



Legal empowerment to promote legitimate tenure rights



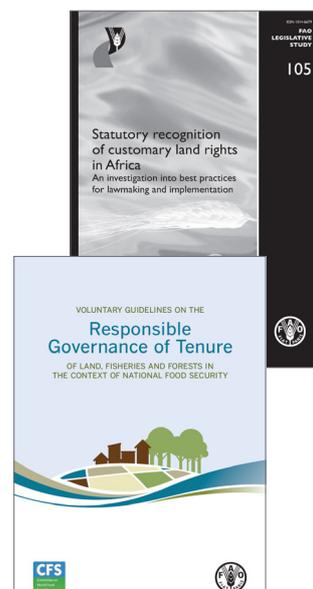
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Over the past thirty years, an increasing number of states have passed good laws that significantly strengthen the tenure rights of their citizens. However, due to multiple barriers, a high percentage of many nations' citizens are either unaware of their legal rights or unable to use national laws to protect their rights when threatened.

Legal empowerment efforts focus on strengthening citizens' capacity to exercise their rights in a wide variety of fora, including in government administrative procedures, courts and tribunals, and when advocating for laws and policies. Legal empowerment is a key component of ensuring that the governance of land, fisheries and forests is responsible, equitable and just. Legal empowerment initiatives may include legal education; capacity development; efforts to shape state justice systems; legal support for citizens; and promotion of citizen participation in law-making.

This legal brief outlines how state- and civil society-led legal empowerment initiatives may contribute to the realization of the **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)** and support greater tenure security, good governance, improved use of formal legal systems, and increased political participation by all citizens.



What is legal empowerment?

Governments and multilateral institutions often focus on strengthening and building up the state institutions that manage national legal and administrative procedures. Such efforts are often referred to as “Rule of Law” assistance and include interventions that train judges, reform court processes, write new laws, create lawyers’ associations, and build courtrooms. However, for true legal change to occur, citizens must also shape and strengthen their nation’s justice system from the bottom up to ensure that it serves all members of society, including all vulnerable and marginalized groups. The process through which legal advocates and government agencies support citizens to engage proactively with formal legal systems is called “legal empowerment.”

The UN General Assembly defines legal empowerment as “systemic change through which the poor are...enabled to use the law to advance their rights and their interests as citizens and economic actors (UNGA, 2009, p. 2). Legal empowerment efforts are rooted in a human rights-based approach to development that recognizes that poverty results from disempowerment, exclusion and discrimination (UNGA, 2009; Maru, 2015). Legal empowerment efforts aim to rebalance unjust power asymmetries and renegotiate established socio-political relations at both the local level, holding community leaders to account, as well as at the national level, where politicians, high-level government officials and business leaders may be abusing their powers (Cotula, 2007; Cotula with Berger, 2017). As such, legal empowerment efforts may be resisted by vested interests that stand to lose power as disadvantaged groups acquire greater agency. (Cotula and Mathieu, 2008).

Legal empowerment is systemic change through which the poor are enabled to use the law to advance their rights and their interests as citizens and economic actors

In the context of legitimate tenure rights, legal empowerment efforts may: support communities to document and protect their customary land rights (Knight *et al.*, 2012); help negotiate the terms of an investment or infrastructure project to ensure that local people benefit (Knight *et al.*, 2019; Szoke-Burke *et al.*, 2019); require investor and state compliance with contractual and legal requirements once an investment has begun (Maru, 2015); or support communities to seek redress for legitimate tenure rights violations and environmental destruction (Schwartz *et al.*, 2019).

The VGGT promote “access to justice” and “equity and justice”, including empowerment as core principles (paras. 3.1.4 and 3.B.3) and emphasise community empowerment as part of corruption prevention (para. 9.12).

The four components of legal empowerment

Competition for land and natural resources is growing. This competition is characterized by power asymmetries, in which individuals with greater knowledge, power and wealth may more easily influence the outcomes of key government decisions. For example, elites may influence the outcomes of key government decisions that prioritize agribusiness, mining, forestry, tourism and infrastructure development initiatives that dispossess marginalized groups from their lands

Legal empowerment to promote legitimate tenure rights

without their free, prior, informed consent and with little regard for due process. Such power asymmetries are also embedded in local dynamics: in the gender dynamics within a family, in the class relations between families within a community, and between different ethnic groups in a region.

