



Promoting participatory law-making for recognition of legitimate tenure rights

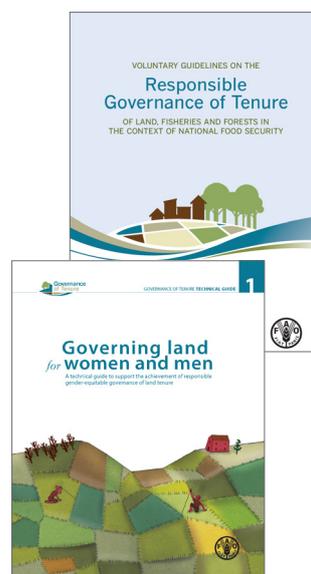


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“Participatory law-making” is the process by which citizens actively contribute to policy advocacy and law-drafting. Citizen participation in law-making can improve the quality and legitimacy of policies and laws by ensuring that they reflect and protect the authentic interests of the national citizenry. In the field of land rights, participatory law-making can help ensure the recognition and protection of legitimate tenure rights. The *Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests in the Context of National Food Security (VGGT)* call on states to develop relevant policies, laws and procedures through participatory processes that include men, women, Indigenous Peoples and members of marginalized groups.

This legal brief outlines how governments and civil society may promote participatory law-making, details the positive impacts of such processes, and makes various recommendations designed to ensure that all citizen’s voices are heard during law-making processes.



Citizens' rights to participate in national law-making are protected under international law

The consultation and participation of legitimate tenure rights holders is one of the core “principles of implementation” of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT). Paragraph 3B.6 sets out that:

Consultation and participation [include]: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

To this end, the VGGT set out that:

States should welcome and facilitate the participation of users of land, fisheries and forests in order to be fully involved in a participatory process of tenure governance, inter alia, formulation and implementation of policy and law and decisions on territorial development, as appropriate to the roles of State and non-state actors, and in line with national law and legislation (para. 4.10).

The VGGT then specifically call on states to develop policies, laws and procedures through participatory processes involving all affected parties, including men, women, Indigenous Peoples, and members of marginalized groups (para. 5.5; see also paras. 10.1, 12.8, 15.6 and 15.9). Importantly, para. 9.7 provides that:

States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.

The VGGT's recommendations on citizen participation in law-making align with international human rights law and international environmental law (United Nations Universal Declaration of Human Rights (Article 21); International Covenant on Civil and Political Rights (Article 25); International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(c)); Convention on the Elimination of all Forms of Discrimination Against Women (Article 7); International Labour Organization Convention 169 (Article 6.1(b)); United Nations Declaration on the Rights of Indigenous Peoples (Article 18)). Similarly, international environmental law also establishes strong 'procedural' rights for citizen involvement in law-making. For instance, principle 10 of the Rio Declaration (1992) mandates that i) each individual has the right to participate in decision-making processes; ii) States must facilitate and encourage public access to information; and iii) effective access to justice must be provided.

Involving legitimate tenure rights holders in law-making can improve the quality and legitimacy of national laws

Participation in law-making is essential to the effective protection of legitimate tenure rights (Cotula *et al.*, 2016). Robust citizen participation in law-making can help to:

- 1. Protect pre-existing legitimate tenure rights and address citizens' tenure challenges.** First, involving citizens in the formulation of draft laws and policies can help ensure that content of those laws and policies accurately reflect the lived realities of national citizens facing a wide range of land tenure concerns. Participatory law-making creates an opportunity for citizens to describe their customary and local frameworks and voice their concerns to lawmakers. It also ensures that the final laws: take into account local contexts; address systemic problems or challenges; bring to light critical issues inadequately addressed in the drafts; and expose potential implementation obstacles.

