Introduction

How to govern scarce resources has been debated for centuries. Yet, the question of how to govern resources that are both scarce and essential for the livelihood of people has hardly been raised as a matter of theoretical discourse.¹ Throughout the developing world, many poor communities still depend for their livelihoods on access to natural resources such as land, forests or water. But the pressure on these resources is increasing while we are becoming more aware of both scarcity and the environmental and social costs of consumption. Population growth; climate change and centuries of overexploitation of resources; and an increase in transborder investment flows and trade that channel natural resources to serve higher-value export markets are all factors contributing to an increased sense of scarcity (Lambin and Meyfroidt 2011). The dire predictions made most famously by the Club of Rome 40 years ago (Meadows et al. 1972) – that economic growth would surpass the carrying capacity of the planet without changes in the management of scarce resources – are materializing (Millennium Ecosystem Assessment 2005).

¹ We recognize that many initiatives are under way to improve access to essential resources. The main purpose of this paper (and indeed the conference project), however, is to rethink the conceptual framework for governing these resources.
In a world that is increasingly interdependent and yet where there remain vast differences in purchasing power between population groups, the question of who controls essential resources is key for future social stability and sustainable development – and for our collective ability to resolve distributional issues humanely. It is therefore critical to develop governance regimes that take account not only of productivity but also provide for fair access and resource preservation – and to do so in ways that are compatible with differences in cultural and institutional conditions.

This scoping paper seeks to frame the debate about governing access to essential resources by critically reflecting on existing debates about property regimes, staking out the normative goals for any regime that seeks to govern access to essential goods, and developing institutional strategies for creating such a regime.

**Background: Existing Property Debates**

There is a vast literature on the governance of resources. It has mostly framed the issue as an optimization of governance tools given the nature of goods and the kind of collective action problems associated with them (Olson 1971). Subtractability and excludability are the criteria used for determining the nature of goods (Ostrom 2003). A good is subtractive if consumption by one person subtracts from the consumption of others (Musgrave 1959; Samuelson 1954). It is excludable if, because of its nature, institutions or technology, it is feasible to exclude others from access to and use of the good. Collective action problems arise when goods are subtractive but not excludable resulting in the 'tragedy of the commons' (Hardin 1968), where resources that all can freely access tend to be overexploited. Yet, exclusion may not normatively desirable because it deprives people of basic needs and creates costly externalities for which there may not be simple solutions.
Table 1: Typology of Goods

<table>
<thead>
<tr>
<th>Exclusion is feasible</th>
<th>Consumption is subtractive</th>
<th>Consumption is not subtractive</th>
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</thead>
<tbody>
<tr>
<td>Exclusion is not feasible</td>
<td>Common-pool resource</td>
<td>Public goods</td>
</tr>
<tr>
<td>Exclusion is economically inefficient</td>
<td>Anti-commons</td>
<td></td>
</tr>
<tr>
<td>Exclusion threatens survival</td>
<td>Essential Resources</td>
<td></td>
</tr>
</tbody>
</table>

*Source: Authors’ compilation following Ostrom (2003), Figure 1 at 241.*

Table 1 classifies goods building on Ostrom (2003, 241), but differentiates between excludability that is economically inefficient – what Michael Heller has termed the ‘tragedy of the anticommons’ (Heller 1998) – and excludability that is not desirable because it deprives fellow human beings of resources that satisfy basic needs. The latter, what we term the *tragedy of exclusion*, is the concern of this project. The tragedy of exclusion manifests itself in forms of deprivation that cannot be tolerated because they violate the basic needs of the individual.

We believe that the tragedy of exclusion has broad application, but for the purpose of this project we focus on indisputably ‘essential’ resources. We call resources essential if they are indispensable for survival; at a minimum, this includes drinking water, adequate food or the means to produce food, and shelter.² For rural households in the developing world, where many still reside in extreme poverty, access to these resources is extricably linked the land on which they grow their food or from which they withdraw water; in such conditions, land itself could be called an essential resource.

