



Enabling legal environment for the responsible governance of tenure

“States should strive to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth”.

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) para 4.1

BACKGROUND

Secure tenure rights are important for subsistence, semi-commercial and commercial food production, and therefore for food availability generally and physical, social and economic accessibility for those involved. Food security implies that people need to be able to access the means of producing or procuring food and that development must be sustainable to guarantee it for all, now and in the future. The responsible governance of tenure is of fundamental importance for ensuring food and nutrition security, contributing to more sustainable and equitable livelihoods, social stability, rural development, environmental protection and the long-term eradication of hunger and poverty.

What is land tenure?

The rules invented by societies to allocate property rights over land, grant access to the use and control of land, and define the associated responsibilities and restraints.

Natural resource tenure in its simplest definition refers to who holds the rights to use what resource. It is about the relationships between people and the natural resources such as land, fisheries or forests. It is complex because these natural resources are precious, limited and valuable, and the relationships people have with them may be legally defined and formally recognized or customarily defined. They are frequently sources of conflict, dispute or abuse, especially under increasing demands associated with population growth, large-scale investments and climate change. Land tenure may be public, private, communal, indigenous, customary or informal and **land tenure systems**, which arise from formal written laws, or informal customary arrangements, determine **who can use what resources for how long and under what conditions**.

Responsible governance of tenure, based on human rights principles, makes access to land, fisheries and forests fairer. It protects people from the arbitrary loss of their rights, including through forced evictions. It helps prevent discriminatory

practices and leads to transparent and participatory decision making. It guarantees equality before the law and can prevent conflicts by resolving disputes. Ultimately, it promotes food security by securing access to natural resources and protecting the rights of people who depend on them.

THE INTERNATIONAL AND REGIONAL FRAMEWORK

The relationship between access to land, forests and fisheries resources on the one hand and the enjoyment of human rights such as the right to an adequate standard of living, including food and water mean that the proper governance of the resources impacts positively upon the fulfillment of internationally recognized human rights. This is reflected in relevant international instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)²; and the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples.

In Africa, regional instruments, such as the African Charter on Human and People's Rights (the Banjul Charter), and the Protocol to the Banjul Charter on the Rights of Women in Africa provide for rights relating to access to and ownership of natural resources such as land.³ The African Union's (AU) Framework and Guidelines on Land Policy in Africa, the AU Agenda 2063, the AU Declaration on Land Issues and Challenges in Africa, the Guiding Principles on Large Scale Land Based Investments in Africa and the Malabo Declaration on Accelerated Agricultural Growth and Transformation recognize the complexity of land issues in the continent and provide guidance for responsive and effective land policies and governance.

Whether the right to food is recognized expressly or implicitly in a State's Constitution, or derived from international or regional obligations, a framework law on the right to adequate food that results from extensive and inclusive consultation, and contains clear definition of the sectors regulated, the roles

African Union's Framework and Guidelines on Land Policy in Africa

Recognizes land as a valuable natural resource and its potential for economic development and poverty reduction; fosters a shared vision of national development and encourages governments to focus on land administration systems, including land rights delivery systems and land governance structures and institutions; and promotes adequate budgetary allocations for land policy development and implementation.

and responsibilities of relevant actors, budget provision and transparency and accountability mechanisms can be a useful and effective tool for guaranteeing, implementing and monitoring the right to adequate food for all and achieving food and nutrition security in the long term.

At the global level, States made strong commitments to make land use more accessible, equitable and sustainable in the interests of ending poverty and eliminating hunger by 2030 with the Sustainable Development Goals (SDG) of 2015⁴. Standards for the responsible governance of tenure in land and other natural resources to achieve food security and nutrition objectives have further been enshrined in internationally accepted instruments such as the Voluntary Guidelines on the Responsible Governance of Tenure for Land, Fisheries and Forests in the Context of National Food Security, 2012 (VGGT), the Voluntary Guidelines on the Progressive Realization of the Right to Food in the Context of Food Security (RtFG), 2004, and the Voluntary Guidelines for Securing Small-Scale Fisheries in the Context of Food Security and Poverty Eradication, 2014. These instruments benefit from widely acknowledged legitimacy given the participative and inclusive consultation process that led to their development, including regional multi-stakeholder consultations.

