the attempt to apply the HRBA to the right to maintain a customary law system of water governance. To do so effectively, a community such as the Marakwet would have to prove that the maintenance of their water supply is entirely dependent on their customary law system of water governance. Implying that, the failure to recognise this system would amount to derogation from their human right to water. Such an argument is difficult to sustain as the community would have to demonstrate that their existing customary law system provides an effective means for the realisation of the right to water in terms of quantity, quality and accessibility of water for basic needs. While not strictly restricted to volumetric standards, a quantity of 20-25litres per person, per day is proposed as a standard for adequacy. The content of the right with respect to the quality of water required may be determined from the following guideline:

> *The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.*[55]

As was noted in the review of the case study, the furrow system does not include a means of measuring the quantities of water abstracted or allocated to each individual or household. Further, as was confirmed by a majority of the water users interviewed the quality of the water obtained from the furrows for domestic use is not satisfactory.

There are thus opportunities and challenges in relation to the potential use of the HRBA and as a basis for customary rights to water and customary law governance of water resources.

See *Formalising water supply through partnership. The Mathare-Kosovo water model* (Water Services Trust Fund, 2010)

[55]Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (29 November 2002) 5.

The HRBA is largely untested in Kenya and thus the jury is still out on how courts would in practice deal with such claims.

IV CONCLUSION

Customary law, defined in the sense of a living reality that emerges and evolves from social practices of a community and which the community eventually accepts as obligatory, continues to exist in the case of Marakwet's customary water governance system. An analysis of the system establishes that it constitutes the primary regulatory framework for governance of water resources for the community.

As demonstrated by the case of the Marakwet, the features of customary law systems distinguish them from the notion of 'customary law system' recognised by the statutory legal framework. The incongruence between the notion of customary law rights and institutions of governance adopted by customary law systems and that adopted by statutory legal systems contributes to the lack of integration of these plural systems for water governance.

In the absence of support from national legal frameworks, the HRBA provides a potential avenue for upholding customary rights to water. The basis for the HRBA in this case would be the human right to water and the recognition of rights of indigenous peoples. The successful application of the HRBA would depend on various factors as has been demonstrated through the case study of the Marakwet and would not be without challenges. Despite the challenges, the HRBA, in some cases, provides the only legal avenue for gaining recognition of customary water rights and the right to maintain a customary law system for governance.