



RECOGNITION AND RESPECT FOR TENURE RIGHTS

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Recognition and respect for tenure rights has long been recognized as an important concern for development, conservation, and natural resource governance. This paper discusses why secure tenure rights for local communities, indigenous peoples and women are central to good natural resource governance and important for livelihoods and human rights, as recognized in multiple international conventions. The paper reviews both challenges and opportunities for securing rights in practice and highlights successful cases of tenure reform. Communities are likely to continue to face resistance and opposition to recognition, and competition for land and natural resources, from more powerful actors, even after rights have been granted. Successfully recognizing and securing tenure requires a strong, evidence-based understanding of these challenges in order to design effective strategies to overcome them. This includes building coalitions and supporting grassroots

Recognition and respect for tenure rights has long been recognized as an important concern for development, conservation, and natural resource governance. At the same time, there is wide variation in understandings of tenure rights and in priorities for rights recognition across actors and contexts. This conceptual paper presents key concepts, challenges and opportunities for recognition and respect for tenure rights to natural resources, with a particular emphasis on those who have often been ignored or marginalized historically – such as indigenous peoples, rural communities, the non-elite or specific marginalized groups within those communities, and women.

Tenure rights with regard to natural resources refer to the social relations and institutions governing access to and use of land and resources (von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006). Tenure rights determine who is allowed to use which resources, in what way, for how long and under what conditions, as well as who is entitled to transfer rights to others and how (Larson 2012). Tenure rights are often described as a “bundle of rights” comprised of rights to access, use, manage, exclude others from, and alienate land and resources (Schlager and Ostrom 1992). Different rights in the bundle may be shared or divided in a number of ways and among stakeholders, along with the obligations and responsibilities associated with rights. The nature of the resource, such as whether it is in a fixed location (e.g. trees or forests), moves (e.g. wildlife), or flows (e.g. water), changes the nature of tenure and resource governance.

Demands for recognition of tenure rights in recent decades, particularly from grassroots movements and communities, reflect an attempt to reverse historical marginalization through the formalization of, and respect for, the legitimate rights of indigenous peoples and communities to the resources that they depend on for their livelihoods. Recognition, in this context, implies a legal process aimed at formalizing, through law or de jure process, rights that are already being held through customary, informal or de facto mechanisms (Fitzpatrick 2005). The term “legitimate tenure rights” has gained currency through its use in the Voluntary Guidelines on the Governance of Tenure (FAO 2012), and calls attention to tenure rights, such as customary or informal tenure, that may not be documented in statutory law. In practice, views and decisions regarding what rights should be granted to which resources and to whom continue to be contested.

Building on this introduction to key concepts, the next section discusses why tenure rights are central to good natural resource governance. This is followed by a section on existing standards regarding tenure rights recognition, particularly as established through international frameworks. The next two sections discuss, respectively, challenges and op-

portunities for recognizing and securing tenure in practice, using examples from research. This is followed by a conclusion and recommendations.

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Tenure matters because it provides a foundation for local governance, the stewardship of land and natural resources, local livelihoods including benefit-sharing, and empowerment and human rights. After a history of resource centralization, views have begun to shift toward decentralization and devolution of resource rights, but not without ongoing challenges.

Natural resources have been centralized under state own-



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tion, and new interests in large-scale agribusiness, biofuels or carbon sequestration. Greater recognition and security of tenure also help to guard against the risk of negative impacts on people and ecosystems posed by large scale land acquisitions for agriculture and extractive industry (German, Schoenveld, and Mwangi 2011). However, conflict and lack of clarity over tenure are still the norm in many places, and this condition works to the advantage of some actors, discouraging resolution (see Fitzpatrick 2006). Violence is still far too common: Global Witness reports 908 people killed in the decade from 2002 – 2013 because of their work on environment or land issues, over half of them in Brazil (Global Witness 2014). Although some, perhaps many, isolated communities are still able to live relatively free of threat under customary norms, it is not clear how long this could last without formal recognition serving as some kind of protection for the future.

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The prominent recognition of tenure rights as a critical element of good governance is reflected in a range of international frameworks that have been adopted on rights to lands and resources.

As discussed by Silverman (2015), the Universal Declaration of Human Rights establishes rights to property alone and in association with others.¹ Rights to property are further guaranteed through the American Convention on Human Rights² and the African Charter on Human and Peoples' Rights.³ The Inter-American Court of Human Rights has further held that the concept of property is not only defined in domestic law, but also by indigenous peoples' customary land tenure.⁴

Indigenous peoples have been a particular focus of international instruments recognizing tenure rights, in light of the close relationship of indigenous peoples to their customary lands. International Labor Organization Convention 169 on Indigenous and Tribal Peoples, adopted in 1989, recognizes the rights of indigenous peoples to lands, territories, and resources that they possess by reason of traditional ownership or use.⁵ The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, further affirms the rights of indigenous peoples to their traditional lands, territories and resources (Article 26), prohibits indigenous peoples' forced removal from their traditional lands (Article 10), and establishes that states should obtain the free, prior and informed consent of indigenous peoples before approving any project that affects their lands, territories or resources (Article 32).⁶

With regard to women's tenure rights, international law also recognizes the equal rights of women to own and benefit from property (Silverman 2015). The Convention on the Elimination of All Forms of Discrimination against Women

(adopted in 1979) includes a provision on the equal rights of women to "ownership, acquisition, management, administration, enjoyment and disposition of property". The Beijing Declaration and Platform for Action, from 1995, 2000 and 2010, also calls for women's rights to inheritance and land and property ownership. In addition to international frameworks, there has been substantial progress with regard to national constitutions and laws (World Bank,

calls for respect for the knowledge and rights of indigenous peoples and members of local communities, and for the full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities. While gender is not specifically highlighted in the safeguards, the Cancun Agreement refers to the importance of gender equality and effective participation of women for effective action on climate change (Silverman 2015). The UN-REDD initiative Social and Environmental Principles also include provisions to: Respect and promote the recognition and exercise of the rights of indigenous peoples, local communities and other vulnerable and marginalized groups to land, territories and resources, including carbon (Principle 2, Criterion 7).⁸

These international standards, among others, set the context of expectations for all relevant actors in their actions affecting tenure rights, including in natural resource and conservation contexts.

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Successfully recognizing and securing tenure require a strong, evidence-based understanding of the many challenges of and sources of opposition to reforms, in order to design effective strategies to overcome them. Securing tenure rights faces multiple challenges. These are not only manifest before winning the right to formalization and establishing the policies that would bring this about but also extend through processes of implementing and exercising rights. Challenges range from resistance and opposition to deficits in human, technical and financial resources at all levels, as well as broader governance problems such as weak rule of law. Efforts to formalize and secure tenure rights need to be attentive to these challenges, which affect whether new statutory rights result in rights in practice (Larson, Barry, and Dahal 2010), and whether rights in practice result in improvements for livelihoods or for natural resources (Larson 2011). This section summarizes challenges in three stages of reform: the formal recognition of rights, in general terms; the implementation process and granting of rights to specific populations; and the exercise of diverse tenure rights in practice for communities and for natural resources.

The first stage in formal recognition is to get the legal framework in place that establishes the right in general terms, thus allowing specific communities to apply for recognition under the new law. This reform requires overcoming resistance to indigenous and community rights from multiple arenas, for example: those who believe natural resources should be managed by the state for the greatest public good; development interests that support large-scale private investment and see granting resources to communities as taking them out of production; and conservationists who

fear local people will overexploit resources and prefer models such as parks without people (Larson and Pulhin 2012). These particular perspectives or worldviews combine with more questionable opposition due to competition for control over resources and biases such as racism to stack the deck against rights recognition.

