



Food and Agriculture  
Organization of the  
United Nations

**LAND  
TENURE  
JOURNAL**

REVUE DES  
**QUESTIONS  
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REVISTA SOBRE  
**TENENCIA** DE  
LA **TIERRA**



**1-22**

**RECALIBRATING RIGHTS, LIMITATIONS AND  
OBLIGATIONS IN LAND GOVERNANCE**

L. Cotula. 2022. *Recalibrating rights, limitations and obligations in land governance*. Land Tenure Journal no. 1-22. Rome. FAO.

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ISSN 2079-715X

E-ISSN 2079-7168

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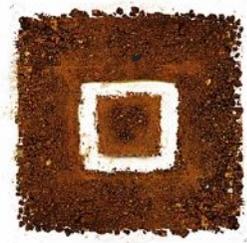


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RECALIBRATING RIGHTS,  
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LAND GOVERNANCE

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## PREFACE

### **Recalibrating rights, limitations and obligations in land governance**

Land rights are typically subject to limitations and come with obligations – to protect the rights of others, such as tenants and neighbours, or to pursue general interests such as environmental protection. The interplay of these rights, limitations and obligations underpins many of the most difficult resource governance challenges – from managing conflicts within families and communities, to reversing legacies of historical injustice. Therefore, effective responses to governance challenges may require not only that certain rights are secured, but also that imbalances between the rights, limitations and obligations of different groups are addressed. This can raise difficult technical and political issues, affecting relations between citizens and state and the distribution of wealth and power in society.

This article explores rights, limitations and obligations in relation to land governance. First, it reconfigures conventional notions of “bundles of rights” to include limitations and obligations originating from both national and international law. Next, it discusses illustrative arrangements that address the limits of land rights or connect land rights to certain obligations – namely, the “social function” of property and productive use requirements. The findings outline an integrated approach

## PRÉFACE

### **Terre et eau: les divergences en matière de droit**

Les droits fonciers sont généralement soumis à des limitations et s'accompagnent d'obligations – pour protéger les droits des autres, tels que les locataires et les voisins, ou pour poursuivre des intérêts généraux tels que la protection de l'environnement. L'interaction de ces droits, limitations et obligations sous-tend nombre des défis les plus difficiles en matière de gouvernance des ressources, qu'il s'agisse de gérer les conflits au sein des familles et des communautés ou d'inverser les injustices historiques. Par conséquent, les réponses efficaces aux défis de la gouvernance peuvent exiger non seulement que certains droits soient garantis, mais aussi que des réponses soient apportées aux déséquilibres entre les droits, les limitations et les obligations des différents groupes. Cela peut poser des difficultés en termes techniques et politiques, ce qui peut affecter les relations entre les citoyens et l'État et la répartition des richesses et du pouvoir dans la société.

Cet article analyse les droits, les limitations et les obligations en relation avec la gouvernance foncière. Tout d'abord, il reconfigure la conception classique que l'on peut avoir de l'ensemble des droits pour y inclure des limitations et des obligations issues du droit national et international. Ensuite, il examine

## PREFACIO

### **Recalibrar los derechos, las limitaciones y las obligaciones en la gobernanza de la tierra**

Los derechos sobre la tierra suelen estar sujetos a limitaciones y conllevan obligaciones: proteger los derechos de otros, como los arrendatarios y los vecinos, o perseguir intereses generales como la protección del medio ambiente. La relación de estos derechos, limitaciones y obligaciones es la base de muchos de los retos más difíciles a los que tiene que hacer frente la gobernanza de los recursos, desde la gestión de los conflictos en el seno de las familias y las comunidades hasta la reversión de los legados de injusticia histórica. Por lo tanto, las respuestas eficaces a los retos en materia de gobernanza pueden requerir no solo que se garanticen ciertos derechos, sino también que se aborden los desequilibrios entre los derechos, las limitaciones y las obligaciones de los diferentes grupos. Esto puede plantear cuestiones técnicas y políticas difíciles, que afectan a las relaciones entre los ciudadanos y el Estado y a la distribución de la riqueza y el poder en la sociedad.

En este artículo se examinan los derechos, las limitaciones y las obligaciones en relación con la gobernanza de la tierra. En primer lugar, se reconfiguran las nociones convencionales de “conjuntos de derechos” con el fin de incluir las limitaciones y las obligaciones procedentes tanto del derecho nacional



to land governance that cuts across diverse legal regimes and considers limitations and obligations as well as rights.

plusieurs types de dispositions qui traitent des limites des droits fonciers ou mettent en relation les droits fonciers à certaines obligations – à savoir, la «fonction sociale» de la propriété et les exigences d'utilisation productive. Cela permet d'aboutir à une approche intégrée de la gouvernance foncière qui transcende les divers régimes juridiques et prend en compte les limites et les obligations ainsi que les droits.

como del internacional. A continuación, se analizan los acuerdos ilustrativos que abordan los límites de los derechos sobre la tierra o conectan los derechos sobre la tierra con ciertas obligaciones, a saber, la "función social" de la propiedad y los requisitos de uso productivo. En las conclusiones se describe un enfoque integrado de la gobernanza de la tierra que atraviesa diversos regímenes jurídicos y considera las limitaciones y las obligaciones, además de los derechos.



## 1. INTRODUCTION

In many parts of the rural world, growing pressures on land have heightened the policy imperative to recognize the rights of socially, politically and juridically marginalized people – from small-scale farmers to forest dwellers, pastoralists, artisanal fishers and people living in informal settlements, including many who identify as indigenous peoples. Agro-industrial plantations, mines, large-scale infrastructure and sprawling cities are swallowing up agricultural lands, and wider socioeconomic transformations are increasing the competition for land within and between communities. These trends erode land access for people with particularly precarious rights – for example, and depending on the situation, low-income groups, youths, women or migrants. Securing their land rights has thus emerged as a recurring policy task, whether in the form of more effective recognition and protection of rights, or improved access to redress for rights violations.

However, land rights are typically subject to limitations and come with obligations, and it is this interplay of rights, limitations and obligations that underpins many of the most difficult problems. Forest burning for soy, oil palm and rubber plantations have questioned whether even the most extensive land rights should allow agro-industry to take Earth to the brink of environmental catastrophe: confronting climate change and biodiversity loss often entails halting the award of new land concessions and limiting corporations' rights within existing ones. Many conflicts over mining or agribusiness projects revolve around land expropriations, but the disputes often also question the existence or scope of the rights claimed by the company, and the company's obligations to the people directly affected and the wider local society. Meanwhile, laws that recognize socially legitimate land rights are often ineffective partly because they condition legal protection to certain obligations that, in effect, hollow out rights from within – such as the obligation to use land "productively", where skewed notions of productivity undermine the rights of pastoralists, hunter-gatherers and shifting cultivators.

Effective responses to land problems, then, often require not just securing certain precarious rights, but also addressing imbalances between the rights and obligations of different groups. Though the interplay of rights, limitations and obligations is an ordinary feature of property systems, it can also raise difficult technical and political issues, affecting relations between citizens and state and the distribution of wealth and power in society. And while there is a vast body of research and action on "securing" land rights, less attention has been paid to limitations and obligations: these notions remain undertheorized and their practical implications are often poorly spelt out.

A study prepared for the Legal Office of the Food and Agriculture Organization of the United Nations (FAO) explores pathways for legal reforms to recalibrate rights, limitations and obligations in land governance. The study draws on insights from experience in national legal systems and from indigenous and customary arrangements, discussing diverse approaches to balance rights with social and environmental obligations. Some findings are theoretical and reconfigure long-established notions of "bundles of rights"; others are more applied and exemplify legal arrangements that limit tenure rights or connect them to certain obligations. The findings indicate that effective interventions to support law reform require both solid conceptual foundations and a fine-grained understanding of context.



## 2. BETWEEN EXTRACTION AND STEWARDSHIP

In many indigenous and agrarian societies, sophisticated arrangements based on tradition and shared belief systems sustain a close connection between people and nature. Despite their tremendous diversity, these arrangements tend to emphasize the all-encompassing interdependence between humans and ecosystems. In the underlying cosmologies, "nature is understood as full of relatives not resources, where inalienable rights are balanced with inalienable responsibilities" (Wildcat, 2013, p. 515). A sense of obligation towards ancestors, supernatural co-dwellers or future generations sustains elaborate systems of prohibitions and restrictions and a strong emphasis on environmental stewardship, whether explicit or implicit (see, for example, Bird-David and Naveh, 2008).

Economic and sociocultural transformations have been eroding many indigenous and customary systems. Colonial and postcolonial legal regimes have also undermined indigenous governance and culture, instead creating proprietary systems premised on the neat separation of humans from nature, and the appropriation of nature by humans, typically characterizing nature in commodified terms ("natural resources"; see also Dehm, 2021). Even within such proprietary arrangements, however, rights are – or should be – subject to limitations and associated with obligations.

The Voluntary Guidelines on the Responsible Governance of Tenure – the foremost global instrument on land governance – affirm this coexistence of rights, limitations and obligations. The Guidelines feature the term "right" more than 300 times, emphasize the link between land and human rights, and call for recognizing, respecting and protecting all legitimate tenure rights. But they also state that "no tenure right, including private ownership, is absolute". Rather, "[a]ll tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes". In addition, rights are "balanced by duties", such as those concerning the sustainable use of land and forests (paragraph 4.3).

Evolving social and ecological imperatives have placed these issues at centre-stage. Responses to ecological problems may involve limiting land rights or imposing obligations on landholders, for example as regards environmental protection or forest conservation. In addition, the climate and biodiversity crises highlight the necessity of protecting the collective land rights of indigenous peoples and communities with customary tenure (RRI, 2020), partly because an emphasis on environmental stewardship often means these groups have a proven track record of caretaking the ecosystems to which they have ancestral rights. At the same time, addressing the crises requires nurturing traditional systems of obligation towards the environment and future generations where socioeconomic change has weakened them (Knight, 2021).

There are important social justice dimensions, too. Because legal frameworks often reflect power relations, those with influence and money may have the most extensive rights and the fewest or weakest obligations. For example, international treaties on foreign investment establish generous protections for businesses' land rights, over and above national law, without affirming commensurate obligations (see also Gathii and Puig, 2019; Ho, 2019; Perrone, 2019; Sattorova, 2019). In contrast, marginalized groups with the most legitimate tenure rights may see laws limit their rights and subject them to stringent obligations that erode their control over land and territories, particularly as commercial pressures intensify. Efforts to tackle land inequality (Anseeuw and Baldinelli, 2020), then, need to consider not just skewed land distributions but also inequalities in the rights, limitations and obligations applicable to different actors – and their resulting impacts on the concentration of power within society. These social and ecological dimensions are interrelated – such as where "fortress conservation" approaches impose draconian restrictions on indigenous peoples' territorial rights, while extensive concession rights enable businesses to destroy nature for large-scale mining, logging and monoculture.



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### 3. RECONFIGURING THE BUNDLE OF RIGHTS – AND OBLIGATIONS

Recognizing limitations and obligations as well as rights affects the way property is understood and operationalized in national legal systems. Property does not just 'exist'; rather, it is created by regulation that defines how tenure rights are established, allocated and enforced (Singer, 2000). And because regulation can take different forms – from state legislation to customary systems – and varies with social, political and economic context, property consists of diverse and evolving "bundles of rights", rather than a universal, immutable given. For example, in relation to a piece of land, relevant rights in the bundle may include anything from the right to access, the right to pick fruits from trees, the right to cultivate or graze on the land – all the way to the right to manage land and territory.

Although discussions about "bundles" often focus on rights, virtually all legal systems also establish obligations and qualify rights with limitations to protect the rights of others or advance the public interest (Singer, 2006). As a result, each bundle includes limitations and obligations as well as rights. Limitations qualify rights. For example, a person's or group's land rights are often limited by the rights of others to use or pass through the same land. Limitations can protect other private actors such as neighbours, by regulating encroachment, or pursue a public interest, such as environmental protection, whereby clearing a forest or establishing a mine is subject to administrative approvals. Legal systems typically enable authorities to acquire land on a compulsory basis, for example to build a road, hospital or school.

Meanwhile, obligations require landholders to adopt a certain conduct. Landholders may owe these obligations to specified others – such as spouses, tenants or neighbours – or to the entire political community, in connection with policy goals such as social justice or sustainable land management. For example, legislation often mandates landholders to uphold certain environmental standards.

**Viet Nam.**

**A woman cultivating soil in a rice paddy.**



Also, many laws require landholders to use farmland productively, in some cases conditioning certain rights in the bundle (such as the right to register the land) to proof of productive land use (Nguiffo, Kenfack and Mballa, 2009), while in other cases enabling authorities to redistribute underutilized land to the landless.

A more holistic understanding of rights, limitations and obligations entails three further departures from conventional approaches. First, the bundles can involve not just individual relations but collective rights and obligations too. In parts of Latin America, collective landholding under indigenous systems underpins notions of territory and self-determination. In West Africa, many customary systems entail collective relations between farming villages and pastoralist groups, or between the descendants of the farmers who first cleared the land and a village of "migrants" who settled in the area with the agreement of the landholding village (Lavigne Delville et al., 2002). "Communities" can present considerable social and tenure differentiation, with internal rights, limitations and obligations varying extensively according to intersecting and overlapping factors such as wealth, income, status, gender, age or ethnicity.

Second, land governance does not just affect relations between private actors but also relations with public authorities. In many countries, the state owns most or all of the land, forests, water and subsoil resources, with government institutions managing these resources on behalf of the people. In addition, public authorities can expropriate private rights for public purposes and often play a central role in spatial planning and territorial development. Many customary systems also vest traditional authorities with considerable powers, enabling them to allocate resources and collect resources revenues (see, for example, Amanor and Ubink, 2008). These public governance dimensions reach beyond conventional "private-law tools" (Violi, 2021) and translate into distinctive rights, limitations and obligations that operate in relations between landholders and public authorities.

Third, property rests not only on national law, or where relevant customary systems, but also on international law. For example, realizing certain internationally recognized human rights may require states to address land issues, and international instruments affirm indigenous peoples' rights to ancestral territories (see, for instance, Golay and Cismas, 2010; Claeys, 2018; Morgera, 2018; Gilbert and Lennox, 2019; Cotula, 2020a).

International treaties to protect foreign investment influence the protection of foreign investors' land rights (see, for instance, Van Ho, 2016; Coleman, Brewin and Berger, 2018; Cotula, 2020b). International law can also influence land relations more indirectly, through national legislation that gives effect to international obligations. For example, environmental treaties may require states to enact legislation that limits land rights, conditioning certain activities to an environmental impact assessment and related administrative approvals.

For any given land area, then, each relevant actor, whether individual or collective, may hold a multifaceted bundle of rights, limitations and obligations that shape their legal position vis-à-vis other directly concerned parties and the wider political community. The legal configurations that operationalize limitations and obligations are extremely varied, ranging from diverse forms of environmental regulation to territorial planning tools, with their socioeconomic outcomes also varying extensively.

Two examples of existing legal practices that give effect to notions of limitation and obligation ("social function" and "productive use", respectively) can help illustrate the contours of the bundles and their concrete implications.



#### 4. LIMITATIONS AND THE SOCIAL FUNCTION OF PROPERTY

The concept of the "social function" of property posits that rights to land do not serve private interests alone, but a public interest too, which both legitimizes and limits their legal protection and configuration (for a fuller discussion, see Cotula, 2021). Conventional conceptions of property usually frame limitations – such as environmental or zoning regulations – as exceptions to the owners' otherwise extensive rights. In the words of Joseph W. Singer (2000, p. 3): "[w]hen ownership rights are limited, we imagine those limits to be exceptions to the general rule that owners can do whatever they want with their property". On the other hand, the notion of social function inherently and comprehensively links establishing, allocating and protecting rights to the pursuit of certain public interest goals (Duguit, 1920). This can affect the shape and content of applicable bundles of rights, limitations and obligations, and enable compressions of rights if the public interest goal so requires.

Several constitutional property clauses explicitly affirm the social function of property, for example in Brazil, Colombia and Italy. On the international plane, the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas calls on states to consider the social function of land and implement agrarian reforms where appropriate (Article 17.6). Though the notion of social function is broad and potentially subject to different interpretations, the constitutional clauses have opened opportunities for social actors to advocate for policy change, and for legislators to enact measures implementing agrarian reform, regulating land use planning or protecting the environment.

Agrarian reform, for example, can encompass wide-ranging measures, such as to return or redistribute land or restructure agrarian contracts between tenants and landowners. Skewed land distribution and unjust agrarian relations affect not only control over productive assets but also power relations, with wider reverberations for social cohesion (Glenn et al., 2019).

As such, redistributive reforms may be in the public interest and have often been an important concern underlying the development of constitutional social function clauses.

Article 184 of Brazil's Constitution links social function to redistributive reform directly, by allowing the expropriation of "rural land that is not performing its social function" ("o imóvel rural que não esteja cumprindo sua função social"). Article 186 defines social function in terms of conditions such as rational and adequate use, environmental protection and compliance with labour law. The Agrarian Reform Act of 1993 reiterates this link between social function and land redistribution. Sustained by the advocacy of the landless movement over the years (Mészáros, 2013), implementation of this legislation delivered transformative change in some parts of the country, including in the form of improved livelihoods and social stability (Heredia et al., 2005). However, concomitant public support to agribusiness and large-scale monoculture, coupled with greater global demand for commodities and the expansion of the agricultural frontier, mean that Brazil's land distribution remains very unequal (Flexor and Pereira Leite, 2017; Robles, 2018).

Across different jurisdictions, the notion of social function has also been linked to measures that protect the environment, with public regulations restricting the land-use options available to landholders or subjecting certain options to government permits and monitoring. Overall, however, social function clauses have often had little application, particularly as market principles became more prevalent in public policies, and their impact on the balance of rights, limitations and obligations in many types of socioeconomic relations has proved limited. The clauses typically coexist with more conventional private-law concepts of property, and some constitutional courts have taken a conservative approach to their interpretation (Rodotà, 1990).



Measures adopted in the name of social function have also created tensions with legal obligations under international treaties that, in protecting foreign investment, establish a different balance of public and private interests (Cotula, 2021). Even so, the affirmation of social function principles in national constitutions and their application in certain policy domains illustrate how national law can and often does systematize limitations of rights in the ways it frames property, as part of efforts to reconcile public and private interests in tackling social or ecological problems.



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Sierra Leone.  
Farmer checking rice seeds.

## 5. OBLIGATIONS AND PRODUCTIVE USE REQUIREMENTS

Where the livelihoods of many depend on land, land governance plays an important role in economic relations and strategies. Land use patterns also raise social and environmental issues. In such situations, land use decisions are not only a private matter; they also engage public interests. In legal terms, this can translate into obligations concerning how landholders use their land, such as the obligation to use land in a productive way.

Productive use obligations vary extensively, reflecting diverse policy objectives and diverse tenure arrangements, even within the same country. In Europe, some productive use requirements form part of efforts to counter farmland abandonment resulting from rural depopulation and declining economic opportunities. In many low-income countries, authorities may be particularly concerned about harnessing land for economic development. And where land ownership is unequally distributed, legislators have enacted productive use requirements to promote redistribution, with laws allowing government agencies to expropriate underutilized land. Multiple policy objectives can coexist, creating complex mosaics of rights and obligations within the same jurisdiction.

Land legislation in Scotland (United Kingdom of Great Britain and Northern Ireland) exemplifies this complexity. The enduring legacy of historical land dispossessions has left the country with a highly concentrated land ownership structure, affecting rural landscapes, the social fabric and the collective sense of justice. The creation of the devolved Scottish Parliament in the late 1990s provided new momentum for land reform advocacy, resulting in legislation to promote community land ownership as a means to redistribute wealth and democratize land decision making (Trench and Trebeck, 2020). Meanwhile, laws enacted since the late nineteenth century regulate "crofting" – the small-scale agricultural holdings in Scotland's Highlands and Islands, typically tenancies on large-scale estates but increasingly also owner-occupied plots, with land use patterns connected to issues of cultural heritage, rural population retention and environmental management.



This legislation involves diverse forms of productive use obligation. For example, the Crofters (Scotland) Act of 1993, as amended, protects crofters' tenure security and entitles them to buy their croft. But it also establishes obligations for both tenant and owner crofters to live within a certain area of the croft and to cultivate the croft or "put it to another purposeful use" (Articles 5AA, 5C and 19C). Breaches can ultimately result in authorities removing the crofter. Legislative amendments over the years have resulted in intricate rules and prompted calls for systemic reform (MacLellan, 2020).

Meanwhile, Scotland's land reform legislation assists community bodies in purchasing land from large owners, including through a legal right to buy certain lands. This right to buy is partly sustained by implied productive use obligations, because the Land Reform (Scotland) Act of 2003, as amended, gives community bodies the right to purchase land that, in the opinion of relevant public authorities, is "wholly or mainly abandoned or neglected" (Section 97C). This rule came into effect in 2018 and is yet to see practical application (Combe, 2020).

