

Whose Water? A COMPARATIVE ANALYSIS OF NATIONAL LAWS AND REGULATIONS RECOGNIZING INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' RIGHTS TO FRESHWATER



February 2020

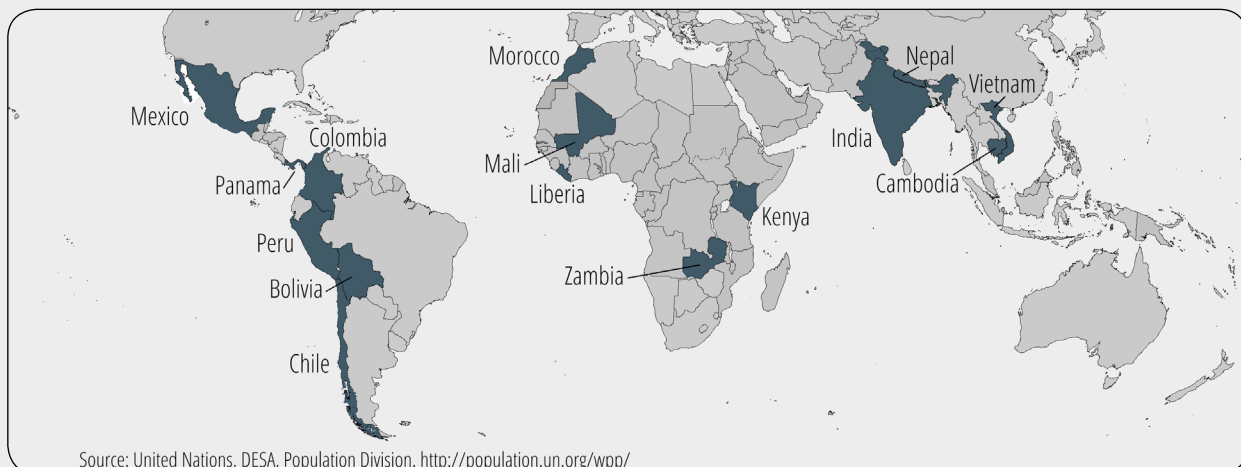
Clearly defined and legally secure freshwater tenure rights are essential to Indigenous Peoples' and local communities' livelihoods, food security, and territorial governance; as well as to countries' efforts to achieve sustainable development priorities and ensure climate resilience. However, the extent to which such rights are legally recognized remains largely unknown and unmonitored. To date, the bundle of legal entitlements most critical to the realization of communities' water tenure security has not been fully articulated or endorsed through global guidance such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).

This brief summarizes findings from **an innovative, international comparative assessment on the extent to which various national-level legal frameworks recognize the freshwater rights of Indigenous Peoples and local communities, as well as the specific rights of women to use and govern community waters.** The methodology and analysis stems from a collaboration between the Environmental Law Institute and the Rights and Resources Initiative and will be expanded and updated over time.

The analysis finds that, **at a minimum, communities' rights to use and govern freshwater exist in 14 of the 15 countries analyzed,** but **considerable legislative gaps and administrative burdens commonly hinder their ability to effectively manage and protect their freshwater resources.** Notably, where communities' legal rights to freshwater are dependent on their recognized land or forest rights—as observed in 25 of the 39 legal frameworks examined—such frameworks tend to provide stronger legal protection for both communities broadly and women in particular. Yet overall, procedural impediments often constrain communities' abilities to lawfully use water for crucial livelihood and commercial purposes, discrepancies among national laws hamper the realization of communities' water and land tenure security, and women's rights to community waters are inadequately recognized. By harmonizing relevant water, land, and forest laws and policies in a gender-sensitive and integrated fashion, countries could address these legislative inconsistencies and oversights while meeting the livelihood needs and development priorities of Indigenous Peoples, local communities, and women within those communities.

The study analyzes **39 legal frameworks** across **15 countries** that are home to more than **1.1 billion rural people** and **over 25 percent of the freshwater resources found across Africa, Asia, and Latin America.** Thirteen of the 15 countries assessed are categorized as low- and middle-income countries, and two countries (Chile and Panama) are categorized as high-income.

Focus countries were chosen to represent diverse regions, biomes, levels of freshwater availability, economic status, and legal traditions; to include states that share transboundary watercourses; and to enable comparability with existing RRI datasets on community land and forest tenure.