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² A broader definition could include what the International Labour Organisation identified as ‘basic needs’ in 1982: ‘First, certain minimum requirements of a family for private consumption: adequate food, shelter and clothing, as well as certain household equipment and furniture. Second, they include essential services provided by and for the community at large, such as safe drinking water, sanitation, public transport and health, educational and cultural facilities’ (International Labour Organisation (ILO), *Target Setting for Basic Needs*, Geneva: ILO, 1982, at 1).
The governance of essential resources raises issues that extend further than the need to ensure increased productivity in the exploitation of the said resource; designing adequate regimes for their management requires that we move beyond the utilitarian criterion of total welfare maximization. Indeed, because of the essential nature of such resources – which corresponds to the basic needs of the individual – any governance regime must take into consideration distributional equity as well as the sustainability of current uses. Nobody should be excluded from resources that serve to satisfy basic needs, and the exploitation of the resource today should not jeopardize the ability of the next generation to satisfy its own needs. Governing access to essential resources therefore requires different approaches than those associated with conventional classifications of public, private or common goods. In fact, as the following discussion will demonstrate, the governance regimes that are commonly used for governing private goods fall short when applied to essential, scarce resources.

Below we present a taxonomy of different governance regimes typically associated with the types of goods identified in Table 1 (see Table 2). This taxonomy is meant to summarize existing debates in the literature, the point of departure for our attempt to reframe that debate.

Private goods are typically slated for individual property rights to ensure their efficient use; public goods for centralized (state) property regimes; and common pool resources for centralized or communal property regimes. Finally, the problem of the anti-commons (when exclusion is technically feasible but creates inefficient holdups) is addressed by central intervention with private property rights, i.e. by the state exercising the power of eminent domain (Heller 2008). However, communal forms of property, at the community level, could also feasibly address this problem. These governance regimes could be labeled ‘classic property regimes’ because they constitute the repertoire of regimes under which essential resources are most commonly managed. It is important to understand the limitations that the current approaches face, and why the dominant regimes leave a number of questions unanswered.
Table 2: Typology of Property Rights Regimes

<table>
<thead>
<tr>
<th></th>
<th>Individual Property</th>
<th>Centralized Property</th>
<th>Communal Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Goods</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Public Goods</td>
<td>0</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Common-pool resources</td>
<td>0</td>
<td>0</td>
<td>X</td>
</tr>
<tr>
<td>Anti-commons</td>
<td>0</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

Source: Authors’ compilation.
Note: ‘X’ is used to indicate the compatibility between a good and a governance regime, and ‘0’ for incompatibility.

As can be seen, some goods are compatible with more than one governance regime. Specifically, private goods can be and frequently are governed by individual, centralized, or communal property rights regimes. This is the case in particular for land. After having been treated for much of human history as a common resource, it has also been governed as centralized, or state, communal, and individual property.

The versatility of private goods in relation to governance regimes contrasts with the incompatibility of essential, scarce resources with any of them. Individual property rights over such resources are not desirable because their dominant mechanism, i.e. the ability to exclude others (Demsetz 1966; Coase 1960), is morally repugnant when exclusion violates basic needs. Centralized property rights are problematic because the power of central control does not guarantee universal access nor effective use (Campbell and Lindberg 1990; Umbeck 1981; Firmin-Sellers 1995). Finally, communal property rights are inadequate because they presuppose communities with the capacity of collective governance (Ostrom 1990; Ellickson 1991; Schlager and Blomquist 19983) – conditions that may not be present where constituencies with heterogeneous interests and varying power seek access to the same resource, whether locally or globally.

3 Note that according to Bloomquist and Schlager heterogeneous groups can engage in collective governance if there is substantial jointness in the production of governance outcomes and capturability is minimized. See (Schlager and Blomquist 1998).
Over the past 30 years, individual property rights have been favored as the optimal governance regime for many essential resources, including land, around the globe (Deininger 2003). Zoning and titling programs promoted by multilateral and bilateral development agencies have extended the geographical remit of individual property rights by penetrating a larger number of countries in the developing world (World Bank 2010). Control rights over land are increasingly allocated to the highest bidder across national boundaries in a market-driven process (Coase 1960). Under private property rights regimes, individual control rights over land will determine who has access to these essential and increasingly scarce resources, and whether they are harvested in a sustainable fashion. Experience with land privatization suggests that this can take a substantial toll on millions of peasant small holders and forest dwellers who have been deprived of the basis of their sustenance (Cotula et al. 2009; Zoomers 2010; De Schutter 2011). Moreover, while private property regimes have been traditionally justified by their contribution to increases in productivity, they provide no assurance of sustainability, i.e. preservation of essential resources in the interest of future generations (Beddoe et al. 2009); nor has private ownership and the allocation of land through market mechanisms (ensuring in principle that land goes to the highest bidder) always translated into higher productivity, as some owners may be tempted to hoard land without using it in ways that increase total output (De Schutter 2011).