Broad citizen participation in law-making is necessary when drafting land laws that define who counts as a “legitimate tenure right holder.” Before the creation of modern nation states, land often belonged to local communities, who held their territories collectively and managed family and individual land rights according to customary legal frameworks. To ensure that lawmakers draft land laws that recognize and protect pre-existing land rights, rather than becoming a tool for (further) dispossession of local communities’ ancestral lands, all citizens – hailing from a range of customary and local land-owning arrangements – should be involved in law-making. When laws are drafted only by westernized, urban legal professionals, there is a risk that only private, individually-held property rights will be legitimized under law.

- 2. Ensure widespread knowledge of and compliance with the law.** Second, the process by which a law is passed can be as important to its implementation as the substance of the law itself: an inclusive, participatory process can help to increase public support for and compliance with the law (Knox, 2018). Comprehensive consultation processes can increase the number of legitimate tenure rights holders who know and respect the law, and will comply with it because it reflects their concerns and interests. Actively taking part in the drafting of a national law or policy can also help develop legitimate tenure rights holders’ legal knowledge of their rights and give them a sense of “ownership” over the final law.
- 3. Empower citizens to demand that the new law is implemented.** Third, participating in the drafting or amendment of a national law may empower legitimate tenure rights holders to demand that government officials implement the new law’s mandates in a timely, equitable, and efficient manner, both directly after passage and over the long term. Having taken part in the law-making process, legitimate tenure rights holders will be better informed about the contents and meaning of the new law, aware of the need to implement it, and empowered to ensure that legislators’ intent is carried out, even as political circumstances change over time.

Involving citizens in the formulation of draft laws and policies can help ensure that content of those laws and policies accurately reflect the lived realities of national citizens

The different degrees of citizen participation in law-making

Citizen involvement in law-making can take multiple forms, which range from a mere guise of inclusion without substantial influence to authentic participation that genuinely impacts the final draft of the law. Various “rungs” on this spectrum of participation include:

- **Informing.** While an important first step to legitimate participation, this is generally a one-way flow of information, without channels for citizen feedback.
- **Placation.** Placation may look like a few hand-picked citizens or members of civil society being asked to join government committees or special commissions, etc. This strategy allows citizens to advise government, but excludes all other citizens and keeps decision-making power in the hands of a few elite lawmakers.
- **Consultation.** Consultation can take the form of open public hearings and meetings in which citizens are invited to give their feedback on draft laws. (However, if this feedback is not then used to improve a draft law to better protect citizens’ rights, such consultations are only an illusory “show” of participation).
- **Partnership.** Partnership may be characterized by authentic, on-going communication and negotiation between citizens and lawmakers, in which the feedback and concerns harvested in consultations are taken seriously and directly influence the text of the law.
- **Citizen-driven.** A diverse spectrum of citizens collaboratively and actively draft laws and policies and submit them to the local, regional or national legislature for passage; citizens may also directly create and manage a local initiative linked to the new law, funded by government. (Note that in order to comply with the VGGT, states should ensure that all law-making processes are citizen-driven.)

Adapted from Arnstein, S.R. 1969. A Ladder of Citizen Participation. *Journal of the American Planning Association*, Vol. 35, No. 4. pp. 216-224.

When lawmakers don’t include citizens, laws may disenfranchise vulnerable groups

Many nations’ legal frameworks establish an affirmative obligation that government officials actively include citizens in rule-making processes. The procedural rights set out in such laws often require that lawmakers: 1) publish draft laws and create opportunities for public comment; 2) receive those comments; and 3) amend the drafts accordingly, taking into consideration public comment.

However, despite the various positive outcomes of inclusive, participatory law-making – and even when the national legal framework requires it – governments oftentimes make only a cursory effort to consult citizens while drafting laws. Instead of an open, accessible and lengthy participation process with citizens from across the country, they may only organize a few meetings in the national capital, or post a draft online, ensuring that only literate citizens with access to technology may read it. Indeed, disadvantaged groups may be excluded from participating in law-making due to societal power asymmetries, economic and/or logistical difficulties accessing consultations or public hearings, and socio-cultural and language barriers. For example, citizens

Societal power asymmetry, economic, logistical, socio-cultural and language barriers may hinder participation by vulnerable groups

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may be effectively denied full exercise of their procedural rights when:

- Legislators and technical drafting teams seek only the input of elite stakeholders' in cities, rather than traveling to rural areas to ensure that they hear from other groups;
- No steps are taken to translate the draft texts into local languages so people who do not speak the national language can fully understand them; or
- No effort is made to create separate opportunities for particularly vulnerable groups (such as women, youth, Indigenous Peoples, and others, who may not feel free to speak up in general meetings) to voice their concerns, among other barriers to robust, diverse citizen participation.

