

## Indigenous peoples and Land tenure practices: Contemporary debates and issues in Nepal

### The Context

Land tenure practice is under transition in Nepal. Change in governance system and legal framework, policy understanding and intervention, rural to urban migration and vice-versa, change in population, urbanization, land acquisition by the investors and issues of federalism and state restructuring all have directly and indirectly been affecting the relationship of people with land resources. Land tenure as such has no universal definition but United Nations Food and Agricultural Organization (FAO) has provided well accepted definition. According to FAO land tenure is “the relationship between people and land, defined legally and customarily – the rules invented by societies to allocate property rights over land, grant access to the use and control of land, and define the associated responsibilities and restraints. Land tenure system determines who can use what resources for how long and under what conditions (FAO, 2002; 2007).

Recognition, registration and protection of customary right to land and land based resources are largely unrecognized by the national legal framework in Nepal. Historically, the nature of the land system was determined relatively by a profusion of cultivable land in comparison of the then demand of land, but in recent years one can observe increased competition over land and land resources which led government to attempt uniformity in land administration and its governance despite of the prevalent cultural diversity<sup>1</sup>. To this end state has abolished some of the traditional land tenure systems like Birta, Jagir and Rakam system. Now Raikar (all lands registered in individuals' name and on which government levies), Kipat (the communal system of land tenure in among Limbus in Eastern Nepal) and Guthi (all trust lands) system of land tenure are in practice.

Hitherto gained political mileage in each historical juncture appeared to be advocating for land rights of the indigenous and disadvantaged groups and promised to give special attention to the proper land reform in Nepal. Several high level land reform committees were formed; many political and social movements were initiated but it is not clear what value added is gained for near and actual landless people by such initiations.

For example, Tharus in Tarai and Kumals in Hill districts of Nepal have slowly and gradually lost control over their ancestral land and they are now near or actual landlessness because their land tenure systems were not recognized, registered and protected by the state. Their social and political structures like Badghar/Bhalmansa (customary leader) have become endangered with the changed state governance in Nepal. Land tenure has become a complex blend of diverse interest over the land which are at once multiple and fluid.

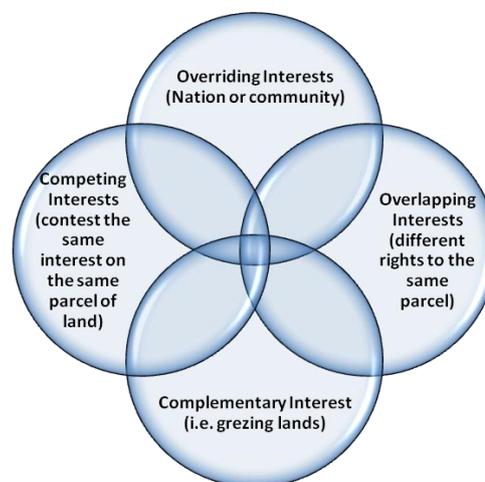


Figure: Determinants of land tenure practice

### Policy Challenges:

- ✚ Should IPs land be demarcated and specified?
- ✚ Should state promote and protect customary land tenure practices in consensus with broader social diversity in the society?
- ✚ How to harmonize scattered policy understanding regarding land tenure among different ministries/ departments of the Government of Nepal in the broader perspective of landscape governance ?

<sup>1</sup> According to the National Demographic Census 2011, there are 125 different ethnic groups following 123 different languages. Further, NEFIN identified 59 indigenous nationalities, though the categorization and annexing of the groups have been debated.

## Land: the unsettled question

Though the land distribution in Nepal has been considered to be highly skewed towards richer class, in addressing the land question, it must be acknowledged that land by its very nature belongs not only to the particular class but to a present and future generation. To ensure the access and control by all people who depend on land for their livelihood can be achieved by formulating pro-poor land tenure policies and laws which has yet to be materialized in Nepal. The question of livelihood prospectus is inextricably attached to the land governance and land management. Vulnerability to poverty and landlessness remain very high in many rural areas in Nepal because many of the rural dwellers found relying heavily on the land other than their own for both livelihood and income.

### Land tenure practice in current land debate

The needs of customary practices of land tenure adequately addressed within community land tenure seem pronounced in the current development debate. The debates include overriding issues of recognition, protection and registration of customary land and resource rights, but the national legal and policy documents lack that essence; and this distinct understanding only adds confusion to the new land tenure categorization in the upcoming land reform initiations in the state restructuring in Nepal. Similar confusion arises from discussions about current land use practices employed at the grass-root level by the near or actual landless communities, i.e. Tharus and Kumals, who are managing their livelihoods by incorporating *ad hoc* land governance strategies such as being Kamaiyas and Haliyas: the worst form of human slavery. Furthermore, indigenous people can be seen mortgaging and sharecropping others land if not operating on Aailan lands (unregistered as private land). Having settled on squatters, aailani, governmental and landlord's land, land poor people are providing heavy toll to the scientific land reform and rational land tenure governance. Indeed, introducing equitable land holding, and land rights would have far-reaching implications in the current land tenure governance system in Nepal. It would be imperative if the upcoming Land Policy could clarify the land tenure systems for the country to address the confusion identified regarding the fragmented, captured, unregistered land and land under dual ownership that currently prevails all over the country. To do that, it is necessary to review and assess existing land related legal and policy documents and rationalize the policy recommendations regarding different tenure systems. Thus, tenure reform has become a complex process,

which involves overriding interests of emerging investors, the state and the communities.

Socio-economic changes taking place in the traditional societies, the general policy and customary preferences for modernization in all aspects of both rural and urban life and inadequate interest in the sustenance or development of productive land tenure have been implying critical times in redefining the broader principles of land tenure which would facilitate the orderly evolution of customary laws. In such scenario policy practice should be able to capture the main essence accordingly while initiating the long-term socioeconomic advancements in the developing country where large section of the population relies on land and land based resources for its livelihood. A major challenge in this regard will be the ascertainment of customary land law while there are no clear customary norms and traditions, like in Tharu and Kumal communities, to structure their land relations. Whether these practices constitute customary law capable of ascertainment and enforcement within the existing governance framework in Nepal is arguable.

Customary law is unwritten and is transmitted orally from one generation to the next. They have been developed in the society primarily in order to regulate resource use systems. Meanwhile, it has been largely influenced by urbanization and modernization. Moreover, the influence of imported perceptions of law and recent development in justice has been so profound and consequently voices can be heard arguing that customary law as such no longer exists. Instead, what exists is the confusion regarding how land governance should happen when every sphere of the state is in transition. Therefore, a significant work will have to be done to clarify and create consensus about what constitutes the relevant customary law for specific communities in Nepal.

### Protection of Indigenous Land Rights

In recent decades, traditional concept regarding indigenous people's customary land rights can be seen challenged by indigenous groups themselves as a by-product of the modernization and urbanization, as in the Limbu community in the eastern Nepal that they began to sell and mortgage Kipat land (Regmi, 1978). Changing livelihood strategies and emerging modern values have affected such 'pure identity' discourse of customary practices. Protection of indigenous land can be ensured in two ways. First, by registering and titling indigenous lands either to communities as a whole or to certain individuals within

the group. Second, special zones or land plots can be demarcated and protected as reserve area(s) for the indigenous groups. However, there could be some critical challenges in this regard: lack of demographic dominance of a particular IP group, social conflicts, resource systems, changing settlement structure and social mobility of people. Since the indigenous communities except Raute, have been employing agricultural practice option one seems feasible for Nepal. It is identified in Nepal that each of the government makes and announces new policy to initiate good practice to ensure the best land reform which is believed to be default defender of all land rights but short tenure and ever-changing nature of the elected government due to political wrangling it gets dethroned by the time it could implement on the real field. Therefore, the question here arises how to fit issue of customary and communal land tenure practice into current 'policy mood' or 'policy paradigm' or 'policy ideology' or the 'leading policy idea' of Nepal?

### Land tenure practice among Tharus and Kumals

Tharu community in Tarai represents one of the largest groups of indigenous people residing in plains of the region, while Kumal, known as one of the marginalized indigenous communities from the Inner-Tarai. Pure traditional settlement following absolute customary practices does not exist within these indigenous communities studied in Kailali and Nawalparasi due to the social, demographic, economic and political factor penetrated into these communities. As a result, the strong hold of these IPs over life sustaining resource, i.e. the land, have been getting loosening risk-jeopardizing their entire livelihood.

Land ownership proportionately indicates to the well-being but disproportionately distributed among the people. Subsistence farming is major occupation for majority of them. Historically, many of the land rich Tharus of Tarai now become land poor and/or landless in their own land. This instance unfolds serious implication to the sustenance of customary practices. Similar is the case for Kumals who displaced from their origin of the mid-hills of the western region.

Either one or the other way indigenous people like Kumal and Tharus lost their hold over land slowly and gradually with the course of socio-political changes. Due to the lack of sociological imaginative quality, it can be claimed that, they could adapt to the changes at the Nepalese socio-political epoch where their traditional values collapsed and new ones were emerged which they found at once lucid, plural and ambiguous due to their indifference towards their inner

development according to the historical need and remain vulnerable. As a result, once their forefathers had been prestigious land owners but now coming down to their time most of them have become land poor and land less and consequently compelled to remain sharecropper in their ancestral land. The most repetitively cited reason behind their landlessness is the tendency to be convinced easily and sell the entire or the piece of land under their ownership in very low price to finance their petty needs and leisure activities, healthcare, to buy livestock and etc. Meanwhile, less access to and from the state structures, policy regime and elitist nature of society all have contributed to create land-based poverty among these communities.

### **Main issues related to IPs land in Nepal**

#### **Land ownership/right:**

Land right is ever-increasing in popularity not only as a tool for agricultural production (subsistence farming) but also as a means for ensuring social power, economic status, cultural being fostering livelihood and contributing development. These concepts have become important in post-conflict Nepal in the context of federalism provided with new constitution. The issue of land ownership among Tharus and Kumals have been providing the bottlenecks for the implementation of public land management, land reform and land distribution in Kailali district as it has large number of landless/land poor people from these indigenous communities in the status of Freed Kamaiyas, Sukumbasis, and operating on others land being sharecropper, bonded labor and maate/mortgaged famer.

Interestingly, local stakeholders noted some contradictions that some of those who have Land Certificate (Lalpurja) on table do not have land on the ground and those who have real land to use do not have land certificate, which could showcase their land ownership. Consequently, in both cases, victims were found to be deprived with the basic civic services and benefits.

#### **Land use practices:**

Given the increasing pressure of rapid urbanization most of the productive land in the plain Kailali and Nawalparasi is being captured by people relatively with higher income mainly for residential purpose. Consequently, those who have weak economic power have been pushed towards the margin of forest, rivers and less productive land. IPs constitute majority of the landless poor, who had not yet upgraded their agricultural skills but use public and governments land for free not only that but also they mortgage (bandaki or maate) and sharecrop

landlord's land for their subsistence. Given the inadequate cultivable land agricultural households were found employing various strategies to manage required land for their cropping, housing and animal rearing.

#### **Rehabilitation/relocation:**

The issue of rehabilitation or relocation of the landless indigenous people (i.e. Ex-Kamaiyas, flood victims and squatter communities) has been one of the most contentious issues among all stakeholders as the size of landless population is increasing day by day in the study site. Interestingly, landless IPs claim that government has always deceived them by relocating them besides jungle or rivers where they cannot live permanently and move place to place time and again because of various risk factors associated like flood and drawn, and wild lives and wild fires. No mater, how frequently they change the place they get place only at the margins and outskirts of river and forests repeatedly. Responsible officials from government line agencies and political leaders contend that indigenous people mostly get involve in traditional types of livelihood activities for which they need land and government should make proper provision to scale-up traditional skills but government has always been unable to do so because of the lack of clear policy direction and accurate data on real landless household. Consequently, they have to lead their life as that of hunter and gatherer even in this post-modern society. Government has no clear plan and program to resolve this issue. Conflicting interest and paradoxical policy provision among governmental agencies has further complicated this problem.

#### **Question of Recognition**

Identity and recognition can be used interchangeably to indicate to one's being which is very adorable to him/her for his/her dignified living. It has been mechanized and become too technical in terms of utilization and claim public services. Customary rights and practices among indigenous people in Nepal seem transforming in line with the migration, modernization and urbanization taking place even in the rural setting. Safeguarding these transitional customary land rights very challenging. Therefore, the state must be able to bring all indigenous communities in the ambit of national recognition through land title, citizenship, and status of land holding.

#### **Policy Gaps to be addressed**

There are three kinds of policy gaps to be addressed in Nepal. These are: a) managerial issues of land governance with the spirit of new Constitution; b) instatement of land policies are either vacant or dysfunctional; and c)

reformulation of contradictions and duplications in the existing land policies. Even after the promulgation of new constitution the government of Nepal has no breakthroughs in the policy provision toward addressing the specific complications related to land tenure of Indigenous communities like Tharus in Kailali and Kumals in Nawalparasi districts. Most disgusting fact identified is that government itself has different leans to oversee the problem of land of Indigenous people. For example, government line agencies and department working on forest conservation, wildlife and national parks constrain indigenous people to utilize their land and other resources while departments working on land reform encourage them to utilize governments land and other resources which remain under-utilized.

This problem remains unsolved by the initiative designed based on the social diversity i.e. ethnicity and caste. So the government has to make a paradigm shift in making its plans and policies regarding land. It can be done by categorizing people by their income levels regardless of the existing caste and ethnicity based interventions.

Land right is ever-increasing in popularity not only as a tool for agricultural production (subsistence farming) but also as a means for ensuring social power, economic status, fostering livelihood and contributing development. Similarly, the issue of land tenure remains a contentious one in Nepal since the primary attention given to land in Nepal is often of distributive and redistributive nature. Problem related to the land is taking multiple facets day by day which is because the issue of land is inherently intertwined with the political issue and seen through the political lanes.

#### **Conclusion and future outlook**

Current and past legal and policy frameworks have not been pro-poor and IP friendly regarding the land governance and land tenure practice. Responsibility of managing land and resources are scattered among different governmental agencies, who hold conflicting understandings regarding the land rights of people. Government has not yet identified true landless people and counterfeits have been jeopardizing both governments land governance and management initiatives and landless peoples' voices. Landless people often get relocated or rehabilitated at the periphery in the marginal areas accompanied with higher vulnerability mostly in the unregistered land in traditional settings where they employ subsistence farming which does not provide sufficient resources to support their daily living.

## Authors

**Dharm Raj Joshi\***  
Executive Director, COLARP

**Mahendra Sapkota**, Senior  
Research Fellow, COLARP;  
Visiting Faculty,  
Kathmandu University

**Dr. Purna Bahadur Nepali**,  
Regional Project Coordinator  
RFSGP, DCA, SARO, Nepal

**Prof. Dr. Kailash Pyakuryal**,  
Founding Vice-Chancellor of  
Agriculture and Forestry  
University, Nepal (2011-2015)

**\*Corresponding/Lead  
author:**

[dharmraj.joshi@gmail.com](mailto:dharmraj.joshi@gmail.com),  
[dharm@colarp.org.np](mailto:dharm@colarp.org.np)

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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 and ILC/CSRC

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## Key Policy Recommendations

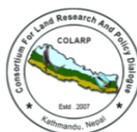
### For the Government

- Establish uniform understanding among concerned Ministries and Departments regarding the land rights. Provide a widely acceptable definition of land tenure and land right considering the social diversity.
- Current legal documents do not recognize customary land tenure practices. With the adoption of inclusive cultural and administrative policies, define the criteria of recognition of customary identities and customary land tenure practices of the IPs.
- Securing land rights is not only about land titles. State should support in strengthening customary land rights and community based institutions in this regards.
- One size does not fit all should be followed and it should comply with social diversity i.e. culture, laws, customs and traditions.
- Identify real land less people and provide them with land if they depend on land resource for their livelihood.
- Formulate policy that could see land and people in the broader lanes of landscape governance from inter-sectionality perspective.

### For Civil Society organization

- Community based land protection and promotion of customary and communal land ownership of land tenure practice in the context of Nepal should be in place.
- Focus on the evidence based research for more validity of the findings and make wider visibility of the findings pertinent to the scientific land reform and diverse land tenure issues among the communities that could guide policy decision at national level.
- Pressurize the government to initiate participatory policy making process and play key role in linking the grass-root level information adequately to policy decision making.
- Inform government about the scattered policies regarding the land and related resources among the ministries and create conducive policy environment to harmonize them.

## For more detail



**Consortium for Land Research and Policy Dialogue (COLARP)**  
भूमी अनुसन्धान तथा नीति सम्बादकालागि सहकार्य (कोलार्प)  
Bhanimadal, Jawalakhel, Lalitpur, Nepal  
Tel/Fax: +977 1 5000649; GPO Box: 9236  
E-mail: [info@colarp.org.np](mailto:info@colarp.org.np)  
Website: [www.colarp.org.np](http://www.colarp.org.np)



**Community Self-Reliance Centre**  
Dhapasi, Kathmandu  
Tel: + 977-01-4360486  
[landrights@csrcnepal.org](mailto:landrights@csrcnepal.org)



**International Land Coalition**  
C/OIFAD  
Via Paolo di Dono 44  
Oo142 – Rome, Italy  
Tel + 39 06 5459 2445  
[Info@landcoalition.org](mailto:Info@landcoalition.org)