

Statutory versus Locally Existing Land Tenure Typology: A Dilemma for Good Land Governance in Nepal

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SUMMARY

The political change of 1951 was a turning point in the history of Nepal. In 1964, Nepal adopted a land reform programme and abolished different so-called feudal land tenure types which were then existing in the country on the basis of customary practices and official grants by the State. The statutorily recognized land tenures came to be limited to private (*Raikar*), religious and philanthropic trusts (*Guthi*), Government (*Sarkari*) and public (*Sarbajanik*). A land ceiling was enforced and dual ownership of land between the landlord and the tenant was proposed to be abolished through land sharing. Despite all these efforts landlessness, skewed land ownership, informality of land tenures and unregistered tenancy are among the key problems of current land administration and management in Nepal. The land and tenure issues were among the key triggers of the armed conflict (1996-2006), and also part of the impediments to judicious reconstruction and rehabilitation process after the 2015 mega-earthquake. There are various studies on the historical evolution of land tenure typology in the pre- land reform era and the statutory land tenures in the post- land reform era but there is a big gap in the systematic studies on locally existing tenure typology in the country. While the new Constitution of Nepal promises progressive provisions for good land governance and a national land policy is under progress, it was felt necessary to study and document all different land tenure typology, statutory or non-statutory, as locally existing in the country to facilitate this process. The paper describes the findings of the study based on elaborate desk studies and field investigations with qualitative analysis of key informant interviews, focused groups discussions, experts' observations and informal conversations, and case studies from at least 16 different areas covering 5 out of the 7 provinces in the country. Besides statutory or formal tenures, it was concluded that different types of non-formal, informal and customary land tenures do exist and also different forms of unregistered tenancy based on verbal contracts between the landlord and the tenant are existing in the country. Acceptance to formal or statutory land tenures alone and ignoring to such informal, non-statutory and unregistered land tenure is a dilemma to good land governance. The study provides a documentation on different locally present land tenure typology in support of a land policy based on the principle of recognition of continuum of land rights and tenure security for all.

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1. BACKGROUND

Nepal is a mountainous country situated between India and China. It has a broad diversity not only in topography and biodiversity but also has a wider assortment of culture and ethnicity; and grown through a long history. Land is the natural resource generating economically productive base for its inhabitants and also one of the fundamental sources of culture, social relations, political power, identity and belongingness for the human society (Wilmsen, 1989). Therefore, not only livelihood but also the question of identity is largely emanated from people's relation to the land they inhabit and cultivate. The evolution of land tenure system is unique as its history is. The type of land tenure arrangements has influenced and often determined the level of food security, economic prosperity and social dignity of its people, as well as the political conflict and stability of any given country. Throughout its history land has remained a source of economic and political power in Nepal. Addressing to land and tenure issues have remained priority of the State after each larger political change in the country recent history being one each in 1951, 1961, 1989 and 2007. In 1951 Nepal ushered into a multi-party democratic system abolishing a century old oligarchy of Rana regime. In 1961 a direct rule of the King under a party-less Panchayati system was established which in 1989 was abolished through re-establishment of a constitutional monarchy and multi-party democracy. The country faced a decade long armed conflict during 1996-2006 which was terminated through a Comprehensive Peace Agreement in 2007 which paved way for the establishment of a federal democratic republic in Nepal. Access to land to the landless, home to the homeless and equal rights of women to inheritance of property were among the 40-points demands of the rebellions of armed conflict. Political settlement of the armed conflict has been culminated through the promulgation of a new Constitution in 2015. Researchers have concluded that the 1964 land reform in Nepal has not been able to deliver what it promised (Wily Liz Alden et al, 2008) and that the armed conflict "have brought into sharp focus the failures of past gestures towards land reform, ethnic, caste and gender equality and regional issues, social and economic iniquities, and decades of failed development" (ICG, 2005). The constitution provided political direction to address many of such issues including issues related to overall land and tenure reform in the country. In line with the provisions of the Constitution a national Land Policy was under formation for which a baseline knowledge on all types of locally existing land tenure typology, statutory or non-statutory, becomes important. Despite efforts of the land reform initiatives to redefine different traditional and customary land tenures to statutory land tenure and bring in all land tenures into a legal cadastre, it is generally understood that different non-statutory land tenure systems do exist

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and are out of the legal cadastre. A comprehensive knowledge on non-statutory land tenure systems was felt necessary. This study was undertaken to address this need.

2. RESEARCH METHODOLOGY

The study (CSRC et al, 2018) was undertaken by a group of experts coming from different field of expertise like land administration and management, sociology and development studies under lead researcher from anthropology background. Qualitative study techniques were utilized to analyse secondary information from literature review and primary data from field observations.

Source of relevant information from secondary sources were a range of published and unpublished literature produced by different academics and governmental and non-governmental organisations, important among them are:

- Academic works on land related issues
- Government plans and policies
- Reports of different land reform and land related Commissions
- Manifestoes and relevant documents of key political parties and their sister organizations
- Reports and other documentations from relevant organizations (Grey literature)

Primary data were collected from 16 different areas in eight districts scattered around five out of seven provinces of Nepal through key informant interviews (KIIs) with knowledgeable persons and tenant farmers; focus group discussion (FGD) with local farmers, tenants, land owners and other stakeholders; typical case studies; and informal conversations and expert observations.

The locations selected represented diversity in topography like terai, middle mountains and high mountains; and in culture and ethnicity like Kirat, Madhesh, Tharu, Newa and Tamuwan. Some selected individuals in each study district were consulted and interviewed to learn from their in-depth knowledge and information in the locally existing land tenure practices and related issues. These key informants in different sites included knowledgeable persons, like tenant cultivator, representatives of the political parties working in the local level, member of the civil society, representatives of *Dalits*, ethnic groups, occupational groups, elderly and women, etc. Such key informants were identified through a snowball sampling technique. FGDs were of semi-structured in nature. A checklist in order to gather the required information was prepared. Land redistribution, community ownership of the land, etc. was also discussed in such FGDs. One FGD in each study site was conducted among tenants, women, people living in public land, and land rights activists. Meanwhile, the research team also had a transect walk around and across some land and settlements under dispute as reported during the field visits and also observed the current land use pattern, settlement patterns and public land utilization patterns. While having a transect walk, the

researchers interacted with the concerned stakeholder on the ground. Some of the observations of the research team provoked new queries and enriched the information collected through other methods. Such observations and informal conversations at the field helped in verifying and validating some of the already gathered information from different sources. Those involved in the observations and informal discussions included the community people, land rights activists, tenants and government officials. A few case studies based on the primary information reveal many unique and seemingly deviant practices in land tenure practices in Nepal. In addition to these, major tools used for the data collection, consultation meeting with the experts, and concerned stakeholders in different occasions were also organized.



Figure 1: Location of Field Study Areas (Outline Map Source: Survey Department)

The study team conducted 8 FGDs, 14 KIIs and presented the findings in 3 key workshops to get the feedback, identify the gaps, and validate the findings. The draft report was shared among few known national and international experts for their feedback before finalization.

3. MAJOR FINDINGS FROM LITERATURE STUDY

There are a host of literature explaining the evolution of land tenure system from the statutory perspectives. The land administration in Nepal is one of the oldest administration systems in Nepal with historical evidences dating back to the early Lichchhavi era of King Manadeva (464- 505 AD). Evolution of land tenure system in Nepal is very old as the history

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is. Traditionally, land was considered as the property of the State and this has remained till 1951 when power of the monarch or the absolute ruler was relinquished. Up to then, the king or the ruler holding state power used land as the main source of revenue or even as a commodity in exchange of cash for gift to the priests and philanthropic causes, endowment to the family members or other loved ones, or even payment of salary to the soldiers and state employees. Traditionally two types of land tenure have existed- the statutory tenure system *Raikar* and the customary land tenure system *Kipat* to be discussed hereunder.

3.1 From the State to the Private Landlordism – History of Statutory Land Tenure System in Nepal

Raikar land holdings were generally agricultural land as owned by the state and cultivated by private individuals within the limits as required for their subsistence. *Kar* or tax on the produce was paid to *Rajya* or state and thus called *Raikar* land. Originally, individuals owning *Raikar* land forfeited right to use the land in case of default of annual payment of *Kar* to the state, and they were deprived rights of alienation through sale or other form of transaction, and thus they could be considered tenants on the state land. However, a new tenure system emerged after the state started to grant *Raikar* land to individuals as well as religious and charitable institutions under generally freehold tenure for different purposes (Regmi, 1977). Such private land tenure system like *Birta*, *Guthi*, *Jagir* and *Rakam* have emerged as derivatives of *Raikar* land tenure system which remained in practice till 1951. *Birta* (derived from *Vritti* or livelihood) grant of land was alienated by the state to priests, religious teachers, soldiers and members of the nobility of the royal family for their livelihood who by virtue of their different professional leaning would not cultivate their *Birta* land and would lend out to tenants for cultivation. As such additional to the state, another form of landlordism did emerge. Till 1951, it was common for the state to designate *Raikar* land as *Jagir* or assign the income of the land as emoluments of office to government employees and functionaries. Another sub-class of *Jigar* was *Rakam* provided as emoluments to working class like musicians etc. The *Raikar* land not assigned as *Jagir* were considered as *Jagera* or pool and open for re-alienation from the state for example for *Birta* or *Jagir* or *Guthi*. *Guthi* or trust system of land tenureship is related to endowment of *Raikar* or *Birta* land by the state or *Birta* owners for the establishment and maintenance of religious and philanthropic institutions like temples and intangible heritages like *puja*, *jatra* etc, schools, hospitals, orphanages etc. *Guthi* land are generally cultivated by tenants who pay rents in lieu to the *Guthi* or the institutions owning the *Guthi* land. *Guthi* land owning institutions emerged as another form of landlords.

The expansion of *Raikar* system to *Birta*, *Jagir* and *Guthi* did devolve the state landlordism to private landlords like *Birta*-holders and *Jagir*-dars and institutional landlords like temples and other *Guthi*-holders. In 1952, 96% of the cultivated land in the country were under *Raikar* system consisting *Birta* 36.3%, *Jagir*, *Rakam* etc 7.7% and *Guthi* 2% (Regmi, 1977). The land was owned by the state or by the

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affluent section of the society while the actual users of the land, the poor farmers and working class, remained as mere tenants or indentured farm laborers like *Kamaiya* or *Haliya*. The tenant farmers and the farm laborers like *Kamaiya* or *Haliya* ultimately fell into debt trap of the landlords and thus obliged to live the life of slavery.

3.2 *Kipat*- The customary land tenure system

Raikar land tenure system has emerged as the sovereign power of the state to own, control, alienate and endow land. But in Nepal, among different communities, the concept of customary land rights did exist side by side. Such customary land tenure system was essentially communal land tenure and existing in different parts of Nepal in the eastern and western hill areas of Nepal and among different ethnic groups like *Rai*, *Limbu*, *Danuwar*, *Tamang*, *Bhote* etc who belong to the Mongoloid origin. While *Raikar* land honour the individual right of use, *Kipat* land is alienated to communal authority of specific tribe or ethnicity. In 1952, *Kipat* land consisted of 4% of all the cultivated land in the country.

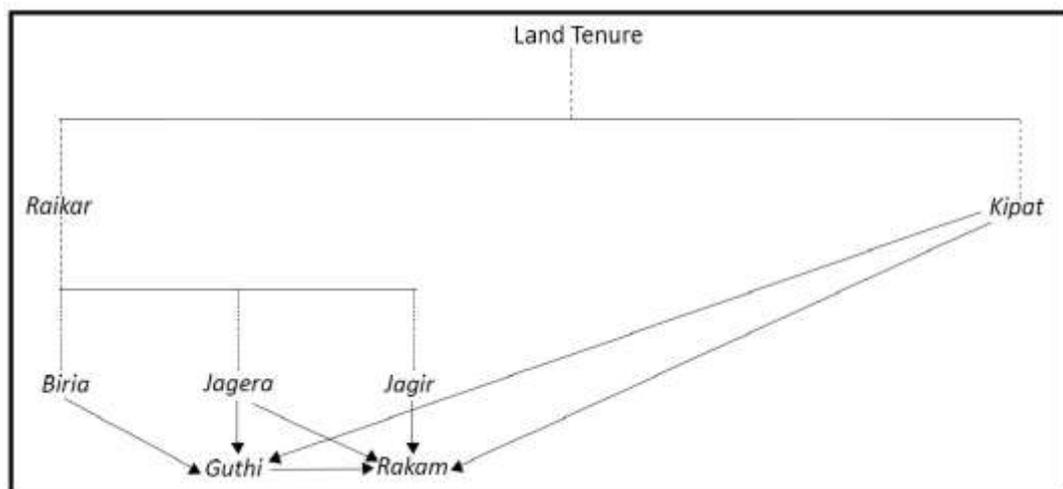


Figure 2: Land Tenure System post 1951 (Source: Regmi, 1977)

3.3 Land Reform in Nepal- Towards democratization of land tenure system

Until the mid-eighteenth century, Nepal was divided into a number of principalities ruled by its own King. The Kathmandu valley itself which is now the capital of the country was divided into three strong kingdoms- Kantipur, Lalitpur and Bhadgaon. The unification process of the current state of Nepal started in 1743 after King Prithvi Narayan Shah ascended the throne of Gorkha. The unification process continued until the 1816 Treaty of Sugauli concluded between Nepal and British East India. After unification till *Kot* massacre of 1846 when Jung Bahadur Rana grabbed absolute power to rule the country as the Prime Minister and

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Commander-in-Chief in the name of the king, Shah dynasty became the absolute power. Jung Bahadur and his family ruled the country for 104 years until 1951 when a democratic system was established through popular uprising. Thus till 1951, it was legitimate for the Shahs and Ranas to govern land in the country and grant *Birta*, *Jagir* and *Guthi* at their will. The *Birta* and *Jagir* landholders came from families and close connections with the ruling families. The peasants who actually tilled the land were subject to different exploitations. The disparity between rich *Birta* or *Jagir* landlords and actual peasants was huge and distinct cases of feudal land tenureship. Immediately after the establishment of democracy in 1951, efforts towards land and tenure reform were initiated. Despite the major political change of 1951, the country has witnessed other major political upheavals in 1961, 1989 and 2007. All these changes have catalyzed policy changes in land and tenure reform in the country. The following lists out major events towards initiation of land and tenure reform in country:

Table 1: Major political events and land tenure reform initiatives post-1951

Major Events	Political	Major Event on Land and Tenure Reform
Multi-party democracy under constitutional monarchy established (1951)		<ul style="list-style-type: none"> - Legislation on tenure rights protection (1951) - Abolition of <i>Jagir</i> system (1951) - Formation of land reform commission (1953) - Legislation on recording of land of cultivators (1954) - Legislation on abolition of <i>Birta</i> system (1959)
Party-less <i>Panchayat</i> system under active monarchy established (1961)		<ul style="list-style-type: none"> - Legislation on reorganization of land tenure (1962) - Legislation on cadastral survey and systematic land titling (1963) - Legislation on land reform and initiation of land reform program (1964) - Legislation on <i>Guthi</i> Corporation (1972, 1976)
Restoration of multi-party democracy (1989)		<ul style="list-style-type: none"> - Report of High Land Reform Commission (1995) - 40-points demand by CPN(Maoist) (1996) - Declaration of civil war by CPN(Maoist) (1996) - Abolition of <i>Kamaiya</i> bonded labour system (2000) - Report of Landless Problem Study and Recommendation Commission (2005)
Peace Process (2006)		<ul style="list-style-type: none"> - Comprehensive Peace Agreement (2007) - Interim Constitution (2007)
Declaration of Federal Democratic Republic of Nepal (2008)		<ul style="list-style-type: none"> - Abolition of <i>Haliya</i> bonded labour system (2008) - Report of High Level Scientific Land Reform Commission (2010) - Report of High Level Land Reform Commission 2008 (2011)
Constitution of Nepal (2015)		<ul style="list-style-type: none"> - 13-pointn Government Workplan to implement different land reform commission reports (2012) - National Land Use Policy (2013, 2015) - National Land Policy drafted (2018) - Fit-For-Purpose Land Administration Country Implementation Strategy prepared (2018)

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The major outcome of the democratization of land tenure system post 1951 and land reform programme (1964) were as following:

- Abolition of feudal land tenure system like *Birta*, *Jagir*, *Rakam* etc and conversion of all such land tenure system into *Raikar* land tenure
- Abolition of customary land tenure system like *Kipat*
- Abolition of exploitation of farm-based laborers system
- Conversion of *Raikar* land tenure form state landlordism into freehold private ownership
- Redefinition of land tenures into *Raikar* (Private ownership), *Guthi* (Owned by trust and cultivated by individuals as tenants with legal rights and responsibilities), *Sarkari* (Government owned) and *Sarbajaik* (Public use)
- Recognition of 50% ownership of Raikar land cultivated by tenants, and abolition of dual ownership through land-sharing
- Protection of the rights of tenants on the *Guthi* land through legislative measures
- Enforcement of land ceiling on the ownership of *Raikar* land as well as tenancy of *Guthi* land
- Comprehensive land titling campaign for land registry of all and cadastre based land administration system

Despite all these efforts towards democratization of land tenure system in Nepal, the remnants of age-old feudal land tenure structure in the society remains. The land titling system has not been complete with some 25% arable land still not covered by the national land cadastre. The landowning class of the past still hold major political and economic power in the country. The working class and rural households (HH) engaged in subsistence farming are still landless or near landless. 51.6% HHs are operating less than 0.5 Ha of land (ADS, 2015) and some half a million HHs are unregistered tenants deprived of all rights due for the tenants (Adhikari, 2008). After more than half a century of its initiation and with a repeated commitment of the successive governments for *land to the tillers*, abolishment of feudalism and advancement of economic transformation, the land reform in Nepal has failed (Wily Liz Alden et al, 2008). The land and tenure issues as reflected in the 40-point demand prior to the armed conflict (1996- 2006), Comprehensive Peace Agreement (2007), Reports of various (high level) land reform commissions (Chhatkuli, 2013) and the Constitution of Nepal (2015) very well amplify the need for an extended study into and land and tenure reforms.

4. MAJOR FINDINGS ON LOCALLY PRESENT LAND TENURE TYPLOGOGY

In the last Section we discussed the historical evolution of feudal land tenure typology and how it supported in the development of landlordism in the pre-1951 era. We also

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discussed efforts towards democratization of land tenure system through statutory reforms and the assessment that the statutory land tenure system was not free from shortfalls. The field study undertaken was to identify typical cases of such shortfalls and look into the gap between statutory and locally existing tenure typology in the country.

4.1 Tenure types based on ownership patterns

We broadly define land tenure into four classes- (1) private land and additional tenure types (2) *Guthi*, (3) *Sarkari* and (4) *Sarvajanik* based on ownership type. Different sub-classification or definition of such tenure types are listed below. The existing land legislation, land titling and land administration system is very much oriented towards protection of *Sarkari* and *Sarvajanik* land therefore not all the land tenure types mentioned below as private land can be titled. For example, *Akada* land mentioned as private land in some official documents are not titled. Also due to technical reasons, land which could be legally titled are as well excluded from titling for example, *Gaun block*.

Table 2: Tenure types under different ownership

Private Ownership	Institutional Ownership (<i>Guthi</i>)	Government Land (<i>Sarkari</i>)	Public land (<i>Sarvajanik</i>)
<ul style="list-style-type: none"> - <i>Raikar</i> - <i>Birta</i> - <i>Jagir</i> - <i>Rakam</i> - <i>Gaun Block</i> - <i>Ukhada</i> - <i>Akada</i> - <i>Jhora</i> - <i>Swobasi</i> - <i>Jiuni</i> - <i>Pewa</i> - <i>Khangri</i> - <i>Satta</i> - <i>Bharana</i> - <i>Bhudan</i> - <i>Kipat</i> - <i>Khoriya/Bhasme</i> 	<ul style="list-style-type: none"> - <i>Rajguthi</i> - <i>Amanati Guthi</i> - <i>Chhut Guthi</i> (Tenancy can or cannot be claimed) - <i>Niji Guthi</i> (Established by individual family, clan. In some cases in order to escape from state-imposed land sealing) - <i>Pashupati, Changu Naryan and Boudha Nath</i>, in terms of the land they had in their name, were the biggest land lords of the valley, [Note: There are many other varieties of <i>Guthi</i> existing] 	<ul style="list-style-type: none"> - <i>Ailani</i> - <i>Bal Bitauri</i> - <i>Parti</i> - Road, Railway - Riverbanks, Reclaimed land - Forest - Water bodies, (River, ponds, lakes) <p>[Note: land owned and controlled by the government]</p>	<ul style="list-style-type: none"> - <i>Ghat/Chihan</i> (cremation sites, graveyards) - <i>Pati, Pauwa, Dewal</i> - Space allocated/used for <i>Hat/ Mela</i> (weekly village market and/ or festivals) - Religious forest - Trails, <i>Goreto</i> - <i>Chaur</i> (open space for public purpose) - Water sources (well, ponds, water holes, sprouts) - Pasture, grazing land <p>[Note: Utilized, managed by the community]</p>

4.2 Tenure types based on private farming/ cultivation contract

The feudal culture of landlordism of Nepalese society is still prevalent. Land owners allocate land to the peasant farmers for farming under different contracts which are mostly verbal and the terms are in most of the cases biased in favor of the land owners. Share-cropping (*Adhiya/ Bataiya*) is the most common and as the contracts are verbal, the tenant farmer pays a large share of the crop sometimes upto 50% called *Adhiya*. Such tenants are excluded from official records and always in the threat of forced eviction. Following are different variants of tenure types based on farming/ cultivation contract.

Table 3: Tenure types based on farming arrangements

Tenure Arrangements Based on Farming/ Cultivation Contract	- <i>Adhiya/Bataiya</i> (Share Cropping)
	- <i>Mohiyani</i>
	- <i>Thekka/ Hunda</i>
	- <i>Bukraha/ Bukrahi</i>
	- <i>Hali Fogato/ Haliya Chal</i>
	- <i>Samyukt Mohiyani</i>
	- <i>Jot Jirayat</i>
	- <i>Maate</i>
	- <i>Bandaki/ BhogBandaki/</i>
	- <i>Dhito Bandaki</i>

4.3 Tenure types based on institutional contract (*Bhogadhikar* and Leasehold)

In several cases, NGOs or other organized institutions are provided with *Bhogadhikar* (occupancy rights) or leasehold for defined purposes upto defined period under defined conditions. Under Leasehold Forestry Programme Government allocates degradable forest to poor households under time-bound lease with a twin objectives of poverty alleviation and improving ecological conditions of the area.

4.4 Community Forestry

Under Community Forestry approach, local community are granted with a bundle of rights to protect and manage the forest including cultivating of different crops like herbs, cardamom etc, and collectively harvest the forest resources.

4.5 Customary and Collective Tenureship

Despite the fact that customary tenures were delegalized after 1951, remnants of such practices still exist in many tribal and indigenous communities. During the study, it was observed that the communities and the customary leaders decide land governance in their communities. Such leaders work in parallel with the local government authorities elected through legal/ constitutional process, and they are de-

facto decisive. The study team could clearly witness different cases of customary and collective tenure existing. The cases of management of shifting cultivation of *Chepang* communities in the Chure hills of Makwanpur, Dhading and Gorkha districts, land use control like grazing, harvesting and other related matters of *Ghale* communities by *Dakp-Serba* in Upper Manang, and existence of some form of *Kipat* system in *Limbu* communities in Panchthar were some examples.

4.6 Squatting and Informal land holdings

There is a growing tendency of migration from the hills to the terai, and from rural to urban areas in search of economic and other opportunities. The political and armed conflicts also encouraged internal migration. This has encouraged people to abandon less fertile land in the hills and mountains and squat and develop informal holdings in the more fertile plains or open areas in the urban areas. Such holdings are in many cases very old sometimes upto 40- 45 years. They can be categorized into two groups- (1) encroachment or unauthorized possessions which are nor socially nor legally accepted, and (2) informal tenure holdings which are socially accepted but not legally recognized. Such holdings are more common. Cadastral survey programme initiated after 1964 was designed to survey all legitimate land holdings and provide land titling. Many of the land holdings in different area remained to be titled when the land-owners could not produce documents to prove their ownership during the surveys. This is yet another typology of informal tenure.

Furthermore, due to technical reasons many areas were left un-surveyed and therefore the national land registry do not have recording of socially and legally accepted land holdings and no Titles have been granted. Such tenures are termed as Non-formal (Joshi et al, 2017). It is estimated that the informal and non-formal land holdings cover 25% of the total arable land and some 10 million land parcels are out of the formal cadaster (MoALMC, 2018).



Figure 3: Continuum of Land Tenure in Nepal

5. CONCLUSIONS AND RECOMMENDATIONS

- The land tenure system in Nepal has a long history developed over the foundation of feudal system. After the political change of 1951, a process of democratization of land tenure system has emerged designed to go away with the feudal landlordism towards pro-poor land and tenure reforms. But the process is short of achieving desired goals.
- The current land administration system deals with statutory land tenures only. Other forms of locally existing land tenure typology covering some 25% of the arable land and some 10 Million physical parcels on the ground are unaccounted in the national land cadaster.
- The local tenure arrangements like share-cropping and other forms of unregistered tenancy provide room for continuation of feudal land tenure relations. Remnants of delegalized customary and collective land tenure practices after more than 50 to 75 years of land reform efforts indicate food for thought for improvement. The discrepancy between statutory land tenure and locally existing land tenure typology is a dilemma for good land governance. All types of land tenures need to be recognized and incorporated in the national land cadaster.
- As the current land surveying and land titling programme has covered an estimated 75% of the arable land only, the remaining 25% arable area mostly owned by poor and vulnerable need to be covered in the national land cadastre within a short period and with minimal cost. A Fit-For-Purpose Land Administration Strategy is an answer.

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