Read the full report: <http://bit.ly/WhoseWater>

Questions and indicators underpinning the assessment of community-based freshwater tenure in selected countries

National-Level Threshold Questions:

Address freshwater rights impacting all individuals within a country, regardless of whether they exercise resource rights through a community-based tenure system.

Rights analyzed:

Human Right to Water and Transboundary Due Process

Community-Level Threshold Questions:

Address foundational characteristics of each legal framework recognizing community-based freshwater tenure within a country.

Rights analyzed:

Recognition of Customary Water Rights, Land-Water Nexus, and Women's Freshwater Rights

Community-Level Legal Indicators:

Legal entitlements supporting community-based freshwater tenure under national law.

Rights analyzed:

Use, Transferability, Exclusion, Governance, and Domestic Due Process and Compensation

Benefits of an integrated, tenure-based approach to legal recognition of community-based freshwater rights

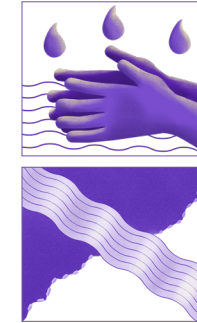
Indigenous Peoples and local communities tend to use and govern their territories and resources in an integrated manner, despite the siloed approach to resource governance that often characterizes land, forest, and water laws. This study finds that legislative frameworks recognizing community-based freshwater rights on the basis of existing land rights tend to offer more extensive and robust protection for the water tenure rights of both women and their communities. This **legislative “land-water nexus” is often essential to supporting communities’ abilities to claim, protect, and realize their water tenure rights**, and provides the only source of recognized water entitlements under the national laws of Cambodia, India, Liberia, and Mexico. Similarly, women’s rights to use or govern community waters are most frequently recognized when they stem from frameworks recognizing communities’ land or forest tenure rights. Of the 13 legal frameworks that explicitly protect women’s rights to participate in freshwater governance, 8 do so by recognizing women’s rights to participate in community-based *land* or *territorial* decision-making processes that are interpreted to include rights to govern freshwater, whereas only 5 frameworks explicitly recognize indigenous and community women’s rights to govern *water* resources.

Procedural obstacles: a common trend across legal frameworks

Communities may face onerous procedural hurdles in order to realize their rights to use freshwater. While Panama is the only country where national law requires Indigenous Peoples and local communities to obtain permits in order to use freshwater for cultural/religious and domestic purposes, governments frequently require communities to meet one or more procedural requirements in order to realize their right to use freshwater for livelihood or commercial purposes. Nearly half (17) of the 39 legal frameworks analyzed require a permit for water use in the context of community-based livelihood needs, and just under three-quarters of reviewed legal frameworks (29 out of 39) place a permitting requirement on commercial water uses—making the pursuit of economic activities the most heavily burdened among the use, governance, and exclusion indicators. In Nepal, communities are required to form three separate types of water users’ associations in order to use freshwater for drinking, irrigation, and consumption (including agricultural, animal husbandry and fisheries, hydroelectricity, and other uses).

Key findings

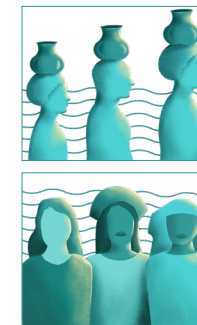
Country-Level Context:



The **human right to water** is legally recognized in 9 of 15 countries. Five of 6 Latin American countries (Bolivia, Colombia, Mexico, Panama, and Peru); 3 of 5 African countries (Kenya, Mali, and Zambia); and only 1 of 4 Asian countries (India) recognize the human right to water.

National-level provisions for the protection of community-based **transboundary due process rights** are rare. Of the 15 countries analyzed, only Panama and Zambia protect this right. None of the four Asian countries analyzed protect communities’ due process rights in transboundary contexts.

Community-Level Context:



Communities’ **customary water rights** are recognized in 32 of the 39 legal frameworks analyzed, including all legal frameworks in Bolivia, Cambodia, Chile, Colombia, India, Kenya, Liberia, Mali, Mexico, and Peru. Ninety percent of legal frameworks in both Africa and Latin America recognize communities’ customary water rights, compared to 55 percent of legal frameworks analyzed in Asia.

