

Land Tenure, Titling, and Property Rights



Sri Durga Sahaya

(salutation, under the protection of Durga, Goddess of destruction of evil)

Epithets and salutations to His Majesty Rana Bahadur Shah

Heretofore, the one *rupani* of paddy land of itaapa was sold by Hindalai Dada of Tokhapokhu tol of Dhatnain village (old name for Bhaktapur). The said paddy land with the following boundaries — south of Dev Giri's paddy land, government paddy land in the west, paddy land of Thurchelal in the north, was bought at 24 sikka by Krishna Newar of Lasko tol. A registration fee of four annas of the said paddy land had been entered into government revenue. The paddy land right has become permanent. The seller's price has become permanent. You have for yourselves rights to this land, knowing it is a Sona Birta, paying annual rent at a par with twelve thousand. (continued) Sambat 1845 year, Chaitra [last week of March], date 15, day 6 [Friday]. Approximately 1788 AD.

TERRA

PROD



A land sale document (Bhaktapur, Kathmandu valley, 1788 AD)
*We wish to thank Mrs Brigid Brown and the family of the late Raphael H. Brown
for allowing us to continue using this plate from his collection*

Chapter Seven

Land Tenure, Titling, and Property Rights

Introduction

Land tenure and property rights are central to any policy affecting land use. This is also a sector of historical and political significance in addition to the usual socioeconomic implications. Tenure and property rights are products of the interests of ruling classes and governance structure. Their nature is also often determined and influenced by political considerations of favouring certain groups of loyalists against the rest of the masses. Thus, **historical continuity is an important element in defining and reinforcing the structure of property rights.** The countries of the Hindu Kush–Himalayan region have gone through different forms of colonial encounter in modern times. India, Pakistan, and Bangladesh were part of the British colonial empire. Nepal and Bhutan were never brought under a colonial administration, and China had intermittent colonial influence (although limited to the eastern seaboard). The former set of countries and China were part of large, well-organised empires from the early and middle ages, resulting in established forms of tenure and land revenue administration. However, the mountain and hill areas of the region, despite their being part of nation states of the present and past, were often outside the direct influence of central authorities. This has meant tenurial and property rights of differing types compared to other areas of southern Asia. The relatively small fragmented fiefdoms and limited suzerainty of local chiefs and kingdoms meant fewer layers of sub-infeudation and somewhat decentralised land management after the share of the ruler had been ensured.

Land tenure, revenue policies, and property rights are intricately linked with land use and, thus, land management. This continuum obviously determines sustainability of resources (land) and future potentials of the resources. Additionally, the historical continuity and political considerations are equally important in understanding the impact of

property-related policies upon land resources over time to the present day. Land, as the most basic and primary resource, has always been the source of sustenance for people and income for military and other grandiose expenditures of the rulers. Since the Middle Ages, the mainstream south Asian society has developed elaborate sub-infeudation systems for management of land resources, along with land revenue collection rates and systems. Mountain areas of the region, historically, largely remained outside of these empires (primarily Indian and Chinese). However, local kings, chieftains, and warlords collected revenue from cultivated lands. The Nepali kings, prior to consolidation of the present-day nation, collected exorbitant amounts of revenue to pay for military conquests. The Mirs of Hunza and other Northern Areas in Pakistan not only controlled the best land but also levied heavy tax on irrigated land on the lower slopes. In the Uttar Pradesh hills of India, land titles and tenancy were once again a matter of princely wishes. The sovereign could give away the rights of a piece of land to anyone in return for services (primarily military), at the expense of an existing right. Indeed, throughout the Hindu Kush–Himalayan region, kings and chieftains used their existing land resources for currying political favour historically.

Changing Context of Tenure Regimes and Policies

Like any other issues and policy areas, policies related to tenurial and property-rights are not static and changes are often motivated by political considerations. Such changes influence land management and hold tremendous potential for impact upon land management that may subsequently lead to degradation. Thus, the change brought about the Chinese revolution in 1949 nationalised all land from political as well as religious authorities at one stroke and placed them at the disposal of communes in rural areas. Communes in turn allocated land among peasant households to cultivate crops according to plans and to meet state obligations. Peasants were never allowed ownership of the plots they cultivated nor were they provided with security of tenure. At the same time, tenure of other resources, such as water, forest, and grazing land, remained under the control and authority of the state. Subsequently, land tenure policies changed many times in China, particularly in the late 1970s, as communes gave way to collectives and private plots began to emerge as a new responsibility system was brought into place. Thus, in China, land tenure broke from past sub-infeudations doing away with layers of revenue collectors and ownership by households.

In Northern Pakistan and Indian Kashmir, previously the land of princely rulers, areas were brought under state control and redistributed among the people by the newly established sovereign countries of Pakistan and India

along the lines of individual holdings practised elsewhere in these countries. The Chittagong Hill Tracts became part of colonial British India by special arrangement of the British India Act of 1900 which allowed retention of special rights by the local kings and traditional authorities such as the Headman and 'Karbari'. The northeastern Himalayan states of India had a somewhat similar political history, and each maintained a degree of autonomy in land administration until the independence of India in 1947. Bhutan and Nepal, mainly remaining outside the colonial encounter, evolved their own land tenure and revenue administration systems. Smaller kingdoms and local chiefs retained control over cultivable land in these two, mostly mountainous, nations until their national unification. Land in Nepal was heavily taxed to provide for the militaristic campaigns of Nepali (Gorkha) kings. However, in both these countries, large tracts of land remained outside the control of central authorities as a result of difficult terrain and poor productivity of mountain land. With increasing population, much of this land is now being used for agro-pastoral activities.

In line with historical experience, rights over land resources evolved according to several patterns. Although, over the years, particularly in recent times, private rights over agricultural land have become the norm rather than the exception, non-agricultural land has largely remained under the control of the state with various classifications such as forest land, degraded or wasteland, rangeland/pastures, and so on. Historical differences in the evolution of land rights have contributed to land use and eventually to the land degradation process. The policies of the Chinese government during the Great Leap Forward, such as land collectivisation and state monopolistic control, contributed to unabated resource extraction. A phenomenon that is still evident in the Himalayan areas of southern China (Yunnan and Sichuan provinces).

Although it is not easy to attribute the differing evolution of tenurial conditions in the six study countries directly to land degradation processes, some indicative impacts are noticeable. Differing land tenure arrangements have contributed to different land management principles and practices. The guzara forests of northern Pakistan and community-managed forests and pastures in Nepal and India are usually in better condition than state-owned lands in the same countries. This is also true for family/group-managed land in China compared to state land that is indistinguishable in terms of its original land-use intent. State-controlled forests (reserve or unclassified) in the Chittagong Hill Tracts of Bangladesh and northeastern India have either been turned into plantations or degraded open access areas. Another interesting feature of land management in the eastern Himalayas has been the conflict arising out of traditional land-use practices based on customary rights over land. The tropical rain forest of the eastern

Himalayas has always been the home of shifting cultivators. In northeast India and the Chittagong Hill Tracts of Bangladesh, land surveys were never completed and the British land revenue system, based on private rights to settled land, was not in practice in this region. Furthermore, due to the special conditions of their annexation to British India and subsequently to independent India and Pakistan, customary rights of clan and kin group's control over a given parcel of land were recognised. Traditional land-use practices (predominantly jhum or slash-and-burn shifting cultivation) continued unregulated until the 1970s. Only recently has jhum been discouraged, regulated, and/or proscribed. This opens up a serious question about the rights of indigenous people who have never had land titles in the modern sense as recognised by the state but nonetheless have always enjoyed the use of land that remained under their control.

Landownership and Reform Measures

The Hindu Kush–Himalayan region, in general, presents a mosaic of systems of land tenure and property rights. The complexity is exacerbated by the designation of tribal lands (Bangladesh, northeast India, and the Northern Areas and North West Frontier Province of Pakistan) in areas where communal ownership is recognised and left alone, and other variants where private property is the norm for agricultural land and state property for forests and rangeland. The role of the state is considerably limited in areas where communal rights and revenue collection by local authorities are recognised. It is also limited where land laws and acts are relatively recent and less well defined. For instance, in Bhutan, the system of land tenure is governed by the Land Act and Forest and Natural Resources Conservation Act of 1995. This was the first attempt by the state to formalise property-related issues of land and other natural resources through a legal mechanism. Thus, in Bhutan, private rights are recognised on settled land and public rights on unsettled (forested, grazing) land, and a combination whereby private tseri land (slash-and-burn agricultural land) may pass to the public domain to be treated as protected reserve forest if left fallow for 12 years. Owner-farms dominate in Bhutan, although roughly one-third of the cultivated land is under some form of sharing arrangement. This is also true of Nepal, although the bulk of the share-cropping in terms of land (not households) is practised in the southern plains. In the hills and mountains, small parcels of private land are the norm for agriculture, although share cropping is also prevalent but in small parcels; community-managed forest, state-owned and managed forest, state-owned degraded land; and grazing land also exist.

State ownership of all unsettled and unsurveyed land is almost universally recognised. This is particularly relevant for mountain areas as considerable

portions of the Hindu Kush–Himalayan region are untitled, unsettled and unsurveyed. The Sixth Schedule of the Indian Constitution provides extraordinary powers to manage untitled land resources, and local governance is notable in northeast India. The Garos and Khasis of Meghalaya (the dominant ethnic groups) practise a matrilineal inheritance system. However, this system, not based on primogeniture, does not encourage land fragmentation, which is observed in most other parts of the Hindu Kush–Himalayan region, excepting China. The Pakistan government, based on the Land Revenue Act of 1967, recognises government control of forests and wastelands and private rights of settled land. In the Northern Areas, land settlement has been recorded only in Gilgit, Astor, and Baltistan subdivisions. The Chittagong Hill Tracts Regulation of 1900, promulgated by the British, provides power to local people and their representatives. Therefore, land has remained largely within the customary traditions in these parts of the eastern Himalayas.

At the other end of the spectrum, absolute control of the state over all land is the case in China. Immediately after the Chinese Revolution, land was nationalised in 1950, its transfer forbidden, and land tax, a vestige of the imperial rulers, was abolished. Subsequently beginning in 1979, property use-rights were changed through the establishment of contracting responsibility. However, as ownership is still vested with the state, incentives for long-term land improvement efforts were seriously affected. The state provided support services for land management, but nonetheless, with growing market reform, increased productivity, and property rights still remaining within the jurisdiction of the state, land degradation became an issue of nobody's concern. A series of laws with strict punitive measures were enacted at the central, provincial, and county level encouraging conservation and sustainable management of land. However, the scars left by overexploitation in the 1950s and 1960s during the Great Leap Forward and Cultural Revolution remain noticeably visible even today.

There is considerable debate over management of communal land (particularly in northeast India and guzara forest in Pakistan), centering around management authority, and type. Such debates also arise over the use of unclassified state forest in the Chittagong Hill Tracts in Bangladesh. The privately/communally owned (both classifications are valid as family/clan ownership makes them communal as well private) guzara forest also comes under the logging moratorium enforced in Pakistan, much to the chagrin of owners of such forest. The argument by the state needs little elaboration in a country of less than five per cent forest cover. However, private interests cannot be easily compromised as people holding guzara forest had always derived a considerable portion of their income from such forest. In recent times, the debate has reached a serious level at which conflicts between forest

officials and forest owners are becoming increasingly evident. Such a situation is creating opportunities for corruption and leading to mass felling of trees to pre-empt logging bans and for maximising short-term profits. Traditional jhum or slash and burn cultivators of northeast India, Chittagong Hill Tracts and Bhutan argue that jhum is the only sustainable farming practice in such agro-ecological zones provided that they can maintain long fallow cycles, which is possible only if they can access all lands that have traditionally been used for such purposes. Difficulties arise as more land is being brought under reserve or protected classification, which bars people even from entering such areas. This is seriously jeopardising the prospect of sustainable shifting cultivation as the area available is shrinking and people have to shorten their rotation; this does not allow the land to regenerate: it increases soil erosion and decreases soil fertility.

Most countries in the region underwent a series of land reform measures in the 1950s that coincided with their gaining independence (India, Pakistan, Bangladesh) or establishing a new government (China, Nepal). Reform measures mainly addressed taxing authority, ceilings on holdings, and tenurial arrangements. However, the vacuum created by dispossession of princely rulers (in northern Pakistan and Kashmir in western India) and expansion of state authority over princely states has created new configurations of property ownership patterns. This is highly significant in terms of land management options, particularly as they relate to long-term sustainability of land resources. Research on land size and productivity is relatively conclusive in support of owner-peasant holdings, although land size and soil conservation have received far less attention. However, ownership, as opposed to insecure tenancy, can provide incentives for soil conservation as can be seen from the arduously crafted terraces in the mountain areas of the region. Despite formulation and enactment of land reform measures in all the study areas, no serious attention was placed on the vexing issue of land fragmentation, security of tenure, and institutional issues of land conservation. Fragmentation is a serious problem in the hills of Nepal where arable land is limited, alternative employment opportunities are small and population growth is rapid. In Nepal, the average number of parcels of land in the hills are 5.1 per ha and in the mountains 6.8 per ha, well above the plains at 3.1 per ha and the national average of 4.2 per ha according to the National Sample Census of Agriculture 1991. This figure has increased in recent times, compounding the fragmentation problem. In Bhutan, where it is estimated that a third of the cultivated land is under some form of sharing arrangement, increasing land productivity and maintaining land quality are already problems. This is despite Bhutan's small population and slow population growth rate. In the Chittagong Hill

Tracts of Bangladesh, scarcity of arable land, largely due to the inundation of valley areas by the Kaptai hydroelectric project, is contributing to clearing of unsuitable sloping land for jhum cultivation, tension among indigenous people and new Bengali migrants from the plains, and other problems of grave consequences. In none of these countries (Nepal, Bhutan and Bangladesh) does existing land policy focus on these land scarcity and fragmentation issues that largely result in a vicious cycle of low productivity and land degradation.

Reform measures in the region have not taken into consideration the peculiarities of the mountain tenure system. Based on the notion of settled land and tenures associated with it, state authorities have tried to impose fixed tenure concepts — linked to ownership and not necessarily use rights and customary rights. Mountain areas differ from the plains in terms of the availability of open access resources and multiple use of such resources. This reality, although understood, is not reflected in the tenure-related policies of governments in the region.

Common-property and Open-access Land Resources

One of the most important areas to be considered is the range of non-private ownership of land resources. In the hills and mountains, where settlement is sparse and survey of any kind is far from frequent and accurate, large tracts of unclassified land resources exist. Some of the important issues that stand out are discussed in the following passages.

- Common-property resources are threatened with conversion to state property.

The dominant development paradigm of the 1950s onwards that necessitated the increasing role of the state in all facets of national economic life precipitated this change. Degraded forest areas were brought under community forestry, joint forest management, and similar schemes. Such measures increased tree cover and thus received kudos from environmentalists world wide. The equity and social-exclusion implications of such programmes only became known later. Much of the area brought under such schemes was degraded but, nonetheless, was maintained as open-access or common resources for communities living nearby. For generations, people have accessed these resources for basic needs such as fuelwood, fodder, organic manure, non-timber forest products, and timber. With the introduction of such schemes, especially for plantations, access to such resources have been severely restricted for at least a few years. Besides, many of these schemes planted species favoured by foresters rather than local people. Thus, people's access was denied, and needs were not

taken into consideration. Equity and social-exclusion aspects come into picture because of the caste-based societies of the Himalayas and the numerous indigenous, ethnic groups. Already marginalised groups, if they are not equally represented in management committees, can suffer further reversal and may become socially excluded from development initiatives on the ground. The Nepal country study makes this point clearly. 'Recent evidence from Sindhu Palchok district shows that there are problems related to equity in community forestry. The forest user group's committee members, who make most of the decisions, are predominantly from economically advantaged groups, and economically disadvantaged groups lose access to vital resources (Graner 1995). In many cases, community forestry has offered village elites legitimacy of their power and an opportunity to expand their political influence (Pokharel 1998).'

In addition to the encroachment of the state through development schemes, there are other instances of declassifying common resources by the state. In the Chittagong Hill Tracts, there is a move by the government to bring a huge tract of land under reserve forest. This land is unclassed state forest, a degraded open-access resource. Local residents have traditionally used this forest to meet their needs. The submersion of fertile valley land by the Kaptai hydroelectric dam further legitimises their claim for the use of such land. Moreover, several small ethnic groups exclusively inhabit some pockets of unclassed state forest. Converting this into reserve forest would evict these micro-groups as well as restrict others' access to it. Such a measure of penetration of state into open-access and common-pool resources could be highly unpopular in the Chittagong Hill Tracts given the background and competing claims of state and communities.

- The authority of community organisations in maintaining common property resources is being weakened by the gradual conversion of such resources into open-access areas; this is impacting on land management.

Many recent studies show the gradual weakening of community organisations in maintaining their common resources in a sustainable way (Jodha 1992). The major question that needs to be asked is what maintains the order and authority promoting community management of resources? Obviously, the main vehicle of such practice is the local institutions. What is needed is strengthening of such institutions and not substituting them with newer structures, for whatever rationale and justification. The northeast India study identifies another interesting aspect of weakening of community authority. The substitution of informal community organisations with formalised local government is inhibiting the authority and efficacy of such local organisations in many places. Although the purpose of formalised local government

structures was to decentralise administration, it is now running contrary to original intent. Overlapping jurisdiction is making the informal community organisations redundant, while local government bodies are becoming increasingly bureaucratic and thus excluding ordinary people who were used to living under the authority of community organisations and their leaders. Penetration of governmental or quasi-governmental authority, demographic growth, market forces, and even education are often observed as alienating forces reducing the viability and authority of community groups. Thus, customary rights facilitating community management of resources, which are in most counts a more sustainable way of resource management, are giving way to centralised and formalised resource-management practices. Such change may be not only counterproductive in terms of maintaining sustainability but also against the currently preferred developmental ethos of empowerment and decentralised resource management.

- Common resources are being converted into private resources.

The Hindu Kush–Himalayan region is characterised by its high dependence on land-based production systems although productive land is scarce. It also has a hierarchical and stratified society by more than one measure of social structure. Therefore, there is always a temptation for anyone, particularly powerful households or clans, to convert accessible common resources into private resources, through either de facto or de jure methods available to them. The Nepal country study points out the conflict between the agricultural and forestry sectors over control of land; forest land is usually being converted to agricultural use. This conflict has its historical roots in government sanction and clear political support.

“There has been ongoing argument between the Department of Agriculture and the Department of Forestry regarding what constitutes forest and agricultural areas. Encroachment of forests for crop production was in fact encouraged in the past with a view to raising land revenue. [Squatters] are encouraged by the politicians of that particular area to break the law and stay in forest areas. They are also promised landownership rights” (SEEP/ICIMOD 2000).

Such moves may have cascading effects in encroaching more and more forest areas and bringing them under private ownership.

In the Chittagong Hill Districts of Bangladesh, similar tendencies are observed. Although records of such conversion is non-existent owing to the political situation and lack of cadastral surveys, knowledgeable sources informed us about changes in the use rights of vast tracts of communal or state property by individuals, particularly after the flooding of fertile valley lands by the Kaptai hydroelectric dam in the late 1950s.

The private-public domain is also critically important in the success of the policy directives of the state. In the Northern Areas and North West Frontier Province of Pakistan, where most of the country's forest is located, such factors determine the success of forest policy. The majority of forest in these two areas is under *guzara* or other privately owned and managed categories. People are unwilling to accept the role of the state in their management. Thus, private and public interests are at odds in such a situation. The enormous amount of piled-up cut timber in the Babushar area of the Northern Areas and, perhaps, in other areas of the region, testifies to the conflict of national policies with private land rights. National policies, in the people's opinion, are not likely to succeed if they do not take into account the divisibility of public and private interests. It is precisely here, in the management of the commons and the defining of the lines of control between private and public domain that the roles of institutions and the state come into serious question. As a contrasting example, in Bhutan, even after the Land Act, behaviour by individual farmers, such as keeping their own land fallow for no reason, cannot be tackled. Possible explanations are hard to conceive. Either the land-related institutions are too weak or the state is retreating from management of such national resources as land.

Another facet of institutional despondency is noted in the failure to deal with communal land rights. In Nepal, during and prior to the Rana regimes, *birta* and *jagir* types of tenures over agricultural land were offered in return for civil or military services to the state. Such land was both tax free and heritable with no set time limits. Similarly the *talukdari* system was also heritable, conferred as a tax-collecting system. Such systems gave rise to their own tenure system, whereby the beneficiaries set their own terms and conditions for the use of the land. *Jagir* and *talukdari* systems and several other forms were prevalent in northern India and the plains of the rest of south Asia as well. British colonial forces did away with most of these systems, and subsequently the Indian and Pakistani states also dismantled the other vestiges of such sub-infeudation. The democratisation of Nepal also saw similar dismantling of tenure systems. However, communal land rights, such as the *kipat* system in Nepal, and various family and clan-based rights on forest land in northeast India where land rights of communities were recognised by the state, were largely done away with in modern times. The state authority symbolised by the king in earlier times recognised the rights of communities in view of traditional communal tenure. Under these systems, the headmen gave individuals rights to collect forest produce in certain parcels of forest area. Such rights were inalienable and, therefore, users treated them with care, just as they would their own land. Nonetheless, with the evolving modern state such systems were done away with. Thus, we find the sacred groves of priests and monasteries in nature-

worshipping northeast India are virtually non-existent today. The fate of systems such as 'law lyndoh', 'law kyntang', and protected forest tenures such as 'law adong' and 'law shong' policies in Meghalaya are under increasing threat of jurisdictional anarchy and legitimacy of institutional support. These are examples of institutional failures and incompatibilities in dealing with traditional land rights under the modern, democratic state. While traditional institutions are breaking down and are incapable of protecting their territories, newer institutions, created by the state in the form of local governments, are not authorised to deal with the ideas of the dying institutions and traditions.

What is interesting to note is that, despite the institutional failures to recognise the traditional land rights, be they agricultural or forest land, a new wave of developmental thinking is reverting back to some old principles. Thus, we find new trust and belief in traditional and communal rights on forest land in the reincarnated version of community forestry, joint forest management, social and participatory forestry, devolution of water rights to the communities and similar efforts by the modern state. While many of these are palliatives and an urge to rediscover the traditions and roots of land management, they are working to a great extent in the interests of people.

Titling and Surveys

In the so-called tribal-administered areas (within the purview of administrative nomenclature), land titling is rather uncommon, and a considerable portion of the Hindu Kush-Himalayan region for administrative purposes is tribally administered in one form or the other. For northeast India, Schedule 6 of the Indian Constitution and, for the Chittagong Hill Tracts, the Regulation of 1900 ensured that tribals not only enjoyed local control over land resources and governance, but also negated land-right titling through land surveys. For part of Bhutan, which lacks a survey tradition, and for the Northern Areas and many tribally administered areas in Pakistan, land rights are still not backed by titling and surveys. In the Northern Areas of Pakistan only the three subdivisions of Gilgit, Astor, and Baltistan have come under the Land Revenue Act following titling based on settlements. This leaves a large portion of the five districts out of the purview of land-titling and land-survey activities. This precipitates the problem of establishing individual rights on land. When individual rights on property are not recognised legally, accessing credit resources and other government-provided services becomes difficult through modern management practices of banks, credit institutions, and, even, government extension services. In China, however, the situation is different. After the revolution of 1949, all land was nationalised; hence, the question of land

having or not having some form of title became redundant. Except for remote mountain patches where the ethnic minorities or nationalities live, every piece of land, even in Himalayan, China came under state control. Communes were developed based on existing land, so that every farming family had to work under political authority. Subsequently, the land-management policy changed several times. However, land-titling policies remained essentially the same, with state ownership being the only option.

Historically, in northeast India, the Chittagong Hill Tracts of Bangladesh and the Northern Areas of Pakistan, most areas did not come under cadastral and other land surveys, resulting in non-recording of land in individual or family names. Participatory rural appraisals in northeast India revealed some interesting opinions. Many people did not want cadastral surveys for recording land rights for fear of being dispossessed from existing use rights. Interestingly, the money-lending class, who have indebted many households and now have effective control over such resources, also do not want surveys as these could establish rights of mortgaged land in the name of the rightful owners and not in theirs. However, small sections of educated and well-off people in northeast India as well as the Chittagong Hill Tracts in Bangladesh would like land surveys to take place. This would greatly enhance their chances of establishing legal rights over land. Such measures will provide them with the opportunity to access state-supported services and may even increase their landholdings owing to their superior position in society. Such a state of affairs goes to show that the mountain areas are still lagging behind the plains in terms of establishing individual rights to land. Difficult terrain, isolated and scattered settlements, and historical isolation from major empires has resulted in such an undefined state of land surveys. After the abolition of the land-taxing authority of local nobles and feudal lords, such a fluid state of land titling can be dangerous for local people. The state has the authority to evict original settlers from land if found without legal documents to establish their rights. The fears of the northeast Indian and Chittagong Hill Tracts' people, as referred to earlier, is, therefore, well founded. In Nepal, this is becoming a serious problem in parts of the mid-hills. Increasing population pressure on the already dwindling land resource is contributing to claims and counter claims to untitled land. There have been reported cases of eviction of squatters in several areas. While the government claims such settlements are on untitled land and hence belong to the state, settlers have argued the opposite, claiming settlement for generations on disputed land.

Lack of land surveys and titling puts the mountain areas at a certain disadvantage and in an unclear situation within their respective countries. In addition to the lack of institutional support like credit and extension

services referred to earlier, it also creates tenurial insecurity and absence of opportunities for improved land management and productivity increasing measures through technological advances and investment options. Hill and mountain areas are eminently suitable for niche based farming systems. Without legal land rights, occupants and users of the land cannot access outside support for diversifying their production base. CHT holds great agronomic and marketing advantages in producing tropical fruits in a country perennially short of horticultural products. To date, largely due to tenurial insecurity, no concerted effort could be made to establish the horticultural production base with scientific management and a commercial orientation.

Another major issue related to tenure and land rights is the problem of displacement and resettlement of people. This is particularly significant in all the countries of the Hindu Kush-Himalayan region as large infrastructures are being built in these areas, causing massive displacement of people. The Kaptai hydroelectric project in the Chittagong Hill Tracts displaced over 100,000 people in the late 1950s and early 1960s, as the reservoir expanded to cover the entire Kaptai Valley. This was a major cause behind alienating the ethnic minorities of the Chittagong Hill Tracts. Subsequent failure to rehabilitate the affected people properly and other ancillary factors led to the disenchantment of locals and two decades of insurgency in the Chittagong Hill Tracts. The proposed Tehri dam in the Garhwal hills of Uttar Pradesh in India is also likely to displace people of several villages along the reservoir. The controversy arising out of the Tehri dam is largely attributed to this massive displacement of local people and the inundation of cultural and religious heritage sites. The Mahakali project in western Nepal, if implemented, would result in large-scale displacement of already impoverished people. The Karakoram Highway in northern Pakistan was built largely for strategic and defence needs. While it has facilitated communication with the otherwise cut-off Northern Areas, the construction has displaced many people. As a national priority, the Karakoram Highway may not have gone through the rigorous project screening processes that other large projects are subject to; nonetheless, it has affected people and settlement living along the route. Although government and project planners of today have access to improved impact assessment tools and so probable and possible impacts can be foreseen in the planning stage, rarely do the affected people receive due compensation. Sometimes appropriate rehabilitation of people and restoration of important sites are almost impossible. For mountain areas, the resettlement process is further compounded by the fact that often proper documentary land rights are not available to the people as land is not always as meticulously titled as in the plains. The indigenous people of the Hindu

Kush–Himalayan region, therefore, despite having customary rights and traditional holdings, are likely to lose out when such displacements occur. Furthermore, the marginalised people of the mountains, having little education and marketable skills, pose special problem for project implementers when their relocation and resettlement are planned. Distant bureaucrats, with little understanding about the mountains and their people, are not best qualified to resettle these people properly.

From Land Tenure to Resource Tenure

The hegemony of the state in controlling all untitled land opens up the vexed question of land versus resource tenure. The mountain areas of the Hindu Kush–Himalayan region, as noted earlier, were never part of large empires that necessitated the need for land survey and titling for the purpose of revenue determination. Hence, communal ownership, customary rights, and open-access resources have always been part of the landownership and use-rights arena. After the establishment of modern states (in colonial and post-colonial times), this question has come to the fore for adjudication by the state. Secure private property in land, as freehold or long-term tenancy, are part of the accepted norms in land management in a modern state. While such a precondition is, perhaps, useful in raising and maintaining land productivity, the situation in mountain areas has always been, and still is, considerably different and has not allowed the acceptance and establishment of such a norm in land management. These unclear land-use rights affect grassland and forests much more than small settled agricultural plots. This paradox in reconciling the existing norm of land-use rights in the context of untitled land is holding back long-term sustainable development of grassland and inaccessible forestland. Other than herders and poor households dependent on forest resources, farmers of all types are also dependent upon resources that are available outside their farmland. Seasonal water runoffs, river or glacial melt-flow, forests, and grasslands constitute such resources for all mountain dwellers. Water held in reservoirs as freehold for irrigation and other basic needs, control over the upper areas of water catchments, and temporary or permanent use rights for pastures and forests (grazing, collection of non-timber forest products, and so on) constitute part of such tenurial arrangements. In the Hindu Kush–Himalayan areas, nearly 60% of land only supports a pastoralist population that has to move its herds from place to place to be able to provide for the animals. Seasonality is also important in the movement of pastoral people. While the pastoral production system covers most of the high mountains in the region, over generations institutional mechanisms have evolved to manage the herds in a sustainable manner consistent with the carrying capacity of the land. Such institutional mechanisms enforce regulations of herding in a rather complex and sophisticated manner (Miller

and Craig 1997). Numerous examples of principles of water use in the mountain areas also point out the essential nature of resource tenure that is as important as land but much broader in scope than land alone (Banskota et al. forthcoming).

Therefore, the focus of tenure is much broader than being merely confined within the limits of survey-based titling of resources, mostly of land in this instance. Here, the concept of resource tenure, encompassing the broad characteristics of tenure, is far more useful than fixed tenure based on ownership and backed by survey and revenue collection systems. For instance, a natural commodity, such as soil, which provides grazing, crop growing, and other functions, cannot carry one homogenous property right under these circumstances. Property rights, in many instances, are a bundle of rights that allows users to apply a particular right at a particular instance. A farmer may own plots of land, but may have use rights to the water of adjacent streams/rivers. Similarly a farmer may have access and use rights of adjoining grassland and forests that do not come under any specific property rights of either the state or individuals. Policies related to tenure therefore have to be analysed for these multifarious use patterns, ownership, and use rights. Policy guidelines need to be developed taking into consideration all resources that are in use or have the potential to be used and are contributing economic value in a production system, mixed or otherwise. As mixed farming and production systems dominate mountain areas, it is critical that use and access rights to various natural resources that are complementary to each other are ensured. Such a condition can only be arrived at by consistency and adherence to ground reality in the policy-making exercise. Inter-ministry coordination, a rare commodity in many instances, is crucial if success in consistent and pragmatic policy is to be achieved.

Once the focus is shifted to resources rather than only land in formulating tenure policies, a much broader and comprehensive view can be taken to enact policies and regulations that go beyond one component of the resource system. Such a reorientation would deal with all other equally, if not more, important resources in the mountain production system that have a significant bearing upon not only livelihood issues but also, and above all, sustainability issues. As water, grassland, and forests are the key areas of mountain ecosystems, tenure policies, to be of any use, must address their use patterns as well.

Tenure and Gender

Tenure and property rights have different connotations for men and women in much of the Hindu Kush-Himalayan region. The question of whether

women use and manage natural resources becomes a moot point unless we know the broader rules that govern ownership issues by gender.

It is by now a well-known fact that women are an integral part of the mountain production system that is largely natural resource based (Gurung 1999). However, it is not sufficiently clear whether women enjoy independent rights to land or whether they receive rights only through their husbands or fathers. Despite increasing forays into this area, it is not yet conclusive whether women can inherit, buy, sell, or mortgage land under the existing social and legal framework in the regional countries. Many communities allow inheritance of land by women while many do not. Such practices and rules are often at odds with the legal system prevalent in the country itself. Throughout the Hindu Kush–Himalayan region, as well as most of the world, rights to land, water, livestock, and trees are determined by gender. Thus, their disposal or acquisition is different for men and women. This is not necessarily because there are no clear legal injunctions on it, far from it; it is often the sociocultural and religious orientations that govern the whole question of whether men and women are equally bestowed with property rights in their entirety. Here, the law is merely a framework for negotiation, and theoretically it opens up opportunities, but is not a guarantee in itself. Rights are more often in the realm of the social and economic order, and the practice of what a woman may actually receive or own is influenced by cultural practices, religious sanctions, and the institutional framework within the society. Then, again, the prevalence of different sets of laws, such as 'shariah' law in Muslim societies or the customary laws in many parts of the eastern Himalayas, interprets the issue according to its own precepts that may not conform to the civil law of the land.

In the Hindu Kush–Himalayan region and in our study area, land, still being the most important resource, is the prime property, and rights to land, in many instances, determine the status and condition of women. There is a common misconception regarding the status of women and gender relations in the region, often thought to be egalitarian among Tibeto-Burman Buddhist groups and much more hierarchical and structured among Muslim and caste Hindu populations. While family and household resources are managed with greater female participation among the former than the latter, there are still no significant property rights for women among the so-called egalitarian communities. Our studies in northeast India, Bhutan, and Nepal (the areas predominantly inhabited by Tibeto-Burman groups) confirm such a fact. Except in the Tibetan Autonomous Region of China and a few small communities in the Chittagong Hill Tracts and northeast India, women still do not have rights over land. In the northeast Myanmar hills, women bring property with them from their

fathers but transfer it immediately to their husbands after marriage. Even in China, thought to practice more egalitarian gender relations, in both Sichuan and Yunnan men control money and land. Among the caste Hindus of the Indian and Nepali hills, women do not have control over land although they take part in farm decision-making and labour. In Bhutan, daughters inherit land but it is not clear whether they control the right to dispose of it and make choices regarding use. In Pakistan, the conservative communities of the northwestern areas do not allow women to have control over land resources although inheritance according to Islamic laws is recognised but not always practised. This is the uniform practice across the Shiah, Sunni and Ismaili divide. Women do participate in farm activities but are confined mostly to post-harvest processing within homestead areas.

An interesting aspect of the gender issue in tenure is the presence of various types of lineage and location of residence in the eastern Himalayas. Both patrilineage and matrilineage are prevalent here. Choice of residence after marriage can be either way with patrilocal and matrilocal residence in practice. Despite this recognition, many matrilineal communities still practice pre-eminence of males in controlling land resources. Even when a husband goes to live with his wife and cultivate his wife's land, control over that land may not be with the wife. Such examples dilute the notion of patriarchy among many ethnic groups in the region that practise matrilineage and matrilocal families. While division of labour between men and women is not necessarily rigid and well defined in the Hindu Kush–Himalayan region and women participate in productive and decision-making activities far more than their counterparts in the plains, they still cannot be formal owners and managers of land-based resources. Therefore, their rights vis-à-vis land use are rather limited. Similarly, women as sharecroppers or lease-holders of land or rights (water, pasture) are still unheard of in the region.

Conclusion

Tenure and property rights are critical in influencing land management practices. Therefore, they are also inextricably linked with potentials for degradation as well as sustainable management of land resources.

Several themes emerge from the comparative discussion of tenure and property rights issues in Hindu Kush–Himalayan region. Firstly, a large part of the region is still not surveyed in the conventional sense of authorising and recognising individual land rights. Despite this, competing claims over land resources abound, not only within the intra-household domain but also within the broad public and private divide. Such competing claims and

conflicts have enormous implications for land management, and, ostensibly, its potential for sustainable land use. Therefore, their resolution in the interest of both the state and the community is imperative for halting further degradation of fragile land resources.

Secondly, scarcity of land resources, demographic changes, and the increasing aspirations of the people are putting increased pressure on land resources. Property rights have a direct link with such phenomena. Land fragmentation, as seen in Nepal, northwest India, and other places, is becoming a critical damper on increasing productivity and sustainability of land resources. Careful policy changes are needed to look into this critical issue in the interests of environmental stability and improving the livelihood options of the Himalayan people. As mentioned earlier, all the study countries went through a series of land reform measures; however, the overriding considerations in the enacted reform measures were with land ceilings and, in some cases (notably China and northern Pakistan), dealing with the abolition of feudal land rights. By themselves such measures are beneficial but not sufficient for land conservation and productivity gains because land fragmentation, insecure tenancy, and lack of private and public investments in land take their toll on land productivity. Tenure reforms in the region are not a totally new concept. In West Bengal, India, the now famous Operation Barga, initiated in the late 1970s, helped to secure rights of tenure. In politically sensitive and overwhelmingly rural West Bengal, such reforms do have their political motivations. Nonetheless, having clear policy directives on tenure rights is essential in any place where cultivation is practised on rented land. In much of the Hindu Kush–Himalayan region, sharecropping is prevalent to varying degrees. Already, in Nepal and Bhutan, we notice that absence of tenurial rights is affecting agricultural productivity and land conservation. However, for marginalised farm households of the Hindu Kush–Himalayan region, policy planners have to bring in forward-thinking approaches to deal with such complex problems as land fragmentation. In medieval Europe, similar problems were solved by changes in inheritance laws. While no one argues for instituting draconian and undemocratic laws, people associated with land policy in the Hindu Kush–Himalayan region must start thinking about the increasing land fragmentation and what it means for land productivity, degradation, and equity. Similarly, tenurial reforms and instituting land surveys for titling need to be initiated immediately. Our country studies suggest that lack of survey and titling are causing manifold problems related to improved land management and land conservation initiatives. Therefore, despite political and logistical problems that beset much of the Hindu Kush–Himalayan region, concerted efforts should be undertaken by respective national governments to establish land rights for inhabitants of

the mountain areas. The sooner this is done the better it is for the indigenous people of the region who are already in a relatively disadvantaged position compared to the people in the plains. Similarly, the discussion on tenure and gender makes it amply clear that women, although they may be de facto operators of land and other land-based activities, still do not have clear and unequivocal property rights anywhere in the region, barring small notable exceptions. While the policy process on land and land-based activities is still evolving in the study countries, attention should be focussed on this inequity. In lieu of tenurial authority, women cannot be effective farmers or herders when their male partners migrate in search of earnings in the off-season or for years together. Female-headed households are much more prevalent in the mountains, and women are regular participants in productive activities. However, they still lack control of landed property; this is not in the best interests of mountain people and resources.

Thirdly, overlapping jurisdiction and overlaying structures of local, regional, and state authorities often provide confusing and mixed signals for land management. The unrelenting extraction of natural resources in the sparsely populated mountain areas of China, particularly in Yunnan province, was due to such mixed signals under a new state-controlled property regime after the revolution. Even after the abrogation of communes and establishment of contract responsibilities, land-use patterns in China still contradict the ethos of the Chinese national environmental policy and provincial policies of restoration of degraded land. It is interesting to note here that the contradictions of collectivisation and the new market economy philosophy of China are glaringly evident in the Himalayan areas of the country. The Great Leap Forward demanded extraction of all natural resources for industrialisation. The mountain areas, with basic raw materials such as iron ore and timber as fuel, paid the price, as in the case of Yunnan. To counteract the environmental imbalance, artificial water courses, in the form of irrigation channels, were built to be managed by communes to meet their own agricultural production quotas. After the abrogation of communes and a move towards the contract responsibility system, no one manages or looks after the country's infrastructure. The indiscriminate felling of trees and strip mining have not yet healed to restore the water balance of the region. The result is ecologically traumatic. The irrigation courses run dry and remain abandoned, while farmers have to put in extra effort and chemical fertilisers to meet their contract responsibilities.

The newly-formed local government structures in northeast India, the Chittagong Hill Tracts (after the peace accord of 1997) and the decentralised

structure in Nepal run parallel to traditional community organisations. Such countervailing forces are not likely to achieve the goals of decentralised governance and empowerment of people — ideas that are found throughout government policies and planning goals. Governance is becoming a critical, but unattended to, issue in the region. While there has been progress in devolution of authority in natural resource management, most notably through community and participatory forestry programmes, appropriate institutional structures accompanying such devolution are still not considered a major requirement for the intended changes. Policy planners need to think through this issue carefully. Existing local governance structures should not be sacrificed in order to accommodate a newer structure. Destroying older, traditional institutions to support the creation of new ones is neither conceptually nor operationally justified. It is also ironic that, when the development community is witnessing growing and persistent global poverty, and is pointing its finger at bad governance as a root cause of such malaise and has redirected its attention to institutional issues, the countries of the region are replacing traditional and largely trusted local institutions with newer, formal ones.

Fourthly, we are witnessing an era of new institutions as new government agencies, and their field presence, are becoming more and more common. Nonetheless, we observe a general trend of institutional change and decay. Corruption, politicisation, and lack of transparency continue to erode the credibility and authority of institutions related to land management. The transaction costs of mountain people in mitigating conflicts are ever increasing. In an age of proliferating policies and interventions, institutional decay, as evidenced in lack of policy application and enforcement of regulations, is affecting land management tremendously. The creation of appropriate development knowledge, the transplanting of best practices, the encouragement of community ownership, and the like are in vain if land-related institutions are not strengthened qualitatively. The institutional decay and retreat are evident, particularly when we focus on the management of the commons and forest resources in the region. Conflicts, arising out of the management of privately owned and community-owned forest areas in much of the Hindu Kush–Himalayan region, reflect the inability of the state to facilitate self-sustaining autonomous development based on participatory principles. Guzara forests in Pakistan, religious and sacred groves in northeast India, and unclassed state forests in the Chittagong Hill Tracts all attest to a pervasive lack of coherent policy and transparency of action on the part of state authorities.

Fifthly, mountain production, though largely land based, requires multifarious use of resources. The dependence of mountain farmers on

forest resources and their need for pastures and natural water sources are equally as important as their tenure of land. The complexity of the mountain production system, therefore, requires multi-bundle tenure rights and not single homogenous property rights as is the case in most places. Conflicts among communities, arising out of this unclear use of and access rights to forests, grazing areas, and water sources, have the potential for spreading far and wide and even for affecting government ministries and agencies. Legal and institutional preparedness for such multifarious rights are, therefore, important for both inter-agency coordination and uniform policy direction for the government and the general well-being of mountain people in the region who are so overwhelmingly dependent upon land-based resources.

In the absence of rational policies for land use in its most comprehensive form, the Hindu Kush–Himalayan people are confronted with limited options for improving their living standards. However, notwithstanding the dismal effect of policy failures and decay of institutions, small doors are opening in the form of new and progressive land-management options. Such entry points are critical, whether through community forestry or participatory watershed management, both for the state and the communities. The state can learn more about the workings and value of policy negotiation, local institutional regulations over land use, and stakeholder consultation, while communities can find new ways of maximising their potential through a variety of options and of empowering themselves by taking control of their destinies.