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Tenure rights and obligations

Towards a more
holistic approach to
land governance



International Institute
for Environment
and Development

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Acronyms and abbreviations

CBD	Convention on Biological Diversity
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CFS	Committee on World Food Security
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, prior and informed consent
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDLO	International Development Law Organization
IIED	International Institute for Environment and Development
IPCC	Intergovernmental Panel on Climate Change
RRI	Rights and Resources Initiative
UNFCCC	United Nations Framework Convention on Climate Change
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

1. Introduction

The development of international soft-law instruments has created new momentum for initiatives to secure rights to land and natural resources. The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)* are a prominent example. The VGGT affirm the policy imperative to recognize, respect and protect all legitimate tenure rights, and provide guidance on how to do so in both law and practice. The guidance aligns with action to realize internationally recognized human rights such as the rights to food and to housing, and Indigenous Peoples' rights over their ancestral territories. It also resonates with growing recourse to rights in public advocacy on land and natural resources (Claeys, 2018; Sandwell *et al.*, 2019; Cotula, 2020a).

This emphasis on rights is apposite. In many contexts, growing competition for valuable lands has raised widespread concerns about the dispossession of socially, politically and juridically marginalized people, including small-scale farmers, forest dwellers, pastoralists, artisanal fishers and people living in informal settlements. Pressures on land and resources often arise from large-scale projects such as agribusiness plantations, mines and transport infrastructure. But wider socioeconomic transformations are also changing land relations, both within and between local communities. For example, Ghanaian scholar Kojo Amanor (2012) talks of "dispossession from below" to describe the impacts of agricultural commercialization on poorer farmers. Growing pressures on land erode land access for people with particularly precarious rights – for example, and depending on the situation, women, youths, migrants and low-income groups. In response to these challenges, securing marginalized groups' land and resource rights has emerged as a recurring policy ask, whether in the form of stronger legal protection, more effective and accessible arrangements to record rights and settle disputes, or improved access to redress for rights violations.

However, tenure¹ 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 resource governance challenges. For example, many conflicts over mining or agribusiness projects revolve around (the lack of) respect for the land and resource rights of affected families and communities. But they 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. Further, forest burning for soy, oil palm and rubber plantations, and pollution from factories and power plants, have questioned whether even the more encompassing tenure rights should allow owners to take Earth to the brink of environmental catastrophe. And where land and resource rights are concentrated in the hands of a few, an exclusive emphasis on protecting existing rights can constrain redistributive action and entrench historical injustices. Meanwhile, many laws that recognize socially legitimate tenure rights are ineffective partly because they condition legal protection to certain obligations that, in effect, hollow out rights from within.

Effective responses to governance problems, then, often require not just securing certain precarious rights, but also addressing imbalances and misalignments between the rights and obligations of different groups. Because legal frameworks often reflect power relations, those with the most extensive rights may have the fewest obligations – or can least effectively be

¹ The term "tenure" refers to the arrangements whereby people hold, access, use and manage land and natural resources, whether individually or collectively.

sanctioned for not complying with their obligations – whereas those with the most limited rights are often subject to stringent obligations that leave them at risk of losing land and resources. At the same time, the interplay of rights, limitations and obligations can raise difficult issues, because it affects relations between citizens and state, and the distribution of wealth and power in society. From a legal standpoint, the boundaries of rights and obligations – and the consequences of a tenure right holder breaching their obligations on their enjoyment of the related rights – are often contested. Therefore, clarifying key concepts and their practical applications is a key step towards more comprehensively addressing resource governance challenges.

This study explores the limits to rights – and the interplay of rights and obligations – in land and natural resource governance. Drawing on legal developments from diverse thematic and geographic contexts, it aims to provide conceptual foundations for legal interventions to support the implementation of the VGGT. Three clarifications are in order. First, an obligation can have both moral and legal dimensions; this study is primarily concerned with legal obligations. Second, the study takes a holistic approach to natural resource governance but focuses on land and surface resources. Third, while the study engages with the text of the VGGT, it also examines selected developments in national law – including constitutional, property and natural resource law – and international law, particularly on human rights, the environment and foreign investment. The study does not aim to provide a comprehensive discussion of these issues. Instead, it aims to outline the issues and encourage readers' further reflection and debate.

The study is structured as follows: Section 2 explores key concepts to understand the interplay of rights, limitations and obligations and reviews global trends in international legal and soft-law instruments; Section 3 examines more concrete themes to illustrate the interplay of rights, limitations and obligations in national legal systems, exploring diverse geographic and thematic settings; and Section 4 outlines a few general reflections for policy and practice.

2. Rights, limitations and obligations: a global overview

2.1. A bundle of rights – and obligations

This section conceptualizes the interplay of rights, limitations and obligations in natural resource governance, reconfiguring conventional notions of “bundle of rights”. It also discusses relevant international soft-law instruments, particularly the VGGT, and international law, focusing on human rights, environmental and investment law. As well as highlighting the relevance of limitations and obligations in international law and guidance, it documents the structural asymmetries that exist in rights, limitations and obligations applicable to different actors; the implications these asymmetries can have in natural resource disputes; and the role the VGGT might play in coordinating the application of international norms.

2.1.1. The inherent bond between rights and obligations

In all societies, humans have developed arrangements to govern relations affecting the environment around them. Societies premised on a close connection between people and nature have produced sophisticated forms of resource governance based on tradition and shared belief systems. Notions of obligation and responsibility are central to these arrangements. Despite their tremendous diversity, indigenous systems tend to emphasize the all-encompassing interpenetration – a “reciprocal appropriation”, in the words of Kiowa writer Navarre Scott Momaday (1976, p. 80) – between humans and ecosystems, reflected in the intimate connection between land, traditional ways of life and belief systems (Kenfack, Nguiffo and Nkuintchua, 2016).

In these contexts, “nature is understood as full of relatives not resources, where inalienable rights are balanced with inalienable responsibilities and where wealth itself is measured not by resource ownership and control, but by the number of good relationships we maintain in the complex and diverse life-systems of this blue green planet” (Wildcat, 2013, p. 515). A sense of obligation towards ancestors, supernatural co-dwellers or future generations permeates these arrangements, resulting in elaborate systems of prohibitions and restrictions and a strong emphasis on environmental stewardship, whether explicit or implicit (for example, Bird-David and Naveh, 2008; Jones, Andriamarovololona and Hockley, 2008; Sarma and Barpujari, 2011; Boadi *et al.*, 2017; Singh *et al.*, 2017).

In the contemporary system of independent states, national legal regimes tend to depart considerably from these arrangements, establishing instead proprietary systems premised on the neat separation of humans from nature, and the domination and appropriation of nature by humans, typically commodifying the former into “natural resources”. In the historical development of these systems, lawyers have often framed ownership as an absolute right. For example, eighteenth-century English jurist William Blackstone famously defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” (Blackstone 1770/1899, Book II, Chapter I, at 2).

Contemporary legal scholarship from diverse jurisdictions tends to reject this emphasis on absolute rights. While conventional conceptions frame property and regulation as antithetical – in the sense that public regulation often compresses private property – 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 varies with social, political and economic context, property consists of diverse and evolving bundles of rights, rather than a universal, immutable given. In such variable property systems, even the more encompassing forms of tenure rarely involve unencumbered rights for tenure right holders to act as they please (Freyfogle, 2003). Instead, virtually all tenure systems establish obligations and qualify rights with limitations to protect the rights of others or advance the public interest. This coexistence of rights, limitations and obligations applies to indigenous and customary tenure systems as well as state-issued regulations. In many societies, the former provide the main arrangements through which people access land and resources, with or without formal recognition under national law.

Legal theorists and practitioners have developed diverse approaches to address the interplay of tenure rights, limitations and obligations, partly reflecting diverse social, economic and political contexts, and fuelling public debates that often affect foundational aspects of social life. For example, property lawyer Bernadette Atuahene (2010) articulated what she called the “transformative conception” of property in response to large-scale racialized land dispossession, as historically experienced in parts of Southern Africa. While conventional understandings of property have often enabled tenure right holders to resist land restitution or redistribution, or made these interventions expensive, Atuahene’s conception seeks to facilitate land reform. It does so by differentiating legal protection based on the nature of the property (for example, protecting a family home or farm more strongly than commercial assets); defending the legitimate tenure rights of those who suffered unjust dispossession; shifting aspects of the burden of proof; and focusing on tenure obligations as well as rights (Atuahene, 2010). Political processes typically involve contestation and negotiation among different forces within society, including over different conceptions of property. As context-specific processes crystallize into law, legal configurations of rights, limitations and obligations can vary significantly in both space and time.

2.1.2. The bundle of rights and the place of limitations and obligations

There are different ways to conceptualize rights and obligations. While many authors have posited the existence of a “unitary” concept of property presenting relatively standardized characteristics, others consider tenure arrangements to involve bundles of rights, the contents of which vary over space and time. The bundle of rights theory has proved particularly influential in some jurisdictions, such as the United States of America (for example, *Kaiser Aetna v United States*, 1979; *Loretto v Teleprompter Manhattan CATV Corporation*, 1982), and in ethnographic accounts of customary tenure systems (for example, Lavigne Delville, 2004; Colin, 2008). In relation to a piece of land, relevant rights in the bundle can include the rights to access, cultivate and/or build a house on the land; the right to pick fruits from trees located on the land; and the right to transfer certain rights through a loan, tenancy, donation, sale, inheritance, or some other means.

Jurists have long highlighted that tenure is inherently relational, as it necessarily involves relations between two or more actors (for example, Hohfeld, 1913; Singer, 2000, 2006). Classical statements of the bundle of rights theory have often emphasized rights – and the fact that, depending on circumstances, several actors may hold different rights to the same resource. For

example, spouses may have overlapping rights to the same land, and a landowner's rights may coexist with a tenant's rights to use the land based on an agreement with the owner. Under many customary systems, the right to harvest fruits from certain trees may be dissociated from the right to cultivate the land; and herders and farmers may have the right to use the same land for pasture and agriculture, respectively, sometimes in different seasons. In line with the relational nature of tenure, however, each bundle of rights typically also involves limitations and obligations, to balance the competing rights of different actors as well as private and public interests.

Limitations qualify tenure rights. There are different types of limitations. First, the law may set limitations to reconcile multiple interests in the same resource. For example, a landowner's rights are often limited by the rights of their family members, or the rights of others to use or pass through the same land, based on usufruct, tenancy or easements. Second, the law can limit tenure rights to protect specific third parties – such as neighbours – by regulating noise, pollution, water abstraction, encroachment or other issues. Third, zoning, planning and environmental regulations often limit tenure rights to pursue a general public interest, such as protecting the environment. For example, regulations may restrict activities such as building a house, clearing a forest or establishing a mine, or subject them to administrative approvals. More generally, concepts such as “abuse of rights” (the exercise of a legal right to cause harm to others) establish overarching limits on the exercising of rights. Abuse of rights doctrines apply in many jurisdictions and in international law (see Byers, 2002, for a review).

Limitations aside, rights also correlate closely with obligations. Whenever one individual or group has a right (for example, to access a piece of farmland, a forest or a pastoral water point), others have an obligation (for example, to refrain from encroaching on the resource, or to negotiate access conditions with the right holders). Resource governance systems typically also establish inherent obligations for the tenure right holder. These are, in effect, obligations that emanate from the fact of having a right. Tenure right holders 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 territorial development or sustainable land management. For example, many laws require landholders to use farmland productively, whether explicitly or implicitly, 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 others promoting cultivation through enabling farmers or community bodies to access land that owners have left abandoned (Strambi, 2015; Combe, 2020).

The overall outcome is that, for any given resource, each relevant actor holds a bundle of rights, limitations and obligations that shape their legal position *vis-à-vis* other directly concerned parties and the wider political community.

2.1.3. Private rights and public governance

Discussions about bundles of rights tend to focus on relations between individuals. However, natural resource governance often involves collective rights and obligations. For example, land may belong to a family, a community or a collective business entity such as a cooperative. The loose term “community” may apply to diverse social realities. Depending on the circumstances, it could refer to an Indigenous People, or groups within an Indigenous People; or to residents who are united by geographic proximity and shared landholding but do not consider the group as a stable source of social identity.

In these situations, bundles of rights, limitations and obligations govern relations between and within the groups. In West Africa, many customary resource governance systems involve 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). Many customary systems in sub-Saharan Africa also involve "nested" arrangements, whereby landholding ultimately resides with the group but families and even individuals hold distinctive and possibly transmissible rights and obligations (Cousins, 2008). Within groups, rights, limitations and obligations vary according to intersecting and overlapping factors such as wealth, income, status, gender, age, descent and ethnicity, with women and men, youths and elders, and "locals" and "migrants" often having different tenure situations.

There are horizontal and vertical aspects to this interplay of rights, limitations and obligations under both national and customary systems. Horizontal relations operate between private individuals or groups. For example, in many national legal systems, the (individual or collective) owner of a piece of land is obliged to cause no harm to their neighbours. The law typically underlines this obligation by establishing liability where harm occurs and requiring the owner to remedy any damage and compensate those affected by it. In customary agropastoral systems in West Africa, while a farming community may hold rights to a piece of land, those rights come with accompanying obligations to respect the livestock tracks running through the land and enable herders to move their livestock. Meanwhile, herders have the right to move across these lands but face sanctions if their livestock stray into cultivated fields and harm the farmers' crops (Hesse and Thébaud, 2006; Djiré and Dicko, 2007; Touré, 2018).

Bundles of rights and obligations in natural resource governance also affect vertical relations between private actors and public authorities. In many jurisdictions, national laws affirm that the state owns most or all of the land, forests, water and subsoil resources. In these situations, government institutions at local to national levels manage these resources on behalf of the people. In most countries, public authorities also have the legally sanctioned power to expropriate privately held rights for public purposes. More generally, public authorities often play a central role in spatial or land-use planning and territorial development, setting parameters that can affect the exercise of privately held rights (FAO, 2020). Many customary systems also vest traditional authorities with considerable powers, empowering them to allocate resources and collect resource revenues (for example, Amanor and Ubink, 2008).

These public governance dimensions are reflected in rights, limitations and obligations that can affect tenure right holders' opportunities to influence public decision-making and hold authorities to account. This can include, for example, linkages between tenure rights and rights of public participation and access to justice, coupled with public authorities' corresponding accountability obligations. Tenure rights, limitations and obligations also define the scope and strength of citizens' substantive land and resource rights in the face of public action. For example, while expropriation laws empower public authorities to compulsorily acquire property, they may also require them to comply with certain safeguards and compensate affected tenure right holders. Rights, limitations and obligations applicable within families and groups can affect relations with public authorities, for example as regards women's participation in land governance processes.

2.2. Tenure rights, limitations and obligations in international law and guidance

2.2.1. The VGGT: a soft-law instrument premised on rights and responsibilities

The VGGT are the first global instrument to provide comprehensive guidance on land and resource governance. Compared to international treaties, the VGGT involve a different theory of change that promotes reform through multi-stakeholder dialogue, political consensus and international best practice, rather than binding norms. But while the VGGT are not legally binding, they enjoy considerable sociopolitical legitimacy, derived from the consultative process that led to its development and to subsequent expressions of high-level political support, including from the United Nations General Assembly, the G8 and the G20, as well as the Committee on World Food Security (CFS) which endorsed them originally. Some VGGT provisions – including on gender equality and respect for human rights – reflect binding international law (Munro-Faure and Palmer, 2012; Seufert, 2013; Cotula, 2017a).

The VGGT frame tenure issues in rights-based terms. “Legitimate tenure rights” is a key overarching concept, with emphasis placed on the link between tenure and human rights. Featuring the term “right” more than 300 times, the VGGT call for recognizing, respecting and protecting all legitimate tenure rights, while paying attention to social differentiation in tenure rights and in the ability to exercise them. The VGGT also mention limits to rights and refer to “responsibilities” and “duties”, including in section and chapter headings. For example, Section 4 discusses “Rights and responsibilities related to tenure”, while Chapters 3 and 4 discuss issues related to “tenure rights and duties”. In practice, however, most of the guidance is directed at states, and relatively few concrete provisions spell out the duties and responsibilities of private actors.

Alongside several brief or indirect references,² paragraph 4.3 provides the most explicit, comprehensive statement on limitations and obligations, applicable to all tenure right holders:

All parties should recognize that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes. Such measures should be determined by law, solely for the purpose of promoting general welfare including environmental protection and consistent with States’ human rights obligations. Tenure rights are also balanced by duties. All should respect the long-term protection and sustainable use of land, fisheries and forests (VGGT, para. 4.3).

Paragraphs 3.2, 12.4 and 12.12 provide guidance on “responsible” land-based investments, affirming the responsibilities of businesses to do no harm, comply with national law and applicable international treaties, respect human rights and legitimate tenure rights, safeguard against environmental damage and tenure dispossession, work in partnership with local tenure right holders, and strive to contribute to policy objectives such as poverty eradication, food security and sustainable resource use.

Although relatively few and succinct, these provisions set important parameters. They explicitly affirm that all tenure rights have limits and establish safeguards around those limits’ aims

² Such as paragraph 6.4, which calls for “explanatory materials” to be “widely publicized in applicable languages and inform users of their rights and responsibilities”.

(protecting the rights of others, pursuing a public interest) and modalities (determined by law, consistent with human rights obligations). The VGGT also create a direct relation between rights and obligations – including those concerning the environment – and outline specific responsibilities for certain actors that operate in contexts often characterized by tenure disputes, such as large-scale investments.

2.2.2. International human rights law

Different rules of international law have a bearing on the rights, limitations and obligations that together sustain natural resource governance. Although a comprehensive discussion is beyond the scope of this study, this brief overview of the rules protecting human rights, the environment and foreign investment illustrates the relevance of international law. In its Preamble, the *Universal Declaration of Human Rights* link the affirmation of rights to “the inherent dignity and ... equal and inalienable rights of all members of the human family”. In many societies, land and natural resources are central to livelihoods, culture and identity. So, securing or improving access to land and resources for men and women can be an essential part of realizing their human rights, individually or collectively (De Schutter, 2010; Cordes, 2017). The VGGT explicitly recognize this close connection between tenure rights and human rights (for example, paras. 1.1, 3.2 and 4.8).

The rights to property, housing, food (where people depend on natural resources for their food security) and enjoyment of one’s own culture (where traditional cultures are connected to land and resources) are just some relevant internationally recognized human rights. Other inherently collective rights include the right to self-determination, the right to freely dispose of natural resources, and Indigenous Peoples’ rights to ancestral territories. Human rights treaties prohibit gender, race, and other types of discrimination, and this can impact land and resource relations within families and communities, and in societies at large. Because all human rights are interdependent and interrelated, the interface with land and resource rights encompasses all internationally recognized human rights (VGGT, para. 4.8).

Several human rights instruments affirm obligations or responsibilities for private actors, to varying degrees. This primarily involves brief references in the Preamble. For example, the identically worded fifth preambular paragraph of both the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* states:

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant (ICCPR and ICESCR, Preamble, para. 5).

Human rights obligations or responsibilities may also involve succinct, general affirmations, such as Article 29(1) of the *Universal Declaration of Human Rights*, which states that “Everyone has duties to the community in which alone the free and full development of his personality is possible”. Certain treaties contain more specific provisions on diverse types of obligations. The *African Charter on Human and Peoples’ Rights* affirms several duties of individuals, including: “to respect and consider [their] fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance” (Article 28; see also Articles 27 and 29). Proposals for human rights instruments to affirm more extensive citizens’

obligations have raised concerns. Depending on how such obligations are framed and who they are owed to, they could provide a pretext for authoritarian governments to allege that citizens have violated their obligations and thus undermine their rights (Saul, 2001; Knox, 2008; Lazarus *et al.*, 2009).

Human rights treaties typically establish limits to rights. These are often inherent in the coexistence of multiple and possibly competing rights, such as freedom of expression and the right to privacy, or – more closely relevant to tenure relations – where redistributive reforms to realize economic, social and cultural rights require compressing the right to property. The limits can also be reflected in explicit treaty clauses that clarify the conditions under which enjoyment of rights can lawfully be restricted. These include general provisions that determine the aims and modalities of any limitations (for example, Article 29(2) of the *Universal Declaration of Human Rights* and Article 4 of the ICESCR), and derogation clauses, such as Article 4 of the ICCPR, that are applicable in emergency situations.

An extensive international human rights jurisprudence has elaborated on limits to rights in disputes that have challenged the ways states seek to reconcile different public and private interests. For example, the European Court of Human Rights has held that public authorities must strike a “fair balance” between private and public interests when they take actions that compress tenure rights through regulation, expropriation or other means. This means that human rights such as the right to property are not absolute; rather, they are subject to limitations and can be lawfully compressed, or even expropriated, for public purposes such as the pursuit of social justice (*James and Others v United Kingdom*, 1986).³

Meanwhile, the Inter-American Court of Human Rights has developed jurisprudence on the rights of Indigenous Peoples, including in the context of large-scale commercial or development projects. In decisions based on Indigenous Peoples’ right to collective property, the court has recognized the foundational importance of the relationship between people and nature in indigenous systems, and the important sociocultural and ecological dimensions of that relationship. At the same time, it held that the right to property can be limited if the public interest so requires, but authorities must respect safeguards including free, prior and informed consent (FPIC), rigorous environmental and social impact assessments and equitable benefit sharing (for example, *Saramaka People v Suriname*, 2007; Antkowiak, 2013; Morgera, 2016; Gilbert and Lennox, 2019; Cotula, 2020a). More generally, legal recognition of indigenous or customary rights often involves qualifications to protect constitutionally sanctioned rights, for example as regards gender equality.

2.2.3. International environmental law

The growing pressures that humankind is placing on ecosystems have heightened public concerns about the environmental effects of land use, from localized pollution and land degradation to biodiversity loss and carbon emissions. International environmental treaties recognize the ecological significance of land and natural resources and establish rights and obligations to protect the environment. For example, Article 3 of the widely ratified *Convention on Biological Diversity* (CBD) vests states not only with “the sovereign right to exploit their own resources

³ In the European human rights system, relevant treaty provisions refer to the right to peaceful enjoyment of possessions, rather than the right to property, but the European Court has interpreted this right as being equivalent to the internationally recognized right to property.

pursuant to their own environmental policies”, but also with “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.⁴ While this provision refers to a “responsibility” rather than a “duty”, the International Court of Justice has recognized that a “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996, para. 2). Other international treaties, such as the *United Nations Convention on the Law of the Sea* (1982, Article 293), also clarify that states have environmental obligations.

These provisions concern the legal contours of state sovereignty, and rights and duties between states, rather than tenure relations. But they can indirectly affect tenure, including via national legislation that gives effect to international obligations. For example, Article 14(1)(a) of the CBD mandates states to require, “as far as possible and as appropriate”, “environmental impact assessment of [...] proposed projects that are likely to have significant adverse effects on biological diversity”. To implement this provision, states may have to enact legislation that limits land and resource rights, by conditioning certain land-based activities to the conduct of an environmental impact assessment and related administrative approvals.

International environmental law also has more direct reverberations for tenure rights and obligations. Certain international instruments call for strengthening land and resource rights as a basis for effective environmental protection. For example, Article 4(2)(b) of the *Regional Implementation Annex for Africa of the United Nations Convention to Combat Desertification* requires African parties to “sustain and strengthen reforms currently in progress toward greater decentralization and resource tenure”; Article 9(3)(b)(i) directs national action programmes to ensure sustainable management of agricultural and pastoral land.

Action to address climate change also presents tenure dimensions. In its special report on climate change and land, the Intergovernmental Panel on Climate Change (IPCC) concluded that not recognizing customary tenure can increase vulnerability and decrease adaptive capacity, while policies to recognize customary rights can provide both security and flexibility in response to climate change (IPCC, 2019, para. C1.2; see also RRI, 2020). The IPCC report discusses issues that are relevant to tenure obligations, elaborating on the role of arrangements that promote sustainable land management (IPCC, 2019, para. B.5) and of land use zoning, spatial planning and integrated landscape regulations (para. C1.1) in addressing climate change.

Because many indigenous or customary tenure systems emphasize obligation and responsibility, protecting rights based on those systems can help promote environmental stewardship and inspire wider governance reforms that connect resource rights more strongly to environmental obligations. Affirming this strong connection between environmental protection and indigenous knowledge, Article 8(j) of the CBD requires states to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”. Article 10(c) requires states to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use

⁴ Principle 21 of the 1972 Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development are similarly worded; the latter refers to both “environmental and developmental policies”.

requirements”; and Article 15(5) refers to prior informed consent and benefit sharing with respect to access to genetic resources. Based on these provisions, the state parties to the CBD have agreed on more specific guidance to ensure that sectoral and cross-cutting initiatives related to the conservation and sustainable use of biodiversity consider Indigenous Peoples’ issues.

These provisions intersect with, and reinforce, human rights jurisprudence that identifies FPIC and “fair and equitable” benefit sharing as key aspects of Indigenous Peoples’ rights (Anaya, 2013; Doyle, 2015; Tauli-Corpuz, 2016; Morgera, 2016, 2018, 2019, 2020; Szoke-Burke and Cordes, 2020). The *United Nations Framework Principles on Human Rights and the Environment*, for example, distil key recommendations for protecting Indigenous Peoples’ rights, based on both human rights jurisprudence and CBD-related guidance (Principle 15).

But tensions can also arise between environmental protection and human rights – for example, where creating protected areas undermines the rights of Indigenous Peoples (Tauli-Corpuz, 2016). Instruments adopted under environmental treaties provide guidance on respecting indigenous and local communities’ land and resource rights in the context of conservation initiatives (for example, Appendix 1, Article 2(c) of the *Report of the Conference of the Parties on its sixteenth session, 2010*, from the United Nations Framework Convention on Climate Change [UNFCCC]). The Inter-American Court of Human Rights has also indicated how to interpret human rights and biodiversity norms in mutually supportive ways, including around creating and managing protected areas (*Kaliña and Lokono Peoples v Suriname*, 2015, paras. 173–174, 177–178, 181, and 214 footnote 247).

2.2.4. International investment law

Customary international law contains rules on the treatment of tenure rights held by foreign investors, but much contemporary international investment law is based on treaties. Worldwide, some 2 700 bilateral and regional investment treaties protect assets held by foreign investors,⁵ typically enabling foreign investors to settle disputes with the host state via international investor-state arbitration. Formulations vary considerably, but investment treaties present substantial commonalities. For example, they tend to define protected investments broadly as encompassing “every kind of asset” (*Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates*, 2013, Article 1). So, although they do not regulate natural resource governance as such, most investment treaties would protect foreign investors’ rights to land and resources. Many explicitly include immovable property and natural resource concessions among the examples of assets they protect (for example, *Agreement between the Government of the Slovak Republic and the Government of Malaysia for the Promotion and Protection of Investments*, 2007, Articles 1(a)(i) and (v)). Shareholdings in corporate entities that hold land and resource rights also typically qualify for legal protection.

Investment treaties are not usually formulated in the language of rights. Rather, they express state parties’ mutual commitment to guarantee certain standards of treatment to each other’s investors. For example, treaty clauses typically set conditions for the legality of expropriations affecting foreign investors’ assets, often including non-discrimination, a public purpose, due

⁵ UNCTAD International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> (data as of September, 2020).

process and compensation, usually at full market value (UNCTAD, 2012). Many treaties also require states to accord foreign investors and investments minimum standards of treatment, including “fair and equitable treatment” and “full protection and security”. By setting substantive standards of treatment and providing foreign investors with direct access to international remedies for breaches of these standards, treaties have a bearing on the legal protection of foreign investors’ land and resource rights. Investor-state arbitral tribunals established on the basis of investment treaties have reviewed the legality of state conduct in connection with expropriating land for agrarian reform; terminating land leases for failure to develop the land within prescribed timeframes; directly or indirectly expropriating land to create natural parks; land valuation issues; and a lack of inter-ministerial coordination around investment approval and land use zoning requirements (for example, Peterson and Garland, 2010; Cotula, 2015; Cordes, Johnson and Szoke-Burke, 2016; Coleman, Brewin and Berger, 2018; Cometti, 2020).

Investment protection rules present some parallels with human rights law. Like human rights instruments, investment treaties establish international standards and remedies for private actors to seek review of the legality of public conduct. For example, Zimbabwe’s land reform programme has given rise to international disputes based on human rights arguments (*Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe, 2008*) and investment treaties (*Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe, 2009*; and *Bernard von Pezold and Others v Republic of Zimbabwe, 2015*). At the same time, human rights and investment treaties reflect fundamentally different conceptions of land and natural resources. The former recognizes the historical, spiritual dimensions of the relation between people and territory, tying it to self-determination and the realization of socioeconomic rights; while the latter primarily conceptualizes natural resources as commercial assets, with their value expressed in monetary terms (Cotula, 2017b, 2020b). Direct tensions have emerged in several disputes, particularly where human rights and investment treaties protected competing claims to the same land and resources – such as those of Indigenous Peoples and foreign investors (for example, *Sawhoyamaxa Indigenous Community v Paraguay, 2006*).

The balance of rights and obligations in the investment treaty regime has been at the centre of lively debates. Comparative analyses have shown that, in several respects, investment treaties tend to provide more far-reaching protections than human rights instruments (see Cotula, 2012 and 2017b for more detailed discussions). These asymmetries can result, for example, from differences in the overall approaches for balancing public and private interests, in applicable substantive rules, in the accessibility of international redress and in legal remedies including damages awarded (Cotula, 2017b). Asymmetries are even more pronounced where no effective regional human rights court exists. In addition, investment treaties tend to establish standards of protection for foreign investors and investments but do not typically affirm investor obligations. And, although a small but growing minority of treaties refer to investor responsibilities, this is primarily through non-mandatory clauses (Gathii and Puig, 2019; Ho, 2019; Perrone, 2019; Sattorova, 2019). In recent years, perceived imbalances in applicable rights and obligations between investors and states – and the absence of arrangements to establish commensurate investor obligations towards those affected by investments – have sustained critiques of the investment treaty regime (for example, Yilmaz Vastardis, 2015; Arcuri, 2019).

2.2.5. Systemic integration, structural asymmetries and the VGGT

A substantial body of international law and guidance has a bearing on tenure rights, limitations and obligations. While instruments such as the VGGT address land and resource governance in explicit terms, the connection is more implicit in the case of investment treaties. In other cases, the connection partly depends on the implementing national legislation, as illustrated by the tenure implications of international requirements on environmental impact assessments. Relevant international law and guidance also embodies different normative values – from protecting human dignity and safeguarding the environment to facilitating cross-border economic transactions – and variable systems of rights, limitations and obligations.

International law provides tools for coordinating the application of rules that advance different values or protect competing rights. For example, as outlined in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, “systemic integration” requires international tribunals to consider other relevant, applicable rules of international law when interpreting a treaty. Systemic integration has enabled human rights courts to consider environmental treaties, and investor-state arbitral tribunals to discuss rights, limitations and obligations under human rights law. But systemic integration leaves considerable discretion to international adjudicators – for example, on which rules they deem relevant and how to take such rules into account – which has sometimes resulted in tribunals reaching diverging conclusions (Cotula, 2017b, 2020b).

Structural asymmetries in rights, limitations and obligations can have practical implications for natural resource relations and disputes. For example, large-scale, land-based investments, such as extractive industry and agribusiness projects, can bring into conflict competing land and resource rights, such as those based on traditional systems and those based on commercial concessions. In several respects, international law accords stronger protections to the rights held by transnational businesses (“foreign investors”) than to the rights of the people impacted by business activities, without establishing commensurate obligations. As well as affecting private relations, such asymmetries can affect public governance. With stronger rights and more effective redress, transnational businesses may have greater leverage in their relations with government than the people their activities affect, compounding imbalances in different actors’ ability to influence public decisions (Cotula, 2012, 2020b).

The VGGT call for the protection of all legitimate tenure rights, paying special attention to social differentiation and the rights of particularly marginalized groups. They also affirm duties and responsibilities, including the responsibilities of businesses involved in land-based investments. Because they are a non-binding soft-law instrument, the VGGT cannot, in themselves, alter the overall balance of rights and obligations under international treaties.⁶ However, they could have a bearing on how international treaties are interpreted and applied. For example, the CEDAW Committee identified the VGGT as a key reference to clarify the nature of state obligations in realizing rural women’s right to participate in and benefit from rural development, a right that is affirmed in Article 14(2)(a) of the *Convention for the Elimination of All Forms of Discrimination Against Women* (CEDAW) (see *General Recommendation No. 34* of 2016, para. 36a). Similarly, the Conference of the Parties to the CBD has referenced the VGGT in its decisions concerning promotion of secure tenure rights and equitable access to land and natural resources (CBD COP

⁶ In fact, several VGGT provisions — such as paras. 1.1, 2.2 and 4.2 — clarify that the VGGT must be implemented consistently with states’ obligations under international law.

Decision XII/5/Annex, point 2(b) and CBD COP Decision XIII/3, 2016, para. 7).⁷ Based on publicly available information, the VGGT are yet to come up in investor-state arbitration, and it is hard to predict whether and how arbitral tribunals might consider the VGGT when interpreting investment treaties.

⁷ On the referencing of the VGGT in the CBD context, see IDLO, 2017.

3. Illustrative themes in national law

In any given local or national setting, the structure of tenure rights and obligations is related to ecological and socioeconomic factors. As a result, national laws vary extensively. Tenure rights, limitations and obligations can affect the fundamentals of collective organization and the relationship between private interests and public authority. So, they are never just a technical legal matter. They are also a sensitive political issue, and it is not uncommon for constitutional property clauses to form the object of difficult negotiations between different political forces (for example, Rodotà, 1990, on drafting Italy's constitutional property clause; Sarkin, 1999; Murray, 2001; Sibanda, 2019; and Hall, 2020, on drafting South Africa's constitution and proposed amendments to its property clause). The diversity and complexity of national laws make it impossible to provide a comprehensive, detailed overview of trends. However, a few selected themes can help illustrate recurring issues. This section discusses examples of national law arrangements that address the limits of tenure rights or connect tenure rights to certain obligations: the social function of property; environmental stewardship; productive-use requirements; public purpose as a condition for compulsory acquisition; territorial development; and the affirmation of certain responsibilities beyond legal requirements. For each topic, the text explores the conceptual foundations of the relevant legal construct and one example of its practical application or implications.

3.1. The social function of property

3.1.1. Conceptual foundations: the internal limits of property

As discussed, property consists of variable and evolving bundles of rights that typically come with limitations, and the VGGT encourage "all parties" to recognize that "no tenure right, including private ownership, is absolute" (para. 4.3). Conceptually, some limitations can be said to be external, in that they restrict conduct that can produce adverse impacts ("externalities") on the rights of others or on the public interest. For example, national laws typically govern liability for harms such as environmental pollution. Classical conceptions of property usually frame these limitations as exceptions to the owners' otherwise extensive rights. In the words of American jurist 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".

However, jurists and legislators have also identified *internal* limits of property, whereby allocating and protecting tenure rights is inherently linked to, and limited by, the pursuit of certain public interest goals, such as social justice and economic development. In the early 1900s, French jurist Léon Duguit and his collaborator Henri Hayem developed the concept of the "social function" of property, whereby tenure rights do not serve private interests alone, but a public interest, too. As such, their protection and configuration are both legitimized and limited by fulfilment of that public interest (Duguit, 1920; see also Mirow, 2010; Foster and Bonilla, 2011; Mattei, 2000; Rodotà, 1990; Golay and Cismas, 2010; Alexander, 2012). More recently, American property theorist Eric Freyfogle proposed that "property rights are justified and limited by their ability to promote the common good" (Freyfogle, 2003, p. 229). In these conceptions, limits to rights are inherent features of property, rather than exceptional and specifically legislated occurrences.

In practice, broad notions such as social function and common good leave significant scope for diverging views about which interests and considerations to prioritize. But at a conceptual level, they establish a strong connection between allocating and protecting private tenure rights on the one hand, and pursuing public interest on the other. The implications of that connection depend on how national laws translate these concepts into legal rules. Several constitutions explicitly link property to social function, especially in Europe (for example, Article 42 of Italy's *1948 Constitution*) and Latin America (for example, Article 5(XXIII) of Brazil's *1988 Constitution*; Article 58 of Colombia's *1991 Constitution*). Some of these constitutional property clauses emerged in the context of major political change and/or sustained demands for agrarian reform. In such situations, coupling legal recognition of private tenure rights with pursuing certain public interests reflected a compromise between different political forces and different conceptions of property. Such constitutional clauses often coexist with the continued application of liberal property constructs in the private law sphere (for example, Article 832 of Italy's *Civil Code*), creating complexities in interpretation and application. Social function ideas have also been developed in jurisdictions where the law does not explicitly affirm the social function of property, such as South Africa (Sibanda, 2019).

Although the specific constitutional formulations are diverse, linking property to social function tends to qualify the protection of acquired rights, enabling significant compressions of those rights for a public interest, if certain conditions are met. Depending on the context, public authorities have relied on social function clauses to justify public action in wide-ranging policy areas, from planning regulations to environmental protection to agrarian reform. Legal vehicles for giving effect to the social function of property vary, depending on the circumstances and the national legal system. They can range from national legislation and administrative action to constitutional court judgments that decide on the constitutionality of legislative or administrative measures. For example, Article 1228(1) of Brazil's *Civil Code of 2002* clarifies that the right of property "must be exercised in accordance with its economic, social and environmental ends", thereby enabling, for example, environmental regulation that restricts available land-use options (dos Santos Cunha, 2011). In 2016, Colombia's Constitutional Court invoked the social function of property, affirmed in the Constitution, to strike down as unconstitutional certain measures that exempted mining projects from environmental restrictions in fragile mountain ecosystems (Judgment 035/16).

3.1.2. Illustrative application: social function and agrarian reform

Natural resource governance often crystallizes injustices. In many societies, land ownership is concentrated in the hands of a relatively small elite and exploitation pervades relations between landowners, moneylenders, tenants, farmworkers and agribusinesses – often with further complexity and differentiation based on factors such as gender, age and ethnicity. A skewed land distribution affects not only control over productive assets but power relations as well, because it can shape influence in land-use decision-making, whether formally or informally, with wider reverberations for social cohesion (for example, Glenn *et al.*, 2019). As a result, enacting redistributive reforms that limit or expropriate landowners' rights may be in the public interest and offer one avenue for public authorities to give effect to the social function of property. Reforms to restructure relations between tenants and landowners may also fulfil the social function of property. Such reforms can limit landowners' rights – for example, where regulations impose rental ceilings or minimum tenancy durations or make it more difficult for landowners to repossess the land.

The VGGT identify the potential benefits of land redistribution and provide guidance for situations where redistribution is appropriate (Section 15). And by framing their guidance around the broad concept of tenure, rather than ownership alone, the VGGT call for the protection of wide-ranging tenure rights, including those of tenants, sharecroppers and other people who access land through agrarian contracts. International human rights instruments also have a bearing on agrarian reform and some expressly link it to social function. Indeed, agrarian reform can contribute to the realization of economic, social, and cultural rights, such as the right to adequate food (De Schutter, 2010). Article 11(2)(a) of the ICESCR makes explicit the connection between agrarian reform and the right to food, and Guideline 8.1 of the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food* encourages agrarian reform, stating:

[...] Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen propoor growth. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources (Guideline 8.1, p. 16).

Similarly, Article 17(6) of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* affirms that “[p]easants and other people living in rural areas have the right to land, individually and/or collectively” and calls on states to implement agrarian reforms, where appropriate, to facilitate equitable resource access and limit excessive land concentration. This latter provision on agrarian reform explicitly refers to the social function of land. Rural workers and the landless should be prioritized in land allocation, without discrimination between men and women, and with “particular attention” being paid to the rights and needs of women, youths, older people and persons with disabilities (Articles 2(2), 4, and 17(6)).

Over the years, many states have enacted measures to redistribute land or restructure agrarian relations. Following diverse ideological and practical approaches, they have achieved varying, if often disappointing, results. In several cases, legislators and governments have relied on the social function of property – and the inherent limitations of land rights it entails – to justify land redistribution. For example, Article 5(XXIII) of Brazil’s *1988 Constitution*, as amended, provides that “property shall fulfil its social function” (*a propriedade atenderá a sua função social*), while Article 184 directly links social function to redistributive reform 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 (see also Júnior, 2018).

Article 2 of Brazil’s *Agrarian Reform Act* of 1993, which implements the constitutional provision, reiterates this link between social function and land redistribution; and Supreme Federal Court decisions have elaborated on the notion of social function in an agrarian reform context (dos Santos Cunha, 2011). Decades of implementation have delivered transformative change in some parts of the country, including in the form of improved livelihoods and social stability (for example, Heredia *et al.*, 2005). But 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 unequal (Flexor and Pereira Leite, 2017; Robles, 2018), with some commentators calling agrarian reform an “unfulfilled political promise” (Robles, 2018, p. 1).

To realize the social function of property, legislators have also adopted measures to restructure agrarian contracts. Although diverse, many such laws aim to protect tenants *vis-à-vis* landowners, recognizing that the former are often the weaker contracting party. In Italy, for example, legislation enacted from the 1960s restricts agrarian contracts to those expressly regulated by law and prohibits certain sharecropping agreements.⁸ The 1982 *Agrarian Contracts Law* allows parties to convert existing sharecropping agreements into tenancies. This law also protects the tenure security of tenancies involving family farmers and agricultural cooperatives, with Articles 1 and 4–7 establishing minimum duration and tacit renewal and requiring “grave breaches” on the part of the tenant as a condition for landowners to terminate the tenancy.

The law originally favoured the tenant by linking the prescribed “fair rental” (*equo canone*) to cadastral values from 1939 and thus below contemporary market prices (Article 9). But in 2002, the Constitutional Court struck down this rule as unconstitutional because it lacked any connection to current land value (Judgment 318; see also Alabrese, 2004). Italy’s legislation exemplifies an attempt to promote more equitable agrarian relations through arrangements that compress landowners’ rights and restrict the parties’ “autonomy of contract”. However, implementation has faced problems, including reverberations in rural land markets and a reluctance by landowners to rent out their land on the formal market. Over the years, constitutionality challenges and legislative adjustments have altered some of the reform’s parameters (Nicoletti, 2008).

3.2. Environmental stewardship

3.2.1. Conceptual foundations: the link between resource governance and environmental stewardship

The VGGT place considerable emphasis on the connection between environmental protection and the governance of tenure, with the former featuring in the VGGT’s objective (para. 1.1). They also call for policy, legal and institutional frameworks to reflect the environmental significance of land, fisheries and forests (paras. 5.3, 9.7); environmental objectives to inform the use and control of publicly owned natural resources (paras. 8.1, 8.7); and public regulation of markets and investments to promote environmental protection and sustainable land, fishery and forest use (paras. 11.2, 12.1, 12.2, 12.4, 12.6, 12.8, 12.10, 12.12). Finally, they explicitly state that environmental protection can justify tenure obligations and limits to tenure rights (para. 4.3).

In practice, resource governance systems commonly associate the recognition or allocation of rights with affirmation of responsibilities or obligations to ensure that land and natural resources are used sustainably. As discussed, although customary systems are extremely diverse, they often emphasize the all-encompassing connection between humans and nature and a sense of obligation towards surrounding ecosystems. While environmental protection is not necessarily an explicit goal in these arrangements (Bird-David and Naveh, 2008; Jones, Andriamarovololona and Hockley, 2008), several studies have shown that elaborate systems of traditional rules and prohibitions contribute to the conservation of species, sites and ecosystems (for example, Bird-David and Naveh, 2008; Jones, Andriamarovololona and Hockley, 2008; Sarma and Barpujari,

⁸ While attuned to the notion of social function, this legislation also finds a more specific constitutional reference in Article 44 of the Italian Constitution, whereby the law establishes “obligations and limits” on private land ownership, promotes land reform, and supports small and medium-scale property to achieve “rational” land use and “equitable social relations”.

2011; Boadi *et al.*, 2017; Singh *et al.*, 2017). In many places, however, social, economic and cultural change has eroded traditional arrangements, fostering change in resource-use practices and ultimately environmental degradation (for example, Sarma and Barpujari, 2011; Singh *et al.*, 2017).

The connection between resource governance and environmental stewardship is also evident in many national legal systems. Laws typically limit the scope and import of tenure rights, or affirm obligations for tenure right holders, to promote environmental protection and sustainable resource use. This includes rules that protect the rights of certain actors who would be most directly impacted by environmental harm, such as neighbours. It also includes regulations aimed at protecting the public interest. These rules may be established in devoted environmental legislation or in property norms, planning regulations, and rules governing civil, administrative or criminal liability. Environmental rules intersect with other laws, for example those protecting the resource rights of Indigenous Peoples or minority groups. The specifics vary extensively depending on the issue and jurisdiction, and in practice, legislation to protect the environment often meets difficult implementation challenges, particularly in the face of vested interests.

3.2.2. Illustrative application: tenure rights, limitations and obligations in environmental legislation

Many national constitutions affirm the right to a healthy environment, with varying formulations. Examples include Argentina's *Constitution of 1853*, as revised in 1994 (Article 41), South Africa's *Constitution of 1996* (Section 24) and Nepal's *Constitution of 2015* (Article 30). In some countries, the right to a healthy environment is affirmed in national legislation, such as Indonesia's *Environmental Protection and Management Law of 2009* (preambular paras. a and f, and Article 3(g)) and Tanzania's *Environmental Management Act of 2004* (Article 4). Other human rights – such as the rights to life or health – also present environmental dimensions (Boyd, 2011, 2018; Knox, 2020), as do norms prohibiting discrimination, such as where environmental damage would compound the structural marginalization of certain social groups. The exercise of the right to a healthy environment and of other “green” human rights can impose limitations on the scope of tenure rights – for example, by restricting certain land-based activities to ensure they do not undermine environmental rights.

Environmental legislation often affirms or entails more specific limits to tenure rights. In most countries, for example, the right to conduct certain activities on or below the land is subject to an environmental permit, which government authorities issue upon approval of an environmental impact assessment. The law may also prohibit certain activities altogether, such as those connected with harmful substances or in environmentally sensitive areas. Depending on the circumstances, such regulations often operationalize states' obligations under international law – for example, under the terms of the CBD.

Impact assessments aim to assess the likely or potential impacts of a proposed project before project approval, identify alternatives to proposed options, and consider preventative or mitigating actions to minimize any impact identified. As such, impact assessment requirements entail inherent limits to tenure rights: a person, group or entity holding rights to a piece of land does not automatically have the right, for example, to build a mine or a factory on that land. Rather, they can only conduct these activities if environmental authorities duly authorize them. Besides pursuing a public interest in protecting the environment, this limitation of tenure rights can also enable third parties – such as those who stand to be affected by any environmental

harm – to protect their own land and resource rights, for example by participating in public consultations that the law requires as part of impact assessment processes.

Further, many laws – such as Tanzania's *Environmental Management Act* (Section 72) – affirm environmental obligations by requiring tenure right holders to use land and natural resources in an environmentally sustainable manner. Much depends, however, on how such obligations are defined in law and operationalized in practice. Concepts such as environmental sustainability could encompass localized aspects – for example, preventing or addressing soil degradation in the relevant area. They could also have higher-level dimensions – for example, in the case of transboundary watercourse pollution or the impacts of land use on global climate change.

Besides general obligations, environmental legislation can also set more tailored obligations by requiring tenure right holders to comply with conditions established in environmental permits. In principle, these conditions would give effect to recommendations from impact assessment studies or separate management plans based on those studies. As such, they can mandate specific obligations such as those aimed at safeguarding groundwater resources or regulating waste management.

National laws typically establish obligations applicable to situations where an imminent threat of environmental damage exists or where harm occurs. Many laws empower public authorities to require tenure right holders to prevent or repair environmental harm caused by activities on their land. Remedial action may include, for example, doing works, treating land, removing contaminants or planting trees. Obligations relevant to these situations would also include compensating those affected. Some national constitutions enshrine fundamental principles in these regards, such as the general obligation to repair environmental harm caused or the right to obtain compensation for environmental harm (for example, Article 41 of Argentina's *Constitution of 1853*, as amended, or Article 30(2) of Nepal's *Constitution of 2015*). But these issues are typically further regulated by environmental legislation, such as Tanzania's *Environmental Management Act* (for example, Sections 7(3)(d), 151–155, 192, 202 and 225–226), and by general laws dealing with civil liability for harm. Administrative and criminal sanctions may also apply.

Unequally distributed tenure rights and entrenched sociocultural practices often marginalize certain social groups, for example in public consultations related to environmental impact assessments, or as regards compensation for environmental harm. This calls for deliberate measures, both in law and in practice, to address social differentiation in the substantive protection of rights, and in decision-making processes. Relevant parameters intersect and vary with context, ranging from gender to descent, ethnic origin and landholding status.

3.3. Productive-use requirements

3.3.1. Conceptual foundations: economic development and social justice

The VGGT link natural resource governance to higher-level goals such as social and economic development, food security, poverty eradication, sustainable livelihoods, social stability and rural development (para. 1.1). And where the livelihoods of many depend on land and natural resources, the governance of these resources can play an important role in socioeconomic relations and national development strategies. Therefore, land-use decisions are not only a private

matter; they engage public interests as well. In legal terms, this often translates into obligations for tenure right holders to use land in a productive way.

Productive land-use requirements vary extensively, depending on jurisdiction and situation. This reflects diverse policy objectives and diverse tenure arrangements, even within the same country. In Europe, certain productive-use requirements form part of policy responses to counter farmland abandonment resulting from rural depopulation, declining economic opportunities and other changes. In many low- and middle-income countries, legislators may be particularly concerned about harnessing natural resources for economic development. And where land ownership is highly concentrated, legislators have enacted productive land-use requirements to promote social justice, particularly in connection with redistributive reforms, with laws allowing authorities to expropriate and redistribute underutilized land.

Productive-use requirements intersect with wider governance frameworks, which affect the ways those requirements operate in practice. When the requirements coexist with a significant state role in controlling land and natural resources, laws may mandate government agencies with monitoring productive use and withdrawing land if productivity requirements are not met. This is the case in several sub-Saharan African countries. In Cameroon, for example, *Ordinance No. 74-1 of 1974* requires lands in the “national domain”, which cover most of the national territory and are administered by the state, to be managed in ways that ensure rational and productive use (*mise en valeur*). The ordinance also establishes administrative structures, and conditions the protection of occupation rights and land titling availability to “evident” occupation and proof of productive use (Articles 15–17).

The effects of productive-use requirements hinge on social context, how laws define and measure productive use, the consequences of non-compliance and how these are applied to real-life situations. Where large landowners leave much of their land idle, effectively implemented requirements can help the landless access land and encourage land-based economic activities. But ill-defined or skewed notions of productivity – often measured solely in terms of visible and permanent land-use change – can undermine the land and resource rights of socially and juridically marginalized groups, whose traditional resource-use systems may be deemed “backward” and unproductive by public authorities. Due to their inherent land-use characteristics, for example, activities such as mobile pastoralism and hunting–gathering are often deemed not to qualify as productive use (Nguiffo, Kenfack and Mballa, 2009). This can disproportionately impact certain groups, for example where women collect wood from communal forests. Rotational systems premised on short or long fallows may also fall foul of productive land-use requirements, which sometimes also neglect the sociocultural and ecological values of land and resources.

Meanwhile, many states have adopted measures to facilitate land access for activities they consider inherently more “productive”, such as large-scale commercial projects. This includes reforms to strengthen tenure rights and streamline procedures through which businesses access land, as well as a range of tax and other incentives – a phenomenon activists have dubbed “agrarian reform in reverse” (GRAIN, 2015). In the absence of properly designed and implemented productive-use requirements and effective safeguards, tenure right holders may be vulnerable to arbitrary state action that deprives them of the resources their livelihoods, ways of life and social identity are founded on. Perverse incentives may also encourage resource users to clear forestland or reduce fallow cycles, with adverse environmental consequences.

3.3.2. Illustrative application: social inclusion and the environment in productive-use requirements

Several states have adopted legislation that tailors productive-use requirements to the pursuit of certain social or environmental goals. Laws that enable transferring abandoned land to prospective farmers or community groups are a case in point. In Scotland (United Kingdom of Great Britain and Northern Ireland), the *Land Reform (Scotland) Act of 2003*, as amended in 2015, 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). Through an application to public authorities, community bodies can buy the land even if the owner does not want to sell. The rule forms part of a wider range of measures enacted in Scotland to promote land reform, in a country characterized by highly concentrated land ownership. It is subject to several exceptions, while secondary legislation clarifies that, to assess abandonment or neglect, public authorities must consider matters related to the physical condition of the land, its designation or classification, or its use or management (*Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Scotland) Regulations 2018*, Section 2). The rules came into effect in 2018 and are yet to see practical application (Combe, 2020).

Other states have enacted measures to avoid or mitigate the exclusionary effects that productive-use requirements can have for marginalized groups. In a few countries where pastoralism is an important livelihood activity, legislators have reconfigured conventional notions of productive use to protect pastoral rights. For example, Article 27 of Niger’s *Rural Code of 1993*, Articles 2 and 56 of its *Pastoral Law of 2010* and Articles 49–51 of 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 longstanding legislative approaches that were traditionally hostile to pastoral ways of life, including livestock mobility. Reflecting entrenched power relations and ingrained prejudice, those old approaches contrasted with the ecological and economic rationale of mobile pastoralism (Hesse and Thébaud, 2006).

Article 1 of Niger’s *Pastoral Law of 2010* and Articles 4–6 of Mali’s *Pastoral Charter of 2001* recognize mobility as a “fundamental right” of pastoralists, and both laws establish rules to protect livestock corridors from agricultural encroachment. They also introduce tailored legal concepts – such as the “*terroir d’attache*”⁹ – to protect pastoralists’ use rights over their traditional resources. Developed in the context of changing, and often conflictual, relations between herding and farming (Touré, 2018; Krätli and Toulmin, 2020), and of local-level innovation around multi-actor dialogue frameworks for shared natural resource management (Djiré and Dicko, 2007), these laws broke new ground but have often faced implementation challenges. Research suggests, for example, that the legislative recognition of pastoralism as a valid form of productive use is marred by enduring misperceptions (Touré, 2018).

Meanwhile, some laws seek to address environmental issues that arise in connection with awarding commercial concessions – for example, for large-scale agriculture or logging – and the need to conserve those sections of the concession area that present particularly significant ecological value (such as high conservation value areas). To discourage speculative investments and ensure that businesses deliver on promised socioeconomic benefits, public authorities

⁹ Under Niger’s *Rural Code of 1993* and its *Pastoral Law of 2010*, the *terroir d’attache* is the area where herders spend most of the year (usually a strategic area, such as a *bas-fond* or the land around a water point), and over which they have priority-use rights. Outsiders may gain access to these resources through negotiations with the right holders.

often attach productive-use requirements to commercial concessions, either through national legislation or in concession contracts. But a mechanical application of such requirements could create perverse incentives for concession holders to clear high conservation value lands, raising questions about the conditions under which conservation may itself be considered a valid form of productive use.

Indonesia's *2008 Regulation Containing Provisions and Procedures for the Granting of Business Permit for the Utilization of Products of Wood Forest Ecosystem Restoration* governs the award and implementation of ecosystem restoration concessions. Providing a legal basis for restoring and continuing to conserve the ecological functions of high-value ecosystem areas within production forests and plantations, these concessions enable businesses to adhere to international environmental standards in contexts where productive-use requirements under applicable legislation would otherwise require land conversion. Reported challenges include bureaucratic procedures, high start-up costs, absence of fiscal incentives and overlapping land claims (Jonas, Abram and Ancrenaz, 2017).

3.4. Public purpose as a condition for compulsory acquisition

3.4.1. Conceptual foundations: eminent domain

The power of the state to expropriate land and natural resource rights in the public interest ("eminent domain") is commonly identified as an attribute of sovereignty. Virtually all national legal systems enable public authorities to acquire property on a compulsory basis – for example, where they need a piece of privately owned land to build a public road, hospital or school. To varying degrees, this legislation also sets safeguards to protect tenure rights from arbitrary dispossession, by requiring authorities to follow due process and compensate affected tenure right holders. The VGGT call on states to respect all legitimate tenure rights in expropriation processes and provide extensive guidance on issues such as only resorting to expropriation where a public purpose requires it, acquiring the minimum resources necessary, and promptly providing just compensation (para. 16.1).

The rules governing expropriation establish the quintessential limitation of tenure rights – in that, no matter how strong or extensive those rights are, they can be lawfully expropriated if the relevant conditions are met. Expropriation is also a recurring source of tenure conflict, and whether a measure constitutes expropriation can itself form the object of disputes – particularly where regulatory measures significantly restrict tenure rights or reduce the value of the asset. Further, disputes frequently arise as regards compensation and – where land is held collectively – its distribution within families and communities, with procedures potentially compounding marginalization including in terms of status, gender or ethnicity. Applicable rules vary greatly in different jurisdictions. But constitutional property clauses and national expropriation laws typically condition the exercise of compulsory acquisition powers to the existence of a public purpose. This setup delineates public purpose as a key notion for reconciling different public and private interests and defining the limits of tenure rights in the face of public action.

One recurring source of controversy is whether private activities can be deemed to be a public purpose, allowing the government to transfer tenure rights on a compulsory basis. For example, authorities in many contexts have routinely used compulsory acquisition to facilitate commercial

mining, real estate or agribusiness projects, often resulting in conflict and contestation. In these situations, a lack of clear legislative definition empties the concept of public purpose of much of its potential as a tool for setting accountability standards. Paragraphs 4.3 and 16.1 of the VGGT call for a clear definition of what constitutes a public purpose and for mechanisms to challenge adverse decisions. The latter may involve judicial review of the legal instruments declaring the existence of a public purpose.

3.4.2. Illustrative application: public purpose and private activities

Many laws do not define public purpose, instead granting authorities significant discretion (Schwartz *et al.*, 2018); others explicitly include private sector activities (Gebremichael, 2016). Some national courts have also deemed compulsory acquisition aimed at paving the way for commercial activities to be consistent with public purpose requirements if the activities are expected to advance wider economic development objectives. In the United States of America, the Supreme Court took this position, by majority, in the 2005 case *Kelo et al. v City of New London*, triggering considerable debate (for diverse positions, see Calfee, 2006; Delogu, 2006; Mikkelsen, 2007; Sprankling, 2007; Somin, 2015). Dissenting judge Sandra Day O'Connor captured the concerns raised in connection with this approach:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more (*Kelo et al. v City of New London*, O'Connor J. dissenting, pp. 12–13).

Meanwhile, constitutional provisions referring to agrarian reform, or in broader terms to more just social relations, have enabled using compulsory acquisition to redistribute land to disadvantaged private groups. Human rights courts have held that, while “a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be ‘in the public interest’”, private-to-private transfers aimed at promoting social justice can satisfy public purpose requirements (*James and Others v United Kingdom*, 1986, paras. 40–41, 45). Similarly, land consolidation programmes often involve reallocating land among private actors; but the expected collective land-use benefits have been argued to be in the public interest (Veršinskas *et al.*, 2020).

Given the scope for abuse – particularly where substantial commercial interests are at stake – and given the controversy that expropriation decisions can generate, some national laws provide greater detail, listing specific land uses that can be deemed to constitute public purpose (Lindsay, Deininger and Hilhorst, 2017). For example, in response to heightened concerns about compulsory acquisitions, India enacted the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013*, replacing colonial-era legislation that had been criticized for failing to adequately protect affected tenure rights (Singh, 2012). Its innovative provisions include: compensating and rehabilitating affected families; ensuring acquisition of agricultural land is a last resort; requiring a social impact assessment before acquiring land; and returning any unused land. Section 2(1) of the law specifically lists, on a non-exhaustive basis, the activities that can qualify as a public purpose, including infrastructure projects and low-income housing developments (see also Ramesh and Khan, 2015).

International courts and tribunals have shown deference to national authorities' assessment of public purpose in their specific contexts. But on several occasions, when scrutinizing whether a genuine public purpose existed and the measures taken were proportional to it, they have found that national governments' handling of public purpose to be in breach of international law. For example, in 2017, the African Court on Human and Peoples' Rights found that, by evicting the Ogiek people from a protected forest, the Kenyan government had breached the *African Charter on Human and Peoples' Rights*, including the right to collective property, partly because of a lack of evidence to sustain the stated public purpose, and a lack of proportionality between that purpose and the measures adopted (*African Commission on Human and Peoples' Rights v Republic of Kenya*, 2017). Some investor-state arbitral tribunals have also found that states breached the public purpose requirements contained in applicable investment treaties (for example, *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, 2006).