Laws regulating community-based freshwater rights are typically gender-blind, with just one-third of legal frameworks protecting **women’s specific rights to participate in freshwater governance**. India, Liberia, and Zambia are the only three countries studied to specifically recognize women’s rights to participate in community freshwater governance across all legal frameworks, while one or more legal frameworks recognize such rights in five additional countries: Colombia, Kenya, Mexico, Nepal, and Panama.

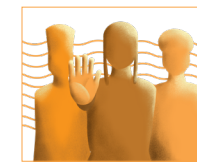
Community-Level Legal Indicators:



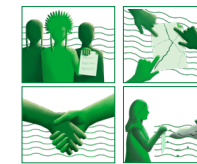
Community-based rights to **use water** for cultural/religious, domestic, livelihood, and commercial purposes are recognized to some extent under the national laws of 14 countries, though communities’ rights to use water for livelihood and commercial purposes are particularly likely to be limited through the imposition of either procedural requirements or other legal obligations.



Just over half of all legal frameworks analyzed recognize communities’ right to sell, lease, or otherwise **transfer** their freshwater rights, including all legal frameworks found in Chile, Colombia, Liberia, Mexico, Vietnam, and Zambia.



Community-based rights to **exclude** at least some third parties from freshwater sources to which they have rights exist in 24 of the identified legal frameworks, and an additional 8 legal frameworks recognize such rights on a case-by-case basis. These rights most frequently exist where a land-water nexus enables communities to exclude third parties from water resources appurtenant to their lands, territories, or forests.



Communities’ rights to **establish rules, develop and implement plans, and manage** their freshwater are recognized by nearly all legal frameworks in 14 of the 15 countries reviewed. More than three-quarters of legal frameworks recognize communities’ right to **resolve internal disputes**. By contrast, the right to **enforce rules** against third parties is the least recognized community-level right assessed.



Fourteen countries recognize communities’ **domestic due process** rights of prior notice, consultation, and appeal, but their right to **receive compensation** from public and private entities who infringe upon or extinguish their freshwater rights is more limited.

Implications and recommendations for action

To address the legislative gaps and constraints that hinder Indigenous Peoples' and local communities' abilities to fully realize their freshwater tenure rights, governments, civil society actors, and international development institutions operating across the land, forest, water, and gender sectors should work collaboratively to:

1. Accelerate the legal recognition of community-based freshwater rights through support to legislative reforms that recognize and protect the full bundle of community-based water tenure rights, acknowledging that communities' land and forest rights often form a critical basis for the recognition of their freshwater rights.
2. Address legislative gaps and weaknesses that impact the realization of community-based water tenure rights, including through the harmonization of existing sectoral laws and regulations to support communities' effective resource protection and governance.
3. Strengthen legal protections for indigenous and local community women's specific water use and governance rights in ways that support inclusive community-based water and land tenure, and provide expanded livelihoods and economic opportunities.

To support these changes, governments and civil society actors will need to continue ongoing efforts to refine and build consensus around the concept of "water tenure," extend analysis of community-based water tenure rights across regions and countries, and ensure that tenure-based approaches are clearly integrated into decision-making processes and initiatives related to forest, land, and freshwater governance. Ultimately, the ability of Indigenous Peoples, local communities, and indigenous and community women to sustainably govern, benefit from, and protect critical freshwater resources depends on securing and advancing their rights to both water and territories.

The Rights and Resources Initiative

The Rights and Resources Initiative is a global Coalition of more than 200 organizations dedicated to advancing the forestland and resource rights of Indigenous Peoples, local communities, and women within these communities. Members capitalize on each other's strengths, expertise, and geographic reach to achieve solutions more effectively and efficiently. RRI leverages the power of its global Coalition to amplify the voices of local peoples and proactively engage governments, multilateral institutions, and private sector actors to adopt institutional and market reforms that support the realization of rights. By advancing a strategic understanding of the global threats and opportunities resulting from insecure land and resource rights, RRI develops and promotes rights-based approaches to business and development and catalyzes effective solutions to scale rural tenure reform and enhance sustainable resource governance.

RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, DC. For more information, please visit www.rightsandresources.org.

Partners



Affiliated Networks



Sponsors



The views presented here are not necessarily shared by the agencies that have generously supported this work, or all of the Partners or Affiliated Networks of the Coalition.

This work is licensed under a Creative Commons Attribution License CC BY 4.0.

2715 M Street NW
Suite 300
Washington, DC 20007
www.rightsandresources.org
@RightsResources

