

Brainstorming Exercise



In legal systems that recognize customary land tenure, does the law explicitly protect the land rights of women?

- (i) What do you understand by customs and beliefs? What are customary land systems/arrangements?**
- (ii) What is customary law and how is it applied in your country? What are the key features?**
- (iii) How does customary law affect women and children?**



Definitions



- **Customary legal systems:** systems that exist at the local or community level, that have not been set up by the state, and that derive their legitimacy from the values and traditions of the indigenous or local group. Customary legal systems may or may not be recognized by national law.
- **Customary land tenure:** the bodies of rules and institutions governing the way land and natural resources are held, managed, used and transacted within customary legal systems.



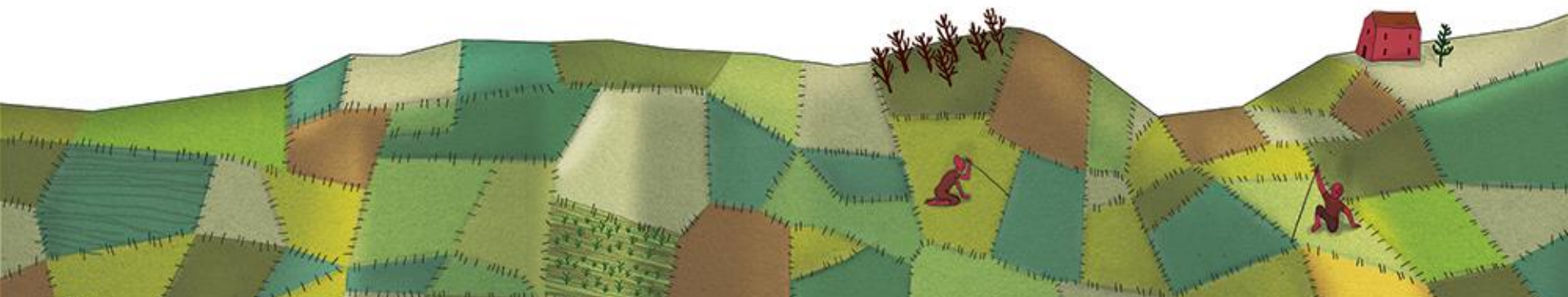


SDG Indicator 5.a.2

Proxy E

Protection of women's land rights
in customary systems

Workshop on SDG Indicator 5.a.2, 2018





In legal systems that recognize customary land tenure, does the law explicitly protect the land rights of women?



Why include a Proxy on Customary Land Tenure?



- In many contexts **customary land tenure systems coexist with the formal law** and often discriminate against women in terms of rights to own land
- Some countries have incorporated customary law/land tenure in their legal systems -> this may perpetuate or reinforce existing gender inequalities:
 - **Accepting retroactive interpretations of women's rights to land**
 - **Registration processes for customary land which provide for recording of primary land rights only undermine tenure security of women who may hold secondary rights**
- **Explicit** provisions providing for the **protection of the land rights of women** should be found wherever the law recognizes customary land rights.



Scenarios for Proxy E



Scenario 1

The Constitution recognizes customary law...

...but gives supremacy to provisions concerning gender-equality and non-discrimination

Scenario 2

A statute law recognizes customary land tenure...

...and includes safeguards for women's land rights





Key Features of Proxy E – Scenario 1

- The provision of the Constitution must **explicitly** state that the recognition of customary law is subject to principles of gender-equality and non discrimination on grounds of gender or all grounds
- The law must establish a **link** between the recognition of customary law and protection of women's rights in the Constitution (i.e. while customary law is recognized in the constitution, it states that principle of non discrimination **prevails** in case of conflict)





Key Features of Proxy E – Scenario 2

- The provision of the statute law must **explicitly** provide for the protection of women's land rights (i.e. not a broad group of individuals)
- The law must establish a **link** between the recognition of customary land tenure and the protection of women's rights in the legislation recognition of land tenure (i.e. while recognizing registration of customary user rights, the same instrument includes safeguards to protect women's land rights)



Threshold for Proxy E



Proxy **IS** Present

Scenario 1

✓ The Constitution explicitly prohibits any form of discrimination based on sex and/or gender

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provides that if a law or custom is inconsistent with any of the Constitution's provisions, the Constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency, be void.

Scenario 2

✓ A law providing for the registration of customary lands.

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an explicit reference to the necessity of registering women's customary land rights in the registration process.

Proxy **IS NOT** Present

✗ The Constitution includes in the preamble a commitment to combat every form of discrimination

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a general constitutional provision recognizing customary law as a source of law so long as it is not 'repugnant to the principles of justice'.

✗ The legal system recognises the right of customary leaders or administration systems to preside over land disputes

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in the same instrument there is a general reference to women and men's equal right to occupy and use land.



Example of Proxy E (Scenario 1) in Legislation



Constitution, 1990:

Art. 32: *“The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, **to the extent that they are consistent with the Bill.**”*

Article 34: *“The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex ...”*

- ✓ Scenario 1 is present. There is an explicit recognition of customary law in the Constitution. Further, the Constitution enshrines the principle of non-discrimination including on grounds of gender and establishes the supremacy of constitutional provisions on customary law.

What are the advantages and disadvantages of recognising customary land for women's land rights?



Customary Law Analysis Exercise



Poster Exercise

Please go to an individual board. Read the legal extract. Reflect and write down your answers to the following questions:

Question 1: Is customary law or land tenure recognized in the instrument? If not what should be the response written on the forms?

Question 2: If yes, are there protections for women's rights that satisfy the threshold of the Proxy?

Question 3: If yes, does the provision fall under Scenario 1 or Scenario 2?

****FIVE MINUTES PER BOARD!!!****