WHAT STATES CAN DO

To meet international and regional commitments towards more equitable and responsible governance of tenure, States should take multiple legislative and policy actions. The VGGT provides guidance on what States should include in

1 Ratified by all African states except Botswana, Mozambique and South Sudan.

2 Ratified by all African states except Sudan and Somalia.

3 See also the Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, <http://www.achpr.org/instruments/economic-social-cultural/>

4 SDGs 1, 2, 5, 10, 13, 15 specifically refer to land tenure.

their own strategies, policies, legislation and programmes on the governance of natural resources to eradicate hunger and poverty and achieve sustainable livelihoods, socio-economic development and environmental protection with the overall goal of achieving food security for all and supporting the progressive realization of the right to adequate food.

The **Guiding Principles** of the VGGT recommend States to take measures to:

- Recognize, respect and register all legitimate tenure rights holders⁵ and their rights, including the legitimate rights of informal occupiers of land, and taking into special consideration the discriminatory practices that women can face and the rights of people in situations of vulnerability.
- Safeguard legitimate tenure rights against threats and infringements, including against unlawful forced evictions.
- Promote and facilitate the enjoyment of legitimate tenure rights, ensuring that services are accessible to all.
- Ensure effective access to justice and remedy where there are disputes or grievances over tenure rights and provide prompt, fair compensation in cases of expropriation.
- Take active measures to prevent tenure disputes, violent conflicts and combat corruption in all forms, at all levels, and in all settings.
- Ensure that non-state actors, including transnational business actors, respect human rights and legitimate tenure rights.
- Observe the principles of human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement (VGGT, guideline 3).

States are encouraged to implement the VGGT, applying human rights principles and ensure security of tenure for all, with emphasis on vulnerable and marginalized groups such as pastoralists, peasants, rural women, youth, fisher folks, rural workers and indigenous peoples. Relevant processes should be participatory, transparent and accountable. Consultations should take into account existing power imbalances and ensure active, free, effective, meaningful and informed participation.

Many countries in Africa have provided legal recognition to legitimate tenure rights, in particular customary rights, which before may have been ignored. Yet, with increasing pressure and demand for large scale land based investments, more needs to be done for their effective protection, in particular through registration/recording efforts of customary, communal and individual land rights. One of the biggest challenges in the recognition and registration of customary rights is to address gender inequalities at the same time, for instance by stipulating that constitutional rights, such as the right to non-discrimination, must condition the customary rights.

Types of legitimate tenure rights:

Legal legitimacy, or rights legally recognized:

- Ownership rights recognized by law including rights of individuals, families and groups, and customary rights recognized by the law;
- Use rights recognized by law including leases, sharecropping and license agreements;
- Servitudes/easements.

Social legitimacy, or rights with broad social acceptance but no formal legal recognition:

- Customary and indigenous rights to resources vested in the state in trust for the citizens;
- Customary rights on state land, e.g. forest communities;
- Informal settlements on private and public land where the state has accepted that it is not possible to relocate the people;
- Squatters on private and public land who have almost fulfilled the requirements for acquiring the land through prescription or adverse possession;
- Not formally recognized traditional fishing grounds.

⁵ See text box with definitions on the different types of legitimate tenure rights, taken from FAO. 2016. Responsible Governance of Tenure and the Law: A guide for lawyers and other legal service providers, Governance of Tenure Technical Guide 5.

ENSURING GENDER EQUITABLE LAND TENURE

Women are often at enormous disadvantage in relation to land tenure. Traditional discriminatory practices result in their claims to tenure being dependent upon their relationships with men. In some cultures, they can be prevented from holding land, be deprived of land, or not permitted to inherit land. Women who work the land in rural communities are often the poorest and most marginalized, frequently lacking formal title to the land, educational opportunities, access to fair markets, systems of credit and fair remuneration for their work⁶.