The VGGT's call for clear definitions and effective recourse indicates that the conventional, unfettered framing of public purpose requirements is outdated and at odds with international best practice. Greater specificity can increase accountability, particularly if the law allows affected people to seek judicial review of public purpose determinations (FAO, 2008). But it also reduces flexibility, and it is often difficult to foresee all possible circumstances in advance. Even relatively detailed lists can be prone to abuse and the rise of public-private partnerships questions traditional boundaries between commercial and non-commercial activities (Lindsay, 2012). And where visions of what constitutes public purpose are contested and polarized, a key issue is whether the law can provide processes to arrive at a shared understanding of public purpose, establish safeguards for local rights (including through FPIC, where relevant) and provide effective arrangements for accountability (Cotula *et al.*, 2016). Recognizing social differentiation in tenure rights and obligations, a related issue is whether such processes can enable diverse groups to have a say, as regards intersecting factors such as gender, age, descent and ethnic origin.

3.5. Territorial development

3.5.1. Conceptual foundations: the public governance dimensions of tenure

Land provides the basis of political organization: there is no state without land, and land often constitutes the most important measure of the space where sovereignty is exercised. Under international law, territory – “a portion of the earth's surface and its resources”, including land, water and resources above and below the land – is a constitutive element of statehood (Jennings, 1963, p. 3). Many indigenous resource governance systems also present territorial dimensions, with the emphasis being often not so much on land as a productive asset, but, in more holistic terms, on the complex interconnectedness between different resources, and their role in sustaining self-determination.

As a result, land and natural resource governance raises issues beyond private relations among individuals, within and between groups, and between communities and businesses. It intersects with arrangements to promote integrated development of relevant portions of national territory, and as such it involves public interests. For example, tenure transactions between private actors

can affect territorial development if they: unduly concentrate, or fragment, landholdings; transfer resources to prospective investors that may lack the capacity to deliver on their promises; or affect the provision of public services – such as health or education – in a given geographic area. Addressing these issues often involves complex relations between tenure right holders and public authorities. It also often rests on limitations and obligations attached to land and natural resource rights. The VGGT emphasize these public governance dimensions of tenure, establishing explicit connections with: spatial planning (Section 20); local government structures (paras. 1.2.4, 2.3, 5.6, 17); and territorial development (paras. 4.10, 20.1 and 20.2).

3.5.2. Illustrative application: consultation, FPIC and community-investor agreements

While the themes are broad and diverse, consultation processes in the context of land-based investments such as agribusiness plantations, mines, factories and infrastructure can illustrate this interplay of private rights and public governance in connection with concerns about territorial development. The VGGT call on investors and states to respect all legitimate tenure rights in the context of land-based investments (paras. 3.2, 12.4, 12.6 and 12.10). They also call for consultation of legitimate tenure right holders and all affected parties, and – in line with relevant international treaties and instruments – for FPIC in the case of Indigenous Peoples and their communities (paras. 9.9, 12.7, 12.9). More generally, the VGGT promote consensual solutions based on partnership rather than involuntary transfers of tenure rights (paras. 12.2, 12.4, 12.6, 12.11). They clarify that consultation involves:

[...] engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes (VGGT, para. 3B.6).

Meanwhile, FPIC is the “collective right of Indigenous Peoples to make decisions through their own freely-chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use” (FAO, 2014, p. 4).

Consultation and FPIC requirements are connected to practices that aim to facilitate equitable partnerships and benefit sharing in investment processes (Morgera, 2016, 2019). Recent years have witnessed growing experience with community-investor agreements in many countries from North and South America, Africa, Central Asia, Southeast Asia and Oceania (Gathii and Odumosu-Ayanu, 2015; Loutit, Mandelbaum and Szoke-Burke 2016; O’Faircheallaigh, 2013; Odumosu-Ayanu, 2015; Knight *et al.*, 2018; Szoke-Burke and Cordes, 2020). The terminology used to describe these agreements varies – from land leases to community development agreements and social responsibility agreements – as does their content. Often capturing the outcomes of a consultation process, such agreements can provide an avenue for communities to express their FPIC but they do not, in themselves, signal FPIC. For example, local actors may consent to receiving certain benefits from a project they oppose but cannot do anything about (Odumosu-Ayanu, 2015). There are also cases in which community-investor agreements were concluded *after* a project started, despite requirements for consent to be *prior* (Gathii and Odumosu-Ayanu, 2015).

However, these processes of consultation and negotiation cannot be reduced to a binary relationship, or even a private tenure transaction, between a prospective investor and a tenure right holding group. Instead, circumstances typically require considering the multiple dimensions at play based on a holistic vision of territorial development, its land-use implications and the wider reverberations for fundamental issues such as rights, livelihoods, environment, culture and social identity. For example, if multiple actual or proposed land-based investments, led by different businesses (possibly operating in different sectors, such as agriculture, mining, forestry, and infrastructure), can affect multiple communities within a given geographic area, there needs to be a holistic consideration of cumulative impacts.

In addition, FPIC derives from Indigenous Peoples' collective right to self-determination and presents inherent territorial dimensions that go beyond tenure rights alone (FAO, 2014; see also Colchester, 2010). Issues of public representation and accountability are also at play, because:

- Local authorities may sign agreements with businesses on behalf of the wider community.
- Many community-investor agreements address public service provision, and therefore the realization of economic, social and cultural rights – for example, in the form of investor commitments to provide health or education facilities.
- Communities may be divided over proposed investments and social differentiation based on wealth, income, status, gender, age and other factors, which can result in diverse needs and aspirations, requiring effective processes for diverse voices to be heard – particularly where entrenched sociocultural practices marginalize certain groups, such as women, youths or migrants.

The modalities by which national legal systems handle these issues vary extensively, reflecting diverse historical legacies, political contexts and juridical traditions. Those modalities often hinge, to a significant extent, on limitations or obligations attached to tenure rights and on the involvement of public authorities in tenure transacting.

Although few national laws fully give effect to FPIC, many provide arrangements for local consultation and negotiation. In some jurisdictions, the law enables local actors to conclude natural resource agreements with external investors, as illustrated by the role traditional authorities play in concluding farmland leases in Ghana (Yeboah and Kakraba-Ampeh, 2016). In other cases, local actors cannot allocate commercial rights – for example, because the land is owned by the state (Knight, 2010; Tanner and Bicchieri 2014). In these latter contexts, local actors can establish partnerships with businesses, but the relationship involves national authorities as well, including when allocating tenure rights. Comprehensive land-use planning laws, such as Tanzania's *Land Use Planning Act of 2007*, can also have a bearing on these issues, as local-level decisions on entering partnerships with prospective investors, and the terms of such partnerships, would in principle be tied to wider planning processes. Some laws establish arrangements for representing traditionally under-represented groups in community-based institutions or in public land governance and land-use planning bodies – for example, through quotas for rural women.

This articulation between tenure right holders and public authorities in investment processes raises complex issues. In many contexts, government agencies have approved large-scale land-based investments over the heads of affected people, promoting top-down investment

models that trigger difficult disputes over land dispossession and competing visions of development. These trends created the need for the VGGT to reassert the principles of consultation and FPIC as the foundations of investment decision-making. They have also fostered initiatives to increase opportunities for tenure right holders and affected people to be more directly involved in investment contracting (Gathii and Odumosu-Ayanu, 2015; Knight *et al.*, 2018; Cotula, 2019; Szoke-Burke and Cordes, 2020; UNIDROIT, forthcoming).

At the same time, the major power imbalances that often affect relations between communities and investors, and the risks and liabilities communities could be exposed to in investment contracting, create a role for public regulation to ensure communities can genuinely make free and informed choices and get fair terms from any incoming investment (see Cotula, 2019, for a fuller discussion). In addition, public authorities have a role to play in ensuring that, even where certain local actors support a proposed project and negotiate agreements with the company, decision-making rests on socially inclusive processes and is aligned with more holistic territorial development considerations.

These issues outline the challenge of establishing arrangements that can enable tenure right holders to have agency in decision-making – including the right to say no to proposed commercial projects – while eschewing privatistic approaches to investment and territorial development that can disarticulate public governance and ultimately expose marginalized groups to considerable contractual risks. This calls for considering consultation and FPIC in the light of the broader right of self-determination (see Article 1(1) of both the ICESCR and the ICCPR), the exercise of which also rests on other human rights related to public participation and political representation in decision-making, including a range of civil, political and environmental rights and gender equality norms. Paragraph 4.10 and Section 20 of the VGGT also call on states to facilitate public participation in spatial planning and decisions concerning territorial development. Compared to reactive consultations in the context of specific external investments, this more holistic approach to public participation in land-use decisions can lend itself to promoting development pathways that more proactively advance local concerns and aspirations.

3.6. Responsibilities beyond legal requirements

3.6.1. Conceptual foundations: from obligations to responsibilities

Legal relations rest on rights and obligations. States enact laws to define such rights and obligations in national legal systems. They also operate judicial and administrative institutions to enforce them. International law establishes legal rights and obligations to govern relations between states and – in some respects – relations involving private actors. But in real life, social relations entail more than legally enforceable entitlements. In natural resource governance, those relations often rest on a shared sense of belonging and mutual responsibility. In any given society, people will often consider that tenure right holders have certain moral obligations, only a subset of which are legally mandatory under national law. This can include moral obligations towards other members of the same family or community, or towards the polity as a whole. In principle, courts will only give effect to legally binding obligations. But moral obligations still matter a great deal in social relations – including between different tenure right holders and between those who hold tenure rights and those who do not.

Some national laws seek to bridge divides between moral and legal obligations. These laws call on tenure right holders to uphold certain “responsibilities” over and above legally binding obligations. This approach may reflect policy efforts to promote peaceful and cooperative tenure relations, or land reform, where social or political factors make it difficult or inopportune to affirm more specific, legally binding obligations. While these responsibilities reflect societal expectations rather than legal requirements, they nonetheless acquire some legal significance by virtue of being referenced in national law. In effect, the approach blurs long-established boundaries between hard and soft law, including within national legal systems. It seems to echo the language of the VGGT, which explicitly feature the notion of “responsibilities” alongside “duties”, although their use of these words is not always consistent.