Meanwhile, in some countries, laws and institutions may not protect the rights of all legitimate rights holders, or may establish subtle procedural biases against marginalized groups, making it difficult for them to access or navigate legal systems. In such instances, formal laws and legal institutions become tools of the wealthy, elite, or majority population. Vulnerable and marginalized groups' exclusion from formal legal systems is often both textual and procedural: laws may be written in a manner that is only understandable and usable to elites, or the procedures set out in regulations may be so complicated, time-consuming, costly or entangled in bureaucratic processes that it is challenging for marginalized groups to follow them to completion. Or, textually "neutral" laws may be inadvertently biased; if laws or regulations do not explicitly include affirmative protections to ensure that vulnerable groups have strong tenure rights, those rights may not be enforced.

In order for vulnerable and marginalized groups to genuinely secure legitimate tenure rights, they must:

- Know and understand national and international laws and their rights under those laws;
- Be able to successfully follow legal and administrative procedures to claim their rights;
- Be able to protect or defend their rights in the event of a conflict or injustice; and
- Participate in national lawmaking efforts, advocating that national laws protect their interests.

Lawyers, paralegals, legal advocates, and members of civil society and government may support such legal empowerment efforts, described below.

1. Knowing and understanding rights

Lack of legal knowledge may prevent vulnerable and marginalized groups from understanding that their grievances are rooted in rights violations. Laws may run for hundreds of pages filled with terms only understood by lawyers and judges, or may be published only in the official state language and never translated into local languages. Consequently, laws may remain unknown, or incorrect rumours of what a law mandates may create misconceptions and confusion.

Legal empowerment efforts necessarily begin by supporting vulnerable and marginalized groups to know their legal rights, including those enshrined within national land laws, inheritance laws, family laws, environmental laws, and investment laws. Legal awareness and capacity-building efforts are best targeted

At the heart of legal empowerment are efforts to rebalance unjust power asymmetries and renegotiate established socio-political relations

Legal empowerment to promote legitimate tenure rights

to the audience; it may be most effective to teach about land rights in the context of pressing community concerns about livelihood, land conflicts, large-scale agricultural investments in the region, etc.

However, knowing the content of a law is not enough; it is also necessary to know *how* to follow the legal or administrative procedures necessary to claim, protect or defend such rights protected in that law. Awareness raising and capacity development go hand-in-hand: for people to genuinely secure legitimate tenure rights, they must also understand how national legal systems function and be able to successfully pursue relevant legal processes. For example, learning how to formally register a community's land rights also means learning which agencies are in charge of processing land claims, where those agencies' local offices are located, what forms to ask for, what documents to bring as proof of claims, how to ensure that government officials process the claim within the mandated time limits, etc.

Legal education works best when it is targeted to the audience, interactive and teaches people how to use the law in practice. The best legal education is not "delivered" by lecturing at people, but by asking thoughtful questions that lead learners into critical reflection process of the injustices they face – bolstered by new awareness of their rights under national laws. Role-plays, games, simulations, discussions of real-life problems and other interactive tools should be used, and questions encouraged. Legal education initiatives may also include training on a range of practical skills related to claiming and protecting land rights, including: surveying and map-making, understanding potential investors' business plans, contract negotiation, and sustainable resource management, etc.

In order to achieve equality, it is necessary for all citizens to know their rights, know how to exercise those rights, and have access to justice systems to defend and enforce those rights

Taking account of literacy levels

To ensure that legal information reaches the widest audience possible, including both literate and illiterate citizens, laws should be drafted in plain and simple language and, when passed, translated into all languages spoken in the country. States and civil society groups might publish explanations of national laws in newspapers; in low-literacy manuals or illustrated booklets; in one-page brochures that quickly explain the basic tenets of the law; on posters, billboards, tee shirts, or in comic strips that illustrate various scenarios of individuals claiming and defending their rights; and through radio and television programs that discuss citizens' legitimate tenure rights under national law (Negrao, 1999).

