

Background Paper on Water Tenure and Social Inclusion

**For the Food and Agricultural Organization (FAO) Workshop on Water Tenure,
28-29 June (Berlin)**

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June 2022

Key Messages

- 1. For the governance of water tenure to be truly inclusive and sustainable, it must account for the diverse, community-based tenure systems employed by Indigenous Peoples and local communities (IPLCs) worldwide.**
- 2. Communities' freshwater tenure frequently depend on their legally recognized land or forest rights, so legislative harmonization and inter-sectoral coordination are critical to support water tenure security.**
- 3. The security of communities' land and water tenure rights hinges on the interface between communities' customary laws and government-issued laws that may or may not recognize those customary rights.**
- 4. Innovative solutions are needed to fill the gaps left by compulsory permitting systems, which are not tailored to the needs of and resources available to IPLCs and fail to effectively protect their water tenure security.**
- 5. More explicit legal recognition of communities' and community women's freshwater tenure rights are central to realization of water and food security, sustainable livelihoods, multiple SDGs, and global climate, ecosystem restoration, and biodiversity goals.**

Water Tenure and Social Inclusion

Introduction

Water tenure is defined as the relationships, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources. Water tenure determines who has access to and can use water for various purposes, how much, for how long, and how those rights interact with other tenure holders. Water tenure also derives its meaning and utility from the **bundle of rights** that constitute the fundamental elements of peoples' relationship with each other when it comes to freshwater resources. Rights to use and manage water are governed both by legislative and customary frameworks, which may or may not be aligned with one another. Unpacking the bundle of rights that constitutes various forms of water tenure thus helps governments and others to understand the diverse ways in which the specific rights constituting tenure regimes are practically formulated, implemented, and enforced.

Over the past two decades, there has been an increasing international recognition of the ways in which natural resource tenure underpins food security, sustainable livelihoods, and equitable and sustainable development (IFAD, 2017). This, in turn, has led to tangible progress in many countries toward the legal recognition and protection of land, forest, and fisheries rights. The development and implementation of principles and tools to guide policy and legal reforms, notably the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs), have provided an important basis for building policy consensus on what constitutes responsible governance of land and resource tenure. A key aspect of this international consensus has been the critical importance of prioritizing the rights of the rural poor (and particularly of rural women) and a growing recognition of the need to support and strengthen diverse local or customary tenure systems that may provide overlapping rights to various individuals, groups, and communities (IFAD, 2017; RRI/ELI, 2020; FAO, 2020). This vision of inclusive tenure applies equally to water tenure, which underpins the food security, livelihoods, health, and climate resilience of vulnerable populations worldwide and is interconnected with their land, forest, and other resource tenure rights (RRI/ELI, 2020).

For the governance of water tenure to be truly inclusive and sustainable, it must account for the diverse, community-based tenure systems employed by Indigenous Peoples and local communities (IPLCs) worldwide. These community-based systems regulate access to, use and management of natural resources on at least half the world's land mass. Despite the prevalence and importance of these tenure systems, communities are recognized as legal owners of only 10 percent of land globally. The extent of their legal rights to water remains largely unknown (RRI/ELI, 2020). Moreover, in many cases, the security of communities' water tenure rights hinges on the interface between customary laws and the government-issued laws that may or may not recognize customary rights as legally valid (Troell and Keene, 2022).

While concerted advocacy efforts and increased international recognition of the ways in which secure, community-based tenure underpins the realization of a broad cross-section of development goals have driven notable progress in the legal recognition of IPLCs' land and forest rights, similar advocacy and policymaking processes around community-based freshwater tenure rights and their connection to land and other resource tenure rights have only recently begun to garner significant attention (see RRI/ELI 2020). There is thus a critical need to advance the concept of water tenure, particularly in the context of

the world's most vulnerable populations and clarify the role that responsible governance of water tenure can play in achieving national water and development policy agendas.

Applied research on water tenure in the context of IPLCs and at the country level has helped to identify the core elements of water tenure and has highlighted a number of core issues related to the recognition and protection of IPLCs' water tenure rights (and the rights of women within those communities) in the larger context of national water governance frameworks. These issues are briefly explored below.

The “Land-Water Nexus”

In many countries, water tenure – and particularly community-based water tenure – is dependent on legally recognized land or forest rights (RRI/ELI, 2020). This “land-water nexus” can impact the realization and security of IPLCs' water tenure rights and often persists even where national water laws de-couple water rights from land tenure (RRI/ELI, 2020; FAO, 2020). Indeed, water laws in many countries are lagging behind other sectoral laws in their recognition of communities' water tenure, including customary water tenure (RRI/ELI, 2020). Where this is the case, the “land-water nexus” can provide a crucial legal foundation for the recognition and protection of IPLCs' freshwater rights.

