

evidence for policy



Formal commencement of the Constitution of Nepal by the then President (20 September 2015, Assembly premise, Kathmandu, Nepal) (Photo: The Kantipur Daily).

Emerging Issues in Land and Constitution of Nepal: A Social Movement Perspective

Key Messages

- After a long political turmoil, Nepal has got a promulgation of new constitution and state restructuring process formally came into constitutional commitment. Though it constitutes an important breakthrough in political constitutional history, its foreseeing future crucially lies on the distribution of productive resources including land and its sustainable use. In particular, land reform, right of property, identity politics and land governance will create more contestations for this intervention.
- Though federalism was the most debated issue, land governance within the federal set-up has not been articulated to manifest future initiatives. Land reform has not been addressed as a mandatory right of the people and fundamental duty of the state. Therefore, the future policy discourse on land continues to be so and is likely to stir further political polarization, state-provincial conflicts and parliamentary deliberations.
- The new constitution should also be recognized as a part of land movement in Nepal. Despite this, land issues in the social movements of Dalit, Adivasi/Janajati and other dissenting groups/ regions are contrasting and fragmented particularly in terms of their ideology and leadership.
- The jurisdiction of federal states under the new constitution for the land issues could be further complicated in Nepal. In such a negotiation, there is a need for the political parties and movement actors to engage with dissenting voices of marginalized groups including landless poor, subsistence-based farmers and agriculture laborers.

The Context

Globally, land posits on the significant motivational factor for social movement, agrarian reform and resource conflict. Nepal's land movement has been one of the social movements which attempts to ensure socio-economic and political rights of historically disadvantaged and land-poor people. In a broader sense, land movements have also tilted towards rights, equity, livelihood and justice. Though land issues have been much discussed before Comprehensive Peace Agreement 2006 and thereafter in the Interim Constitution 2007 and thematic committee's during constitution making process, it fails to become prominent constitutional agenda and a mandatory motto for the political parties. Following this, land governance has been facing multiple setbacks despite it witness a number of promulgations in terms of revenue, tenure and management. A full understanding of land issues over the long term and ways to address them require an integrated/comprehensive analysis encompassing the debate of identity, social movements, political party reform, and a review of international relations as well as the specific ways in which Nepali politics work. Unfortunately, the issue of land in Nepal has not been analyzed as a basic component of political economy, particularly in terms of rural poverty, dependency, caste/ethnic and gender discrimination and other structural/ institutional power relations. State-governance, academia, and non-state activism all are grooming around this lacuna virtually in the shadow of Eminent Domain of the Nepali state.

Within the similar matrix, the Constitution of Nepal was commenced in September 2015. By *dejure*, it has come as an outcome of consensus between four major political parties, though it has been challenged constant agitations in different regions of the country. Indeed, constitution-writing process in Nepal exhibited a number of challenges and contradictions, and land issues were simply unavoidable in the negotiation. The political parties and state actors concerned primarily with the problems of how Nepal's public sphere understands and responds to popular policies on land reform. This policy brief, however, takes a 'specific' view on addressing the existing provisions and challenges from a perspective of constitutional-social movement.

Main Contentions on Land Issues in the Constitution

Throughout the seventy years from the dawn of democracy in the country in 1951, political parties and the rulers (as well as other groups) put forward contending positions on land as their propagandas. Historically, it is evident that peasantry, agricultural transformation and land reform have been cross-cutting issues for many political actors and movement groups. The issues were also vibrant during the course of constitution writing. The three major issues on land which deep divisions were evident during the debate within the CA, beyond the CA and the social movement public sphere are highlighted below:

State restructuring and land: The constitution has ensured a state-restructuring through federalism and decentralized governance (Article (Art 4, 56, 57). Theoretically, state-restructuring has been glamorized as a holy panacea of underdevelopment of Nepal. The underdevelopment, however, has not been analyzed in terms of the political economy of land including its historical distribution, ownership and productivity among different castes, class and regions. The vicious circle of elite capturing is being continued in the name of 'mainstream development'. This is happening in every class, caste, ethnic group and region, making a whole discourse of development contested. The land did not come as a separate indicator of federal division, but has been kept under both separate as well as concurrent jurisdiction of the governance to be formulated and implemented by the federation, the province and the local. As a matter of fact, the discourse of state restructuring has revolved only around reorientation of central state's power and authority into the provinces and local levels and it could address the concerns of political and socio-economic elites. But, the land reform talks more about restructuring of society which addresses the concerns of land poor and historically marginalized groups. This could further intensify the legal confrontation and policy dilemmas in the future discourse of conflict over the productive resources.