Land tenure governance is inevitably complex and its relationship to gender inequities is replicated in many other areas of social, economic, political and cultural life, including family law and inheritance, access to education, information and training, decent employment, access to markets and the economy, among others. For good governance of land tenure, gender-equitable land policies and legislation are necessary and for this to occur, women must participate actively, meaningfully and effectively in discussions and negotiations relating to pertinent decision-making processes. The elaboration of gender equitable land tenure systems is vital to furthering sustainable development and good governance and there are diverse actions that states can practically take to enhance their economic, social and cultural development with proactive measures for gender-equitable governance of land tenure. Land laws, registration laws, expropriation laws, family and inheritance laws may all be in need of reform to ensure alignment with the VGGT and respect for human rights in general and gender equality in particular. Ensuring that legislation protects all legitimate tenure rights and the equal rights of men and women is a key responsibility of parliaments.

VGGT paragraphs 5.4 and 5.5: "States should consider the particular obstacles faced by women and girls with regard to tenure and associated tenure rights, and take measures to ensure that legal and policy frameworks provide adequate protection for women and that laws that recognize women's tenure rights are implemented and enforced. ... States should develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset."

Gender equality in agriculture and with regard to access to resources is high on the regional and international agenda (see above). Under SDG 5, States have committed to reach gender equal land rights in practice and by law.

SDG 5.a.2 – Percentage of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control.

In order to track progress in the achievement of SDG target 5.a.2 on legal frameworks that guarantee women's equal rights to land ownership and/or control, FAO, as the custodian for the indicator, has developed the following six variables, known as proxies, for countries to report on:

Proxy A. Is the joint registration of land compulsory or encouraged through economic incentives?

Proxy B. Does the legal and policy framework require spousal consent for land transactions?

Proxy C. Does the legal and policy framework support women's and girls' equal inheritance rights?

Proxy D. Does the legal and policy framework provide for the allocation of financial resources to increase women's ownership and control over land?

Proxy E. In legal systems that recognize customary land tenure, does the law explicitly protect the land rights of women?

Proxy F. Does the legal and policy framework mandate women's participation in land management and administration institutions?

Source: FAO. 2018

Africa has some good practice examples where women's participation in decision-making processes have led to more equitable policies and laws.

⁶ FAO, 2013, *Governing Land for Women and Men* – <http://www.fao.org/3/a-i3114e.pdf>

In **Uganda**, the Land Policy included women's groups in the policy-making process whereby 16 land-related laws were reviewed to ensure gender mainstreaming in all aspects of landownership, access, use, administration and management in Uganda. The Constitution prohibits cultures, customs, and traditions, which are against the dignity or interests of women. The Land Act recognizes that customary rules that deny women's rights as guaranteed in the constitution, including access to ownership, occupation, or use of any land, will be considered void.

In **Kenya**, the Constitution of 2010 gives women and men the right to equal treatment and opportunities in political, economic, cultural and social spheres; eliminates gender discrimination in inheritance and in access rights to land and property. The Constitution recognizes customary law as a source of law in the country, and community lands held under customary tenure should be governed by customary rules as long as customary law does not conflict with Constitutional principles (including gender equality). The Community Land Law states that every member of the community has the right to equal benefit from community land, and specifically states that women have the right to equal treatment in all dealings in community land. Furthermore, the Constitution requires that "not more than two-thirds of the members of elective public bodies shall be of the same gender," which is arguably applicable to land management committees.

In **Sierra Leone**, the National Land Policy of 2015 was supported by a VGGT process, including a legal assessment against the VGGT and specific legal assessment on gender-equitable land tenure. The policy resolves to amend and update the legal framework to ensure equal value in law of customary rights and freeholds, and to do so in ways that ensure the equal rights of women and men, including through constitutional amendment and the enactment of a new land law.