In such instances, the resulting laws may not reflect the lived realities and tenure concerns of these groups, and may, in some situations, actively disenfranchise them of their legitimate tenure rights. In certain countries, the absence of consultation can result in the relevant law being annulled (see e.g. Constitutional Court of Colombia, Decision C-030/08, 2008; Cotula *et al.*, 2016). However, most national frameworks do not seem to spell out the consequences for government actors' failure to adequately consult with citizens or create opportunities for citizen participation in law-making. Civil society advocates might consider supporting citizens' efforts to hold government agencies accountable to their national and international legal obligations to authentically consult with citizens in law-making processes that impact their rights.

How governments can involve legitimate tenure rights holders in law-making

Governments can take various steps to ensure that legitimate tenure rights holders can participate in law-making regarding tenure law and policy (Bruce *et al.*, 2007; Daley *et al.*, 2013; Cotula *et al.*, 2016). To ensure their participation, governments can:

- **Launch public information and advocacy campaigns on draft laws and policies** that teach legitimate tenure rights holders about the laws being drafted and give them time to think about the issues and articulate their needs. States should ensure that relevant information about proposed new land law or policy is made available to all members of the public in an objective, understandable, timely and effective manner. All communications should be written in low-literacy, plain language. Efforts should be made to reach a wide spectrum of stakeholders, including women, Indigenous Peoples, pastoralists and other vulnerable populations.
- **Support national media's efforts to educate the public about draft laws and policies.** Television and radio programs may be platforms where the content of draft policies and laws can be shared in a clear, direct manner, and where citizens and civil society actors can publicly debate them.
- **Increase legitimate tenure rights holders' interactions with government officials and elected representatives overall throughout the law-making process.** Regular exchanges between officials and the community may be fostered through frequent public hearings, "town hall" meetings, and other forums designed to increase public awareness, promote transparency, foster public debate and communication about state action, and create a space in which legitimate tenure rights holders can question, advise, and hold state officials accountable to fair enactment of the law.

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- **Hold local consultations to seek the concerns and expertise of legitimate tenure rights holders when drafting policies and laws.** Legitimate tenure rights holders may have technical, hands-on knowledge that can inform and improve proposed policies and laws. Lawmakers should plan comprehensive visits to all areas of their country to hold community consultations. Drafts of the law, translated into the local language, should be circulated well beforehand and read out on local radio. Efforts should be made to ensure that a very diverse set of stakeholders are present at each consultation. During each meeting, moderators should make sure that the voices and opinions from all marginalized groups are both heard and captured in writing to inform lawmakers about proposed edits to the draft law.
- **Amend draft laws and policies to reflect the concerns and interests voiced during the consultations.** Lawmakers should carefully ensure that the concerns and interests voiced by legitimate tenure rights holders are integrated into subsequently revised draft laws and policies. A full transcript of the public's feedback and concerns voiced during consultations should be made available to lawmakers, civil society and the media, who can then ensure that legitimate tenure rights holders' concerns are fully addressed in subsequent drafts.
- **Promote the election and appointment of government representatives, officials, and lawmakers who come from diverse backgrounds and can represent the concerns of their diverse constituencies.** To do this, governments might set aside a certain number of seats on elected and appointed government bodies for women, Indigenous Peoples, and members of other marginalized groups.
- **Create formal processes through which legitimate tenure rights holders can monitor government actors' implementation of national laws and policies, provide feedback, and suggest necessary amendments to implementing regulations.** Expedited complaints procedures and citizen appeals processes can help hold government officials accountable to compliance with and full enactment of a law's mandates.