Model of land reform: Historically, there are a number of schools of thoughts and campaigns regarding the process and model of land reform. One school of thought has pushed for 'revolutionary' land reform as it is being the responsibility of the state. According to this claim, re-distribution is the basic component of land reform which would provide social justice and right to property for historically deprived sections of society. Another school of thought has countered it and advocates for 'progressive' land reform. It claims for reformist package of strategies that would be based on contextual reality without eroding the right of (earn and own) private property of people. Beyond these two broader perspectives, the third one focuses on

'blended' alternative of the land reform though this has not been outlined theoretically on its vision towards state and market. Land ceiling and compensation for the acquisition have been the core issues in all school of thoughts with different positions. Eventually, however, the major parties agreed to a 'scientific land reform', with some provisions on agrarian and land issues. It has got constitutional assurance as a state policy. Yet, within the constitutional discourse, there is not evident linkage between the basic premises of land reform, i.e. land re-distribution, social justice/equity, productivity and agrarian transformation. Further, it is yet to be seen how and what type of land reform model will be formulated in the future.

Right of property and the issue of identity politics: The constitution has ensured right of property as a fundamental right of people (Article 25) which also recognizes land as a property. However, the provision does not address land as separate entitlement of life. The property right could mean for the issues of identity, customary practices and livelihood for many social groups including indigenous groups and Dalits. The constitution has proposed a proportional representation (PR) system on the basis of social categories, and inclusion in state

structures on the basis of gender, ethnicity, caste, and geography. However, landlessness and poverty has been neglected for such proportional representation that could further hinder the excluded ones. The implementation of ILO Convention 169 and the guarantee of preferential rights over land and natural resources are other missing issues lagged behind from land movement perspective. Unwillingness of political leadership, dominance of well-off elites in each caste/ethnic groups and influence of foreign aid on non-state actors, in effect, have diluted the key issues of land and it is becoming a game of 'opportunity' for the elites. The issue is likely to surface in one or the other form of class-based land movement in future.

The State Policy and Actor's Complexity

The Nepali state does not articulate formal ideology of development though it claims to be a socialism-oriented welfare state. The place of agrarian transformation and land reform has remained undefined despite there are bureaucratic celebrations for poverty reduction and equitable development. Post-constitutional

Table 1: Provisions on the constitution and interlined issues

Constitutional Provision	Critical Issues
• Art. 16 Right to live with dignity: (1) Each person shall have the right to live with dignity.	• Use of abstract term 'dignity', but how is it possible without allocation of resource and its sustainable use?
• Art. 25 Right to property: (1) Every citizen shall, subject to laws, have the right to acquire, enjoy own, sell, have professional gains, and otherwise utilize, or dispose of property (2) The State shall not, except in the public interest, acquire, requisition, or create any encumbrance on the property of any person.	• This article does not talk about the specific issues of property rights of the farmers including poor and landless people. Moreover, the state's commitment to secure private property is more ideal which means land will be more contested property in future.
• Art. 26 Right to religious freedom: (2) Every religious denomination shall, maintaining its independent existence, have the right to manage and protect its religious places and religious trusts in accordance with law.	• Customary land tenure practices and communal celebration of the cultural-religious customs should be protected, particularly for some marginalized indigenous groups in context of ILO 169.
• Art. 29 Right against exploitation: (1) Every person shall have the right against exploitation.	• Exploitation is an abstract term. What will the state do for land-based exploitation and social relations?
• Art. 32 Right to language and culture: (3) Each community living in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.	• Land and issue of identity have been integrated. So it should have legal linkage to satisfy the dissenting voices of some social groups.
• Art. 36 Right to food: (1) Each citizen shall have the right to food.	• Right to food and food sovereignty has been included. But, issues lie in its empirical sense, and the linkage of food and land is also missing out.
• Art. 37 Right to housing: (1) Each citizen shall have the right to appropriate housing.	• There is no any commitment that the state shall not exile any landless squatters from their settlement without providing them with suitable alternatives
• Art. 38 Right of women: (1) Every woman shall have equal right to lineage without any gender discriminations.	• This is challenging; but can be linked with the policies for the accessibility of women to land property
• Art. 40 Right of Dalits: (5) The State shall, according to law, provide land to landless Dalits for one time.	• The given land should be assured for the livelihood enhancement packages which can avoid its misuse.

