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Understanding the Land Issues and Agrarian Reform in Post Conflict Nepal

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LAND CONTESTATION IN NEPAL: INDIGENOUS LAND TENURE AND NATIONAL LAND POLICY

Kabin Maharjan*

ABSTRACT

Current contestations over land as a public or private good revolve around the issue of who owns, controls and manages it. Particularly, after the second April uprising of 2006, indigenous people, have emerged as a new actor in land policy demanding equitable rights for state's power and resources. However, these claims have been countered by non-indigenous people. The disagreements are strong and the institutional bargaining for a share in land ownership has been tough. Currently, the Ministry of Land Reform and Management is in the process of drafting the National Land Policy. While this draft land policy has addressed the issues of the indigenous people to some extent, the larger approach has been piecemeal and short sighted. If we were to look for a long-term solution, it would be essential to think about major concerns of the marginalized and indigenous group and develop a coherent strategy to address their demand. This paper tries to study and analyze the multiple contestations over land in context of the emergence of indigenous group as an important stakeholder and makes an attempt to come up with a policy option that is rational and far-sighted addressing the multiple intra-group claims.

Key words: land policy: indigenous people; land tenure; conflict

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INTRODUCTION

With the declaration of a multi-ethnic, multi-lingual, multi-religious and multi-cultural characteristic of the country by the Interim Constitution of Nepal 2007, Nepal's approach to national policies has shifted from being mono-cultural to pluralistic. The newly endorsed constitution of Nepal embraces the principles of republicanism, federalism, secularism, inclusive democracy and proportionate representation of marginalized groups and regions. It has broadened the country's governing priorities, socio-economic structure, geo-political opportunities and has challenged the existing monistic system. The established notion of the Nepalese society as a homogeneous group is now being challenged by people from different class, caste, gender, ethnicity, regions and marginalized and vulnerable communities, who are actively seeking their own rights in the state. Fundamental political discourse and contestations now revolve around the issue of multiple identities and their relationship with resources.

Issue of land as a major resource has become central to this discourse. Land in the context of Nepal is a source of livelihood for a large section of the population. It is also a symbol of social prestige and people are emotionally attached to it. Ownership of land can be linked to political power and is also a major financial resource. Thus, it is embedded in social, political and economic relationships. As a result, the governance, political ideologies, tenure patterns and social settings are a key in determining how land resources are managed, utilized and governed.

Based on distribution of these types of land, mostly agriculture and forest land is situated in the hilly and Tarai regions and most of the pasture land is situated in the mountain as well as the hilly regions. This distribution largely determines who settles there, how the land is used and for what purpose. Particularly *Bhote-Sherpa* and *Thakali* etc. communities live in the mountain areas and rely on pasture land for their livelihood whereas *Chhetri, Brahmin, Chepang, Gurung, Jirel Limbu, Magar, Newar, Rai-Kirant, Tamang, Thami* etc. in the hilly areas predominantly depend on forest and agriculture land. Likewise, the *Danuwar, Darai, Kumhal, Majhi, Raji, Yadav, Dhimal, Rajbansi, Tharu* etc. in the Tarai areas rely on agriculture land. Compare to other, various indigenous people of Nepal have higher dependency over various types of land.

- **Economic discourse**: This perspective sees land as a factor of production and a commodity for transaction and hence places the market at the centre for land management. Similarly, it argues production yield is affected by efficiency, collective farming, contract farming, co-operative farming, reduced land fragmentation, diversification of land based livelihood options and modernization of traditional agriculture practices. It portrays, Land and labor are the major sources of livelihood in the developing countries that are lagging behind in industrialization.

- **Political discourse**: Land has always been at the centre of the political agenda for all political parties in Nepal. After the declaration of Nepal as a federal democratic republican state in 2007, land based political discourse has revolved around land reform with reference to land ownership under a federal state linked to identity politics, management of land generated revenue and international conventions and treaties that govern land use. The issue of land has become a way for political parties to negotiate, maintain and exercise power. For example, during the Maoist insurgency, 'revolutionary land reform' was one of the major slogans used to garner public support for securing votes. While the slogan of the Nepali Congress was 'land to the tiller', the UML (United Marxist Leninist) used '*bhakari phor aandolan'* (burst-open grain storages) and 'scientific land reform' as election catchphrase. Even the Maoist conflict based on class struggle has transformed into an ethno-political struggle to grab the attention of the majority of poor people. In addition, new policy stakeholders are emerging (civil society, universities and community based organizations) and shaping political discourses. According to the UNDP, these newly emerging political forces hold the 'capacity to influence national policy debates' (UNDP, 2011).

- **Social discourse**: Land holds social value in the context of Nepal. Ownership of land can mean more than just ownership of an asset as it encompasses emotional aspects as well. Land is a symbol of social prestige, social bonds and can also hold religious meanings. Within the social context, ownership of land is through inheritance as land is passed down through generations but this raises question about the land access situation for women, due to the gender biased inheritance laws. There are also additional social issues like: development induced displacement from ancestral land, access and conservation of religious or culturally significant land etc.

- **Livelihood perspective**: Land debate has also been viewed from perspective of the livelihood framework. From this angle, land is taken as the multiple and diverse livelihood asset of people to sustain basic human needs. Ranging from agriculture, pasture to forest and communal land; land resources are the major livelihood options for majority of Nepalese people. In this way, issues of resource entitlements and livelihood assets are central to the land discourse.

Discourses on land has stressed on the dichotomies of equity versus efficiency, capitalism versus socialism, state led versus market led reform and public, private or community property rights. Contemporary land debate and land related policy formulation have been shaped by different socio-political paradigm shifts leading to the emergence of new political forces with conflicting

ideologies. One of the major groups influencing land policies at this point in time are the indigenous people (IP). In the context of Nepal, IP are seen as the original settlers prior to the formation of Gorkha and the Nepali state. They have their own unique language, culture and religion which were different from that of the conquering rulers. They are also regarded as the group with a higher dependency on natural resources thus; their stakes are high on natural resources like land. In recent period, IP claim that there is a social domination over their linguistic and cultural traditions by other ethnic groups due to which their access to natural resources has been limited. This phenomenon has been generally termed in literatures as *Nepalization*, *Hinduization* or *Sanskritization* (Guneratne, 2002; Bhattachan, 2003; Whelpton, 2005). These indigenous issues have been boldly led by the Nepal Federation of Indigenous Nationalities (NEFIN).[1] One of the main areas of focus of this institution on land is the equitable and equal distribution of land resource. However, there are many key questions associated with their demands such as on what basis are they claiming these rights? Are IPs homogeneous group? How can national policy on land serve their multiple interests? What will be the reaction of the non-IPs if all the claims of IPs are accepted? These are some of the issues that this paper tries to answer. The focus of the paper will be on property and land right issues linking national policies related to land tenure to the indigenous people. It also explores how these claims fit in with the National Land Policy being drafted.

METHODOLOGY AND LIMITATIONS OF THE STUDY

This paper intends to study and analyse the claims and counter claims over land issues relating to IPs. The paper aims to explore what are the major contestations over land in context of IPs and how these contestations have/can be rationally addressed. For achieving the proposed objective and answering the research questions, an intensive desk study of land policies, land acts, books related to property rights, policy briefs and draft land policy are reviewed. Similarly, primary data has been gathered as Key informant interview (KII) from academicians, activists, government officials and other stakeholders. It then identifies three policy options, analyzes it and recommend the rational option at this contemporary context. As a limitation, there are many other demands of indigenous people like a federal model of the state based on nationality, language and cultural identity; proportionate representative electoral system, quota for women and youth; inclusive education for indigenous students; establishment of multilingualism and multiculturalism; right to self governance and self-determination; full autonomy up to the local level, etc. However, only their demands related to natural resources, specifically land will be the focus in this paper.

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[1] NEFIN is an alliance of 48 indigenous member organizations that has been advocating for the rights of IPs in Nepal with the aim to address the historical injustice and inequality and to have a more assertive political voice.

BACKGROUND OF THE PROBLEM

The new constitution of Nepal envisions scientific land reform. It has been a widely discussed issue both politically and socially, driven by the objectives of delivering social equity and increasing productivity. However, despite decades of advocacy, debates and investment of resources, land reform has not witnessed any significant changes and the implementation aspect is also poor. Before the 'Second People's Movement' in 2006 the contestations regarding land ownership and reform revolved around the existing agrarian structure (tenant-landlord relations), government revenue collection, tenure security, land distribution, land survey and management, abolishing feudal land ownership and its associated labour relations. However, after the second people's movement issues such as identity, restructuring of the state, equity approach and the rights of indigenous people on resources have also become a part of the land discourse.

Land issues now have to encompass and address the demands and claims for equity by marginalized communities such as the indigenous people. IP received a lot of attention during this period compared to other groups or ethnic communities as the indigenous movement gained popularity with an objective to end historical discrimination inflicted by the Brahmin and Chhetri groups. The movement became even stronger when land rights were tied up with the concept of ILO 169, an international convention by the UN supporting indigenous rights and access to their resources. The entire land reform debate became concentrated on prior rights and special rights compared to the earlier debate where land reform agenda was used to address landless and marginalised sections of society.

Constitution of Nepal 2015 also emphasized the social, cultural, economic and political rights of the IP. On the issue of territorial rights, the dominating political parties to make a federal state based on the criterion of caste/ethnicity/ Janajatis which highlighted the new focus on ancestral right to abode and self determination. The Unified Communist Party of Nepal (UCPN) Maoists became firm advocators of indigenous issues and their related demands. After the political change of 2006, attention was driven to the equity and justice principle in relation to the issue of access to the state's resources. The shift in the nature of discourse and interest on land, has been dominated by the IP movement which aims to gain equitable access and ownership of land.

However, it has also been contested that if the equity and justice principle was the key determinant of resource distribution, would that completely ignore the efficiency argument? How can equity and efficiency work together? Key issues that are linked to this debate are agriculture production and productivity in the context of food crisis, limited land, privatization of land, etc. Thus, the major challenge would be to consider these distinct dimensions to regulate land ownership.

The National Land Policy is being formulated at a time when land

contestation is at its highest due to multiple stakeholders and interest groups. According to Central Bureau of Statistics (CBS), almost 40% of court cases in Nepal that are filed are related to land disputes (CBS, 2008). This reflects the scale and level of contestations over land. Furthermore, about 62 acts and 23 legislations in Nepal have been formulated in the past six decades related to land (Nepali and Basnet, 2013). However, they have failed to manage land, initiate land reform and fully address the contestations of the IP.

Moreover, in the past, the state has been the sole actor in policy formulation and reform. However, with emerging new actors and stakeholders, the policy formulation process is open to influence as the groups have vested interest in the formulation of a policy that addresses their needs. The indigenous communities are one of the key stakeholders in any land policy whose movement has made the state government respond to their demands. According to NEFIN, the state has responded in many ways to their various demands. The National Language Policy Recommendation Committee was formed in 1993 and Radio Nepal started to broadcast news in nine indigenous languages in 1994. Similarly, a national committee for the Development of Nationalities was established in 1997; the National Foundation for the Development of Indigenous Nationalities (NFDIN) Act was formed in 2002; the Initiation of Janajati development was included in the Ninth Plan (1997-02); social inclusion, as one of strategic pillars of broader poverty reduction strategy, was included in the Tenth Plan (2002-07) and special programmes for Janajatis was included in the three year Interim Plan (2008-11). Thus, they have proved to be strong policy stakeholders. Regarding land related issues, they claim that the privatization and nationalization of resources through acts like; the forest nationalization Act, 1957, Range Land Nationalization Act, 1974, National Parks and Wildlife Conservation Act 1973 and abolition of *Kipat* land by the Land Act 1964 have affected their livelihood and religious ties. Since the nature of the IP's livelihood is attached with common property like pasture land and forest land, nationalization acts have created restrictions for the IP in terms of access to resources. It is estimated that 65% of ancestral land of IP are occupied by national parks and conservation areas[2] forcing the group to migrate. Apart from the high dependency on livelihood, there are also spiritual attachments and religious values of these communities with their customary land and land based resources. NEFIN argues that at least 40 common and special national laws are discriminatory towards the indigenous communities (Lawoti, 2001 cited in Upreti and Adhikari, 2006) out of which, some of the acts that focus on various natural resources.

Furthermore, NEFIN claims that *Tharus* in Chitwan were displaced from customary land due to the creation of the Chitwan National Park. Similarly, *Sherpas* in the mountains were displaced due to the nationalization of pasture and rangeland

[2] http://www.nefin.org.np/list/Indigenous-People-of-Nepal/5/0/5

and the *Raute* and *Chepangs* were displaced from forest land because of the nationalization of forests. As a result their demands focus on the right of self-determination in order to own, control and access ancestral/traditional/ customary land. They are also claiming for compensation, akin to what Deborah Stone called 'compensate for past disadvantage' (Stone, 2002). Some of the major claims of indigenous people over land are as follows (NEFIN, 2010):

- Right to land and natural resources: "Indigenous people shall have right to ownership, utilization, consumption, management, conservation and control over their ancestral lands, territories and natural resources (therein).
- Right to self determination: Indigenous people shall have right to self-determination. By virtue of this right they shall freely own, control, utilize, consume and manage their traditional lands and natural resources.
- The indigenous people shall have the right of free, prior and informed consent through their representative or traditional institutions while enacting, amending or repealing the laws relating to land management, administration, policies and development that are relevant to them and are of their concerns.
- Protection and promotion of intangible cultural heritage, customary rights
- Implementation of ILO 169

On the other hand, the government policies have been directed towards nationalizing the natural resources. With the state nationalizing forests and pasture land and transforming land under the *Raikar* land tenure as well as enabling itself to acquire any land in return for proper compensation, it becomes obvious that the state has more power in terms of property rights compared to other institutions. In this process, it has bypassed the rights which IP have been claiming for and their interests have not been adequately catered by the policies and acts before 2006.

However, the draft policy being formulated has been circulated to the stakeholders working in land issue for comments. It has included the concerns of IP's. With different levels of debate involving the government, civil societies (including non-indigenous groups) and international institutions, the land policy is currently under formulation. Reviewing the current draft land policy as it stands, it fails to address some of the above mentioned multiple contestations like sustainable management of land resources by maintaining both the equity and efficiency. There are provisions to give special attention to improve the access of agriculture communities to land, women friendly initiatives, tenure security, land ceiling, land use planning, scientific valuation of land, improving land governance, optimum and efficient utilization of land, etc. In addition, the policy encompasses the protection of the communal land that IPs are utilizing and maintaining easy access to it. However, the draft land policy has been silent over

issues of ownership, self-determination and right of free prior and informed consent demanded by the IP. It also talks about managing the customary land tenure systems through existing laws but it has limited the land tenure pattern to *Raikar* and State land making the tenure patterns insecure for the IPs. One of the failures of the state has also been its treatment towards IP as a homogeneous group, which ignores the fact that there are many types of land dependent people with varying degrees and types of land dependency.

The entry of non-indigenous groups with similar claims over land rights and ownership adds complexity to the matter. Whilst staking their own claims, these groups are also against the claims of the IPs. Their argument is that, even though they do not belong to indigenous communities, their livelihood also depends on agriculture therefore they should also benefit from distributive land policies. But, they argue that it is the IPs who are given priority and special treatment over other agricultural and land dependent communities. This marks the counter discourse over the claims of IP's.

On the other hand, there are conflicts within the indigenous groups as well over land rights. As IP is not a homogenous entity, a uniformed land policy cannot address the varying levels of land dependency and the different needs of different groups within the indigenous community. There are also other broader contested issues of land in Nepal which have not been discussed in detail at this point however, stands contested such as the status of land in the process of state restructuring/federalism, the involvement of multinational companies in land grabbing, national and international encroachment on land, small farms versus large farm efficiency, food security, migration and the environment.

As the National Land policy is in the formulation process and different actors, agents, interest groups are emerging to influence the land policy in their favour; all of the issues mentioned above have to be taken into consideration. IP are one of the emerging policy stakeholders on land and make up 37.2% of the population of Nepal, therefore the land policy has to address the claims of this group.

If we analyse the reasons behind social movements such as the Dalit, Madesh, feminist and the indigenous movement in Nepal, various studies (Adhikari, 2004; Upreti et al., 2008; Pyakuryal and Upreti, 2011) show common causes: injustice, discrimination, exploitation and marginalization as some of the common factors leading to such movements. In terms of the IP movement for land ownership; feudal land control, skewed land distribution, unsecure tenure right and limited access to resources are some of the more specific causes. UNDP also supports the argument that conflict can occur due to 'economic exclusion and inequality' (UNDP, 2011: 33). And another report of UNDP states that Nepal is already known as one of the South Asian countries with the highest inequality ratio (UNDP, 2010).

Therefore, the paper argues that the lack of equity and justice has a lot to do

with the conflicts and contestations of IPs. In the globalized political economy, it is understandable that when there is a debate of equity versus efficiency, certain tradeoffs have to be made to achieve a balanced outcome. There is no doubt that this paper supports the argument of efficiency which is also an important component in public policy, however, it also argues for shaping land policies to go beyond just the efficiency dimension and take the equity variable into consideration. Hence, this paper claims that land contestation can be rightly addressed by the 'equity and justice' principle.

POLICY OPTIONS

Public policies generally adhere to three principles- rationality of intention, where the policy is formulated with good intent; rationality of consequence where it is focused towards a positive outcome; and rationality of consequences, by which it aims to follow a fair process (Anderson, 2005). These principles guide the resources, processes and output of any public policy.

According to Deborah Stone, an academic expert in public policy, policy issues involve distribution of resources and services whether it is tangible or intangible. The distribution process involves three dimensions: recipients who receive something, the item which is being distributed and the process of how distribution is decided upon and carried out (Stone, 2002). Goals for any policy revolve around efficiency, equity, security and liberty (ibid). The agreement of stakeholders on the type of distribution is often ridden with conflicts. The points of contention involve theories of distributive equity and the theory of allocative efficiency (ibid). While talking about land, the socialist ideology backs distributive equity whereas the capitalist ideology believes that rather than distribution, production and productivity should be increased. Other dominant theoretical perspective on land includes the Agrarian Political Economy that studies (i) who owns what (ii) who does what (iii) who gets what (iv) what do they do with the surplus wealth created.

Of the other theoretical schools that explain conflicts regarding land ownership, the Marxist perspective blames class dynamics whereas the Frankfurt school of thought holds the caste system responsible. Thus, land issues are not just based on the economic argument but also the political and socio-cultural inequities. Hence, as property right and land tenure represents the relation between people and resources, this paper uses the theory of property rights and tenure of land as a conceptual framework against which the claims of IP is looked upon. It also tries to analyse and evaluate different components of property rights like legal pluralism, tenure security, prior rights etc.

The three policy alternatives this policy evaluates are: i) Minimizing Legal Pluralism; ii) Distributive Policy; and iii) Differentiate Policy. However, the paper recommends the third policy alternative which is 'Differentiate Policy' as the preferred policy option, based upon its strengths, practicality and the way it addresses the current contestations.

Legal pluralism acknowledges that there exists multiple sources and overlapping rights or legal frameworks within a social setting. Land resource is one of such social settings where different communities can have overlapping rights over land, supported by the state's legal framework or customary laws making it possible for multiple claims to exist over land. There are statutory laws that govern the land at national level and at the same time there are customary laws and practices that govern the land at the local level. These kinds of customary laws mainly exist in the communities of indigenous people and the overlapping right exists over the resources they use.

The state is in the process of minimizing legal pluralism to secure the tenure of land, where existing plural legal frameworks or overlapping rights will be directed by a uniform policy over time. The Chief Survey officer at the Survey Department, who is also directly involved in drafting the land policy, has the position that legal pluralism should be minimized. He claims that the effort to limit the land tenure pattern under two tenure forms *Raikar* and *State* land by the current draft land policy is to minimize legal pluralism. He also talked about using the Cadastre approach, which would document details of ownership and tenure and include boundary and title verifications. The cadastre approach, developed by the International Federation of Surveyors (FIG) would result in the reliable documentation of rights and restrictions on land (Kaufmann and Steudler, 1998). He also pointed out, 'Cadastre 2014 will show the complete legal situation of land, including public rights and restrictions.' It assumes that traditional and customary land rights are often not documented in a manner that creates the necessary legal security thus, Cadastre 2014 could correct this situation. Due to the lack of boundary verifications, title verifications, and the lack of an official land register, land disputes become more complex (ibid). He was in agreement with several other literatures (Unruh, 2004; Schmid, 2001) which identify legal pluralism as the source of insecure tenure rights and the source of conflicts.

However, minimizing legal pluralism would ignore customary rights over land and would also ignore communities that are nomadic and dependent on different areas of land. With the abolition of many types of land tenure systems over time, the state perceives that technically, customary land does not exist in Nepal. The Joint secretary, a member of the Land Policy Steering Committee, one of the major government officers engaged in drafting land policy at the Ministry of Land Reform and Management, asserted that customary land does not exist in Nepal. He suggested that since the abolition of the *Kipat* land tenure by the Land Act 1964, forms of customary ownerships over land has ended. On the contrary, while conducting a FGD with the key informants working at NEFIN, the female indigenous right activist who was National Coordinator of NEFIN claimed that even after the modernization and abolition of customary tenures, customary laws still exist and IPs have been practicing their traditional practices and also have the traditional institutions to govern them. Customary land tenure systems

are beyond just a simple land governing technique but are influential institutional setups that make a real difference in their social lives.

In the FGD, there were participants from NEFIN office, local Indigenous people from Jiri, Dolkha and Ilam district, NEFIN District Branch Office and a foreigner from Italy with law background who was doing his research on legal pluralism in Nepal. During the FGD some of the examples of practices of customary laws and institutions included the *Sherpa* communities in Manang District and the *Thewe* community from Limbu tribe in Ital, Jamuna VDC of Ilam District. Some groups that identify themselves as IPs have been utilizing some areas of land since time immemorial and have a high dependency over land resources in many aspects of their daily livelihood. Hence, at community level, some groups are still practicing their customary laws. Suddenly trying to limit the access of these communities by minimizing legal pluralism and ignoring customary rights on the land can result in insecure livelihood exacerbating conflicts.

The reflection over primary data from key informants indicates that these customary practices turn out to be more powerful than statutory laws in the local context. According to Elinor Ostrom, an academic figure in property rights, claims that Common Property Resource (CPR) can work well in the absence of higher governing authority. There are examples of community forests, farmer managed irrigation system, etc., which have proved that resources are better and sustainably managed under community tenure rather than state and private sector's intervention. And customary practices over resources are also one form of CPR. This suggests that adopting new policies and reforms does not make them effective unless they are applicable to the local setting.

Clarifying his position in this issue, one of the academicians who hold expertise in legal pluralism, asserts in interview that, 'Devising only a policy would be meaningless if it was unable to address the local need and fails to materialise and internalize in local setting.' He further, insists that legal pluralism provides ample room, options and flexibility to govern the resources, specially a dynamic resource like land. His joint paper on legal pluralism, argues that, 'Security of tenure is important, but so is flexibility to respond to changing conditions that affect resource use and property rights' (Meinzen-Dick, Pradhan and Gregorio, 2004). Other key informants while talking about legal pluralism also believe that that legal pluralism is inevitable where new set of social structure creates new set of overlapping rights over resources. They gave the example of migration where legal plurality is constantly being modified but exists nonetheless. Therefore, the attempt of the state to reduce legal pluralism would not be the rational option where large group of people are still dependent on resources and the state would be trying to curtail their rights over the resources by minimizing legal pluralism. As legal pluralism is flexible, it would be better suited to manage land.

Furthermore, when talking about Cadastre 2014, the government official from the

survey department mentioned that the process of registration is justifiable for tenure security however the document at the same time also states under "Principles of Cadastre 2014" in subsection 3.4.2. under heading "No Change in Land Tenure", it mentions, "If the property right belongs to a traditional tribe or clan, it is a customary tenure." Hence, it indicates that there will not be any shifts of resources and power from indigenous to others in the process of boundary definition and land registration. It does not speak of nationalization and privatization of resources, which knowing or unknowingly narrows the power of IP over their dependent resources. But, it recommends the registrations and boundary mapping for tenure security. However, the current draft land policy's approach towards minimizing legal pluralism contradicts the concept forwarded by Cadastre 2014.

According to one of the land activist representing CSRC, "*Now is not the right time to initiate the policy of minimizing legal pluralism when the indigenous people's agenda dominates the political discourse.*" Furthermore, when the state has endorsed international treaties and conventions like ILO 169 and United Nation Declaration on the Rights of Indigenous Peoples, the IPs cannot be bypassed by curtailing their rights over dependent resources by minimizing legal pluralism.

DISTRIBUTIVE AND REDISTRIBUTIVE LAND POLICY

Distributive policy is generally understood as the effort of government to distribute a good or benefit to some portion of the population, often in an effort aimed at solving public problems regarding inequality. On the other hand, redistributive policy is one that shifts resources or power from one social group to another. It mainly includes shift of economic resources and power from one group to another making it often controversial. Thus distributive land policy includes distribution of land-based wealth and power without any dispossession whatsoever. Whereas, redistributive land policy includes taking the land-based resources and power of one group in society and redistributing them to another. Hence, this type of policy could be one of the policy alternatives for addressing contestation on the ground.

A scholar in land issues, Jennifer C. Franco proposed the potentiality for indigenous land rights recognition and reinforcement under the distributive mechanism by saying, 'The more relevant and potentially salutary type of distribution involves the recognition and reinforcement of those already occupying or using specific lands, whose tenure has remained or become fragile and insecure' (Franco, 2008). It should be done by detecting and understanding the dependency and practices of these population to 'make socially legitimate occupation and use rights, as they are currently held and practised, the point of departure for both their recognition in land and for the design of institutional frameworks for mediating competing claims and administering land' (Cousins, 2007, 282). Franco sees that land (re)distribution can go beyond the (re)distribution of private land (private individual titles), to include state/public

land as well. Borrowing her concept of (Re)concentration (Franco, 2008), through state government's initiations of nationalization of land based resources like forest, rangeland, national parks, the full property rights or land ownership comes under the state but these resources can be passed on to communities. For examples, in the Philippines redistribution involved state/public land being turned into community forests (ibid). Similarly, the successful case of community forestry in Nepal is also a good example where some rights of the state land has been transferred towards community as a form of distribution or redistribution reform.

While participating in various seminars and workshops related to land, IP and property rights programs, many supporters of re/distributive policy argued that land may not be the prime asset but land is always the best supporting asset that can be transformed into other livelihood capitals as identified under DFID's livelihood assets (DFID, 1999). Giving people access to land is a way of providing them with sufficient options and alternatives to expand their livelihood. This is further valid in the lifestyle of IP where their subsistence is linked to land pasturing, fishing, living in forests, customary forms of agriculture, etc. However, on another hand this research also found that there is an argument against re/distributive land policy. It claims that re/distribution of land alone cannot not be the right option due to the changing Nepalese context. Some of the major questions underpinning this argument are: why all people need to be producers in the context of agriculture? Why should every individual have the need for land? How can all IPs be treated similar towards re/distributing land-based wealth and power when IP are not homogeneous and dependency on land is not similar in the context of Nepal? In the current changing dynamics of livelihood led by diversification from farm based livelihood to non-farm activities, is it right and rational option to only look at land as the source of livelihood? These arguments also criticize re/distributive land policy as being compromising to efficiency and leading to increasing land fragmentation, creating reverse discrimination against other social group especially the non-IPs.

Furthermore, borrowing the concept from 'Badal Commission', land is a limited resource. It is limited and cannot be manufactured. This leads to questions over how a limited resource can be distributed or re-distributed to appease the needs of all groups. Interviewing another academician, the Department head of Development Studies at Kathmandu University said, "*There is significant shift taking place in today's Nepal from agriculture to non-agriculture uses of land*." Changing demographics, changing market opportunities, changing consumer demands and migration has prompted the need to rethink the relationship of the people with land. In one of his papers he claims, "Land is not as productive as it used to be in the present changing Nepalese context." (Sharma, 2013) Thus he thinks that level of land dependency is changing and should further be changed if land should address the equity and efficiency concerns. So, the main question to consider is whether to distribute land to all groups that identify themselves as

IPs through land reform or whether to provide alternative livelihood options and empower them accordingly. According to PhD scholar doing his research on social movement at Kathmandu University said, "*Only providing resources without empowerment will make the access to those resources futile*." Therefore, distributive reforms are being replaced with more scientific management of land resources thus shifting the discourse of distributive policies.

This policy alternative may address the current claim of IPs as distributing land and shifting legal tenure rights could help IP who are highly dependent upon those resources for their livelihood. It may also address the present contestations as they seek for the right to ownership, utilization, management and control over their ancestral lands, territories and natural resources. However, this policy has its limitations when addressing the demands of the IPs. Firstly, as mentioned before, land is limited, therefore not everyone can benefit from distributive policy. Secondly, the indigenous people are heterogeneous in nature belonging to different class, ethnicity, and locations. The differences also define the varied dependency on land and this policy may not address this distinction. Also some indigenous groups such as *Chepang* and *Sherpa/Dolpo.* IP are nomadic in nature so their land needs cannot be addressed by a particular piece of land. In such cases, ownership entitlements over land resource are difficult to establish because communities rely on large portions of forest and pasture land to sustain their livelihood. Furthermore, there is shifting livelihood pattern from land based to other forms of livelihood sources and land is not the only factor for responding to the dynamic livelihood needs.

This paper recommends designing 'Differentiate Policy' as a policy option. The term 'Differentiate Policy' is applied in this paper with an assumption that 'one size fits all', does not work in relation to the IP. However, this paper also acknowledges the fact that policies have to take into account various needs and claims made by people and then generalize it and provide a holistic framework for governance. Nevertheless, this paper forwards the differentiate policy option as a special provision through identify the indigenous issues within them through intersectionality approach to address the concerns of different groups of the Indigenous People.

'Differentiate Policy' is not the established approach but is a simple strategy that can be adapted to mitigate the diverse social problems. There is limited grey literature on this policy pertaining to land issues. Having said that, there are some practical examples of differentiated policies. Tödtling and Trippl (2004) argue for the differentiate policy approach, however not on land but in the innovation system (knowledge economy, learning and innovation). Their paper makes a call for more differentiated innovation policies, dealing with specific innovation barriers in different types of regions. On the other hand, they claim that there is not a single "ideal model" for innovation policy approach which could be applied to any type of region. Even the success stories are only of limited use for certain regions. Thus, they call for more differentiated

innovation policies, dealing with specific innovation barriers in different types of regions, which they believe will address the need of the firms, clusters and institutions of an innovation system. Hence, the central theme is just to adopt different process to different issues as per required. Similarly, Government of Ontario, Canada has adopted this approach and initiated differentiation agenda to produce a more "differentiated" university system as each university has a distinct mission, program focus, and enrolment mix. It is generally known as Ontario's Differentiation Policy Framework for Post-secondary education. It argues that such a system will be more efficient by avoiding duplication and rationalizing operations (OCUFA, 2013). The differentiation policy approach taken by the university is also linked with program prioritization whereby, based on certain criteria some programs are prioritized over others for resource allocation.

Nepal's land ceiling mechanism is one of the good examples of differentiate policy. The table 1 shows the Fifth Amendment on the Land Act 1964 proposed the land ceiling in Tarai and inner Tarai to 7.45 ha (6.77 ha for agricultural land and 0.68 ha for homestead). Land ceiling for Kathmandu Valley was decided at 1.52 ha (1.27 ha for agricultural land and 0.25 ha for homestead), and rest of Nepal (hills and mountain) to 3.81 ha (3.56 ha for agricultural land and 0.25 ha for homestead) (Ministry of land Reform and Management, 2006). The core concept of this is to address the land issues according to the geographical condition and value of the land within the local context. It tries to address the issue through the mechanism of differentiating state polices and provisions that address land issues in various contexts. At the same time it also internalizes the local contexts in the national policy.

Table 1: Land Ceiling proposed by land act 1964 (Fifth Amendment)

Region	Agricultural land	Homestead	Total Ceiling
Tarai and inner Tarai	6.77	0.68	7.45 ha
Kathmandu Valley	1.27	0.25	1.52 ha
Rest of Nepal (Hills and Mountain)	3.56	0.25	3.81 ha

Source: Ministry of land Reform and Management (2006)

One of the KI policy analysts, Assistant FAO Representative at the Food and Agriculture Organization (FAO), identified the need for differentiated policies for land and agriculture in Nepal due to the rich diversity in Nepalese society like geographical differences, caste and gender. He thinks that this mechanism would help in managing the land resource more effectively in the context of Nepal. Similarly, in one of the policy debate related to land issues, one of the land activists in KI called for the need for 'Differentiated Policy' as one unified policy may not fit with all geographical location and demographic characteristics. Thus, the implication of this policy option is to

design a policy mechanism to treat different land dependent people differently. The same mechanism can be applied to some other serious cases/claims of indigenous people as well. Other KI talked about the contents of draft land policy which is being formulated by Ministry of Land Reform and Management by saying that it has provisions for the access to land, especially for women from the agriculture community. This policy has differentiated women engaged in agriculture and women who are not engaged in agriculture. It shows how a policy can serve a large group but address smaller sections within the group as well. However, according to him this distinctive mode of addressing the problems is not approached in current draft land policy in terms of IPs.

Figure 1 shows the types of IP and their general dependency on land and their livelihood source. The table shows that *Newar*, *Thakali*, and *Marphali, Thakali* indigenous tribes are generally dependent on land for agriculture and business as their livelihood source. It also shows other tribes like, *Kusunda*, *Chepang,* etc, who use land for horticulture. Other group belonging to the indigenous community like *Jirel*, *Larke*, *Sherpa*, *Dolpo* and *Bhote* use land as pastures. This table clearly shows the level and type of dependency on land and how it is different for different groups and therefore their livelihood strategies are different too.

Figure 1: Adaptive/subsistence strategies of Indigenous peoples of Nepal

Adibasi/Janajati	Foraging	Horticulture	Pastoralism	Agriculture	Industrialism
Raute; Kusunda	+	-	-	-	-
Kusunda; Bankariya; Chepang	+/-	+	-	-	-
Thami; Raji; Hyayu	+/-	+	-	+/-	-
Majhi; Bote	+/-	-	-	+	-
Jirel; Larke; Siyar; Tangwe	-	-	+	+	+/-
Balung; Topkegola; Thudam; Lhomi (Shinsawa); Sherpa; Hyolmo; Dolpo; Bhote; Lhopa; Mugali	-	-	+	-	+
Gurung; Byansi	-	-	+	+	+
Limbu; Lapcha; Yakkha; Rai; Sunuwar; Surel; Tamang; Pahari; Free; Baramo; Bhujel; Dura; Chantyal; Magar	-	+/-	-	+	-
Danuwar; Darai; Kumal; Meche; Kisan; Santhal; Rajbansi; Tajpuriya; Dhimal; Gangai; Jhangae; Tharu; Dhanuk (Rajbansi)	-	-	-	+	-
Chairotan; Thakali; Barh; Gaule	-	-	+/-	+/-	+
Newar; Thakali; Marphali Thakali	-	-	-	+	+

Source: NEFIN, 2010
+ means main strategy of Subsistence
- does not mean main strategy of Subsistence
+- means some groups or group members are involved in this strategy

The National Land Policy hence should concentrate on increasing the access and ownership on land that are more dependent on land for their livelihood. NEFIN has categorized five groups of indigenous nationalities based on literacy rates, occupation, land ownership, and population (Endangered Groups, Highly Marginalized Groups, Disadvantaged groups, Advanced Groups). Hence, National Land Policy should further prioritize Endangered Groups and Highly Marginalized Groups rather than Marginalized Groups and Advanced Group identified by NEFIN on the basis of their level of development. They have claimed for right to land and natural resources that they are dependent on and have utilized from generations. They have also demanded the right to self determination over those resources; right of free, prior and informed consent when any outsider try to intervene over their resources; protection and promotion of customary rights; and implementation of ILO 169. These claims are more urgent for the Endangered Groups, Highly Marginalized Groups of IPs compared to the Disadvantaged and Advanced Groups identified by NEFIN. The need to address the intersectionality which exists in IP can be achieved through differentiating the state's policy to address different sections of people in diverse ways.

In addition, based upon the homogeneity, dependency, demography characteristics, the ownership and access should be determined. This paper has identified the following four major criteria or basis through which the indigenous land rights can be recognized and reinforced. If certain section of people within IP are; i) highly dependent upon land, ii) homogeneous communities and iii) still practicing their historical practices iv) within institutional setups, then their rights over those lands should be recognized and reinforced. Firstly, the community of IP should be highly dependent on land if their demand is to be addressed through land. Similarly, a community should be homogeneous in nature as the same ethnic tribe because when the community is highly heterogeneous with different ethnic groups, the customary laws and practices that IP are following on land are not effective due to the multiple actors. Furthermore, it should be evident that they are still practicing their old traditions and have institutional frameworks to govern them. If they have abandoned their traditional practices and the institutions guiding them, then shifting land based wealth and power to address their land based livelihoods will be meaningless. Hence, these four criteria could acts as a basis for recognizing and reinforcing indigenous land rights. This paper also holds the position that entire IP communities may not fall into this category for recognizing and reinforcing indigenous land rights based upon the above mentioned criteria. This mechanism is flexible and has the scope to address the level of dependency on land resources, the homogeneity of their community and the

existing practices over those land based resources before determining indigenous land rights.

This policy option also is rational compared to the other two policy options as it safeguards legal plurality by looking at multiple claims through the four criteria mentioned before. Furthermore, land re/distributive to IPs will only be done when the needs are established under the four criteria which minimizes the pressure on limited land resources. With supporting the characteristics and effective nature of community property resource (CPR), this paper also infers that security of indigenous land rights could be achieved by transferring dependent land to a form of community land tenure. Existing tenure modalities like community forestry, public land management groups are some of the best examples of these community tenures that have proved that it is effective in both sustaining their livelihood and also managing the resources. One of the international land experts in tenure with legal background, Liz Alden Wily, along with national land experts. Devendra Chapagain and Shiva Sharma have argued for the rational and judicious use of public land under community land tenure (Wily et al., 2008). Hence, indigenous land rights can also be attached with the transfer under the tenure of IP's community land. However, the nature of tenure in the current draft land policy does not seem to be in line with this argument according to key informants interviewed in this research. This form of treating different sections of people with different working policies is the rational implication of the differentiated policies. The limitation of this policy may be that it place difficulties and challenging task to analyse different section of people differently under different contexts and come up with the policy provision with intersectionality approach, however it is worth undertaking to address the multiple contestation on the ground.

As enlisted in draft land policy according to joint secretary from the Ministry of Land Reform and Management, it is very crucial to first create the database about the different types of land that are being used by IP. It will be the fundamental basis to show the level of dependency on land, the level of homogeneity and active institutional setups that govern the traditional practices. Therefore if the policy is designed for poor, marginalized and disadvantaged groups, it should be flexible enough to treat these groups according to their varying needs. This provision would secure tenure, ensure the access and ownership to land and sustainably manage the land resource by also addressing the claims of IP.

CONCLUSION

There are multiple contestations, questions and counter arguments over who owns the land, how it should be utilized, what institutions are needed, and who is responsible for all this. In the midst of these contestations, the claims of IP have emerged/surfaced due to the historical injustice, discrimination and inequality. In this changed political and economic milieu, their movement and institutional network supported by international conventions has proved

that they are one of the important policy stakeholders. The indigenous people's rights are also recognized by the international communities. Hence, indigenous agenda as a whole needs attention; however some sections within indigenous people need more attention from the state than others.

'Differentiate Policy' has been forwarded as a policy option after evaluating the other two policy alternatives which are Minimizing Legal Pluralism and Re/ distributive Land Policy. Shifting land based wealth and power to IP and distributing land to all IP, is not viable at this point of time. Thus, when the issues, contestations and groups are heterogeneous in nature, the main focus should be on devising a mechanism that addresses different people differently but through the same policy. As shown in above sections, there are counter-claims against some official claims of indigenous communities, however, it is generally agreed that the IP have been marginalized and there is an intrusion over their resources and practices and their concerns should be addressed. Their basic claims for land rights are based on the prior appropriation doctrine (Sterner, 2003) where the first right is to the first users meaning that indigenous people are the first settlers and have their own history, language and culture over their ancestral lands and thus have prior right over it. However, all claims of IPs have not been accepted yet. The heterogeneity nature of the indigenous groups have forwarded challenges that may place the pressure on the policy to be relative. Thus, the mechanism of differentiate policy to address different section of people, including the IPs as a whole and intra-group claims and counter claims within IP could be applicable. It may address the contextual, relative and changing dynamism of society and its problems.

Based upon the four different criteria mentioned above to assess the type and level of dependency over land, the differentiate land policy holds the flexibility to treat different section of land dependent people differently, whether it be between non-IPs and IPs or within IPs. Policy Research, empirical facts and theoretical frameworks have clearly proved that property rights/land tenure is the fundamental basis of livelihood for natural resource dependent people. Thus, it is also argued that the indigenous land rights (to only those indigenous people whose basic livelihood are dependent on land) could be granted by transforming land into community land tenure system. Finally, this policy research paper forwards the following recommendations such as differentiated policy option and recognising diversity; free, prior and informed consents; customary best practices; substantive issues of IPs; community land tenure.

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