The alternatives to individual property rights in the classic repertoire do not fare much better when applied to essential resources. Centralized control is the *ultima ratio* for dealing with the problem of scarcity as demonstrated time and again in times of war or emergencies, when governments requisition critical assets and resort to rationing. These cases also exemplify the problems associated with centralized control: abuse of power and mismanagement of resources. Any government that has the power to decide on the allocation of resources also has the power to determine who may benefit from them and to exclude others at its whim (Binswanger, Deininger, and Feder 1995). Moreover, government control
often suffers from mismanagement as bureaucratic management and accountability structures frequently fall short of the governance tasks at hand.

Communal property rights also face limitations when applied to essential resource management. The scarcity of essential resources now plays out at the global level: with the emergence of a transnational market for land, water and carbon, the competition for control of these resources pits against one another actors located in different jurisdictions; similarly, with climate change and increasing pressure on natural resources, the management of essential resources must take into account not only the interests of local users, but also of broader constituencies whose basic needs would otherwise be difficult to meet. Furthermore, externalities may result from how one community chooses to manage the resources over which it exercises control, for instance where an unsustainable use of a resource affects the ability of other communities to satisfy their basic needs (as where shifts in land use increase greenhouse gas emissions or where agricultural production result in the pollution of shared groundwater reserves). Communal governance regimes would therefore have to expand their remit to the global community to be effective. In other words, even when localized communal regimes may ensure effective governance of essential resources for that community, they do not address the problem of uneven distribution of these resources around the globe.

In addition, each of the classic property regimes assumes institutional arrangements for its operation that may or may not be present in a given context (see Table 3 below). The efficacy of individual property rights depends on their delineation and legal validation (Hodgson 2003; Benda-Beckman 1995) as well as a market and a meaningful price mechanism. Yet, property deals are made typically not in transparent, liquid markets but in private deals characterized by asymmetries in information and power: the value that is attached in such deals to the resources exchanged is typically determined not by some objective standard related to the ‘use’ to the actors, but by the power that each can exert on the other, as well as by a mimetic process in which what has value for one actor
depends on whether, in the view of that actor, other actors attach the same value to the object of the exchange (Orléan 2011).

Table 3: Conditions for Effective Property Rights Regimes

<table>
<thead>
<tr>
<th>Individual Property Rights</th>
<th>Centralized Property Rights</th>
<th>Communal Property Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear delineation of rights</td>
<td>Effective management</td>
<td>Shared norms of reciprocity and community</td>
</tr>
<tr>
<td>Market</td>
<td>Information</td>
<td>Information</td>
</tr>
<tr>
<td>Enforceability</td>
<td>Authority</td>
<td>Long time horizon</td>
</tr>
</tbody>
</table>

*Source: Compilation by authors.*

For centralized property rights to avoid the major pitfalls associated with that regime, effective public asset management systems and accountability systems must be in place to ensure, in particular, that the resource will be managed in the public interest, and that the opposing interests of different communities or geographically dispersed groups will be reconciled (De Schutter 2012). This requires information about how resources are managed, knowledge about how to improve their management, and mechanisms to implement reforms. Moreover, the central manager must have both the authority and legitimacy to manage these resources, lest shirking, corruption, and theft will undermine it. At the global level, no such regime exists.

Finally, decentralized communal property regimes may not be transposable to global governance of essential resources. This would require the development of shared, general norms of reciprocity and community across groups, whether at the local, transnational, or global level. Even within a nation state, experience with divided jurisdiction over the same watershed or lake system suggests that common management of such a resource is difficult. While powerful arguments have been made that cosmopolitanism is feasible (Appiah 2007), the challenges facing multilateralism today suggest that its full realization will remain aspirational for some time to come. The efficacy of communal property regimes
depends on a fairly long-term horizon, particularly for issues of sustainability, as well as sufficiently powerful incentives or motivations for a community to invest in collective governance regimes – a substantial challenge in a world characterized by high levels of heterogeneity, mobility, and the absence of institutional arrangements that would give voice to the diverse interests affected by governance choices.

We thus face a dilemma with respect to governing essential, scarce resources. The interplay between the global diffusion of private property rights in land and the increasing scarcity of essential resources raises fundamental issues of global governance and justice. Yet, we lack viable alternative governance regimes that ensure equitable access to essential resources while avoiding the pitfalls of depletion and mismanagement. We therefore need to move beyond this limited repertoire of governance regimes.

Reshaping the Debate

The purpose of this project is to disrupt and seek new strategies, both conceptually and institutionally, not to confirm existing knowledge. In this section we set forth some of our own ideas. Spelling them out is not meant to limit your imagination or your summary of existing governance practices that may well go beyond our own imagination. We merely seek to provoke the process of rethinking and we invite your critique and encourage you to develop alternatives.

In light of the shortcomings of the classic property regimes outlined above, it seems imperative to move beyond existing debates. We seek to broaden the debate by introducing three factors: power, interdependence, and time (dynamics).
Power

There is, of course, a long tradition of linking property rights to power. Starting with John Locke, it has been widely recognized by political philosophers that owning assets and exercising the rights associated with ownership is a fundamental individual freedom. This line of thinking is also reflected in the capabilities literature inspired by Amartya Sen and Martha Nussbaum. Nussbaum defines one of the core capabilities as ‘being able to hold property (both land and movable goods), and having property rights on an equal basis with others’ (Nussbaum 2003).\(^4\) Clearly, this formulation goes beyond the classic notion of property as a negative right, which assumes the existence of rights that need to be defended against perpetrators (primarily the state), and instead emphasizes that individuals need to be enabled to hold property and to do so on an equal basis with others. It thus calls attention to the fact that property regimes are embedded in social relations of unequal abilities and unequal access to resources.

This is where power come is in. We use a very general definition of power, namely the capacity to affect outcomes and realize one's own preferences vis-à-vis others, not only by coercion (Rousseau was the first to explicitly equate property and the power to exclude others with coercion) but also by agenda setting or manipulation of preferences. As several contributors to the literature on power have emphasized, abilities and resources are determinants of power (Giddens 1986). This implies that power is not necessarily associated with specific entities (the state, multinational corporations), but can be defined in relational terms as the product of social relations that are manifested in institutional structures created by human agency (ibid). It follows that property regimes are not just an expression of freedom but both a product and determinant of access to resources and abilities.

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\(^4\) This is part of the more broadly defined capability to have control over one's environment, including political and material control. See ibid.
Power is hardly ever unconstrained. Most theories of power emphasize that the exercise of power requires some degree of autonomy to act by those subjected to it. This presupposes authority rather than pure coercion unmediated by institutional structures (Arendt 1970); as such, the exercise of power rests on legitimacy in the eyes of those affected. Yet, the nature of the constraints and their effectiveness vary by the ex ante distribution of abilities and resources of those partaking in power relations, the choice of regime, and the context in which it operates.

We observe, for example, substantial divergence in the manifestation of private (individual) property rights regimes within legal systems and across countries. Thus, contrary to the widely held view that individual property rights in developed economies (esp. common law countries) guarantee autonomy, we observe that many formal legal systems have molded the content and scope of property to take account of competing interests and social values. As Hanoch Dagan has pointed out, the common law is characterized by a plurality of property regimes (Dagan 2012) the contents of which vary by domain (e.g. marriage, knowledge, or business organization). Regulation, liability and sharing rules modify the autonomy of individual decision making and make property relations much more complex than assumed in most of the standard economics or law and economics literatures that advocate monist models of individual property (ibid).

The same, however, cannot be said for transnational property regimes designed to protect foreign investors in bilateral investment treaties (Lehavi and Licht 2011; De Schutter et al. 2012; Suda 2006). They are designed to immunize foreign investors from local politics in the places where they invest and allocate the power to determine the contents and meaning of property rights to arbiters with no knowledge of or affiliation with the host country. This effectively prevents the development of what we might call ‘thick’, or contestable, property regimes. Indeed, there is now a lively debate about how to design the next generation of BITs to give greater deference to local preferences, even if such policies might
detrimentally affect foreign investors. Not surprisingly, this rethinking has been triggered at least in part by the experience of countries that had assumed to be primarily home, not host countries to foreign investors with foreign investment suits that challenged their domestic regulatory prerogative.

Bringing power into the debate about access to essential resources implies that governance is not merely a design question, but a broader question about the political economy of institutional change. Yet, the fact that some of the most developed capitalist economies have rather thick property rights adapted to different domains and competing interests also suggests that there is not a single logic of property rights regimes even within a single 'capitalist' system. In short, we need a more fine tuned framework for analyzing shifting power relations and their effects on governance regimes.

*Interdependence*

The hallmark of globalization is the expansion of economic, social, and political relations beyond boundaries defined by territory, entities, or societies. As a result, people are increasingly interconnected without being part of a common polity. Actions by states, firms, and even individuals in one part of the world inevitably create repercussions elsewhere without those affected by them being able to express their consent or dissent, even to claim damages for the harm they have suffered. We therefore continue to act as if these externalities can be ignored even though they can come back to haunt us.5

Lambin et al. (2011) identify four mechanisms that account for interdependencies in the environmental realm: displacement, rebound, cascading, and remittance. These factors capture the effects local actions can have elsewhere, and as such are

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5 Indeed, the interdependencies resulting from an increasingly globalized world, as different regions are linked through trade and investment and share a global commons, explains the emergence in recent legal doctrine of the notion of extraterritorial human rights obligations (Salomon et al. 2007; De Schutter et al. 2012).
– with some modification – applicable to our problem of governing access to essential resources. *Displacement* stands for the migration of activities from one place to another as a result of regulatory interventions, policy changes, or modes of consumption that affect the use of resources in other places. For example, the increased demand for animal protein and for biofuels in rich countries impacts the use of arable land in developing countries, encouraging export-led agriculture for animal feed and bioenergy. The *rebound effect* suggests that cost reducing improvements such as technological or institutional change may, contrary to expectations, increase rather than decrease certain activities. For instance, the introduction of ‘clean’ technologies that save energy could free revenue to allow for increased consumption, thus reducing the savings from better technologies; improvements that allow large scale farming on less fertile soil could accelerate erosion of land in areas hitherto idle. A *cascade effect* ‘is a chain of events due to a perturbation affecting a system’ (ibid at 3468): localized events can create multiple and interacting effects at the local, national or global level, as could happen when shifts in property rights over land following large-scale land acquisitions (‘land grabs’) accelerate migration to cities, leading to the growth of urban slums and political unrest. The *remittance effect* shows how resource transfers can reinforce practices previously deemed unsustainable. Lambin et al. use the example of money sent back home by workers who emigrated from impoverished agricultural lands and how it led to renewed agricultural investments back home. In more general terms ‘remittance’ captures the effects of resource transfers on practices in the recipient location. For example, profit repatriation can lead to policies that condone unsustainable practices overseas, such as investments into large scale agriculture without considering its environmental, social, or political repercussions.

Interdependencies may be unplanned or inadvertent; but they may also be institutionally structured. The latter are of particular interest, because they might lend themselves to reforms that undo the institutionalize bias. Zoning and titling programs in countries around the globe have created the institutional conditions for the commodification of land and the emergence of transnational real estate
markets. In doing so these measures have exposed poor rural households, which depend on access to land for farming, gathering wood or water, or grazing cattle, to the rising global demand for arable land and its resources, leading to deprivation of essential resources. All too often, these households do not benefit from titling schemes that are instead captured by local elites – the formal owners rather than the land users – and even when they do, it may not suffice to protect them from losing access in the long term (De Schutter 2011). For them, not only the price of land, but also of food, water, and shelter, has increased beyond reach.