development should be linked to the global strategies of development (including sustainable development goals- SDGs) and national context of peaceful, prosperous and just Nepal. Development and land are concurrent and there is a symmetrical matrix. Under the part of Directive Principles, Policies and Responsibilities of the State, Article 51 (e) takes an account of the policies regarding agriculture and land reform. It has included many clauses:(1) Introducing scientific land reform...(2) Increasing produce and productivity...(3) Protecting and promoting rights and interests of peasants...(4) Making proper utilization of land... and (5) Making arrangements for agricultural tools and an access to market. Despite this, these policies are not obligatory for the mandatory jurisdiction and their legal treatment could be out of the verdict of the courts. Further, land reform and agrarian transformation should be linked yet in the policies. Marketing of agricultural product should be monitored by a defined arrangement of state-legislation(s). The state should be clear about the foreign direct investment (FDI) in land and other productive resources including forestry, mining and water. The foreigners and multinational companies including diplomatic missions should be disallowed for the opportunity to buy land and natural assets.

Following this, state policy regarding social justice and inclusion (Art. 51-j.6) has outlined that the state policies should ensure rehabilitation of Kamaiya, Kamlahari, Haruwa, Charuwa, Haliya, the landless and the squatters by identifying them, and making arrangements of housing, or providing small plot of land or house, employment, or arable land for their livelihoods. This policy is closely interlinked with the premise of land reform and livelihood enhancement from social protectionist perspective; but further policy debates crucially lie in making the social justice and inclusion as a constituent of scientific land reform process.

For much optimism, the constitution has envisioned a number of fundamental rights aligned with the duties of the citizens (part 3). A look at those provisions reveals that the land is rooted inherently for the invisible reservoir of the social power and legitimacy. The Table 1 narrates some of those provisions which are incurred with some contested issues.

With existing disagreements on the above issues, among others, it becomes evident that the new constitution will continue to be a rule of negotiation for a number of actors including the legislature parliament (and their subsequent committees), Government of Nepal (including ministry of land reform and other land-administrative structures), political parties (within the

government and in opposition; and in legislature parliament and outside it), and social movements (land movement, ethnic movement and Dalit movement). In federal structure of future Nepal, the breeding of actors in land issues could not be denied due to emergent scope of land in the changing context of governance and political, including regionalism and electoral manipulation. It would affect various domains of economy, viz. agriculture, industrialization, urbanization, disaster risks, tourism and forest.

Need of Integrated Land Governance

There is also an abundance of legislation in place on land rights and land use, and many organizations have been set up to manage and control land use, land reform, land surveying and registration, tax collection and many other land-related activities. However, most of the efforts of governmental bodies are focused on formulating policies and plans as technocratic mode rather than political leadership/ownership that leads to effective implementation. In turn, they could not come in practice and objectives and intentions remain on paper rather than being followed by proper action.

Institutions and stakeholders involved in the development of land resource management priorities, action plans and policies are scattered in different ministries and institutes. Then, along which interventions post-constitutional land policies will be accomplished? The policy brief proposes an integrated land governance system. It is a holistic package to resolve land issues from general to particular and vice-versa. The complexity of land management sector calls for a holistic approach to translating land management policies into administrative and management actions. The issues are multidimensional and interrelated, and therefore require a mix of integrated strategies. Guidance must come from the political leadership/vision and subsequent policy statements and translated into operational plans that help implementation

of land management activities. The existing policies need to be simplified, harmonized and brought in line with other policies. This requires an interdisciplinary and inter-institutional/ ministerial collaboration, co-ordination and participatory policy-making and alliance building process that adequately and regularly links field level evidences to policy decision making.