However, the recognition of IPLCs' water tenure rights across various sectors can also pose a threat to those rights when sectoral laws are not effectively aligned or harmonized. In Kenya, for example, land and water rights are inherently different. While customary land rights are recognized by the constitution and include the access to water, water rights do not explicitly recognize these customary rights and require that any water use other than those for domestic purposes needs either a permit or the formation of a Water Users Association. Hence, Kenyan government has yet to reconcile whether communities require permits or formation of WUAs to vest their water tenure on customary lands.

Where there are inconsistencies or even contradictions between water, land, forest, or other laws with respect to water tenure, this can create confusion as to sectoral mandates, result in duplicative requirements for realizing communities' water rights, or even undermine their existing water rights (FAO, 2020). It is therefore critical for countries to have a clear understanding of existing water tenure systems and their legal status, which can enable a more integrated approach that promotes inter-sectoral harmonization of tenure policies, institutional mandates, and legal rights and, ultimately, security of communities' water tenure.

The Role of Customary Water Tenure

Customary tenure encompasses the relationships between IPLCs and their natural resources (including water), which are governed by a set of customary rules and norms that communities use to express and order their ownership, possession, management, use, and regulation of those resources (Troell and Keene, 2022). The importance of formally recognizing IPLC customary tenure rights has increasingly been reflected in international and national laws recognizing, to varying extents, the customary land and forest tenure rights of IPLCs (RRI, 2015; RRI, 2018). The specific recognition of IPLCs' water rights was highlighted in the 2018 UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. The declaration expands the scope of protections previously only provided for Indigenous Peoples to all communities with resource-based livelihoods and include individual or collective rights to access and sustainably use and manage land and waterbodies to achieve an adequate standard of living, as well as to safe drinking water and “water for personal and domestic use, farming, fishing, livestock keeping and for securing other water-related livelihoods, ensuring the conservation, restoration and sustainable use of water” (UNGA, 2018, Art. 17). States are also called upon to “respect, protect and ensure access to water, including in customary and community-based water management systems, on a non-discriminatory basis” (UNGA, 2018, Art. 21). At the national level, countries are increasingly recognizing customary laws, and customary land (and water) tenure in particular, providing new avenues for ensuring that IPLCs' water tenure rights are more effectively protected. It is important to note that the majority of customary water rights enjoying legal recognition and protection have their basis in land

and other resource-related or environmental laws through the “land-water nexus” described above, so the same concerns regarding inter-sectoral harmonization apply.

Legal recognition and protection of Indigenous and community water tenure rights provides a critical basis for securing and protecting IPLCs’ water tenure, particularly where third parties may be threatening those rights. However, it is important to note that legal recognition of customary water tenure rights also raises difficult questions of legitimacy, power, autonomy, and self-determination for communities. Legal recognition is also only one aspect of overcoming the challenges IPLCs face in protecting their water tenure rights, which requires effective community and national water governance frameworks to ensure meaningful implementation.

Community Based Water Tenure for Livelihoods and Food Security

In most countries, water use rights are granted through an administrative permitting or licensing process overseen by the government. Many countries exempt “primary” or “domestic” uses of water from the permitting requirements, usually requiring that these uses be small-scale in nature and/or not achieved with the use of mechanized abstraction technologies. These exemptions can include certain cultural, religious, and even small-scale agricultural or other livelihoods-based water uses. However, often the rights to use water for livelihoods purposes are burdened by permitting or sometimes other administrative requirements (such as the need to incorporate as a users’ organization). Such permitting systems, while providing important benefits for water management agencies, including monitoring and regulating water uses, facilitating more effective resource management and financing water administration and infrastructure, are also rarely tailored to the priorities, needs and capacities of communities and other vulnerable users and often place high administrative and financial burdens on these users. Government offices administering permits are often far from communities and online applications are not commonly available or accessible, thus requiring communities to travel long distances (sometimes multiple times) in order to apply for permits. Permitting processes may be particularly intimidating if community members lack the necessary literacy and education levels to easily understand and fulfill the requirements. These requirements also frequently limit the duration of water rights, which contrasts with the unlimited duration of many communities’ customary water tenure rights. Even where communities’ livelihoods-based water uses are exempted from permitting requirements, those exempted use rights often do not have the same legal status as permitted rights, leaving them more vulnerable to third party challenges. Moreover, government capacity to implement permitting requirements in rural communities is frequently limited and the logistical burdens and costs to the state of implementing such systems is much higher than the intended revenue generation (RRI and ELI, 2020; van Koppen and Schreiner, 2018). It is thus critical to explore innovative solutions to the gaps left by compulsory permitting systems, which are not often tailored to the needs of and resources available to IPLCs and fails to effectively protect their water tenure security. This could include expansion of permitting exemptions to include livelihoods uses (while ensuring their equal legal status to permitted rights) or legally prioritizing a broader range of community use rights to strengthen the legal position of communities when conflicting claims arise or during times of water stress.