Lawmakers should carefully ensure that the concerns and interests voiced by legitimate tenure rights holders are integrated into subsequently revised draft laws and policies

Governments must be careful to ensure that efforts to capture the voice and protect the interests of one marginalized group do not result in the increased marginalization of a *different* marginalized group. For example, lawmakers should ensure that an agricultural law that recognizes the customary rights of farmers does not override the rights and needs of pastoralist groups.

What civil society can do to involve legitimate tenure rights holders in law-making

Civil society can support legitimate tenure rights holders by helping them to access consultations, network, share resources and combine their voices to make a strong impact. The relevant ministry or organization in charge of a law-drafting process should assume responsibility for organizing legitimate tenure rights holders' involvement in the law-making process (Cotula *et al.*, 2016). However, the VGGT call on both states and non-state actors to provide technical and legal assistance to affected

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communities to allow them to participate in the development of tenure policies and laws (para. 9.10). As such, civil society groups may create spaces or opportunities for a diverse range of citizens to more easily and effectively participate in national or local law-making processes. A network or coalition of legal advocates, cooperatives, community-based organizations, academics, social service providers, religious leaders and non-governmental organizations working with the same populations or in the same regions can work together to positively impact legitimate tenure rights holders' participation in tenure law-making processes. They may do this by:

- **Widely publishing accurate information about the draft legislation.** Civil society actors might communicate clear information about the draft law or policy, ensuring that the information conveyed is consistent and accurate and that legitimate tenure rights holders have this information in time to effectively participate and give their feedback.
- **Motivating broad participation from a wide range of stakeholders.** Civil society actors might appeal to diverse constituencies across the country, motivating greater participation in the law-making process by groups who might not normally be galvanized into legislative advocacy.
- **Creating powerful coalitions.** Civil society actors might support diverse stakeholders to recognize their common interests and concerns, and align or combine forces for more powerful advocacy efforts that allow them to speak in a united voice.
- **Helping legitimate rights holders attend consultations and related law-making meetings.** Civil society actors might increase legitimate tenure rights holder's access to funds, transportation, technical knowledge and political support to allow them to more actively take part in law-making meetings and processes, among other possible actions.

Supporting local communities to contribute to the land reform process in Sierra Leone

Throughout 2020, the government of Sierra Leone worked to develop two proposed legislation – the National Land Commission Act and the Customary Land Rights Act – to enact its progressive National Land Policy (2015). To ensure that the interests of rural Sierra Leoneans villagers would be protected under the new laws, a consortium of civil society organizations arranged a round of citizen consultations in five districts of Sierra Leone. In total, more than 250 men, women, elders, youth and community leaders took part in the consultations. To ensure that women's and youth's voices were heard, the consultations split participants into groups that ensured that all could speak freely, and their opinions fully captured. The consultations provided concrete suggestions for how Sierra Leone's legal drafters could improve the draft laws; such suggestions included: vesting legal ownership in families and communities thereby removing the power of land custodianship from chiefdom councils; giving women the legal right to use, access and control family land; ensuring inclusive land governance that gives women a role in decision-making; limiting leases granted to investors to 25 years; reducing the amount of land that may be granted to investors in long-term leases to 3 000 hectares; creating legal obligations to promote smallholder investments in land; and prioritizing the interests of women and youth in all negotiations with investors, among many other recommendations. During regional consultations on the proposed laws, these recommendations were presented to, and taken into consideration by, the government.

(Land for Life, unpublished)

Civil society groups can also provide legal empowerment education to legitimate tenure rights holders, helping them to see that their personal or local tenure conflicts are rooted in systemic or institutionalized injustice. Such legal empowerment efforts must go beyond basic legal knowledge

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and include the ability to use the law to take part in efforts to actively shape the laws that influence their lives.