Formalization has also commonly, in the past, prioritized private individual rights over collective rights, which can sever the web of multiple legitimate and distinct claims of women, youth, seasonal users and others and impact sustainability where larger scale collective governance is a better fit with the management needs of ecosystems and resources (Meinzen-Dick and Mwangi 2009). Although this has changed in important ways, such as among multilateral agencies like the World Bank (see Augustinus and Deininger 2006), there are still strong advocates for breaking up collective lands for individual titling (see DeSoto 2011) and policies that encourage this, e.g. laws in Mexico and Peru that facilitate the division of collective lands (Chirif and García-Hierro 2007). These policies represent a particular and hegemonic market-oriented perspective on development, which tends to favor corporate sector actors and elites, who often have powerful friends in government, in the opinion due to coalition has als-

The process of formalization can also create risks of a breakdown of property rights systems into open- or contested-access areas due to the superposition of, and conflict between, formal and customary property systems (Fitzpatrick 2006). Related risks include increased competition and land-grabbing (Cronkleton et al. 2009), the favouring of some groups over others or inattention to existing customary arrangements (Sikor and Nguyen 2007, Sikor and Thanh 2007, Meinzen-Dick and Mwangi 2009). Formalization can create opportunities for elite capture by more powerful players, external or internal to a community, who obtain rights to lands, forests or other natural resources that had previously been under the customary control of the community; this is particularly true when formalization involves titling where there are multiple, overlapping rights (Cousins 2007, Mwangi 2007, Peters 2002, 2004).

In Bolivia, for example, the government placed a moratorium on land sales when the Guarayos indigenous territory was in the process of resolving conflicting land claims and demarcating borders. Demarcation began in the more remote areas, while “accessible areas were subject to heavy pressure from colonists, loggers, and other actors [who were] strategically placed to take advantage of the situation to occupy land”; that is, powerful actors ignored the moratorium and participated in extensive land grabbing (Larson, Cronkleton, and Pulhin 2015, Cronkleton et al. 2009).

Not all implementation challenges emerge from competition, however. The rules and regulations created for formalization can often be burdensome for communities, requiring high time and financial investments. Land and resource management may be subject to multiple types of regulations, such as “rules that limit areas available to local communities; rules that delineate conservation areas and impose limits on use; and bureaucratic requirements for permits and management plans, which restrict the commercial use and marketing of valuable forest products” (Larson and Pulhin 2012). Such restrictions often go beyond what is needed for sustainable resource management, and instead undermine incentives and support for it.

Similarly, formalization requires ongoing investment of resources by government agencies. Resolving overlapping claims, such as to land and forests, requires demarcation, up-to-date cadasters, conflict negotiation and mediation and the technical, financial and human resources to carry this out. For example in the case of Peru, after more than 40 years of reform implementation to recognize indigenous rights through communal land titles, fewer than 10% of the titles granted in the Amazon region have been geo-referenced and/or registered properly (Instituto del Bien Común 2016, 25). This lack of unified official data is a major bottleneck and has resulted in overlapping conflicts. Constant changes in regulations and institutional mandates of government institutions in charge of implementation result in major

incongruences resulting in titling processes that have taken over 15 years. In fact in a recent survey in Peru of agents of implementation more than 80% of respondents raise concern of existing incongruences and lack of coordination between government institutions involved. Additionally, while regulations specify that sub-national governments are in charge of implementing titling procedures, these entities lack the financial and human resources to be able to fulfil this mandate (CIFOR 2016).

Weaknesses in legal frameworks also emerge in the process of implementation. Tres Islas is an indigenous community in Peru. As explained in a *Forest News* blog from October 6, 2016, one of the community’s main complaints is that, when they obtained the title in 1992, community leaders thought they were also obtaining the right to the resources on their land and to exclude others from entering their territory to extract resources. This exclusion right was not officially granted, however, so when they tried to build a barricade to prevent intrusions, mainly by illegal miners, they were fined and jailed. Tres Islas finally won its exclusion right after the landmark ruling of the Peruvian Constitutional Court in 2012 upholding the community’s autonomy to control access to its territory.

The case of Tres Islas is not uncommon. In many countries the state retains formal ownership over natural resources, although the extent to which control is exercised varies from between countries and resources. Rights to resources such as forests may be granted with a land title; rights to water are often not. Ownership over subsoil resources is often retained by the state. “New” resources such as carbon, associated with emissions reductions schemes such as REDD+, are still largely undefined (Loft et al. 2015). In practice, this means, on the one hand, that people from outside the community may have legal rights to resources within the community and, on the other, that community access to resources – particularly the most valuable ones (such as forests as in the case of Peruvian Law 29763) – is often governed by onerous regulations. In many cases, the latter makes it extremely difficult for communities to benefit from valuable resources without substantial external support (Larson and Pulhin 2012, Cronkleton, Pulhin, and Saigal 2012).

Finally, the challenges do not end after communities have obtained their title, contract or other legal document. Other questions remain: to what extent is the right secure, free of threat, and able to be exercised? Does it improve livelihoods and/or the condition of the resource? Does it improve access to benefits, and does it do so in a manner that is equitable with regard to internal community relations?

Formalization can help protect against land invasions or competition for rights, but this is not guaranteed, and minimally requires ongoing vigilance; it may also require time

and resources such as for lawyers and grassroots mobilization. In the case of Nicaragua’s newly titled indigenous territories, for example, non-indigenous peasants continue to migrate into these areas, although it is illegal, and government authorities have done little to stop them. The result has been increasing tensions, including violence and armed conflicts, with a number of people killed.⁹

In Guatemala, the Peten community forestry concessions have been challenged repeatedly by the prospect of park expansion around the Mirador Basin archeological site. The interest in promoting cultural-archeological tourism in the north of the Mayan Biosphere Reserve, expanding an existing national park, could result in the annulment of existing concession contracts affecting at least five community forest groups. While community organizations, through legal battles, have been able to halt the expansion process to date, proposed changes in regulations could renew the project (Paudel, Monterroso, and Cronkleton 2012, Devine 2016). If successful, it would revoke existing community concessionaire rights to make room for an initiative led by private investors. A land title is only as good as the ability and will to enforce it.

An additional challenge for collective rights is what happens internally to communities, particularly for marginalized groups or women, or for temporary or migratory resource users who are also from poor populations. In Nepal, for example, granting rights to settled communities ignored the customary rights of transhumant pastoralists in Nepal’s high hills, leading to a large drop in the population (Paudel, Banjade, and Dahal 2008). In Cameroon, indigenous hunter gatherers are not included as part of the “community” of agriculturalists (Oyono, Kombo, and Biyong 2009). In other cases, local elites have been able to take advantage of reforms for their own benefit. There is considerable debate in the context of sub-Saharan Africa over the re-emergence of chiefs and customary authorities under democratic regimes in some countries (see, for example, Ribot 2004, Ntsebeza 2005, Mwangi 2007, Ribot, Chhatre, and Lankina 2008, Cousins 2011, Nuesiri 2014).

With regard to women, multiple studies (Fonjong, Fombe, and Sama-Lang 2013, Westendorp 2015, Kaarhus and Dondeyne 2015, Mhache 2014) exemplify how local customs, norms and traditions in different ways could hinder the implementation of new laws giving women equal rights to land, mainly in Africa and Asia. There is little research on women’s access to resources under collective tenure regimes. Women often face different risks as tenure reforms are implemented (Namubiru-Mwaura 2014, FAO 2010, 2002). Not only is their access and control over resources often tied to their relationships with male relatives, but also they tend to be heavily dependent on forest resources (Meinzen-Dick et al. 1997, Bose 2011, Agarwal 1990). An assessment of women’s land rights by United Nations (2013)

states, “A major part of the remaining challenge revolves around implementation and enforcement. Even in countries where good laws exist, women frequently do not enjoy their rights to access and control productive resources.”

These implementation challenges also affect the relationship between formal rights and resource stewardship. Studies have shown that deforestation is less in indigenous and community forests, as compared with surrounding areas, where communities have legal rights and the support of the state, such as for enforcement of their rights or for community forestry (Stevens et al. 2014). The extent and nature of tenure security or threats, as well as the right and capacity to exclude unwanted outsiders are important. Another important variable is the economic value of the resource to community livelihoods, and related to that, the resource governance regime. The role of the state is central – in the reform, the relationship to communities and whether it facilitates or inhibits good community management.



Despite the challenges associated with recognizing and securing tenure rights, the growing awareness of the role of tenure in achieving development and environmental goals has created a range of new commitments, initiatives, and policy openings at the country level. Several countries are in the process of reforming their legal frameworks for land tenure, such as Cameroon and the Democratic Republic of the Congo. In other countries, such as Kenya and Liberia, new land laws have recently been enacted. Advocacy regarding the impacts of large-scale land acquisitions have prompted private sector commodity investors to adopt commitments to avoid “land grabbing” in their supply chains (e.g., see Oxfam 2016). Initiatives such as the Global Donor Working Group on Land and the European Union program of support to implement the Voluntary Guidelines on Governance of Tenure indicate that some international donors are providing support to tenure-related activities. These opportunities also highlight the importance of learning lessons from previous tenure reforms, including key conditions for reforms and practices that can help advance them.

Reforms have emerged under a variety of conditions, although there are some common characteristics. Most reforms would probably not emerge or progress without grassroots social movements, often arising from deep social unrest or overt conflict, together with strategic alliances and networks. When governments have been reticent to support indigenous rights, these advocates have put pressure on congress, turned to national and international courts, and lobbied other external organizations that can put pressure on their national government. India’s Forest

timber and non-timber forest resources in about 400,000 ha. Although the regulations were strict, requiring FSC certification, it was possible for communities to meet them because of the investment made in the arrangement by multiple actors, including the commitment of key government supporters (Monterroso and Larson 2013). A comparative study of forests in the region (the Maya Forest of Mexico and Guatemala) found no significant difference in deforestation rates between the community concessions and protected areas (Bray et al. 2008). Income from collective timber and non-timber sales surpasses US\$44 million and is distributed to members, invested in social infrastructure and reinvested in community forest enterprises (Monterroso 2016).

The cases from Guatemala and Nepal also demonstrate the ongoing importance of social movements, and specifically the higher-level federations of community organizations, to overcoming implementation challenges (Paudel, Monterroso, and Cronkleton 2012, Taylor 2010, 2012). A comparative study of the Association of Forest Communities of Petén, Guatemala (ACOFOP) and the Federation of Community Forest Users Nepal (FECOFUN) found that both were important to the emergence and success of tenure reforms, particularly in light of ongoing threats (Paudel, Monterroso, and Cronkleton 2012). These two federations, in very different contexts, influenced reform processes and outcomes in common ways: (1) enhancing the performance and effectiveness of community groups, organization and livelihoods efforts, (2) improving public support for community rights and forest management, (3) effectively challenging top-down government policies that would have undermined community rights, while increasing government accountability and responsiveness, and (4) formulating and proposing people-oriented policies (Paudel, Monterroso, and Cronkleton 2012).

Granting a significant and meaningful portion of the bundle of rights is also important for success. Tanzania’s community based forest management (CBFM) has been lauded as the model mechanism for transferring and securing forest ownership rights to forest residents, promoting sustainable forest management and ensuring that communities benefit from their forests. Unlike Tanzania’s Joint Forest Management (JFM) program, which has been less successful (Persha and Meshack 2015), CBFM has a strong basis in village land ownership. Introduced in early 2000s, CBFM has expanded from 544 villages (323,220 hectares) in 1999, when the Village Land Act was passed, to over 2328 villages (covering about 2,400,000 hectares) in 2012 (TNRF 2013). CBFM implementation usually involves an initial NGO/donor supported phase lasting about 3-5 years with subsequent implementation solely by the communities with technical support from local governments. While there are several success stories, one case stands out as unique. The Mpingo Conservation and Development Initia-

tive (MCDI) supported CBFM implementation in Kilwa District in South-Eastern Tanzania (see MCDI n.d.). It started in four villages in 2004 and expanded to 17 villages by 2016. In this program, the CBFM mechanism secures collective forest ownership, management and use rights at the village level; sale of certified timber and carbon credits generate revenues. In 2009, Kikole became the first village in Eastern and Southern Africa to generate revenues from sustainably and selectively harvested timber using Forest Stewardship Council (FSC) certification; as of 2016, 17 villages now benefit from FSC certified timber sales (Mshale 2016).

Specific attention to the tenure situation and needs of women and marginalized groups can overcome risks of exclusion from the benefits of tenure recognition. Cameroon provides an example of how to build recognition of the importance of women’s customary tenure rights. The Cameroon branch of a regional organization aimed at advancing women’s tenure rights, REFACOF, has worked with rural women throughout the country and developed strategic alliances to influence both parliamentarians and traditional authorities (chiefs). One result was a Common Position document from the Traditional Chiefs in Cameroon and a reinterpretation of customs that appeared to discriminate against women. One position of the National Council of the Traditional Chiefs (CNCTC) stated that, “Custom is not an obstacle for women in land tenure. May the traditional leaders who administer the land customarily sensitize head of families for an end to the frustration experienced by women holding land” (Bandiaky-Badji et al. 2016).

Finally, ongoing vigilance is also required to increase the potential for long-term security of tenure. The example of rollbacks in Brazil, after initial strong success, both in securing indigenous rights (Gonçalves and do Valle 2014) and in lowering deforestation rates, serves as a warning. “‘Successful’ tenure reforms at any particular point in time may not be permanent but rather likely to be met with opposition and attempts to rollback community rights” (Larson et al. Forthcoming). This means having a clear understanding of the obstacles to and the conditions for success, and providing ongoing monitoring of, and support for, reforms.

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Tenure refers to the content, or substance, of rights and to the security of rights. It refers to rights from different points of view, to overlapping rights and sometimes to conflict. Understanding rights requires an understanding of history and of power relations. In addition, a focus on ‘rights’ alone only tells part of the story: not all rights can be exercised, and not all of those who gain access to resources have rights.

Pressures from those who see national development and “progress” as driven by large-scale private investments,

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¹ Universal Declaration on Human Rights. UN General Assembly resolution 217 A. December 10, 1948.

² American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32).

³ African Charter on Human and Peoples' Rights (Banjul Charter). Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁴ The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

⁵ *ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries*. 27 June 1989, 1650 U.N.T.S. 383 (entered into force 5 September 1991).


⁶ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 61/295. 13 September 2007.

⁷ Resolution adopted by the General Assembly on 25 September 2015. 70/1 Transforming our world: the 2030 Agenda for Sustainable Development.

⁸ UN-REDD Programme Social and Environmental Principles and Criteria. UNREDD/PB8/2012/V/1.

⁹ See for example http://www.nytimes.com/2016/10/17/world/americas/nicaragua-dispute-over-indigenous-land-erupts-in-wave-of-killings.html?_r=0

¹⁰ Many reforms have also emerged from serious environmental problems such as deforestation or resource scarcity. Examples include some of the earliest reforms in India (Sarin 1993; Saxena 1997; Sundar 2000) and the Philippines (McDermott 2001), in which communities were granted denuded lands to reforest, as well as more recent reforms in China, which now has the largest area of afforestation/forest restoration in history (see Robbins and Harrell 2014; FAO 2010).



IUCN is a membership Union composed of both government and civil society organisations. It harnesses the experience, resources and reach of its 1,300 Member organisations and the input of some 15,000 experts. IUCN is the global authority on the status of the natural world and the measures needed to safeguard it.

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