Pastoralism

Approximately 500 million people rely on pastoralism for their only or a main part of their livelihood globally (FAO, 2016). Livestock fodder and water are the most important resources for pastoralists. Water tenure rights for pastoralists are therefore critical in determining timing of access to water, physical access to water sources, number of animals, etc. Yet, in many countries, overlapping and often competing customary and formal governance systems constrain the effective recognition of their resource rights, particularly where pastoral communities cross boundaries (World Bank, 2016). More recently, some countries (including Mali, Burkina Faso, and Niger and Mauritania) have passed legislation protecting grazing land and granting herders rights to land and water resources, recognizing existing access and sharing arrangements (FAO, 2022).

Women's Water Tenure

Another key issue relates to the specific role of women's water rights within IPLCs. Women's access to and control over land and natural resources is central to their economic and social empowerment, providing a critical basis for livelihoods security, collateral for credit, and access to decision-making.

Despite the critical roles women play in water management and protection, they are less likely than men to have control over these resources (USAID, 2016). Women's water tenure also often depend on their legally recognized land rights, which highlights the importance of strengthening land and forest tenure for women (RRI/ELI, 2020).

Where women do have secure tenure rights, they often make investments to improve land, participate in land rental markets, increase their economic empowerment and control over household decisions, and contribute to broader family food security, children's health and increase sustainable agricultural productivity (FAO, 2022; ADD). Research also demonstrates that secure rights to land enhance women's ability to participate and hold positions of authority in community governance institutions, further enabling them to advocate for gender-equitable land and water resource management and governance (Id.). Yet, research has also shown that many community-based water tenure systems remain gender neutral and fail to explicitly protect women's rights to use and make decisions around their water resources (RRI/ELI, 2020). In Senegal for example, women have great difficulties in accessing or owing land. In line with customary and traditional practices, women rarely inherit or otherwise acquire land rights despite the fact that according to state law women and men should have equal access to and control over land and other natural resources, including water.

Efforts to formalize women's land and water rights are critical, but women also face a number of social and cultural barriers that can prevent them from realizing the multiple benefits associated with more secure tenure. Social restrictions can limit women's ability to make productive use of land and water and tenure insecurity can persist through inequitable marriage and inheritance laws. Thus, reforms to address these issues require effective analysis of gender inequities in legal frameworks, but also in the political economy of land and water resource governance at the local level to facilitate women's equal participation in land and water governance and achieve truly gender-equitable outcomes (Doss and Meinzen-Dick, 2020).

What is water tenure?

Water tenure can be defined as “the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources” (Hodgson 2016; FAO 2020). The advantage of this relatively new concept is that it considers all types of water uses, including those that are not formally recognized by law. **At the center of most water tenure systems is a core group, or bundle of rights** that constitute the fundamental elements of peoples’ relationship with their water resources and with each other in relation to freshwater resources. For example, tenure holders can have rights to access, impound, use, and manage water, as well as “procedural” rights to have access to information and participate in decisions pertaining to their water resources. The rights that are held by any one individual or group can vary, resulting in different “bundles of rights” that are created and protected by legislative and customary frameworks which may or may not be aligned. The ways in which various rights within the bundle are assigned, who the rights holders are and how the rights are implemented and enforced shapes both the quality and security of water tenure regimes. While the bundle-of-rights approach to tenure was initially developed to apply to terrestrial resources, it can be tailored to apply in the freshwater context.

Water tenure offers a nuanced framework for recognizing the diverse kinds of formal water tenure relationships as well as those derived from customary and local practices. Another key benefit of thinking in terms of water tenure is that it focuses on water users. The relationship between water users and the way they access and use the water is the main focus of water tenure. Because water tenure concentrates on users as opposed to laws and policies that are imposed from the top, a water tenure approach is by nature bottom-up (Hodgson 2016). Looking at the example from South Africa, it is evident that the dam was built upstream without considering customary water tenure arrangements by users downstream. A tenure approach could have encouraged a broader understanding of the ecosystem services and connected livelihood benefits provided by the river’s floodplain to downstream communities.

One can broadly distinguish between two types of tenure, legally defined water tenure and customary tenure. **Water tenure defined by formal law** often include permit-based rights for using surface and groundwater resources. They constitute property rights (or quasi-property rights) which enable the rights-holder to exclude other third parties from using these resources. Formal arrangements on water rights are signed, for example, between individuals and Water User Organizations (WUOs). In these cases, rural farmers receive their water from irrigation agencies but handled through WUOs (Hodgson, 2016). In many countries some small-scale domestic activities, so called “*de minimis* uses” allow the abstraction of small quantities of water for livestock or drinking water. They are listed under formal law arrangements but do not require a regulatory license.

Customary and religious water tenure rights on the other side include the rights to abstract and use water based on customary practices or religious teaching. In many places, customary or local law remains the dominant legal paradigm for water tenure. These customary water tenure arrangements vary significantly in form and scope. Often, they emphasize the rights of groups and communities rather than individuals (which is common for formal water tenure) and are frequently part of complex frameworks that regulate access to other natural resources. In cases where formal law does not acknowledge or protect these customary tenure rights, they do not provide formal security to water users, making them vulnerable for possible risks of sanctions and sudden prohibition of use (Hodgson, 2016).

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