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Changing Aspects of Tenancy Right

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Introduction.

The national economy of Nepal was dominated by agricultural income. Most of the population were engaged in agricultural works. The exports from Nepal had majority portion of agricultural products. Nepal has therefore been, and often called as, an Agriculturally Based (*Krisi Pradhan*) country. The overall enrichment and development of nation and its people was realized to be accomplished by means of agricultural development. This and various other reasons had time and again created environment for land and agrarian reforms. Access to land, lawful title over the land, equal distribution of land has always been proposed as the demand of time and the means to achieve social justice in the Nepalese context. The enactment of different laws relating to land and acknowledgment of tillers/tenants' right over the land has been considered as the achievement for the social and economic development as well as the political expediency. Nepalese history exhibits the legal and/or customary relationship of the tenants with the land. Tenants are the actual farmers or tillers who cultivate the land and yield crops. Although the terms farmers, peasants, tillers or tenants are often interchangeably used, the term Tenant '*Mohi'* explicitly means the legal title of tenancy on the land. The 'Tenant' is entitled to the tenancy right over the land of any landowner cultivated by him under any conditions. In the development of land law to modern stage, we can see the emphasis on the legal recognition of tenancy and legal provisions in safeguarding the rights of tenants. In this backdrop, the concept of tenancy has a deeper relation with land and agriculture. Major historical developments, change of ruling regimes and rulers, political changes have enunciated different land reform policies and practices. The debates and discussions regarding changes to the land reforms is an ever-going process as the spirit of land reform is invariably related to time and social changes. The current dual ownership, of the tenant over the land, derives its rationale from the past experiences of exploitation of tenants in different land tenure practices.

Traditional land tenure practices and their termination.

Nepal has a long history of different land tenure system. The traditional land tenure do not constitute the actual rights of the tenants. There were different land holding practices in the traditional land tenure system. In the *Birta* tenure, large pieces of land were given as grants by the king to the near ones. Later in Rana regime the *Birta* lands were graciously granted by the Rana rulers to their kinship and closed ones. Large portion of Nepalese agricultural land concentrated in few elites until 2007 BS. The *Birtawals* did not cultivated the land by themselves. "Absentee landlords invested very little in the agriculture sector, whereas the intermediaries and tax collecting agents such as *Jimidars*,

Talukdars and *Patwaris* desperately exploited the land and the tillers. …A pair of bullocks was that all a tenant could hardly pay for."[1]The Birta System came to an end after the promulgation of the Birta Abolition Act, 2016. All the *Birta* land have been converted to *Raikar* land. The Act classified the existing *Birta* Land into Category 'A' and Category 'B'. The Category "A" *Birta* land, except uncultivated abandoned land & forest, was provisioned to be registered in the name of tenant.[2] Further amendments provided for registration of Category 'B' *Birta* land in the name of the tillers if the concerned landowner failed to do so by 2049 BS.[3]

In the *Kipat* Tenure communal land ownership was in practice. The tillers enjoyed the right over the land mere for cultivation and income generation. Restrictions were imposed on the transfer rights as the *Kipat* land was not transferrable or sold to person belonging to other communities. The *Kipat* land tenure system was put to an end by the second amendment (2025.7.9 BS) of the Land Concerning Act, 2021. After this enactment *Kipat* land can be completely disposed (or sold) like *Raikar* Land.[4]

The *Ukhada* tenure was the most feudalistic land ownership practice. The landlords would hold auction for tilling their lands and the tenants who posted the highest bid in cash or crop per year would obtain that land for cultivation till a year. The same process would repeat next year. The Ukhada Related Act, 2021 terminated or eliminated the title of landowners over such *Ukhada* Land. Such lands were to be registered in the name of the tillers as *Raikar* Land.[5]

The *Jagir* tenure means the land authorized to civil servants to collect and use the land tax in terms of cash or crops for a certain period in lieu of salary. In the Rana regime, most of the *Jagir* lands belonged to the relatives and near ones of Ranas. The *Jagir* land was non-inheritable. The possession of employees was until their service. When such *Jagir* land underwent the major audit and was distributed (*raibandi*), the tenants were attributed upon collection of certain portion of the rent, the tenancy was confirmed by law (*sanada*) safeguarding tenants from dismissal until he pays the rent and applicable taxes for the land, but, if someone lies about or decreases the rent of the land, or stops the payment of the customarily applicable taxes, such a tenant could be dismissed and the land could be reassigned to another person.[6] The practice of assignment of land as *Jagir* was abolished after the end of Rana dynasty, by a government decision in 2008/7/12 BS.

The *Rakam* tenure denotes the labor land ownership. The *Rakam* land was granted as a recognition of long & faithful service. Unlike *Jagir* land which was provided to civil servants, *Rakam* land were provided to carpenters, bricklayers, musicians, postmen and

[1] RAM BAHADUR K.C., LAND REFORM AND LAND ADMINISTRATION WITH PROBLEMS & REMEDIES, Department of Land Reform Nepal, Kathmandu, at 11, (1971)
[2] Birta Abolition Act, Section 4, 2016
[3] Ibid at Section 7 'ka'
[4] Land Concerning Act, Section 3 'ka', 2021
[5] Ukhada Related Act, Section 3, 2021
[6] Muluki Ain, Chapter on Tenants and Landlords, Number 25, 1910

similar professionals for their work. The term *Rakam* literally means money in Nepali language. Instead of cash, land were assigned as *Rakam*. These *rakam* lands were also granted by Prime Minister, generals, chief priests and other high ranking officials in the palace, civil or military service. Even landlords would give land parcels to their faithful servants. No such land granted after 2007 BS. Muluki Ain, 2020 Chapter on Land Arrangement, Number 6, dissolved all *Rakam* land and converted into *Raikar*.

In the *Guthi* tenure, land in the form of guthis were given either by the government or by individual donors. Land were allocated as a source of income for managing the expenses for certain religious, charitable and social functions. In Newar, Tharu, Thakali communities guthis are even used for discharging family functions and community chores. The Raj guthi lands are managed by the government. There are no tenancy rights over such *Guthi Tainathi* land. The *Nizi Guthi* were run and managed by private individuals. The guthiyaar (trustees) were the donor, patron of the land or their successors, managers or person assigned to run the guthi or consume the remainder from the guthi proceeds or the priests or saints of such guthi. Guthi Corporation Act, 2021 provisioned for establishment of a Guthi Corporation to operate the state trusts (Raj Guthi) in a systematic manner. The latter Guthi Corporation Act, 2029 continued its existence as well as the current Guthi Corporation Act, 2033. The Raj Guthi land having tenants were categorized as *Guthi Adhinastha* Land. The tenant of such land has to pay rent (in-kind) to Guthi Corporation. The tenancy right can be bought and sold. If any person has obtained the right pursuant to law and built a house and resided in any *Guthi Adhinastha* land, the land up to the ceiling of land that can be held for house and cartilage pursuant to the prevailing Nepal law shall be registered in tenancy in the name of that person. [Section 26] This Act affirmed that the actual tiller/farmer shall be entitled to the right of tenancy in a Guthi land in accordance with the prevailing law (i.e. Land Concerning Act, 2021). In addition, The Corporation was assigned with the power to register the land on the tenancy by collecting the prescribed fees, where the Guthi land has been allotted on the land rent, before the commencement of the Act, and, also if any person has already constructed a building in a Guthi land without obtaining the approval of the Corporation, at the time of the commencement of the Act.

The *Jhora* region in the eastern side of Nepal, basically in Jhapa, Morang and Sunsari districts, the land/region were used for human habitats (settlement) or cultivation by clearing the forest, obtaining legal authority. The landowners, instead of cultivating by themselves, used tillers to cultivate these lands. Act Concerning the Land of Jhora Region, 2028 was enacted which discouraged further deforestation for the sake of human settlement. This also put an end to all the rights and titles of the landowners who did not cultivate the lands by themselves but used tillers for cultivating. Such land were distributed to the actual tenants upto 4 *bighas* considering the size of their family.

The exploitation of the land resources and defective land tenure practices hindered the productivity of land. The owners of the larger piece of land did not manage nor cultivated their land by themselves, they used tillers for cultivation or may opt to leave the large portion of land uncultivated. The concentration of large portion of land remained on

few elites or landlords. The uneven distribution of land resulted in the lesser land occupancy thereby upholding primitive and subsistence-based farming. Actual tillers were deprived of land holdings. Their rights as tillers or cultivators of the land remained unsecured, in most cases, upon the will of the landowners. Paradoxically the agricultural income and development has remained a backward sector. This traditional approach towards agricultural productivity needed a leap both structurally and institutionally.

Position of Tenancy Right in the *Muluki Ain*

The traditional land tenure practices focused on the ownership title of the landlords over the land. The landowners exercised their ownership titles unconditionally, thereby suppressing and invalidating the permanency of the tenancy right of the tenants over the land they tilled. The first codified law of the land, Muluki Ain, 1910 had few chapters regarding tenancy over land and eviction of tenants. The Chapter on 'Tenants and Landlords' (*Mohi Talsingko)* guaranteed the exclusive right of the landlord over the land. The landowners collected rent (fees) from the tenants/tillers who cultivated the land. The tenant who did not pay the rent and customary fees incurred on that land could be dismissed. If the landlord declared that he himself wanted to cultivate his land he was allowed to dismiss the tenant and cultivate his land himself. He was entitled to evict the tenant even if he wished to live on his land by building a house on it. The eviction of tenants was to be performed in the given time frame only i.e. in hilly region- after *Dashain Tika* (month of Asoj) until *Sripanchami* (month of Falgun) and in other region- after *Dashain Tika* (month of Asoj) until the month of Jyestha. The landlords could be questioned and fined only in case of eviction of tenants in season other than the prescribed one. The law seems to safeguard the tenancy only during the planting and harvesting seasons. The tenant who complaint for his dismissal during this prescribed time was rather fined and in case of his inability to pay such fine he could be imprisoned for 15 days.[7]

The tendency of the prevailing laws showed lesser sympathy towards tenants compared to the landlords, however rights of the tenant seem to be protected against other tenants; as the law restricted reassignment or replacement by new tiller on the land to some extent. The old tenant could not be replaced by the newer one, as long as he submits the harvest and pays the rent at regular intervals. Nevertheless, the limit on reassignment cannot be presumed to be the permanency of the tenant, the tenant was reluctantly in competition with other tillers. If a new tenant offered rent and fees more than the existing tenant does, the existing tenant comes under pressure to increase his rent in order to retain his tenancy and if he does not promise to pay the increased rate, the new tenant shall be introduced in his place.[8] The tenancy was protected from encroachment of the land by other tillers. No one except the tenant was allowed to dig or plough on his field. The violation or encroachment was made punishable with fine and payment of damages.[9]

[7] Muluki Ain, Chapter on Tenants and Landlords, Number 14, 1910
[8] Muluki Ain, Chapter on Tenants and Landlords, Number 13, 1910
[9] Muluki Ain, Chapter on Land, Number 55, 1910

The Chapter on Tenants defaulting on the payment of rent *(Bali Natirnya Mohiko)* provisioned for the duties of the tenants towards the landlords and the land. The *birtawal* or the *jagira* holders had the choice of receiving paddy as rent from their tenants. The tenants were obliged to deliver the rent to the landlord either at the landlord's residence or at the field as per the agreement. If the tenant does not pay the rent or defaults on the timely payment of the rent pretending reason for deficient crop, fire, hailstorm, landslide, flood, lack of water, damage to the irrigation channel, and, upon disclosure of the reasons to be fraudulent, or embezzled rice that grew on the field or troubled the landlord with such trickeries, such a tenant could be dismissed and the land could be reassigned to another person.[10] But, if it is ascertained that the damage caused to the land does exist, the tenant could get a reasonable rebate in terms of the rent. Nonetheless no rebate was given, upon assessment, for a loss up to one-fourth of the total crop yield.

If a *Jagira* holder complained that his tenant had withheld the payment of rent by fraudulent and deceitful means, and if it was ascertained upon interrogation, such a tenant shall be detained and his goods, house and land shall be used as compensation for the outstanding rent. If the property of the tenant was not sufficient, he was made to sign a loan agreement (*kapali tamasuka*) or could be fettered and sent for road construction works. However the landowner could pardon the tenant and set him free.[11]

The Muluki Ain, 2020 also contained provision regarding eviction from the land in the Chapter on *'Jagga Pajaniko'*. The Number 3 of the Chapter states *" If the eviction of a land is to be made or cause to be made for any reason, such eviction should be made between the last day of the month of Falgun to last day of the month of Jestha in case of Terai Region and the last day of the month of Poush to last day of the month of Chaitra in case of Other Region."*

Land Concerning Act, 2021 and Rights of Tenants.

Since 2007 the land reform laws and policies seem to be directed towards securing rights of the tillers or tenants on the land they cultivated. The Royal Land Reform Commission, 2009 and later the proclamation of Late King Mahendra in 2012 recognised that tenancy was not compatible either with agricultural efficiency or with social justice, and that it has therefore to be replaced either by 'secured tenancy' or by 'owner cultivation'.[12]But the framework of policy adopted by the then government favored neither of these two courses, instead a middle course reconciling the interests of landlords with those of the tenants was followed.[13]The Land Concerning Act, 2021 was introduced with one of the objectives as to bring about improvement in the standards of living of the actual peasants/tillers dependent on the land by making equitable distribution of the cultivable land and by making easily accessible the necessary know-how and resources on agriculture. Political change and a new environment created by it provided favorable

[10] Muluki Ain, Chapter on Tenants defaulting on the payment of rent, Number 2 & 3, 1910
[11] Ibid at Number 9
[12] Y.P. Pant, "Our Land Reform Policy – The Middle Course", Land Reforms in Nepal, Vol. VI, at 1, (1971)
[13] Ibid, at 2

conditions for formulation and implementation of this newer land law. This Act was said to be a progressive step to the management of land holding system in Nepal. This Act contained as many features as to address the demand of that time. This Act abolished feudal system (*Jamindari*) and *Kipat* land made taxable and converted to *Raikar* land.

It prescribed ceiling over land holdings by an individual or his family, provisioned for confiscation of land above the ceiling and redistributed such land in equitable manner. Although this Act is often criticized in terms of its definition of the family which has put hindrance to the achievement of the spirit of the promulgation of law on ceiling to land holding. At the time of Manmohan Adhikari government, the Land Reform High Commission (Badal Aayog) 2051 was formed. Report was presented in 2052/5/8, which stated: 70% Farmers have less than 20 *Ropani* land (which amounts to only 30% of the total agricultural land), 1.5 % Rich Farmers have more than 100 *Ropani* land (which amounts to 14% of the total agricultural land). The report pointed that the government has not been able to acquire all the land above the prescribed ceiling. On the contrary, the government showed reluctance to implement the recommendations, for lesser land holding limits, prescribed by the report. Later, Sher Bahadur Deuba government amended (Fifth amendment in 2058.10.25 BS) the land ceiling to current provisions. The Land Concerning Act, 2021 had also put upper ceiling over the land held by a person in the capacity of a tenant in Section 8. But this section has been repealed by the eighth amendment (2076/10/28) to the Act.

The Land concerning Act, 2021 have explicitly recognized the rights of tenants over the land and also affected the Muluki Ain provisions regarding eviction of tenant. No pervious laws had addressed the issues of tenants as clear and extensive like this Act does. There were requirements for compulsory saving by the tenants and the landlords, which was later repealed. The amount accrued from the scheme of such compulsory saving was later required to be dispersed to the concerned person, by the eighth amendment in 2076 BS. The Act also provisioned for arrangement of loan to the farmers. The tenancy right cannot be purchased or be subject to acquisition by way of gift, donation or other means whatsoever, and cannot be auctioned for governmental or non-governmental amount or punishment.

As defined in Section 2(b), "Tenant" means a peasant who holds the land that belongs to another landowner to till the same on any terms and cultivates the land by him/herself or his/her family's labor. A person who as a tenant had been cultivating a land that belonged to any landowner until the date of the commencement of Section 25 of the Act could obtain the tenancy right, in respect of the land. A creditor, who had obtained any land except the land subject to tenancy from any other landowner in the prescribed area, could also obtain the tenancy right over the land if he had tilled that land on his/her own. However, tenancy rights could not be conferred for cultivating homestead land (i.e. land used for personal use and not for paddy yield), land owned by government as well as land assigned by the government for industrial purpose. Foreign nationals were not entitled to tenancy rights. The concept of tenancy right which initially denoted the rightful title, as recognized by law, for possession or cultivation of the land and also safeguard

against willful dismissal by the landowner gradually shifted its virtue towards title of ownership [in half] to the actual tenants/tillers of the land. The fourth amendment in 2053/09/24 B.S. of the Land Concerning Act, 2021 secured dual ownership right i.e. the tenant receives half of the land as a co-owner. Land can be divided on fifty-fifty basis according to the area or valuation of the land. Joint or separate application can be lodged by the landowner & tenant in the Land reform office for such allocation of title over land. While conferring the ownership title over half of the land to the tenant, the fourth amendment of the Act put on halt the entitlement to tenancy right, to a new tiller, by the promulgation of Sub-section (2) of Section 25. But tenancy right, which was already acknowledged, can be transferred, to the legal heir, after death. Nonetheless, Landowners possessed the rights over rent and selection of tenant, after the tenant's death, amongst the husband, wife, son, daughter, mother, father, adopted son, adopted daughter, daughter-in-law, grandson, granddaughter, granddaughter-in-law, elder or younger brother or elder or younger sister living in the same family of the tenant. There are numerous cases where the tricky landowners were found exploiting this right of selection, while depriving the actual successor of the tenant from cultivating the land and taking over the land by themselves in whole. The landowners tricked by persuading the other members, more often the younger ones, for a certain amount of money, and pretended to trust him as the descendent of the tenant and after confessing the tenancy right over them, usually made them to abandon such tenancy and surrender it to the landlord himself either via a deed of compromise or any other means, from the concerned Land Reform Office, making the overall process look realistic and legal. The fortune turned into nightmare, for those who were supposed to be the genuine tenants, as their plight went overlooked by the courts as well, on the ground that the law has vested the landowner with the right to choose his tenant, amongst the deceased tenant's family members, and hence procedural requirements were fulfilled as prescribed by the Act. After the eighth amendment in 2076, this right of the landowner regarding selection of the tenant, after the tenant's death, was curtailed and the tenancy right of a tenant over the land shall be devolved to his successors as per the law of inheritance i.e. National Civil code, 2074 [Section 238, 239].

Along with the rights, the tenants were also assigned with responsibilities of paying rent to the landowner. The landowners could opt to charge rent or collect division thereof from the main annual crop yield of the land. "Rent (Kut)" means any consideration in money or in kind or both payable by a tenant to the landowner on account of the occupation of the landowner's land for cultivation. Furthermore, the Land Concerning Act, 2021 prescribed the rate of the rent to be paid to the landowner as well as the time or season of such payment. Time limitation is imposed against the landlords regarding the claim of rent from their tenant. In addition, if the crops do not go better in any year due to a natural calamity or unfavorable situation, the tenant was granted remission of the rent on such portion, as payable to the landowner.

Termination or end of Tenancy right

The tenancy right ceases if any one of the family members of the tenant buys the land. That means there can be no tenant over the land of members of the same family.[14] For example if someone is the tenant of a land and when his own blood brother or son buys the land and becomes the landowner then the tenancy right is automatically said to be dismissed or terminated. By the definition of a tenant, the right or title of tenancy, it is clear that the tiller who cultivated other's land could only be conferred upon such right over the land. No one can be a tenant of his own land. The courts have upheld the decision of cancellation of the record of tenancy over the land if the new landowner filed application informing that the previous landowner and the tenant belonged to the same family.

The tenant can also voluntarily terminate or leave/give up the tenancy over any land by providing information to the concerned authority and the landowner in writing. There are few grounds prescribed by the Act for dismissal of a tenant. Section 29 of the Act states that if any tenant who has abandoned the land or disappeared or tenancy right has terminated for not paying rent then the landowner shall inform the concerned authority within 25 days. Upon petition filed by landowner, if it is found that the tenant failed to pay the rent except by the act of God, or by any act done or carelessness by tenant due to which the value or crop of the land has decreased or the land has not been cultivated or neglected by tenant for one year the concerned authority can order for dismissal of such tenant. But conversely, according to the judicial decisions, the tenancy right cannot be terminated mere for the cause of not paying rent to the landowners.[15] The Full Bench of the Supreme Court has laid precedent[16] where the termination of tenancy right for not paying rent to the landowner is termed to be unconstitutional and illegal. Although the Section 29, regarding termination of tenancy right, of the Land Concerning Act, 2021 has not been repelled but the judiciary has most often denied the termination of tenancy right, upholding the legislative intent in making the tenants the owners of the land. Judiciary has played key role in the changing dynamics of the concept of tenancy right in Nepal. The judicial precedents have safeguarded the tenants against the legal provision of eviction and dismissal. Unless the land has been distributed among the landlord and the tenant, tenancy right cannot be terminated or put to an end.[17]

Conclusion

The relation of tenants with the landlords has been a very old notion. The concept of tenancy emerged from the non-cultivation of the land by the landowner himself either willingly or by impossibility as the plot of land was large. This relation was based on the mutual agreements between them. The traditional tenure practices shows that the landlords

[14] *Bansi Raut Khulawat Vs. Land Reform Office, Bara et. al,* NKP 2043, vol. 4, d.n. 2679, p. 311.
[15] *Jogindra Mahato Nuniya Vs. Sitaram Sah*, NKP 2077, vol. 10/11, d.n. 10587, p. 1938.
[16] *Loknath Upadhyaya Vs. Debimaya Bhattarai et.al*, NKP 2062, vol. 6, d.n. 7549, p. 670.
[17] *Advocate Chandralal Shrestha et.al Vs. Government of Nepal, Office of the Prime Minister and Council of Minsters et.al,* NKP 2072, vol. 4, d.n. 9379 p. 619.

resided on the upper hand in prescribing the terms and conditions of tenancy. The tenants and their tenancy right could not get acknowledgement by the previous laws. Different political upheavals led to formation of law and policies focusing on the rights of landowners. The concept of tenancy started getting formal and legal recognition after the downfall of Rana regime along with the political drift towards land and agrarian reform. The Land Concerning Act, 2021 and its amendments has been able to shift the paradigm of concept of tenancy from lawful possession towards the title of ownership, over half of the land to the tenant. The tenant cannot be removed by the landowner or anyone without conferring title of ownership for half of the land. Nepalese Judiciary as the protector and guarantor of the tenancy right, against dismissal, has the most crucial role in shifting and changing dynamics of the tenancy right.