The constitution has allocated defined authority, powers and jurisdiction for federation, province and local level. These have been enlisted in the Schedules, where land-related jurisdictions are clearly articulated though some of the provisions are confusing and diffusing¹. As the central, provincial and local governments of Nepal will intent on the formulation of different policies on land to supplement the constitution, the following points may be worth consideration:

- The policies should ensure inclusion of social, political and economic circumstances which will promote the effectiveness of the policy making process from a participatory perspective of bottom-to-up;
- The thematic areas of land-related policies should be defined at prior focus. These should include three dimensional interventions: a) guarantee of land right for the historically marginalized groups and social justice; b) promotion of sustainable land use; and c) increase in agricultural productivity;
- It should take into consideration of specific problems of landless farmers, tenants and women whose livelihood is based on agricultural activities, including un-skilled workers and bonded laborers by assuring both input and output-based subsidies. The land rich people and large scale producers should be payable to higher progressive taxes;
- It must create a proper synergy to link many of the scattered policies to re-imagine the differentiated policy discourse for new Nepal, particularly in the context of implementing constitution.



An ex-kamaiya struggling for a new livelihood (Dang, Sauriyar); (Photo: Mahendra Sapkota)

¹ For example, see **Schedule 5** (List of Federal Powers/Jurisdiction); **Schedule 6** (List of Provincial Powers/Jurisdiction); **Schedule 7** (List of Concurrent Powers/Jurisdiction for federal and provincial); **Schedule 8** (List of Powers/Jurisdiction for Local Level); and **Schedule 9** (List of concurrent Powers/Jurisdiction for Federation, Province and Local Level).

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Disclaimer

The views expressed in this policy brief belong to the author(s) concerned and do not necessarily reflect the opinions of COLARP.

Policy Implications and Future Research:

Identify and acknowledge how new Nepali state works: Post-constitutional state - building is inherently political-structural in terms of power sharing and building a broad-based economy. Therefore, designing and implementing land-based policies/ strategies in federal Nepal should follow a legitimacy which could be locally perceived and generated therein. But, the issue of legitimacy should be analytically envisioned within the given jurisdictions of federation, province and local- level of land governance. Rethinking in policy discourse for new Nepal, therefore, needs a critique of traditional notions of development, politics, democracy and land reform.

Federal dilemma and collaborations between state and non-state actors: State administration in Nepal seems unwilling or unable to deliver services due to vacant local bodies at local levels. It will be further prolonged with federal dilemma. With these spaces, donor agencies may bypass the state in the name of efficiency and accountability of services and in making propaganda of land issues. Further research should be focused on alternative paradigm so as to analyze the relationship between state and non-state actors and state-society relations.

Land movement in the context of social movements: There is growing scope of social movement in contemporary societies and it cannot be exceptional for the federal context of Nepal. Mass mobilization of marginalized and land poor groups is precursor for creating pro-political set up of land reform and agrarian transformation. But, some pertinent research questions are also emerging in this context. How will the land issues be manifested in the agendas of social movements to influence the state policies, and how do they attempt to influence development ideology in view of overcoming setbacks of mainstream development?

Referral Definitions:

Land: An integrated aspect of natural-physical asset including soil, rocks, minerals, water masses and vegetation surrounding the surface of the earth. Broader notion of land includes social, cultural, economic and political asset that can be attributed to different groups and communities which determines social relations and power structure.

Land administration: A process of determining, recording and disseminating information about the ownership, value and use of land while implementing land management policies including taxation, revenue, leasing, and conflict resolution measures.

Land governance: A broader and integrated system of public administration which includes good governance values in maintaining land administration (services, actors and agencies), land policies (including laws and regulations), land information system and sustainable land management.

Social movement: A collective behaviour and/or action of people (or group) developed as a long-term campaign for the claim or counter-claim of any kinds of social change in society or state. Leadership, ideology, organization and policy/strategy and people's mobilization are the basic components of social movement. The major theoretical domains include Marxist, functionalist and interactionist.

Land movement: A major socio-economic and cultural part of social movement; also used as synonymous to the terms like land right movement and land reform movement. It is a particular type of agrarian movement adjoined with the livelihood and production relations.

Property rights: Property rights govern who can do what with resources, for how long, and under what conditions. There are number of interpretations on property right including right/identity-based, oriental, liberal, modern and post-modern.

Further readings:

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For more detail



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