It should be noted that “responsibility” is a complex concept that has formed the object of extensive debates. It can have different meanings in common parlance, law and political theory, and can be used in an individual, collective, moral, political and even legal sense. Also, theorists and practitioners have used that word to advance different political programmes – from establishing collective responsibility in a given society in order to remedy structural injustices past or present, to describing approaches that emphasize individual responsibility to justify downsizing of state action. Through these political processes, “responsibility” has become the framing concept of certain legislative interventions. A comprehensive analysis of the intersections between the law and notions of responsibility is beyond the scope of this study. Instead, what follows is a brief discussion of one experience with public policies that affirm the responsibilities of tenure right holders.

3.6.2. Illustrative application: the place of tenure responsibilities in land reform

Scotland’s legislation illustrates the place of tenure responsibilities in land governance, particularly in the context of land reform. In the United Kingdom of Great Britain and Northern Ireland, the *Scotland Acts of 1998, 2012 and 2016* devolved certain powers to the Scottish Parliament, established in 1999. From its early days, the new parliament faced longstanding public demands for authorities to address the enduring legacy of historical land dispossessions (the enclosures and “Highland Clearances”). This legacy has left the country with a highly concentrated land ownership structure, which has lasting impacts on rural landscapes, the social fabric and the collective sense of justice (Wightman, 2015; Combe, Glass and Tindley, 2020). Promoting land reform, particularly community land ownership, was considered a means to redistribute material wealth while also improving social resilience, democratizing land-related decision-making and promoting wellbeing in rural communities (MacInnes, 2020; Trench and Trebeck, 2020).

Over the years, the Scottish Parliament enacted several land reform laws to abolish feudal tenure, support community land ownership and facilitate public access to privately owned land, among other aspects (Combe, Glass and Tindley, 2020). Under the terms of the *Land Reform (Scotland) Act of 2016*, the Scottish government also issued the *Scottish Land Rights and Responsibilities Statement* to guide the activities of the then newly established Scottish Land Commission. The VGGT were an explicit consideration in the drafting of the statement; its advisory notes cite the VGGT in several places (pp. 25–26, 36 of the Statement).

The notion of responsibilities runs through these legal and policy instruments. This emphasis on responsibilities partly responds to the Scottish context, where those resisting land reform have sometimes invoked human rights, particularly the right to property (Shields, 2015; MacInnes,

2020);¹⁰ though judicial recourse to the right to property has had relatively minor impacts in litigation challenging land reform measures (McCarthy, 2020). In this context, highlighting that rights are not absolute but instead accompanied by responsibilities has emerged as one strategy for shifting public discourses and rebalancing policy emphasis (MacInnes, 2020). Another strategy has been broadening the relevant human rights dimensions to more fully consider enjoyment of economic, social and cultural rights (Combe, 2020).

“Access rights”, as regulated under the *Land Reform (Scotland) Act of 2003*, are a good illustration of the place responsibilities have in tenure relations. Similar to legal arrangements applied in some other northern European countries such as Norway and Sweden, this law accords extensive public access rights over private land. According to the Act, everyone has the right to be on or cross land – including privately owned land – for specified purposes, including recreational activities, subject to limited exceptions (Section 1). Third parties do not need landowner consent to exercise access rights. However, the Act clarifies that “[a] person has access rights only if they are exercised responsibly” (Section 2), and that landowners must in turn conduct their ownership in responsible ways with regards to access rights (Section 3). While these provisions refer to the responsible exercise of legal rights, rather than to tenure responsibilities *per se*, in effect responsible conduct sets the limits of both access and ownership rights. The *Scottish Outdoor Access Code* – an instrument envisaged by Section 10 of the Act – provides guidance on the circumstances under which the exercise of access rights and the conduct of landowners can be deemed responsible.¹¹

The *Scottish Land Rights and Responsibilities Statement* discusses tenure responsibilities in more encompassing terms. Its principles situate tenure responsibilities in the overall governance framework (Principle 1) and affirm that “[t]he holders of land rights should exercise these rights in ways that take account of their responsibilities to meet high standards of land ownership, management and use” (Principle 4):

The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society (*Scottish Land Rights and Responsibilities Statement*, Principle 1).

The Statement also contains advisory notes that elaborate on the meaning and implications of the Principles. These clarify that “[w]ith all rights come responsibilities” (p. 11) and that these responsibilities include regulatory requirements and responsibilities that derive from social perceptions of moral obligation, such as responsibilities “towards the care of the land and ... towards ... neighbours” (p. 11). Elaborating further on this point, the advisory notes also state that “The holders of land rights already have duties under legislation, for instance pollution control and building safety regulations, designed to protect people and the environment. However, for the purpose of this Statement, meeting high standards of ownership, management and use, goes further in that it provides that landowners should take decisions about their land in ways that support social and economic development and protect and enhance the environment” (p. 25).

¹⁰ Under Section 29 of the *Scotland Act of 1998*, the Scottish Parliament cannot legislate in a way that contravenes the *European Convention on Human Rights*.

¹¹ For further information, see <https://www.outdooraccess-scotland.scot/>

This approach reflects cross-fertilization between hard and soft law, as illustrated by:

- references to “responsibilities” in legislative acts and policy documents, over and beyond legally mandated requirements;
- the role of the statement in shaping public action; and
- the reliance on a guidance document – the *Scottish Outdoor Access Code* – and its referencing in binding legislation.

At the same time, the language of the Scottish Land Rights and Responsibilities Statement seems relatively broad. Beyond the affirmation of general principles about the place of responsibilities in tenure relations, the practical implications are not always immediately apparent. Additional implementation time and rigorous empirical studies will be needed to assess the effectiveness of this approach in pursuing its stated policy goals in the longer term.

4. Conclusion

Resource governance systems routinely limit rights and establish obligations. This includes general limitations and obligations that pursue public interest goals and more specific arrangements that apply to certain actors, such as tenants or neighbours. Land and resource relations also have public governance dimensions, illustrated by the role public authorities play in spatial planning and territorial development. These aspects cut across diverse legal regimes that, while often considered in isolation, can have a direct bearing on tenure rights, limitations and obligations – from constitutional property clauses and national laws governing land and natural resources to international treaties protecting human rights, the environment or foreign investment. Properly understanding and effectively addressing the challenges of natural resource governance requires a holistic approach that integrates these multiple aspects.

Diverse social settings and political choices mean that bundles of rights, limitations and obligations vary extensively in space and time. Also, similar bundles can have different implications for differently situated members of the same group. Where landholdings are concentrated in relatively few hands, legal constructs such as social function and productive use and the affirmation of tenure responsibilities have provided avenues for advancing public interest goals, such as redistributing land, regulating agrarian contracts and protecting the environment, which an exclusive emphasis on protecting existing rights could otherwise curtail.

Depending on the context, however, such broad notions can create opportunities for abuse, as exemplified by recourse to compulsory acquisition to advance private interests and by skewed notions of productive use that undermine the resource claims of marginalized groups. Where land and resource rights are vulnerable to legal precarity, ill-defined notions of public purpose and productive use can make those rights even more fragile and expose people to the constant threat of dispossession.

Thus, while theoretical explorations can clarify the conceptual foundations for legal interventions aimed at addressing resource governance issues, any concrete policy action requires a solid anchoring to specific contexts and concerns. In some situations, effective responses require more explicit or encompassing tenure obligations or limits to rights. In others, however, they necessitate easing, qualifying, or clarifying limitations or obligations that undermine certain tenure rights. Often, much depends on the specifics, for example as regards the forms of land use that can be deemed "productive", and who has a say in shaping such legislative choices. Much also depends on how legal concepts, rules and institutions intersect with social realities, including power relations that cut across local settings, national polities and transnational processes.

At the same time, holistically considering rights, limitations and obligations can illuminate overarching legal imbalances at local to international levels – 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 commensurate investor obligations. The analysis also sheds light on differentiation within local societies and the ways in which legislators and judges have used certain legal concepts to reconcile different interests – for example, in tenant-landlord or pastoralist-farmer relations. Within "communities" and even families, 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 – are differently situated; this requires a granular approach in determining equitable rights, limitations and obligations.

Meanwhile, varying emphases on different rights – such as the right to property versus a range of economic, social and cultural rights – and on the need to complement rights with responsibilities can respond to specific policy agendas aimed at promoting, or resisting, more equitable access to land and natural resources. As tackling land inequality becomes an increasingly prominent global policy issue (for example, Guereña and Wegerif, 2019; Anseeuw and Baldinelli, 2020), public initiatives would need to consider not just skewed land distributions but also inequalities in the rights, limitations and obligations applicable to different actors, and the knock-on effects these can have on the concentration of power within society.

These issues present time dimensions. Long-term socioeconomic changes can transform tenure relations (Toulmin, 2020) and evolving circumstances can require shifts in the balance of rights, limitations and obligations or make those shifts more urgent. For example, the global imperative and momentum to tackle the climate crisis compounds the urgency to protect the land and resource rights of Indigenous Peoples and communities with customary tenure. Doing so would increase security and flexibility in response to climate change (IPCC, 2019) and strengthen arrangements that rest on a strong sense of obligation towards the environment and future generations (RRI, 2020).

To sum up, addressing the social, economic and environmental challenges of natural resource governance, and implementing the VGGT, requires not just securing certain rights, but also reconfiguring the overall balance of rights, limitations and obligations among and within different groups. It requires considering the interplay of rights, limitations and obligations rooted in diverse national and international legal regimes and granular approaches that can take account of social differentiation at local to global levels. Finally, any policy action to reform tenure rights, limitations and obligations must rest on careful contextual analysis and consider how evolving social and ecological imperatives affect resource governance priorities.

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Tenure rights are typically subject to limitations and come with obligations, whether to protect the rights of others, such as tenants and neighbours, or to pursue general interests such as environmental protection. Tenure also intersects with public governance, for example as regards spatial planning and territorial development, which can affect the scope of rights and connect them to obligations. And where land ownership is concentrated in the hands of a few, limits to rights and tenure obligations can enable redistributive action. This interplay of 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.

Effective responses to governance challenges may thus require not just securing certain rights, but also addressing imbalance between the rights, limitations and obligations of different groups. This can raise difficult technical and political issues, affecting relations between citizens and state and the distribution of wealth and power in society. At the same time, notions of limitation and obligation remain undertheorized, and their practical implications often poorly spelt out.

This study explores rights, limitations and obligations in land and natural resource governance. Drawing on legal developments from diverse thematic and geographic contexts, it aims to provide conceptual foundations for legal interventions to strengthen governance and implement the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.