One recurring problem with productive use requirements is that implicit political assumptions often influence assessments of productivity, such as assumptions about desirable land use patterns and ways to prioritize between competing land claims and uses. In many contexts, ill-defined or skewed notions of productive use undermine the land rights of marginalized groups, whose traditional resource use systems public authorities may deem "backward" and unproductive. In several countries, for example, activities such as mobile pastoralism and hunting-gathering are deemed not to qualify as productive use, due to their inherent land use characteristics, even though they may be well-suited to the local ecology (see, for example, Nguiffo, Kenfack and Mballa, 2009). Shifting cultivation and rotational systems that are premised on short or long fallows may also fall foul of productive use requirements, which sometimes also neglect the sociocultural and ecological values of land and territory. These arrangements make farmers, herders and hunter-gatherers vulnerable to dispossession.

Some states have enacted measures to mitigate such exclusionary effects. In a few countries where pastoralism is an important livelihood activity, legislators have reconfigured conventional notions of productive use to protect herders' rights. For example, Niger's Rural Code of 1993 and Pastoral Law of 2010 and Mali's Pastoral Charter of 2001 all recognize pastoralism as a valid form of productive use. These measures emerged in the context of wider policy efforts to reverse legislative approaches traditionally hostile to pastoral ways of life, partly in response to more vocal pastoral civil society (Touré, 2018; Krätli and Toulmin, 2020). The laws broke new ground, but have often faced implementation challenges, partly because the legislative recognition of pastoralism as productive use is marred by enduring misperceptions (Touré, 2018).

Notions of productive use reflect an extractive relationship between humans and nature, whereby land is an asset to be appropriated and exploited for economic activities. As such, productive use requirements can foster deforestation and ecosystem damage. For example, they can facilitate the reallocation of land from traditional uses to ostensibly more "productive" activities, such as monoculture plantations, that are often associated with extensive environmental harm. In addition, public authorities often attach productive use obligations to commercial concessions, either through national legislation or in concession contracts, to discourage speculative investments and require businesses to deliver on promised socioeconomic benefits.

A mechanical application of such obligations creates incentives for concession holders to clear the concession area, including sections that present particularly significant ecological value. One question is whether conservation may be considered a valid form of productive use. Some laws establish "ecosystem restoration concessions" enabling concessionaires to conserve high-value ecosystems within production forests and plantations, in situations where productive use requirements would otherwise require land conversion (Jonas, Abram and Ancrenaz, 2017).



#### 4. FROM CONCEPTS TO CONTEXT

Land governance systems entail limitations and obligations as well as rights. General limitations and obligations pursue public interest goals such as tackling inequalities or protecting the environment, while more specific arrangements apply to relations with certain actors, such as spouses, tenants or neighbours. A holistic consideration of rights, limitations and obligations illuminates structural imbalances across diverse legal regimes – for example, where skewed productive use requirements undermine the rights of marginalized groups, while international treaties protecting foreign investment establish generous standards of treatment without affirming investor obligations.

In practice, the ways limitations and obligations play out partly depend on how legal concepts, rules and institutions intersect with social realities, including power relations within families and communities, in national politics and across transnational processes. Where landholdings are concentrated in relatively few hands, legal concepts such as social function and productive use have provided entries to redistribute land, regulate agrarian contracts or protect the environment, which an exclusive emphasis on protecting rights could otherwise curtail. But where rights are vulnerable to legal precarity, ill-conceived productive use obligations can make those rights even more fragile – while also causing environmental harm. Meanwhile, similar “bundles” can have different implications for differently situated members of the same group – men and women, youths and elders, “locals” and “migrants”, landlords and tenants, high- and low-income groups, to name a few illustrative aspects of social differentiation. As a result, any concrete action to recalibrate rights, limitations and obligations requires fine-grained analysis of the specific context.

Overall, however, it is important to recognize that confronting social and ecological problems may require not just securing certain rights, but also reconfiguring the balance of rights, limitations and obligations. It calls

for moving from material appropriation to environmental stewardship – learning from indigenous systems to re-embed rights within notions of obligation and responsibility. It also requires redressing imbalances in rights and obligations among and within different groups, considering diverse national and international legal regimes and granular approaches that can take account of social differentiation at local to global levels. Effective reform hinges on clear concepts, careful contextual analysis and continued tracking to consider how evolving social and ecological imperatives shift land governance priorities.



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Bangladesh.  
Rice fields that have been  
flooded for three years.





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