Using litigation to shape national laws and their implementing regulations. Legitimate tenure rights holders and civil society can also shape legal systems by strategically bringing cases to court to refine implementation of existing laws. Strategic litigation can be an effective method for influencing policy change, improving laws and enhancing how those laws are implemented. Progressive lawyers can argue for more ‘pro-poor’ interpretations of legitimate tenure rights and liberal judges can take an active role in judicial interpretation. These legal actions should take care to work in combination with other forms of advocacy, including non-violent marches, public debate, and other forms of pressure that regular citizens can actively participate in. Legitimate tenure rights holders must stay involved and active throughout, pressing for necessary changes through a variety of strategies.

Legitimate tenure rights holders may sometimes face resistance from powerful elites when seeking to participate in law-making processes. To be able to effectively influence law-making, they will need to understand who the political and economic forces are and how to deal with them. They will likely require support to do so alongside legal empowerment education. For instance, they may learn the best way to work *with* such elites. It will, in any event, be key for legitimate tenure rights holders to be in the driving seat of the processes. (Cotula with Berger, 2017).

Supporting local communities to contribute to Myanmar’s land policy

To ensure that citizens’ concerns were addressed in Myanmar’s 2016 National Land Use Policy, the international NGOs Namati and Landesa supported local communities to put forward recommendations to the government drafters. Namati, with its local partner the Civil and Political Rights Campaign Group, supported a corps of paralegals to gather citizen’s experiences of structural land tenure challenges and injustices, then made recommendations for how these injustices could be affirmatively addressed in Myanmar’s land policy reform process. Meanwhile, Landesa carried out field research on rural women’s experiences protecting their land rights, then presented the women’s policy priorities into a report that recommended that Myanmar’s land policy strengthen women’s land rights, recognize local communities’ customary rights, and require free, prior and informed consent before land can be transacted for corporate use. Throughout the policy-drafting process, FAO also co-hosted national workshops and learning events that were attended by a broad range of stakeholders, including civil society groups and farmers’ organizations. Taken together, these efforts to relay citizen’s concerns and priorities successfully contributed to Myanmar’s National Land Use Policy affirmatively recognizing a range of legitimate tenure rights and strengthening women’s land rights under law.

(Namati and Landesa, 2015; FAO, n.d.; Jansen *et al.*, 2021)

Conclusion

The consultation and participation of legitimate tenure rights holders is one of the core principles of implementation of the VGGT. Governments and civil society can take steps to ensure that legitimate tenure rights holders can participate in law-making regarding tenure law and policy. The end goal is that by speaking out, making their needs heard, and demanding that governments shape national laws and policy accordingly, legitimate tenure rights holders can not only strengthen their particular tenure rights, but contribute to the improvement of the quality and legitimacy of the policies, laws and systems that govern tenure administration nationally.

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Key messages

To involve legitimate tenure rights holders in law-making, Governments can:

- Launch public information and advocacy campaigns on draft laws and policies;
- Support national media's efforts to educate the public about draft laws and policies;
- Increase legitimate tenure rights holders' interactions with government officials and elected representatives throughout the law-making process;
- Hold local consultations to seek concerns and expertise of diverse groups of legitimate tenure rights holders when drafting policies and laws;
- Amend draft laws and policies to reflect concerns and interests voiced during consultations;
- Promote election and appointment of government representatives, officials, and lawmakers from diverse backgrounds that can represent concerns of their diverse constituencies; and
- Create formal processes through which legitimate tenure rights holders can monitor government actors' implementation of national laws and policies, provide feedback, and suggest necessary amendments to implementing regulations.

To enhance participation of legitimate tenure rights holders in law-making, civil society can:

- Help legitimate tenure rights holders access consultations, network, share resources and combine their voices to make a stronger impact;
- Widely publish accurate information about draft legislation;
- Motivate broad participation from a wide range of stakeholders;
- Create powerful coalitions;
- Help legitimate rights holders attend consultations and related law-making meetings;
- Provide legal empowerment education to legitimate tenure rights holders; and
- Use litigation to shape national laws and their implementing regulations.