Because one-off legal trainings will likely be insufficient, legal empowerment efforts must take into account the time, security and resource concerns of vulnerable and marginalized groups. Oftentimes only the wealthiest members of a community can afford to leave their work to attend trainings, and thus capacity-building efforts may further entrench pre-existing power asymmetries within communities. Efforts should strive to educate as broad a section of a community as possible, and be designed to reach people in places they normally congregate (for example,

Legal empowerment to promote legitimate tenure rights

public marketplaces, schools and local meeting halls) and in a manner that easily integrates into their lives.

Particular efforts may be made to train the community leaders; elders; and local religious and spiritual leaders who are often at the forefront of community-wide land conflicts. Special efforts must also be taken to reach women. This may mean creating separate trainings for all-female groups of villagers or placing educational materials at places women regularly visit, such as water sources and grain mills.

2. Claiming rights

Knowing one's rights and understanding how to assert them is not enough. Even when lawmakers pass good laws, these laws often establish complex legal or administrative procedures – including new certification, titling, and registration processes – that prove difficult for vulnerable groups to follow. Various systemic and institutional challenges may impede access to legal systems, including:

- **Access and resource challenges.** Government offices may be located in urban centres, far from where vulnerable and marginalized groups live, requiring days of costly travel. Marginalized groups may not be able to neglect their jobs or livelihoods to follow a legal process to its conclusion. There may be separate fees associated with every step of administrative processes, which together amount to prohibitively high expenses for poor claimants.
- **Structural inadequacies.** Complex legal systems and overlapping jurisdictional mandates involving various ministries or departments set the stage for bureaucratic mismanagement, duplication, contradiction, confusion, and error. Systemic failures – such as excessive centralization or lack of necessary funds – may tie the hands of officials, reducing their ability to make decisions or finalize procedures.
- **Procedural complexity.** Procedural requirements may prescribe complex, difficult-to-navigate processes or require documentary evidence of rights claims that marginalized groups cannot provide.
- **Corruption and power asymmetries.** The very structure and operation of state institutions may deepen elite capture of political outcomes and resource distributions. Bad faith bureaucratic mismanagement and lack of transparency may impede vulnerable groups from claiming their land rights. Services that should be available to all as a matter of right may be converted into “favours” based on kinship, friendship or politics.

Actions states can take

Government actors can make efforts to address obstacles and power asymmetries in land administration systems to ensure that all citizens can use these systems to successfully claim their rights. Efforts will require the political will of both central and local government leaders. Such efforts may include:

- **Decentralizing state systems to make them more easily accessible**, including devolving surveying, mapping and land registration services to the local level, then synchronizing local records with national databases;

Legal empowerment to promote legitimate tenure rights

- **Instituting pro-poor rules and waivers** in implementing regulations, including provisions specifying state officials help illiterate applicants complete forms and advise them about their rights, translators are provided when applicants do not speak the official language, or fees are waived for poor claimants;
- **Making formal legal procedures simpler and less expensive** by eliminating unnecessary steps and formalities, or holding local “clinics” where community members can be supported to file communal and family land claims together *en masse*;
- **Coordinating the actions and records of multiple government agencies**, for example by integrating all land-related administration tasks into one agency, or creating synchronized land information systems accessible to officials of various ministries at local, regional and national levels;
- **Cultivating civil servants’ sense of public service** and teaching them to be sensitive and responsive to the administrative obstacles that vulnerable groups face;
- **Establishing oversight and accountability mechanisms** that hold government officials accountable for their actions, for example by creating expedited complaint procedures and appeals processes, defining performance standards for government officials, and instituting ombudsmen or community groups that review the performance of local officials; and
- **Make government records freely available to the public**, for example by mandating public disclosure of land administration decisions and records, or by allowing citizens to access local land administration proceedings and transcripts of relevant hearings and government meetings.

