

INDICATORS OF COMMUNITY LAND TENURE SECURITY

Guidelines for Researching, Scoring and Documenting Findings

This note provides guidance for analysts who are conducting research, establishing scores and documenting the findings for the indicators of the security of indigenous and community land rights. These guidelines are designed to provide quality assurance and to ensure consistency in data collection, analysis and scoring of indicators. It will also enable comparative analysis – over time and across countries—of the indicator scores.

For the purposes of this review, the following definitions apply:

- **Communities** are a grouping of individuals and families who share common interests and are often united by tradition or custom. These rural social groups hold some or all their lands and natural resources on a collective basis. Communities have long-standing and distinctive cultural, traditional, and historical connections to the land. The norms (*e.g.*, rules and institutions) by which communities hold and govern these lands and resources are usually founded in custom.
- **Community lands** refer to the collectively-held or governed lands—and the attached natural resources—that are used by communities. In many communities, some community land is allocated for individuals and families to use for homesteads and farms, but which remains under the ambit of community control. Other community land is collectively-held, managed and used as common property (also referred to as “commons”, “commonage” or “communal lands”).
- **Indigenous Peoples** are individuals, families and communities who self-identify as indigenous and are recognized as such by other members of their community. It is important to distinguish indigenous peoples from communities (the former being a subset of the latter) because indigenous peoples are specifically recognized in international human rights instruments, which include collective rights to land and natural resources.
- **Indigenous lands** refer to the collectively-held and governed lands and the associated natural resources used by indigenous peoples. As with community lands, some indigenous lands may be allocated for individuals and families to use while other indigenous land is managed as common property and used by all members.

Please note that these definitions exclude more modern associations or cooperatives that hold and manage lands collectively. The members of such associations/cooperatives may or may not have historical and/or cultural ties. For example, a number of families may pool their resources to collectively purchase a large plot of land. The title deed may be in the name of a legal entity that they create but the land is allocated for use by the various families. This research does not address the security of land rights held by such associations or cooperatives.

I. Indicators

As stated in law:

1. Do community land rights, including customary rights, have the same legal force as land rights based on statutory law?

Explanation. By law, do community land rights, including customary rights, have the same legal force and effect as land rights based solely on statutory law (*e.g.*, freehold or leasehold tenure)?

2. Are community land rights - customary and statutory - perpetual (*i.e.*, not just for a fixed term)?

Explanation. Does the law recognize that community land rights are perpetual (*e.g.*, not for a fixed term with the presumption of renewal unless the government acts to cancel the right)?

3. Does government recognize all community land, including homesteads, family farms and common property (*e.g.*, forests, pasture)?

Explanation. By law, does government recognition of community land include all lands that the community holds collectively, including homesteads, individual plots, family farms, and common property (*e.g.*, pastures, forests, wetlands, etc.)?

4. Does government recognize community rights over the following community lands, even if not formally demarcated or registered?

4(a) Lands held and used by individuals and families (*i.e.*, farms and homesteads)

4(b) Lands held by the community and managed as common property (*i.e.*, forests and pastures)

Explanation. By law, are community land rights recognized by government even if not formally adjudicated, demarcated, mapped, registered, in respect of: a.) farms, homesteads and similarly individual or family-held assets; and b.) lands and natural resources held by the community in common (*e.g.*, rangeland, wetlands, forests).

5. Is it allowable and are there established procedures to formally register community land rights in a public registry?

Explanation. Does the law allow and are there established procedures for registering community land rights in a public registry?

6. Are community institutions - traditional or modern - recognized as the legal authority over community lands?

Explanation. Does the law recognize “communities” and/or “villages” (or community institutions) as the local entities with the legal authority over the concerned area/land? This could be a traditional institution or community leader, such as a chief, responsible for

land under customary tenure arrangements. It could also be modern, government-sanctioned village government.

7. Are the following natural resources within community lands under community jurisdiction?

- 7(a) Trees and forests
- 7(b) Waters, including groundwater, rivers and natural water bodies
- 7(c) Wildlife (*i.e.*, wild animals)
- 7(d) Sub-surface minerals (*i.e.*, excluding sand, pebbles or rocks found on the surface of land)
- 7(e) Oil, natural gas and other forms of hydrocarbons

Explanation. By law, are the five natural resources – trees/forests, water, wildlife, sub-surface minerals and hydrocarbons (in all its forms) - on or below community land included in community jurisdiction and tenure?

8. Is community consent required before an outside actor, including government, can acquire community land (excluding compulsory land acquisition)?

Explanation. By law, is consent (*i.e.*, not just consultation) of the community required before the government or a non-community member may acquire community land, except in cases where the acquisition is by compulsory land acquisition (*i.e.*, eminent domain)?