Similarly, the removal of barriers to trade and capital flows and to cross-border movements of legal persons (corporations), but not of natural persons means that the former are better placed to employ their financial capital than the latter their human capital. As a result, natural persons are more likely to be forced to relocate within than across states, whereas firms and capital have the option to do either. A result has been the rise of slums and slum dwellers in mega cities where land is scarce to begin with, along with accompanying social and political problems.

Lastly, the foreign investor protection regime enshrined in bilateral investment treaties denies voice not to people far afield, but often to local constituencies directly affected by actions foreign investors take in their home, the investors’ host country. This may increase investment flows, but constrains political choice and prioritizes one set of interests – productivity – over others (equity and sustainability).

Conventional debates about property rights assume that interdependencies can be resolved through bargaining. It has been clearly recognized that while privatization and the creation of private property rights help internalize some issues, it externalizes others. The solution to this dilemma is that the new owners can bargain for optimal outcomes, and because the number of owners is smaller, they are more likely to overcome the collective action problems to do so (Demsetz 1966). Obviously, this argument ignores the non-owners – those squeezed out
from assets and resources that have found a single owner. It is also insensitive to the fact that externalities may arise in contexts where bargaining is impeded by geographical distance, language barriers, and vastly uneven power relations; even efficient outcomes are thus unlikely to be achievable.

Dynamics

The third factor we wish to introduce is time, not as an isolated factor but in interaction with power and interdependence.

Social relations are never static, but dynamic. They are constantly produced and reproduced. While there is substantial evidence and theoretical support for path dependency of institutional change (North 1990), history suggests that far reaching social transformations can be triggered by relatively minor triggers. Polanyi, for example, attributes the rise of landless masses and migration of large numbers of workers to industry to the elimination of Elizabethan poverty laws that linked individuals to a municipality from which that individual could claim support (Polanyi 1944). For our purposes it is critical to understand how relations to land and other essential resources might change over time and how interventions might affect such change.

In recent years the literature on ‘institutionalism’ (Thelen and Steinmo 1992) has made some inroads in explaining processes of gradual change and has moved the debate beyond North’s assertion that institutions are largely path dependent. While some focus on change actors (Mahoney and Thelen 2010), their identity and position, others place greater weight on institutions that facilitate or hinder processes of contestation, where continuous contestation is deemed a critical change trigger (Streeck and Thelen 2005). Both approaches are relevant for the question before us, but neither has much to say about the longer term effects of gradual change that systematically disempowers or disenfranchises some. The absence of change actors or contestation may result in stagnation; but it might also lead to social unrest. As Terra Lawson-Remer has shown, strong property
rights for the elites are associated with economic growth, but growth is also associated with weak property rights for marginalized groups. The systematic deprivation of the latter can result in civil unrest or war which may undo the gains elites have made by securing exclusive access to such resources (Lawson-Remer 2011).

In short, any governance solution is subject to change over time, which at times can be radical. The vital importance of essential goods implies that governance solutions will be contested, if not fought over. Any lasting governance solution must be responsive to future change without relinquishing the normative goals further developed in the next section.

**Triangulating Property**

When British colonizers sought to establish control over the territories they had seized, they surveyed the land and ‘triangulated’ it (Home 2006). Triangulation in this context was a geometric exercise: an attempt to map the territory in a fashion that clearly identified control points while assuring close congruence with the actual terrain being mapped. Our triangulation exercise is not a geometrical, but a normative (or ideational) and institutional one. We seek to re-think the concept of property in relation to resources that are not only scarce, but also essential, and to do so in a global context.

Moving away from debates that seek to optimize governance for different types of goods or resources and instead viewing property arrangements as part of socially constructed power relations that link people with different abilities and access to resources to one another, the governance problematique looks quite different. It calls for conceptions of governance under conditions of heterogeneity yet interdependence in the absence of a unifying political structure, both in order to choose the governance regime in the first place and to address the distributional effects of whatever governance regime has been chosen. This requires a
normative framework for assessing governance and a positive account of whether and how the realization of these normative goals is feasible.

We posit that an ideal regime for essential resources should optimize three normative goals:

- **equity** (fair access)
- **productivity** (economic gains that enhance welfare); and
- **sustainability** (environmental and resource preservation).