Women’s legal empowerment for stronger land rights

Women’s land and property rights are vital to gender equality and food security. However, women often face multiple barriers to claiming and protecting those rights. Even when women’s land rights are enshrined in law, and even when a woman successfully arrives at a government office to try to claim or protect her land rights, she might face discrimination and insensitivity to her situation by administrators and magistrates. Efforts must be made to empower women and men to protect women’s land rights. Such efforts might include:

- Amending national laws to proactively ensure women’s right to hold, own, and manage land – individually, jointly, or as part of a family.
- Training both women and men about women’s land rights and supporting women to claim and protect their rights within their families and communities.
- Electing women to land governance bodies; when women have decision-making power, they often take decisions that protect women’s land rights.
- Training government officials to take gender sensitive approaches and creating women’s advocacy positions so that female officials can address women’s land-related grievances.

Actions civil society actors can take

Lawyers and paralegals may need to provide on-going legal support to help communities navigate legal systems, proactively pursue formalization of their land claims, and follow administrative processes to their successful completion. Such support may include: helping clients to fill out all of the forms and seek the signatures necessary to apply for community or family land title; requiring that investors and government actors follow due process in good faith and receive a community's authentic free, prior, informed consent for use of its lands; ensuring that surveyors follow required adjudication processes; or insisting that an application for land registration is processed within the mandated time limits. Legal providers may particularly support vulnerable groups in situations characterized by unequal bargaining power and risk of loss of land, for example, in negotiations between communities and companies seeking land for large-scale agricultural investments or during government compulsory purchase processes.

The effects of legal exclusion and discrimination include: tenure insecurity, increased poverty and socio-political disenfranchisement

3. Enforcing and protecting rights

When land rights of vulnerable and marginalized groups have been violated, legal empowerment efforts are particularly necessary. It takes significant courage to engage with government institutions or stand up for one's land rights in the face of powerful, wealthy, or influential opponents. Land conflicts can be fierce, and the choice to defend one's land may come with the possibility of great personal risk. Upon initiation of a legal claim, clients and community members may be threatened with or be the victims of violence or harassment (see for example, Global Witness, 2020). Threats of retribution for taking legal action may come not only from powerful figures, but also from within individuals' own communities (Knight, 2019).

Moreover, various systemic obstacles may impede vulnerable and marginalized groups' use of the justice system, ombudsman's offices, or formal administrative complaints procedures to defend their land rights, including:

- **The location, timeline, language and high cost of bringing a case to a court or administrative tribunal may be prohibitive** for members of vulnerable and marginalized groups.
- **Inflexible procedural rules and excessively formal court procedures** may transform justice systems into the exclusive domain of "experts."
- **Judicial interpretations may have a bias towards elite interests;** when judges come only from elite classes, cultural, racial, class, or gender biases may impact how they treat marginalized claimants and rule on their cases.
- **Judicial corruption and lack of enforcement.** More nefariously, government leaders may pressure or bribe judges to rule a certain way or endlessly postpone a hearing. Alternatively, even if marginalized claimants win in court, if the losing party is powerful enough, the verdict may be ignored without consequence.

Legal empowerment to promote legitimate tenure rights

As a result of such trends, vulnerable and marginalized groups may avoid the national justice system, fearing an unfair judgment or outcome, which may embitter them against state justice mechanisms and drive them to choose extra-legal means of seeking justice.

Actions states can take

States can take an active role in strengthening citizens' ability to protect and defend their land rights within national justice systems. State actors can do this by:

- **Establishing alternative dispute resolution mechanisms** for example, by collaborating with local or customary/indigenous leaders to create legal fora more appropriate to the local context; holding community meetings to openly talk about the land conflict at issue; or establishing clear, state-sanctioned paths to mediation;
- **Increasing the accessibility of courts** by devolving state dispute resolution mechanisms to the local level and setting up mobile courts that periodically visit remote areas to hear disputes locally; reducing or waiving court costs for poor claimants; training court staff to help citizens file legal claims; and providing court translators so that marginalized groups can speak in their own language and understand the proceedings;
- **Providing free attorneys or legal advocates** to help unrepresented members of vulnerable groups represent their claims;
- **Relaxing procedural rules** to allow members of marginalized groups to represent themselves in their native language, or accepting oral evidence and customary or indigenous proof of land claims;
- **Diversifying the judicial system** by appointing judges who are members of vulnerable and marginalized groups, including women and Indigenous Peoples, and instituting affirmative action in judicial selection procedures;
- **Strengthening oversight and accountability mechanisms** that address judicial corruption, for example by imposing strict consequences for accepting bribes, opening all trials and hearing to the public, making court transcripts mandatory, and publishing all judicial rulings; and
- **Enforcing court judgments** in favour of vulnerable and marginalized groups' land rights by immediately remedying the injustice perpetrated and restoring any lands claimed in bad faith.

Such efforts will require political will and significant dedication. Advocacy and sensitization programs for government leaders may be necessary to enhance their commitment to creating a competent, independent, and impartial judiciary.

Actions civil society can take

To defend their land claims successfully, lawyers and paralegals may support vulnerable groups to: identify how their rights have been violated; appropriately articulate a legal grievance; know who is at fault (which may not be obvious, for example when the offending company is a subsidiary of

Legal empowerment to promote legitimate tenure rights

another corporation); identify the legal remedy they are seeking; choose a legal strategy; mobilize the financial resources necessary to follow that strategy; and then complete the necessary procedural steps until a final resolution is reached, which may include appeals to high courts or central government agencies.

For true legal empowerment to occur, lawyers and paralegals must not do this work on communities' behalf; rather, lawyers and paralegals should advise and teach community members, enabling and empowering them to choose and pursue the legal strategy that best serves their interests. In situations characterized by significant power asymmetries and injustice, lawyers and paralegals may need to more actively represent vulnerable and marginalized groups. All such actions should be co-designed collaboratively with rights holders, ensuring that the chosen strategies will resolve the conflict at issue, impose the least burden on community members, and protect their safety (Schwartz *et al.*, 2019).

Paralegals increase access to justice

Rather than relying solely on formal legal strategies or solving their clients' legal problems *for them*, paralegals work *with* clients to solve their legal problems *together*, putting more agency in the hands of clients and pursuing both legal and non-legal remedies. Paralegals support legal empowerment efforts by:

- **Increasing access to justice.** Because paralegals often work (and live) directly within or near to the communities they serve, they often bring legal services to communities that would otherwise never have regular access to lawyers.
- **Drawing on a wide set of tools** that empower their clients to advocate on their own behalves. For example, paralegals might work collaboratively with customary leaders to resolve local land disputes; organize community members to take collective action; or prepare citizens to voice their interests during law-making efforts.
- **Bridging formal and customary legal institutions.** Paralegals may draw on and engage both customary and formal legal frameworks and institutions in ways that leverage the benefits and strengths of each system.

4. Advocating for more equitable laws and policies

Finally, legal empowerment includes being able to make one's voice heard during policy and law-making processes. Vulnerable and marginalized groups' participation in land administration and policy formation is a critical component of legal empowerment (see FAO Legal Brief 3 on participatory law-making). When their concerns are not well-reflected in land tenure laws and policies, members of vulnerable and marginalized groups may need to lobby for policy and regulatory changes.

To effectuate this, governments should promote the meaningful participation of vulnerable and marginalized groups in political debate and law-making at national, regional and local levels, for example, by convening diverse citizen focus groups; widely publishing drafts of the law; allowing public comment by mobile text or calls; and other strategies.

Legal empowerment to promote legitimate tenure rights

Civil society groups can support citizens to bring their concerns to the forefront of national discussions and pressure governments to strengthen their land rights. These efforts can include: insisting that elected officials listen to the concerns of their poor constituents; critically identifying flaws in existing legislation and communicating this information to lawmakers; taking part in local land administration; and claiming a participatory role in the drafting of national policies and legislation. Such policy advocacy may need to take place at both national and international levels and may require new local-to-global coalitions between actors able to take action in a range of legal *fora* (Cotula with Berger, 2017).

Conclusion

Legal empowerment efforts are inherently an exercise in improving governance, levelling power asymmetries, and addressing inequities. Critically, legal empowerment is not something that should be done for vulnerable and marginalized groups; rather, they must be active agents, driving their own legal empowerment processes. Ultimately, legal empowerment should create a positive feedback loop: as vulnerable and marginalized groups become empowered, they pressure state systems to improve; and as state systems improve – enabling vulnerable and marginalized groups to ensure realization and enforcement of their rights – vulnerable and marginalized groups are in turn empowered further.

When done well, legal empowerment efforts can help make all citizens truly able to use the law to protect their legitimate tenure rights. The outcomes and impacts of such efforts may include: resolving land conflicts; strengthening the tenure security of vulnerable and marginalized groups; increasing the political participation of all citizens; decreasing social instability and violent conflict; reducing government corruption, mismanagement and injustice; and improving good governance of tenure.

Legal empowerment efforts are inherently an exercise in improving governance, levelling power asymmetries, and addressing inequities

References

Commission on Legal Empowerment of the Poor & UNDP. 2008. *Making the Law Work for Everyone. Making the law work for everyone. Volume 1, Report of the Commission on Legal Empowerment of the Poor.* New York, USA, UNDP.

Cotula, L. 2007. *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects In Africa.* London, IIED.

Cotula, L. & Mathieu, P., eds. 2008. *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa.* London, IIED.

Cotula, L. with Berger, T. 2017. *Legal Empowerment in Agribusiness Investments: Harnessing Political Economy analysis.* London, LEGEND.

Global Witness. 2020. *Defending Tomorrow. The climate crisis and threats against land and environmental defenders.*

Golub, S. 2003. *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative.* Rule of Law Series Working Paper 41. Washington, DC, Carnegie Endowment for International Peace.

Goodwin, L. & Maru, V. 2017. What do we know about legal empowerment? Mapping the evidence. *Hague Rule Law Journal*, Issue 9, pp. 157–194.

Knight, R. 2010. *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation.* Legislative Study No. 105. Rome, FAO. 301 pp.

Knight, R., Adoko, J., Auma, T., Kaba, A., Salomao, A., Siakor, S., & Tankar, I. 2012. *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique, and Uganda.* Rome, Namati and International Development Law Organization.

Knight, R., Szoke-Burke, S., Mebratu-Tsegaye, T. & Cordes, K. 2018. *Community-Investor Negotiations Guide 1: Preparing in Advance for Potential Investors.* Namati and Colombia Center on Sustainable Development (CCSI).

Maru, V. 2010. Allies Unknown: Social Accountability and Legal Empowerment. *Health and Human Rights Journal*, Volume 12, Issue 1, pp. 83-93.

Maru, V. 2014. *Legal Empowerment and the Land Rush: Three Struggles. The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward.* Marshall, David, ed. Boston, USA, Harvard University Press.

Negrao, J. 1999. *The Land Campaign in Mozambique.*

Schwartz, B., Cotula, L., Luhula, M., Ferrando, T. & Fairburn, H. 2019. Redress for land and resource rights violations: a legal empowerment agenda. IIED Briefing Note.

Szoke-Burke, S., Knight, R., Mebratu-Tsegaye, T. & Cordes, K. 2018. *Community-Investor Negotiations Guide 2: Negotiating Contracts with Investors.* Namati and CCSI.

United Nations General Assembly. 2009. Sixty-fourth session, Item 58: Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary-General A/64/133.

Key messages

- Legal empowerment can be understood as the process through which legal advocates support vulnerable and marginalized groups to use the law to protect their rights and interests and make governments downwardly accountable to their citizens. Legal reforms will not be effective in ensuring security of tenure for all, with a focus on those most vulnerable, unless they are able to know and claim their rights.
- The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* place access to justice and legal empowerment at the centre of their recommendations and encourage us to take positive action, including empowerment, to promote equitable tenure rights for all, women and men, youth and vulnerable and traditionally marginalized people.
- The four elements of legal empowerment include:
 1. Knowing and understanding rights;
 2. Claiming rights;
 3. Enforcing and protecting rights; and
 4. Advocating for more equitable laws and policies.
- Legal empowerment efforts can strengthen tenure governance by, for example: representing individual and community interests during government compulsory purchase processes; defending community interests in the face of corporations' environmental abuses; enforcing individual and community tenure in the face of bad faith dispossession by elites; seeking redress where rights violations have occurred; or filing complaints or lawsuits against corrupt or bad faith actions by government officials or investors, among many other positive outcomes.