9. Is an outside actor, including government, required to prove that sought land is not claimed or registered as community land?

Explanation. By law, is the government or any non-community member seeking land required to prove that the land being sought is not registered community land or not subject to claims as customary lands?

10. Must government develop an official map of all legal tenure types, including community land?

Explanation. Does the law call for the development of an official cadastral map of all formally-recognized tenure types, including community land rights as well as other forms of land rights (e.g., individual and government/public land rights)?

11. Are dispute resolution mechanisms established for land conflicts with actors outside the community?

Explanation. Does the law provide for grievance and dispute resolution mechanisms for land conflicts with actors outside the community, including government, commercial operators and other communities (*e.g.*, opportunities to review decisions and resolve conflicts outside courts of law)?

12. Are land interests of the following community members equally protected?

- 12(a) Women

12(b) People joining the community by marriage, settlement or other customarily-approved means

12(c) Minorities by virtue of ethnicity, livelihood or other distinctive attribute

Explanation. Does the law require that the tenure interests of the following community members are equitably protected in respect of land rights for: a.) Women; b.) People who have joined the community by marriage or settlement or through other locally or customarily-approved means (*e.g.*, not people defined as original members of the community); and c.) Minority sectors in the community or settlement by virtue of ethnicity, mode of livelihood or other distinctive attribute?

II. Data Collection

The assessment of each indicator will be based on a review of all relevant national laws, including the constitution, statutes, regulations, and high court cases; to the extent they are available. It is important to review both land and natural resource laws; the latter laws are critical to addressing the link between land and resource rights (*e.g.*, Indicator 7). The scoring of indicators should be based exclusively on express legal provisions.

In countries with a federal system, such as India and Australia, the review should be limited to national or federal laws, not state laws. Certainly some state laws in federal systems provide more legal protection for community land than federal laws. For example, in Australia, the state laws in the Northern territory provide stronger indigenous land rights and more legal security than the federal laws (including providing indigenous peoples with the right of Free, Prior and Informed Consent over mining operations on their lands). If the researcher becomes aware of the existence of such state laws, this should be noted and documented.

The researcher should read and review the national laws directly, s/he should not rely on reports or articles that review and interpret the legislation. Any international conventions ratified by a country should be included in the assessment only to the extent that they were incorporated into domestic law and enacted as local statute. There should be no attempt by the researcher to assess the implementation or enforcement of the law. There should also be no attempt to examine government or community perceptions of the security of community rights.

If possible, the laws and other material should be reviewed in their original, official languages by a native speaker. If that is not possible, researchers should review good-quality (and, if possible, official) translations of the law. Researchers should note when translated laws are reviewed – see below).

Community Tenure Types. The indicators will be assessed separately for each community land tenure type recognized (*i.e.*, community land and indigenous land) that is governed by a different legal framework. For example, laws governing all or certain groups of Indigenous Peoples' land rights should be assessed separately from laws governing the tenure of other non-indigenous communities, if indeed different laws are applicable to each. In such cases, the indicators should be scored separately for Indigenous Peoples and non-indigenous communities. For example, in Brazil,

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the indicators should be scored twice – once based on the laws that govern indigenous lands and a second time for the laws governing non-indigenous communities (*e.g.*, Afro-Brazilian communities).

It is important to be as specific as possible which community or indigenous lands are governed each set of laws. For example, in Peru, there are indigenous people in the Amazon (*comunidades nativas*) and indigenous peoples on the coast (*comunidades campesinas*) – the latter recognize themselves as indigenous but are not considered as such by the government and their lands are not governed by the indigenous land laws, but rather by the community land laws.

Community-Controlled Land. In many countries, community land includes land that a community (or the responsible local institution) allocates to individuals and households (*e.g.*, homesteads and individual/family farms) as well as land held and managed by the community as common property (*e.g.*, forests, pastures, wetlands). In certain cases (*e.g.*, some community lands in India), the community land that was allocated to individuals and households has been titled and is no longer within the ambit of collective authority. In such cases, community land is limited to the land that is still collectively managed as common property. The research should focus on scoring the indicators for the community land, which in this case, is limited to the land managed collectively as common property (the commonage).

III. Scoring of Indicators

Each indicator will be assigned a score of 1, 2, 3, 4, or N/A.

<u>Score</u>	<u>Description of Score</u>
Score 1	There are no attempts in the law to meet the issue addressed in the indicator. The law in a particular jurisdiction is either silent on an issue or there is express exclusion. It either does not address, explicitly or through omission, the particular issue. For example, a score of 1 is given to Indicator 1 if indigenous or community land rights are not recognized in formal law (even if the law references community lands).
Score 2	The legal framework addresses the indicator, but not substantively. There is only limited attempt to meet the issue addressed in the indicator (<i>i.e.</i> , the legal framework struggles to meet the indicator). The law is closer to not meeting the requirements than it is to meeting all the requirements (<i>i.e.</i> , closer to a Score of 1 than to a Score of 4).
Score 3	The legal framework makes significant progress towards, but does not meet the issue addressed in the indicator. The law is closer to meeting all the requirements than it is to not meeting the indicator (<i>i.e.</i> , closer to a Score of 4 than to a Score of 1).
Score 4	The legal framework clearly or expressly meets the issue addressed in the indicator. The law in a particular jurisdiction fully meets the requirements of the indicator. For example, a score of 4 is given to Indicator 6 if the law expressly recognizes that a

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village institution – traditional or modern - has broad authority over community land.

N/A The indicator is not applicable. N/A is only applicable where the subject matter in question is non-existent. For example, in Australia, the law recognizes indigenous land and individual/family-held assets, but not non-indigenous community land. As a result, N/A is appropriate for community land that is not indigenous land.

A spreadsheet (in Microsoft Excel) has been developed to document the research findings on the indicators (attached). In addition to basic information, including country, community tenure type, local name and indicator number, the score for each indicator will be accompanied by four additional fields of information:

- Justification of Score. A brief comment explaining why the particular score was assigned (the comment must be no more than 250 characters).
- Law and Provision. The name of the law(s) and the specific provision(s) in the law(s) that provide the answer to the indicator (the name/provision of the law must be no more than 250 characters).
- Language of Law. A note on whether the law was assessed in its original language or whether an English translation of the law was assessed.
- Comment. Any additional comment, justification or information regarding the scoring of the indicator (the comment must be no more than 1000 characters)

IV. Additional Guidance on the Scoring of Indicators

Indicator 1. Please note if the law distinguishes between community land rights held under custom and community land rights held under other (non-customary) tenure arrangements.

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| Score 1 | Community rights are not recognized in formal law (legislation and cases) even if the formal law makes references to undocumented customary law. |
| Score 2 | The law recognizes only a few community land rights (<i>e.g.</i> , land used as homesteads or family farms, but not the commons) or limits the recognition of those rights (<i>e.g.</i> , only recognizes lands used for subsistence use, but not commercial purposes). |
| Score 3 | The law recognizes important number of community land rights or places few limits on the recognition of those rights. |
| Score 4 | The law fully establishes community land rights as equality to other land rights (<i>e.g.</i> , freehold). |

Indicator 2. Please note if the law distinguishes between community land rights held under custom and community land rights held under other (non-customary) tenure arrangements.

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- Score 1 The law establishes that customary rights are for a short fixed-term (*e.g.*, less than 2-3 years) or is silent on this matter.
- Score 2 The law establishes that customary rights are for a term of less than 20 years.
- Score 3 The law establishes that customary rights are for a term of more than 20 years.
- Score 4 The law establishes that community rights are perpetual.

Indicator 3. In many cases, community land includes land that a community allocates to individuals and households (*e.g.*, homesteads, individual/family farms) as well as land held and managed by the community as common property (*e.g.*, forests, pastures, wetlands). In India and elsewhere, however, community land which is allocated to individuals or households is often titled or otherwise outside the ambit of collective authority and only the common property is still managed collectively.

- Score 1 The law does not recognize any community or customary land rights.
- Score 2 The law recognizes only some community land, such as the land that is “used and occupied” - commonly the land used as homesteads and family farms.
- Score 3 The law recognizes most but not all community land, such as the homesteads, farms and pastures, but not the forests.
- Score 4 The law recognizes all land held and used by the community.

Indicator 4. This indicator addresses whether the government formally recognized community land even if the land is not demarcated, mapped or registered with the state. A distinction is made between community land that is regularly “used and occupied” such as homesteads and family farms, and community land that may not be regularly or intensely used, such as pastures, wetlands and forests. In some countries, the government recognizes homesteads and farms held under customary tenure arrangements but not community land managed as common property (which is often considered to be vacant, idle, underutilized and available for investment).

- Score 1 The law does not recognize any community land that is not formally registered with the government.
- Score 2 The law recognizes only some unregistered community land (*e.g.*, homesteads and family farms).
- Score 3 The law recognizes most, but not all unregistered community land.
- Score 4 The law recognizes all unregistered community land, including community land held as common property.

Indicator 5. Does the law allow communities to formally register their land rights in a government registry and does the law (in national law or regulations) establish procedures for registering community land rights? Please note if the law distinguishes between community land

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rights held under custom and community land rights held under other (non-customary) tenure arrangements.

Score 1	The law does not allow communities to formally register their land rights.
Score 2	The law allows for the registration of some community land rights (<i>e.g.</i> , homesteads and family farms) and/or establishes complex, expensive procedures to do so.
Score 3	The law allows for the registration of most community land rights.
Score 4	The law allows communities to formally register all their lands and establishes a relatively simple, straight-forward process to do so.

Indicator 6. Community institutions include traditional leaders, customary institutions or modern, state-sanctioned village institutions. In Tanzania, the law established formal village government, including both the Village Council and the Village Assembly.

Score 1	The law does not recognize a village institution as the legal authority over community land or is silent on this matter.
Score 2	The law recognizes a village institution but grants it only limited authority over community land.
Score 3	The law recognizes a village institution but grants it some important authorities over community land, but grants a few critical powers to the government
Score 4	The law recognizes a village institution has broad authority over community land.

Indicator 7. Addressing this indicator will require reviewing the land and relevant natural resource laws. Please note if the law distinguishes between community land rights held under custom and community land rights held under other (non-customary) tenure arrangements.

Score 1	If the natural resource belongs to the state and can be allocated to investors.
Score 2	The law requires community consultation or consent before the investor can exercise its natural resource right on community land.
Score 3	The law provides a specific process for the community to secure rights over the natural resource.
Score 4	The law recognizes that natural resource as under community jurisdiction (<i>e.g.</i> , the law recognizes that land rights include rights to the natural resource).

Indicator 8. This indicator does not ask if concepts of “unconscionability” (typically seen in contract law) are explicitly addressed. Consent for Indigenous Peoples is often recognized as Free, Prior and Informed Consent (FPIC). For the purposes of this review use the following definition of FPIC (adapted from the IFC Performance Standards). The law provides for the following three matters:

- A mutually acceptable process between the community and the acquirer of the land;
- Evidence of agreement between the parties as to the outcome of the negotiations; and
- The community’s right to withhold consent, free of intimidation or coercion

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Please note if the law distinguishes between community land rights held under custom and community land rights held under other (non-customary) tenure arrangements.

- Score 1 The law does not require that community be informed or consulted.
- Score 2 The law requires only a public hearing
- Score 3 The law requires only community consultation, but not consent
- Score 4 The law provides for community consent (e.g., not just consultation)

Indicator 9. The seeking of land is broadly defined to include taking by governments, company or other external actor by adverse possession (*i.e.*, eminent domain), granting of an easement, or for the use of the land (*e.g.*, to exercise natural resource rights – mining, etc.), whether temporary or permanent.

- Score 1 The law does not require the outsider actor to prove the sought land is not claimed as community land.
- Score 2 The law requires the actor to conduct minimal due diligence on the sought land, such as check the national registrar.
- Score 3 The law requires the actor to provide some evidence that the land is not claimed.
- Score 4 The actor must prove that the sought land is not claimed as community land.

Indicator 10. Please note if the law requires the mapping of community land not formally recognized by the government.

- Score 1 There is only an implicit requirement for a map, for instance, when a map is required for the application and/or registration for land title.
- Score 2 The law calls for an official map to be developed, but does not make specific reference to community lands.
- Score 3 The law requires the government to develop an official map of at least all registered community and indigenous land.
- Score 4 The law requires the government to develop an official cadastral of all tenure types, including indigenous and community land, whether the land is registered or not.

Indicator 11. This indicator examines government-sponsored or endorsed grievance and dispute-resolution mechanisms outside the formal courts of law. They include administrative review of government decisions or state-sponsored mediation between the community and external actor. Please note that this indicator does not address conflicts within a community between individuals or families that are locally-recognized members of the community.

- Score 1 The law is silent on this matter and the courts available to resolve land conflicts.
- Score 2 The law recognizes an existing dispute resolution mechanism and encourages communities use it to resolve conflicts with external actors.

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- Score 3 The law makes available an existing mechanism but perhaps does not ensure it is easily accessible to communities.
- Score 4 The law establishes 1 or more new dispute resolution mechanisms or endorses 1 or more existing mechanisms for land conflicts.

Indicator 12. This indicator examines the land rights of three specific sets of community members. Do women, new members and minorities have the same land rights as other members of the community?

- Score 1 The law is silent on this matter or explicitly excludes land rights to these community members
- Score 2 The law provides these community members with only certain rights or allows the community to decide on which land rights these community members have.
- Score 3 The law provides these community members with many, but not all rights that the other members have
- Score 4 The law requires that these community members must have the same land rights as the all other community members