The example of land, which as discussed supra can be considered an essential resource for many rural households in the global South, may serve to illustrate the significance we attach to these goals. We suggest that institutions governing land tenure should comply with a number of baseline conditions related to equity, productivity, and sustainability. First, they should ensure that no rural household that depends on land as an essential safety net against malnutrition (i.e. households with insufficient income to procure adequate food and water on the market), is deprived from access to land (i.e. from the possibility to cultivate land for their own consumption). Second, such institutions should ensure that land is used in ways that are productive: the hoarding of land by large landowners, or the abandonment of large tracks of land by farming communities due, for instance, to a lack of support or to the inability to sell produce on markets, is in principle undesirable because of the scarcity of land in relation to the increase in demand for raw commodities. Third, land should be managed in a way that does not threaten its future productivity or unduly harm the environment – for instance, as a result of overexploitation, pollution, or erosion.

We recognize that at times these goals conflict with one another and that it is impossible to maximize one without infringing on at least one of the other two: tradeoffs may be required. Yet, we dispute that any one is more important than another and therefore reject attempts that offer hierarchy as a solution. We also
reject approaches that delineate the multiple goals in such a way that leave one regime, e.g. individual property rights, to deal with productivity, and another, e.g. government regulation or taxation, to address problems of sustainability or equity. That might work in well-functioning democracies (but even this is proving difficult), but is not available in many localities and is thus far beyond reach in the global setting. It follows that we do not find governance solutions satisfactory that seek to optimize one, say productivity or equity, and leave it to ‘others’ – the state, international aid organizations, NGOs, the market, or some unspecified trickle down mechanisms – to fix any negative ‘externalities’ of an optimal first order solution. These forces are often weak, lack the tools to mitigate the negative spillovers of reforms meant to enhance one of the three goals, and might even reinforce them.

We therefore seek institutional strategies that recognize the three normative goals – equity, productivity and sustainability -- as corners of a single triangle that denotes a unified governance space. This is what we mean by triangulation.

Theoretically, this can be achieved by invoking the concept of ‘practical concordance’ from (German) constitutional jurisprudence. This concept holds that some norms are so important that they cannot be trumped by others or balanced out, but also takes into account the decreasing marginal utility of protecting any single interest. In cases of conflict between such overarching norms, each norm must be accommodated to ensure that all can be realized to the largest extent possible without compromising the very essence of any one of them. The critical question is whether ‘practical concordance’ is achievable in a heterogeneous world that lacks authoritative mechanisms for mediating conflicting values and goals.
Institutional Strategies

We start with the premise that there is no single set of institutions or governance regimes that would work for all constituencies or across all domains. We are therefore limiting ourselves to proposing strategies, not solutions. These strategies need to be specified and adapted to local circumstances and change over time.

First, the baseline normative conditions expressed in the triangle – equity, productivity, and sustainability and productivity – should be the guiding principle for any governance regime over essential resources, even as the specific institutional solutions may vary. This requires consensus about the relevance of each one of these goals, even if there may be disagreement about their relative importance. Such a consensus might be discerned from many existing agreements in international and local law, but this does not suffice. It must be reinforced by education, mobilization and continuing contestation both locally and globally. As noted above, the process is a dynamic and dialectic one: just as individuals' concerns cannot be reduced to material interests or their objectives reduced to maximizing utility, the values and norms they adhere to are not given once and for all. Institutions and governance regimes should not only seek to achieve the right fit between social equity, welfare-enhancing productivity, and environmental sustainability; they also serve to shape individuals' expectations and abilities to enter into the kind of collective action that is required for the management of essential resources.⁶

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⁶ One example of such a transformation is the Self Employed Women’s Association (SEWA)'s Women, Work and Water Campaign launched in 1995 in the west Indian state of Gujarat (Mishra Panda 2007). The campaign aimed at improving access to water primarily for domestic use and to some extent for agricultural irrigation, in order to relieve women from the time-consuming chore of fetching water. The campaign included awareness-raising and training; the establishment of local water users' groups (pani samitis) for the management of community water sources, composed of a majority of women; capacity building for women, including for the maintenance and repair of water pumps; and the improvement of water supply systems by small infrastructural works such as roof rainwater harvesting systems or the establishment of a rural piped water supply scheme, but also the revival of traditional sources of water (ponds or wells). The campaign initially raised some hostility from men, as it was seen as intruding on 'male territory'. It was also greeted with scepticism by many women. But meetings and the work of the women technicians
Second, achieving consensus about the need to compromise each of these goals in order to realize all of them requires recognition of the importance of values that compete with productivity – which in many debates has been elevated to the priority goal. One such strategy has been to recognize a right to food or water on equal terms with the right to property – not necessarily as enforceable claims, but as a game changer in the debate. This will have to go hand in hand with a critique and reform of the vastly different institutional support structures currently available for the realization of these different goals.⁷