FAO, 2013 and <http://www.fao.org/in-action/securing-land-tenure-rights-sierra-leone/en/>

PARLIAMENTARY CHECKLIST FOR ACTION

Sustainable growth and development in Africa will largely depend upon the way land and land-related resources are conserved, used and managed.

Gender-equitable governance of tenure in land and other natural resources supported by sound policy and legal frameworks and appropriate budget and operational plans that are adopted and implemented through participatory processes can ensure broad-based and sustainable socio-economic development. Parliamentarians have an important role in aiding such progress and can consider the following actions:

- Forming a parliamentary alliance, a parliamentary committee or joining an existing parliamentary front, to raise awareness on and promote policy, legal and organizational frameworks to support the

implementation of the VGGT and other relevant regional instruments such as the African Union F&G.

- Join multistakeholder platforms on the VGGT where these exist.
- Assess the current policy, legal and institutional frameworks, nationally and locally, and identify potential areas for reforms, windows of opportunity for action, and ensure that land legislation and regulations are consistent and relevant to internationally accepted standards.
- Support the ratification and application of international conventions and regional instruments on women's rights relating to land and other natural resources.
- Support the enactment of land laws and policies that recognize the legitimate tenure rights of all, with particular attention to vulnerable and marginalized groups such as pastoralists, forest dwellers, fisherfolk and communities with customary tenure.
- Enact laws that ensure that customary law and practices respect gender equality.
- Promote and support legislative reform where necessary to achieve SDG 5, indicator 5.a.2.
- Enact laws that provide strong protection against forcible evictions, that set up a predictable legal framework for expropriation in the public interest, that combat corruption in the administration of tenure and support affordable and accessible dispute resolution mechanisms.
- In approving or drafting legislation, review local context, work constructively with constituents, customary and religious institutions and their leaders; involve the whole community in consultations, discussions and decision-making processes involving policy, legislation, customary law and land tenure practices, including awareness of tenure inequalities.
- Approve budgets for inclusive public sensitization, awareness raising and the provision of incentives, particularly on gender-equitable governance of tenure, so that people know their rights and how to claim them.
- Seek to support budget allocation for the training of professionals and public officials in the land, family and justice sectors in internationally accepted human rights

and gender equality standards and of how land laws intersect with family laws, inheritance laws etc.

- Support local groups to find innovative and creative ways to use customary law to help women negotiate their land rights, where statutory protection is inadequate or inaccessible, and promote these good examples to foster legislation and policy or as part of parliamentary oversight.
- In carrying out oversight mandate, seek to ensure the equitable representation of women (and rural women) in the political and governance institutions and structures involved in land policy-making and implementation.
- Strengthen monitoring and follow up practices to evaluate improvements in relation to equitable governance of land tenure in practice and encourage the development of disaggregated data to allow for evidence-based decision-making and strategies.
- Learn from good practice examples or parliamentary experiences, including in gender-equitable participation in land tenure policy-making, from other countries and regions; consider South-South cooperation and share examples from your country.

REFERENCES/RESOURCES FOR FURTHER INFORMATION

For additional resources, please see:

- FAO. 2012. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*
<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>
- FAO. 2013. Governing Land for Women and Men. A Technical Guide to support the achievement of responsible gender-equitable governance of Land Tenure*
<http://www.fao.org/3/a-i3114e.pdf>
- FAO. 2016. Responsible Governance of Tenure and the Law. A guide for lawyers and other legal service providers*
<http://www.fao.org/3/i5449e/i5449e.pdf>
- FAO Gender and land rights database*
<http://www.fao.org/gender-landrights-database/en>
- FAO. 2018. Realizing women's rights to land in the law. A guide for reporting on SDG indicator 5.a.2.*
<http://www.fao.org/3/i8785en/i8785en.pdf>
- AU, ECA, AfDB. 2010. Framework and Guidelines on land Policy in Africa*
http://africandpolicy.org/eu-programme/sites/default/files/F%26G%20on%20Land%20Policy_ENG.pdf
- AU, ECA, AfDB. 2014. Guiding Principles on Large Scale Land Based Investments in Africa*
https://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf