



Protecting legitimate tenure rights: From concepts to practice



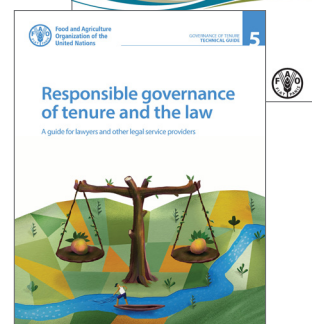
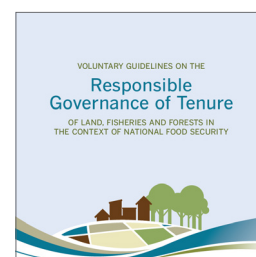
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Lorenzo Cotula and Rachael Knight

Misalignments between national laws and local tenure systems can undermine the resource claims of marginalized groups and lead to conflict.

To proactively address rights violations that stem from such misalignment, the United Nations Committee on World Food Security endorsed the **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)**, establishing the most comprehensive global soft-law instrument concerning tenure rights. The VGGT call on States to recognize, respect and protect all “legitimate” tenure rights, including those not currently protected by national laws. They also affirm the responsibility of businesses to respect all legitimate tenure rights, linking tenure issues to businesses’ wider human rights responsibilities.

However, the concept of legitimate tenure rights has often proved difficult to operationalize. This legal brief discusses the meaning and implications of recognizing legitimate tenure rights, then outlines possible ways forward for States, civil society, the private sector and development agencies.



Tenure rights: Understanding legal and social legitimacy

The term “tenure” refers to the arrangements whereby people hold, access, use and manage land and natural resources, whether individually or collectively. National laws typically regulate tenure rights. In many societies, however, people access land and natural resources according to arrangements other than legally recognized tenure rights, including customary and Indigenous systems, and de facto occupation. Tenure rights include not only full-fledged ownership but also more limited rights of access and use, such as herders’ seasonal grazing rights, hunters’ access rights to shared local forests, and long-term tenants’ rights to land they have farmed for generations.

Legal legitimacy is established when national laws recognize land-use practices as “rights,” ensure their protection in statutory law, and require the national justice system to support their enforcement. Most legal systems recognize rights acquired through continuous use, inheritance, purchase, lease or other transactions, and documented with a title, deed or other formal paperwork. Typically, the most protected tenure right is full-fledged ownership, which, depending on the country, generally involves the right to possess, control, use, manage, bequeath, exclude, and dispose. National legal systems usually also protect lesser rights such as easements (e.g. the right to cross somebody else’s land) and usufruct (the right to use an asset and draw benefits from it).

Social legitimacy refers to rights becoming legitimate through broad social acceptance, even if they are not legally recognized. Local tenure systems function relatively well in many contexts, providing accessible arrangements for people to use resources and settle disputes, and often underpinning deeply felt cultural practices and beliefs. As such, the rights these systems establish can have considerable social legitimacy among local actors. At the same time, these arrangements often reflect power relations in local societies, resulting in forms of exclusion – such as where customary systems marginalize women or migrants. A lack of legal protection can make vulnerable to dispossession even broadly accepted, socially legitimate rights.

Tenure rights: Legal and social legitimacy

Type of legitimacy	Illustrative examples
Legal legitimacy (legitimate through the law; legally recognized)	<ul style="list-style-type: none"> • Private ownership or other tenure rights recognized by law. • Use rights recognized by law, including leases, cooperative, rental or sharecropping agreements, easements, and legally recognized customary rights.
Social legitimacy (legitimate through broad social acceptance even without legal recognition)	<ul style="list-style-type: none"> • Land rights based on customary or Indigenous tenure systems, which lack legal recognition or records in official registries. • Shared forests and rangelands, accessed and used by multiple communities. • Traditional fishing grounds.

Source: adapted from Palmer *et al.* (2009) and Cotula *et al.* (2016).

Gaps between legal and social legitimacy can undermine tenure rights

Some countries' laws recognize a wide spectrum of land and natural resource rights and provide them with a degree of legal protection. But many national legal systems fail to recognize certain types of socially legitimate tenure rights. There can be many reasons for this. In many contexts, colonial legacies and imported legal concepts place national law at odds with local ways of using, accessing, sharing, and inheriting land. Further, tenure systems vary considerably, even within the same country, and it may be difficult for national laws to cater for diverse local realities.

Even where laws recognize legitimate tenure rights, governments may lack the resources to properly set up the necessary administrative structures to validate, recognize and document those rights. In addition, narrow interpretations of laws may, for example, result in government officials refusing to record the names of both husband and wife on a registration form, or to record that two neighbouring communities have shared rights to a local forest. They may also lead officials to deny that pastoralism or shifting cultivation meet legal requirements for resources to be used "productively".

Vested interests, corruption and elite capture often also undermine recognition of legitimate tenure rights. For example, gaps in the law can allow officials to more easily extract payments or acquire land for personal gain. Disconnections between law and practice can make local tenure legally precarious, weakening the rights of most of a country's citizens, including low-income families, Indigenous Peoples, pastoralists, women, migrants and tenants.

International law and guidance protect a wide range of tenure rights

Reconciling the legal and social legitimacy of tenure rights has long been recognized as an important priority in natural resource governance (Chauveau and Lavigne Delville, 2002). Recognizing, respecting and protecting all legitimate tenure rights is one of the central messages of the VGGT.

While many professionals are accustomed to defining tenure rights by reference to national law, the VGGT explicitly depart from this approach and consider as "legitimate" not only legally protected rights but also those rights that, while not formally recognized, are considered to be socially legitimate in local contexts. There is no other international legal instrument that establishes, in so explicit and comprehensive terms, such a wide range of rights as worthy of protection (Cordes, 2017).

While the VGGT are a voluntary instrument and do not create legal obligations, they can inform the interpretation

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of international treaties and the development of national laws (Cotula, 2017). In addition, their emphasis on recognizing, respecting and protecting all legitimate tenure rights is in line with international human rights law. Indeed, regional human rights courts have consistently held that international law protects resource claims even if they are customary in nature and not recognized as ownership under national law (Morgera, 2019).

To bridge legal and social legitimacy in practice, the VGGT call on States to “provide legal recognition for legitimate tenure rights not currently protected by law” (para. 4.4; see also para. 5.3). They also call on business enterprises to respect legitimate tenure rights, linking tenure issues to businesses’ wider responsibilities in relation to human rights (paras. 3.2 and 12.12). Depending on the jurisdiction, implementing this guidance may require reforming national law. It may also require practical action beyond legal reform and face difficult implementation challenges (e.g. Veršinskas *et al.*, 2020). Addressing these complexities may entail not only the use of effective tenure tools (for example, to document tenure rights or settle tenure disputes) but also inclusive dialogue with relevant actors to ensure the process and its outcomes enjoy social legitimacy (CTFD, 2015).

The VGGT outline procedural and substantive safeguards to ensure all relevant rights are properly identified and adequately protected. They call for holistic identification processes that consider the social, cultural, economic and environmental significance of land and natural resources, as well as the interconnected relationships between resources and their uses (para. 5.3). They also clarify that processes to identify legitimate tenure rights should be non-discriminatory, consider power imbalances between different parties, and ensure “active, free, effective, meaningful and informed” participation of individuals and groups (para. 3B.6). The VGGT especially emphasize protecting the legitimate tenure rights of marginalized groups, which may be the least protected under national law. They also discuss several categories of tenure rights as being legitimate, whether or not they are recognized by national law.

Processes to identify legitimate tenure rights should be non-discriminatory, consider power imbalances between different parties, and ensure “active, free, effective, meaningful and informed” participation of individuals and groups

Examples of legitimate tenure rights

Customary rights

Customary tenure refers to rules, institutions and practices that ground their legitimacy in tradition – though arrangements have often evolved over time (see e.g. Chimhowu, 2019). Although customary rules are not often written down, they may enjoy widespread social sanction and may be generally adhered to. More than two billion people worldwide access resources through customary tenure regimes (USAID, 2011). This covers an estimated 90 percent of all land in Africa, lands held by Indigenous Peoples in Latin America and parts of Asia, and rural commons in places such as Spain, Portugal, Italy and Switzerland. Customary tenure systems may be associated with Indigenous systems of shifting cultivation, but also pastoral resource use, communal forests

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and sacred or burial sites. Further, customary tenure regimes often support highly intensified farming systems, such as cocoa cultivation in West Africa, as well as extensive areas where community members can gather resources that their families depend upon for survival, such as building materials, wild foods, medicines and other necessities (Shackelton *et al.*, 2001; Ubink and Amanor, 2008).

Recent law reforms have strengthened the legal protection of customary rights in several jurisdictions (Knight, 2010). But while evidence shows that many traditional land-use practices are resilient and sophisticated, inadequate legal protection of customary rights is a recurring source of tenure disputes (Nguiffo *et al.*, 2009).

The VGGT identify customary rights as legitimate. In line with other international instruments such as human rights treaties and the United Nations Declaration on Indigenous Peoples' Rights (UNDRIP), for example, Section 9 of the VGGT calls on States to:

- Recognize and protect the legitimate tenure rights of “Indigenous peoples and other communities with customary tenure systems”;
- Provide “appropriate” recognition and protection to customary rights;
- Clarify that Indigenous Peoples and other communities with customary tenure systems should not be forcibly evicted from their ancestral lands; and
- Adapt national legal frameworks to local practices.

Overlapping rights

Within both customary and statutory tenure systems, multiple actors may have different rights to the same resource. For example, a landowner may have rented out his or her land to a tenant or a sharecropper. Herders and farmers may have the right to use the same land for pasture and agriculture, respectively, possibly in different seasons. In mobile pastoral systems, actors that are primarily based elsewhere can hold tenure rights to dry-season grazing, water points and livestock corridors. And under many customary systems, different communities may have shared ownership, use and access rights to the same forest and its associated watershed. Failure to identify all relevant rights and right holders – for example, in the context of land registration, spatial planning or consultations for a proposed large-scale investment – can dispossess some groups and undermine their livelihoods.

The VGGT pay special attention to the tenure rights of tenants, pastoralists, and other groups with limited tenure rights (paras. 7.1, 8.7, 8.8, 9.4, 10.3 and 20.3). For example, they call on States to:

- Consider mobile pastoralists in all actions to implement the Guidelines, including in relation to the governance of transboundary resources (paras. 1.2.4, 2.3, 4.8, 15.5 and 22.2); and

Failure to identify all relevant rights and right holders – for example, in the context of land registration, spatial planning or consultations for a proposed large-scale investment – can dispossess some groups and undermine their livelihoods

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- Ensure that any measures to provide legal recognition to informal tenure are adopted “through participatory, gender-sensitive processes, having particular regard to tenants”, and paying “special attention to farmers and small-scale food producers” (para. 10.3).

Women’s land rights

In many cultural contexts, women’s tenure claims may hinge on their relationships with male relatives. In patrilineal systems, daughters are expected to move onto their husband’s family’s lands after marriage, and are therefore not usually allocated land by their own parents. Meanwhile, wives are generally not permitted to inherit their husband’s land, as the land is traditionally considered to belong to the husband’s family or clan and is therefore passed through the male bloodline from fathers to sons (Giovarelli, 2006). Even in matrilineal systems, women’s tenure claims may also hinge on their relationships to men as land inheritance passes from uncles to brothers through the female line. Although many rural women have strong rights to access and use land, they are generally less likely than men to have control over it. This lack of control places many women in precarious situations: women risk losing access to land when their husbands die or when male family members decide to sell it. Such culturally ingrained marriage and inheritance rules can perpetuate gender inequalities in tenure relations across generations.

The VGGT directly address gender inequities in tenure rights, with regard to a wide range of landholding, use and access situations (e.g. paras. 4.4, 4.7, 5.3, 5.5, 6.1, 8.9, 8.11, 9.10, 10.1, 10.3, 12.11 and 13.5; see also Daley *et al.*, 2013). Their provisions complement relevant treaties such as the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). The VGGT call on States to:

- Recognize gender equality as a key principle governing the implementation of the VGGT, with the mandate to “ensure the equal right of women and men to the enjoyment of all human rights”, while taking specific measures aimed at accelerating de facto equality when necessary (para. 3B.4);
- Ensure that “women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status” (para. 3B.4); and
- Where tensions arise between customary tenure systems and gender equality, work with “all parties” to accommodate into those systems any legal and constitutional reforms that strengthen women’s rights (para. 9.6).

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From concept to practice

States have the main responsibility for land governance within their jurisdiction, and much guidance contained in the VGGT is addressed to States. Therefore, States – and the professionals advising them – should play a key role in ensuring that all legitimate tenure rights are recognized,

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protected and respected, both in law and in practice. Actions to ensure the protection of all legitimate tenure rights might include, for example:

- Developing an inventory of all legitimate tenure rights and tenure systems that exist within their jurisdiction, through inclusive, participatory processes that effectively engage with local tenure actors;
- Regularly assessing whether existing national legal and institutional frameworks meet the standards established by the VGGT and other national and international legal instruments that protect legitimate tenure rights, as well as designing and implementing reforms to ensure all legitimate tenure rights are properly recognized and protected; and
- Establishing effective, accessible and sustainable institutional arrangements to: record and protect legitimate tenure rights; settle tenure disputes; conduct territorial and spatial planning; and, where relevant, implement land consolidation, readjustments and redistributive agrarian reforms.

Civil society. While the VGGT are primarily directed at States, they also call for collaboration among different actors to sustain the implementation of their provisions, including civil society, development agencies and the private sector (see for example, Section 26). In the context of the VGGT, civil society actors include Indigenous Peoples; local communities; small-scale rural producers such as farmers, pastoralists, forest dwellers and fisherfolk and their related associations and federations; non-governmental organizations; cooperatives; and pro-bono legal service providers, among others. Civil society actors can play an important role in advancing the implementation of the VGGT. This is partly because vested interests and power relations often mean that changes in tenure systems need to be fought for. Civil society can:

- Advocate for reforming national policy and legislation to recognize, respect and protect all legitimate tenure rights, and facilitate public participation in legal reform processes;
- Support the implementation of laws that protect legitimate tenure rights – and where legislation is lacking, proactively develop approaches to secure tenure rights (for example through participatory mapping, land-use planning, or “interim”, community-created tenure records) and generate lessons for future law reform;
- Assist local groups as they interact with businesses and government agencies, including through organizational, technical, legal and other support;
- Document tenure rights violations and, where relevant, help local groups obtain redress through the courts, complaint mechanisms, advocacy and public mobilization.

Civil society actors can play an important role in advancing the implementation of the VGGT – including Indigenous Peoples, small-scale rural producers, fisherfolk and their organizations, NGOs and cooperatives

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Businesses. The VGGT also affirm the responsibility of businesses to respect legitimate tenure rights (see for example, paras. 3.2 and 12.12). Because of the gaps between national laws and local practices, and between legal and social legitimacy, in many contexts compliance with national law alone does not shelter companies from tenure disputes. Implementing the VGGT requires businesses – and the professionals advising them – to ensure that their operational procedures respect all legitimate tenure rights, including those not protected by national law. This may entail rethinking due diligence exercises to ensure that they consider not only the legal paperwork and chain of title, but also social perceptions of tenure (Cook, 2019). Addressing these issues requires effective engagement with local actors, as well as time, resources and efforts to acquire specialized expertise in tenure matters.

Businesses should ensure that their operational procedures respect all legitimate tenure rights, including those not protected by national law

Development agencies. Translating the VGGT into real change can incur costs, and development agencies can support states and civil society. In addition, governments that are the home countries of businesses operating overseas have responsibilities to ensure that any publicly supported investments abroad are consistent with the VGGT and human rights norms, and that their own finance institutions adhere to the VGGT and promote them among businesses (para. 12.15). Multilateral donor agencies can also play a key role in expanding the international pool of experts who can provide VGGT-sensitive advice to states, businesses and civil society.

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Key messages

- The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* is the first international legal instrument that explicitly acknowledges a wide range of tenure rights as legitimate, and encourages States to recognize, respect and protect those rights.
- Legitimate tenure rights include not only rights that are recognized by national law, but also those considered to be socially legitimate in local contexts. Customary and Indigenous rights, collective rights, use and access rights, tenancy rights, overlapping rights, and women's rights are legitimate tenure rights.
- To ensure legitimate tenure rights in both law and practice, states should review existing legal and institutional arrangements and, where necessary, undertake reforms to meet the standards established by the VGGT. These processes should cover policy areas such as land tenure, forestry, fisheries, conservation, investment regulation, and spatial planning.
- Civil society can leverage the VGGT to: advocate for laws and institutions that recognize, respect and protect all legitimate tenure rights; facilitate public participation in reform processes; support the implementation of laws to protect legitimate tenure rights; and help families and communities obtain legal redress for violations.
- Businesses should ensure that their operational procedures respect all legitimate tenure rights, including those not protected by national laws. This may entail, for example, expanding due diligence exercises to consider not only the legal rights enshrined in law, but also the social perceptions of tenure.