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Legal pluralism in the area of human rights: water and sanitation

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Access to clean drinking water and adequate sanitation and hygiene facilities is crucial to achieving social and environmental sustainability. We examine the global human water and sanitation right from a legal pluralism perspective to see if it is indifferent to, competes with, accommodates, or is mutually supportive of national laws and local customs. The paper concludes that legal pluralism in the area of human rights is a multilevel process operating at different levels of governance. Therefore, the effective implementation of international human rights depends on the nature of the relationship with existing regional, national and customary laws. After a legal pluralism diagnosis has been conducted for a specific region, there may be specific tools to deal with the related challenges.

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Introduction

As part of this special issue on legal pluralism and aquatic resources, this paper focuses on access to potable water and sanitation services. Although access to water and sanitation is a human right recognized in various international [1,2] and national policies, there are still over 748 million people without access to safe drinking water and 2.5 billion people who use unimproved sanitation facilities mostly living in poor regions [3]. This negatively affects environmental, social, and economic sustainability [4,5,6]. The legal pluralism framework allows us to understand the challenges facing the implementation of the human right to water and sanitation (HRWS).

Legal pluralism is 'the co-existence *de jure* or *de facto* of different normative legal orders within the same geographical and temporal space' [7••]. Resulting from historical evolution [8], legal pluralism can occur in any state [9] or jurisdiction [10,11]. The literature covers various forms and operations of legal pluralism in different contexts [12,13], and development challenges [14]. The evolution of legal pluralism in the human rights field 'may reflect a pragmatic response to resource or other constraints that are perceived to impede a population's right of access to justice' [7••]. This occurs where non-state informal or traditional justice systems operate in addition to formal human rights systems [15]. Three publications on legal pluralism and human rights are significant. First, the International Council on Human Rights Policy's (ICHRP) 2009 report analyses the compatibility of international human rights standards with other formal and informal law [9,16]. Second, a review article [17] raises three unresolved issues in the ICHRP: (a) how to manage competition between human rights and existing legal orders; (b) the role of States in, and the political process for, managing such competition; and (c) the importance of recognizing individual rights to resolving the conflict. Third, Quane [7••] advocates disaggregating the various forms of legal pluralism and analyzing their compatibility with international human rights law [7••].

The scientific literature recognizes two types of legal pluralism, *de jure* and *de facto*. The former recognizes co-existing multiple legal orders and their linkages in order to enhance the efficiency and effectiveness of the formal justice system [7]. The latter implies that the state does not recognize non-state or informal legal orders, but may implicitly allow their operation [7,18]. This paper goes further to differentiate between horizontal and vertical legal pluralism. Horizontal legal pluralism means different legal rules that apply to the same level of governance. Vertical legal pluralism, on the other hand, signifies different legal rules that apply across multiple levels of governance.

The paper analyses the challenges to implementing the HRWS through a legal pluralism lens, departing from the conventional focus on pre-existing rules to investigate also the underlying discourses that legitimise the rules [19,20]. It argues that a key challenge of modern legal

pluralism is the competing discourses and how these influence the adoption of rules on managing fresh water resources at multiple levels of governance [21••]. Through an in-depth review of relevant scientific literature and policy documents, and applying the conceptual framework presented by Bavinck and Gupta (in this issue) this paper identifies four types of legal pluralism relationships: indifference, competition, accommodation, and mutual support, and analyses their implications for implementing the HRWS.

Relevant discourses in fresh water governance

Economic, social, cultural, and political discourses on fresh water governance influence the application of the HRWS. The discourses are themselves influenced by factors such as climate, extreme variability in the availability of water resources, geography, and water uses [22]. The co-existence of different discourses helps frame legal orders, and creates a situation of legal pluralism at different levels of governance. This is particularly evident when customary rules influenced by religious laws such as the Hadiths of Islam come in conflict with colonial and post-colonial laws and modern discourses [7].

In this regard, under European Law, the two principal systems: civil law and common law regulated the abstraction and use of water from natural sources to ensure orderly allocation and sustainable use. Under both systems, the right to use water derived from use or ownership of land adjacent to water courses. Civil law, sometimes described as Romano-Germanic [22], had limited private ownership of water; water was classified as open for use subject to regulation to avoid over-exploitation [23]. Roman water law permitted the use of public streams and rivers by all who had access to them, but the government retained the right to regulate the use [24].

The common law system originating from England on the other hand had two key principles: riparianism and prior appropriation. During the industrial revolution in England, water resources played a central role in economic development. Riparianism entitled the water riparian rights to the ordinary use of the water flowing in the watercourse for domestic purposes, and reasonable use for any other purpose which did not interfere with the rights of other users, subject to certain restrictions [25]. This doctrine spread to many former British colonies. However, practical limitations in arid places such as the Western US led to the adoption of prior appropriation [22]. Prior appropriation is linked to the practise of miners on federal public lands who assigned the best rights to the first water users in the same way that the mining rights were accorded to those who first discovered the ore deposits [22]. The occurrence of the mining activities on federal public lands instead of private lands precluded the application of the riparian principle [22].

Modern discourses include equity and priority of use; water as an economic good and pricing of water resources; the Millennium Development Goals (MDGs) aimed at halving the human population without access to improved drinking water and sanitation facilities; water as a source of ecosystem services; water as a political good and the securitization of water resources; protection of water as a heritage of humankind; and water as a free gift of God [26••,27].

Horizontal legal pluralism at international level

Early discourses pertaining to access include the right to water for drinking, priority of use and water as a gift of God which emerged from Islamic water law [28]. The concept of priority of use is included also in the 1997 UN Watercourses Convention, Article 10, where in the case of a conflict between uses of water resources, 'special regard' must be 'given to the requirements of vital human needs' [29].

The MDG [30,31] target on water and sanitation aims to at least halve the number of people without access by 2015, using 1990 as the baseline year [32]. Although by 2010, 89 percent of the global population had already gained access to improved drinking water sources, the quality and reliability of services, and inequity in the distribution of access are still major concerns [33].

The recognition of water and sanitation as human rights in international law, reaffirmed by the UNGA [1] and the UNHRC [2], respectively in 2010, also adds to horizontal legal pluralism. The HRWS is often either derived from the International Covenant on Civil and Political Right (ICCPR) [34] based on the right to life; or the International Covenant on Economic, Social, and Cultural Rights (ICESCR) [35] with reference to the right to an adequate standard of living, for instance [36]. In addition to affordability, other normative contents of the HRWS are safety, accessibility, and acceptability [37]. States are required to respect, protect, and fulfil the HRWS within their jurisdictions; and to desist from interfering with the realisation of the right in other jurisdictions [37]. There is no consensus on whether a derived right is an independent right under international law [36,38]. Though the sources of the HRWS are largely fragmented, evidence of State practise combined with a sense of legal obligation on the part of States (*opinio juris*), shows that the HRWS has evolved into becoming a part of customary international law [36,39,40].

In addition to the above three discourses and related rules on access to water and sanitation services, there are other discourses and related rules that may impact on the HRWS. The historical discourse of sharing water between users has emerged through the equity principles in international water law which govern the allocation of transboundary water resources among countries [41••,42••].