Third, individuals and groups (communities) with a claim to accessing essential resources should have a stake in designing their governance regime. Conceptually, this may require squaring our triangle by explicitly including the collective right of communities to self-determine their way of life as a fourth goal (a possibility we are contemplating but have not yet fully embraced). Giving voice to affected constituencies would, for instance, necessitate a change in current practices of zoning and titling land. Specifically, zoning and titling to be relied on in transnational dealings should require more than a government mandate, especially where governments are effectively unaccountable to their people; foreign or international tribunals should deny legal validation of agreements that do not comply with certain minimum conditions.

Fourth, triangulation (or squaring, as the case may be) stands for the reconciliation of conflicting goals by compromising all of them – to a degree. This is difficult to achieve through bargaining processes, not only because these goals are frequently in conflict with one another, but also because an efficient solution is inherently beyond reach. Once practical concordance – i.e. a balancing that

⁷ As suggested supra, the legal protection of foreign investors is fairly well developed in the transnational context, but similar mechanisms do not exist for sustainability or equity.
takes away some but never all of each goal – has been reached, every party could in principle still further improve its position. Yet from a holistic perspective that recognizes the value of all competing goals or interests, practical concordance may well be the best possible outcome. An indispensable component of a governance regime that seeks to achieve compromise not optimatily therefore seems to be a mediation or arbitration mechanism – adapted to local circumstances – to ensure that due consideration is given to all relevant norms and relevant constituencies both at the local and the global level.

Fifth, developing proactive strategies for practical concordance of equity, productivity, and sustainability with regard to the governance of essential resources will not be sufficient, because any achievements may be eroded by counterveiling forces. This includes competition over scarce resources, corruption, and regulatory capture. The latter two forces of erosion are well recognized in the literature, and while there is no silver bullet solution to them, there is substantial evidence that improvement is possible. We don’t believe that our project can add much to these debates. In contrast, competition is a more difficult issue, since it is associated with productivity and market efficiency. Yet, competition can drive up the price of land, water, food, or shelter beyond the reach of many – and the more scarce these resources are, the higher the price. This is especially troubling with regard to essential resources. This implies a need to rethink the scope of market mechanisms and the use of defensive mechanisms against the potentially erosive effects of market forces on access to essential resources.

**Moving Forward**

As stated previously, this scoping paper is meant to disrupt and begin the process of reframing the debate. We have tried to spell out the directions that we believe our thinking should take to address the challenges we face, but we do not have a ready-made solution. Neither do we expect ready-made solutions from you or from the conference. However, we do hope that by bringing together an
interdisciplinary group of scholars, advocates, and practitioners, we can begin the process of reshaping the debate.

Specifically, we hope that you will do one or more of the below:

- Reflect on the concept of essential resources and discuss the type of resources that should be included
- Critique the concept of triangulating property rights and the goals specified
- Offer alternatives for framing a debate about governing access to essential resources, particularly in the context of developing transnational markets
- Provide empirical examples of governing access to essential resources in different countries and communities you are familiar with – taking care to identify the conditions that account for their operation (or failure)
- Show how governance regimes have changed to accommodate or eliminate competing goals and identify the causes for such change, including changes that relate to the values or norms held by the actors concerned
- Reflect on the conditions for the development of governance regimes that respect competing interests and incorporate (or ‘internalize’) them
- Discuss the factors that might have eroded regimes that once worked (and respected the core normative goals) but no longer do
- Consider how local, domestic, or transnational institutions have strengthened or weakened broad access to essential resources
- Suggest strategies for strengthening access locally, transnationally, and globally.

References:


