



Protecting the Most Vulnerable: *Legal Frameworks for Community Freshwater Rights*

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Protecting the Most Vulnerable:

Legal Frameworks for Community Freshwater Rights



Moderator:

Nighisty Ghezae, International Foundation for Science

Background on Methodology:

Chloe Ginsburg, Rights and Resources Initiative (RRI)

Methodology and findings from pilot analysis:

Jessica Troell, Environmental Law Institute (ELI)

Discussion on India Context:

Philippe Cullet, SOAS University of London and Centre for Policy Research

Discussion on Kenya Context:

Barbara Van Koppen, International Water Management Institute (IWMI)

Q&A and Facilitated Discussion



Rights and Resources Initiative (RRI)

A global coalition consisting of 15 partners, 7 affiliated networks, 14 international fellows, and more than 150 collaborating international, regional, and community organizations dedicated to advancing the forest, land, and resource rights of Indigenous Peoples and local communities.

Tracking Indigenous Peoples' and Communities' Rights to Lands, Forests, and Natural Resources

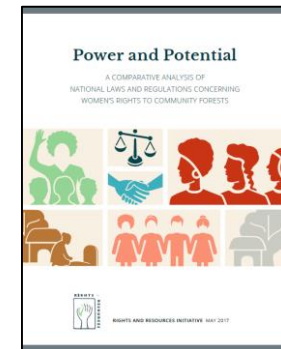
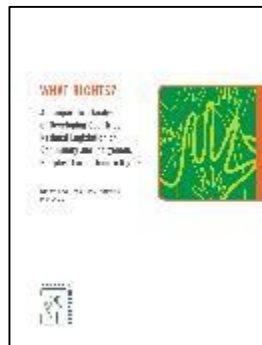
2002, 2008

2012

2014

2015

2017



Development of a Methodology for Tracking Community Freshwater Rights

- Developed over the course of a year, with input from a wide range of stakeholders through interviews and two expert consultations
- Methodology applied to three pilot countries: Colombia, India (and Rajasthan State), and Kenya
- Lessons from pilots discussed in Working Paper are presented here for discussion and feedback, to be incorporated
- Scaling up to include additional countries during a second round of analysis, including expert peer review of findings

Water Tenure Methodology

Uses **seven (7) legal indicators** and **four (4) threshold questions** to assesses whether **community-based freshwater rights**, including rights to **surface and groundwater**, are recognized under formal law, and how those rights are protected or addressed within **national legal frameworks** regulating water resources.

Unit of Analysis and Scope of Laws Assessed

- **Communities:**
 - Indigenous Communities
 - Local Communities
 - Other Water User Groups
- **Recognition/protections in formal laws, including:**
 - Constitutions
 - Water laws
 - Sectoral laws (e.g. land, mining, forestry)
 - Frameworks environmental laws
 - Indigenous and customary/traditional rights laws
 - Case law
 - Treaties

Threshold Questions

Provide essential context for indicators and often impact the legal rationale underpinning the assessment of those indicators:

1. Does national law recognize customary water rights, laws, traditions, and/or practices?
2. Does national law guarantee the human right to water?
3. Are communities' water rights recognized independently from or in relation to their land rights?
4. Does national law acknowledge some or all of women's water rights within indigenous communities, local communities and other water user groups?

Indicators

1. Access
2. Use
 - Domestic Uses
 - Livelihoods/Small-scale productive uses
 - Commercial Uses
 - Religious/Cultural Uses
3. Exclusion
4. Governance
 - Rule-making/Planning
 - Management
 - Dispute Resolution
 - Enforcement

Indicators, cont'd.

5. Due Process and Compensation

- Right to be informed and/or consulted on decisions that could impact rights
- Right to compensation for infringement of rights
- Transboundary: focus on prior notification and consultation requirements

6. Duration

7. Transferability

Key Findings: Land/Water Nexus

- Land-water nexus is complex and crucial
- Water law reforms are failing to clarify how intrinsic linkages between land, water and other land-based resources should translate into clear water tenure for communities
- Legal status of community-based water tenure often ambiguous, with lack of harmony across sectoral laws
- Creates distinct avenues for asserting rights under various laws while simultaneously undermining the security of those rights

Land/Water Nexus in Kenya

- Customary land rights given full legal recognition under 2016 Community Land Act -appurtenant water rights included pursuant to constitutional definition of “land”
- 2016 Water Act connects permitting of water rights to land rights “as far as possible”
- Creates confusion as to whether customary rights recognized under Land Act will require permit to be fully cognizable under Water Act
- Another layer: Water Resource Users Associations

Land/Water Nexus in Colombia

- Constitution and legislation recognize customary land and resource rights of Indigenous and Afro-Colombian communities – water is exception
- Water use/management rights (except domestic) must be permitted through creation of community-based institutions (Community Aqueducts)
- Atrato River case decided in Constitutional Court established “biocultural rights” according access to and use of water as part of intrinsic community rights
- Result: Will legislature respond to secure these rights?

Key Findings: Realization of the Human Right to Water

- All three pilots recognize the human right to water
- Access and use → most consistently recognized rights
- Legislative mechanisms for promoting access to/use of water for domestic use/basic human needs
 - Prioritization among uses/reserves
 - Permit exemptions
 - Variations/reallocation authority in times of scarcity
 - Financing mechanisms
- Legal prioritization of water for small-scale productive uses/livelihoods?

Key Findings: Decentralization of Water Governance/OWUGs

- All three countries (and Rajasthan) have some legal mechanism(s) for delegating water management authority to communities:
 - WRUAs in Kenya, WUAs in Rajasthan, Community Aqueducts in Colombia
- 2/3 pilot countries fail to recognize customary rights/practices of communities – Colombia is exception
- Lack of clarity regarding tenure security associated with incorporation as OWUG

Key Findings: Due Process and Compensation

- All three countries provide mechanisms:
 - Colombia relies on ILO Convention 169 provisions for FPIC, constitutional requirements for PNC, and specific legislative requirements related to specific types of projects/decisions
 - Kenya requires PNC prior to permitting, during EIA/SEA, under the Community Land Act, and establishes a Water Tribunal to hear appeals
 - India mandates PNC that land and water impacts from proposed government land acquisitions, has specific consent requirements for Scheduled Tribes and EIA requirements

Key Findings: Gender

- Provisions limited to quotas/requirements for participation of women in governance institutions
- Gender specific provisions in water laws very general/vague
- No requirements under OWUG/WUA provisions for gender equity

Methodological Implications

- Key questions identified and initially addressed in pilot phase:
 - Capturing the full range of issues under the land-water nexus
 - Refining the role of water services in realizing the human right to water and access rights in relation to community water tenure
 - Refining scope and language of indicators to reflect findings
 - Determining which legislation to apply to State-level analysis

Questions for Scaling Up: Moving toward a Water Tenure Regime Approach?

- Current approach: capturing results across three user groups: Indigenous Peoples, local communities & OWUGs
 - Is best case scenario a functional approach?
- Water tenure regime approach:
 - Identify sets of laws comprising distinct community-based water tenure regimes that apply to specific sub-sets of Indigenous Peoples, local communities, user groups
 - Undertake a community-based water tenure regime analysis for each defined tenure regime (e.g., Scheduled Tribes in India, Afro-descendant communities in Colombia)

Questions for Scaling Up: Federalist Countries

- What rights to accord at national level where there is effectively only “enabling” legislation?
- How to address situations where States/Provinces are implementing federal directives but not through legislation?
- Do we apply federal laws at State level where duplicative of national analysis?
- Complex role of policy in state-federal relationship where methodology is not addressing policy directly

Questions for Scaling Up: Permitting

- Current approach recognizes permitted rights as rights, while understanding the impacts they may have on substance and realization of pre-existing rights
- Are permits according desirable level of protection to communities? Exemptions? Should there be a “partial credit” option for recognizing the conditional aspects of permit-based community water rights?

Questions for Scaling Up: Role of Courts

- Human right to water recognized only in courts of India and Colombia...how to accord “credit” to rights where legislature has fallen behind the courts?
- Additional examples:
 - “Biocultural rights” in Colombia
 - Ogiek case in Kenya