

Below the Surface of Private Property: Individual rights, common property, and the Nepalese *kipat* system in historical perspective

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This article¹ will investigate the following questions: (a) how was it possible for some Kiranti villages in east Nepal—maybe only a tiny minority²—to largely maintain their traditional rights in landed property over the course of the last 200 years? (b) what were the macro-sociological conditions which enabled this development? (c) which special characteristics of the groups concerned favoured the survival of traditional rights?

I do not adopt the mainstream perspective on the investigation of the Nepalese *kipat* system of land tenure which was initiated by Caplan (1970), adopted by Sagant (1978), Müller (1984), and others, and continued by Forbes (1999). This focuses on the discontinuity in the historical change from collective rights in land to private property, from tribal to state law, from a clan-based economy to a market economy, or as “a broad shift in local-national political relations, a shift shaped by Nepal’s transformation from a kingdom on the edge of the British empire to a nation-state on the edge of an international market economy” (Forbes 1999: 116). Instead, I try to show that the often neglected individual rights belonging to the *kipat* system had a continuity, beneath the surface of private property. In so far as this article is a contribution to recent trends in the discussion of common property resource management systems, it shares the criticism contained in Hardin’s neo-classical theory, the ‘Tragedy of the Commons’ (1968), which shows that “privatisation and government control are not the only mechanisms to affect the use of natural resources. There is a middle way: rules developed at the community level” (Acheson 1989: 358). Its consequences coincide with Neef’s conclusion in his recent study of the Djerma and Fulbe in Niger and the Fon and Ayizo in Benin, that a government should not introduce private property rights, or insist on their effective application in instances where they have been introduced already, if special circumstances exist, such as “high social cohesion of the

¹ This article is based on a talk given at the Blockseminar der Schweizerischen Ethnologischen Gesellschaft in 1998, under the title ‘Kollektive und individuelle Eigentumsrechte bei tribalen Gruppen Nepals im Laufe der neueren Geschichte’. For critical remarks on a draft of that talk I am indebted to Dr Joanna Pfaff-Czarnecka, Zurich University.

² Even though I think the investigated case is not unique, the proverbial heterogeneity of the Kirantis from village to village (Vansittart 1980: 66f.) must be taken into consideration.

local population, low ethnic and socio-cultural diversity, low conflict potential and institutional pluralism" (Neef 1999: 263).

The Sunuwar: a brief outline of the main ethnographic references

The Sunuwar³ or Koinch, as they call themselves, live at the foot of the Everest massif. They number approximately 30,000, and they are the original inhabitants of the area into which the well-known Sherpa migrated during the 16th century (Oppitz 1968). Their language belongs to the Tibeto-Burman family and together with the Rai, Limbu, Hayu, and the Surel, a Sunuwar subgroup, they form the *kirāntī*, who are often considered to be the historical descendants of the legendary *kirāta* mentioned in the Vedas (Singh 1990). The Sunuwar are mainly to be found inhabiting slopes of intermediate altitude in the valleys of the Khimti Kholā and the Likhu Kholā. In the Khimti region they are very Hinduized, while in the Likhu valley they still live largely in their traditional manner (Fournier 1974, Müller 1984).

As among other Kiranti groups, the main crops of the Sunuwar are millet, maize, and rice. About one third of the cultivated land is irrigated and terraced. Animal husbandry is negligible. Today there are no more land reserves. The main unit of production and consumption is the household, almost always identical with the nuclear family; this contrasts with the Indo-Nepalese household, which is often based on an extended family. The prevalent inheritance rule for land is preferential ultimogeniture, "the transfer or residuum of father's rights after other members of sibling groups have received a share during his lifetime" (Goody 1962: 326),⁴ and succession to religious and political offices follows the rule of primogeniture. This regime of inheritance and succession is also typical of other Kiranti groups (Gaenszle 1991: 162ff., McDougal 1979: 59ff.). Landlessness is rare among the Sunuwar and the rate of out-migration is relatively low compared with other groups inhabiting the same region.

The Sunuwar universe of supernatural beings, and Sunuwar ritual practices, are dominated by a strong ancestor ideology which implicates shamanism and forms the frame of the Sunuwar understanding of Hinduism. The main themes of Sunuwar as well as Kiranti mythology are separation and conflict among brothers, and a special trait of Sunuwar and Kiranti culture in general is an indigenous notion of culture called *mukdum* among the Sunuwar.⁵

³ The Sunuwar are described as I met them in the early 1990s. Most data were collected at a village on the east bank of the Likhu Kholā (Okhaldunga District, former *Mājh Kirāt*, East No.3). For further information on Sunuwar ethnography and history, see Egli (1999).

⁴ Women are excluded from land ownership. Only as widows do they have usage rights. Unmarried adult women mostly stay in their parental homes. According to the custom of *sororāt* an unmarried woman is often given in marriage to replace a sterile or deceased sister.

⁵ See Gaenszle (1993) for other Kiranti groups.

Sunuwar social organization is characterized by a segmentary lineage system with rules of fission which are exemplarily described by Evans-Pritchard for the Nuer (Gaenszle 1991: 213). Each exogamous patriline, most of which are named and localized, is subdivided into maximal lineages. These are subdivided into minimal lineages. Each segment has its own ancestor ritual. The minimal lineage is not only a ritual community but also the main unit of institutionalized exchange and permanent cooperation. Cross-cousin marriage, which was probably practised in former times (Gaenszle 1991: 183f.), is nowadays strictly forbidden. It is not the horizontal principle implicated in marriage alliance, but the vertical principle implicated in the descent rules which shapes social organization and the sphere of cultural ideology as well. The position of Sunuwar women, compared with that of Hindu women in Nepal, is relatively comfortable,⁶ mainly because the wife-givers retain a certain kind of protective function over the well-being of their 'daughter' after her marriage.⁷

The Sunuwar ancestor ritual of the minimal lineage (*chengu*) is a periodic repetition of the mortuary ritual. It is celebrated twice a year: after the harvest and during the time of food shortage. The celebration of this ritual is the responsibility of the youngest brothers or the principal heirs.⁸ Large amounts of millet beer (*shyabu*), the main material contribution the youngest brothers make to the ritual, serve as a symbolic feeding for the ancestor souls. In reality, it benefits the elder brothers and their families, who are politically influential, but, in respect of their material status, disadvantaged.⁹ Elsewhere I have shown that the *chengu* ritual creates a paradigm for the exchange of goods and manpower between brothers in Sunuwar society, which helps to compensate for the material differences which are systematically created by the inheritance rules.

In traditional Sunuwar villages the local patriline still generally holds the supreme ownership of the village or ancestral land (*am batek*) up to the present day. The transmission of landed property, whether by inheritance, gift, or purchase, is almost impossible without the permission of the council of clan elders (*amal*). Similar circumstances are described by Gaenszle for the Mewahang Rai (1991: 150). The Nepalese law providing for private property¹⁰ is hardly ever invoked by a clan member who intends to stay in the village. In particular, the Nepalese law of inheritance, a system of equal partition,¹¹ is very seldom invoked.¹² The few exceptions are people who have decided to leave the village for ever.

⁶ See Jones (1973) for the position of Limbu women.

⁷ See McDougal (1979: 88) for the Kulunge Rai.

⁸ According to Cicero's argument in *De Legibus* (see Goody 1962: 379).

⁹ In the village under investigation, the youngest brother is the heir of the parental house in 70% of cases. The youngest sons have about 40% more production than their elder brothers and they own the lion's share of the *khet* land.

¹⁰ Or, more accurately, state property with individual rights of use.

¹¹ Today this law benefits women as well, but this does not affect my argument.

¹² The same is stated by Vinding (1979: 41) for the Thakali.

The influence of the Sunuwar in the village under investigation, which clearly indicates the survival of the most important trait of the communal land tenure system—*kipat*, i.e. the prohibition on the alienation of land to non-group-members—can be seen in the following figures concerning land disputes, the persons who decide them, and the kind of decisions taken. About 75% of the quarrels recorded are concerned with land and inheritance.¹³ Almost all of these quarrels are in a way consequences of the disharmonious rules of the traditional inheritance system. After the death of their parents, elder brothers often demand a share in addition to the land they received around the time of their marriage. Sometimes they threaten to leave the village and to sell their land to anybody who will buy it. But no case is known where this has actually happened, since nobody ever seems to have resorted to the district court at Okhaldunga Bazaar to fight for his rights. This does not seem to be uncommon for Nepal: with reference to a village in the Kathmandu valley, Bennett states, "elder men in the village say they can't remember a single case (out of many threats) where villagers actually went outside" (1983: 8). Land disputes are settled neither above the level of the village panchayat nor among kinsmen. In other cases, influential kinsmen often act as mediators, but in land quarrels they are usually an interested party.

The Sunuwars in the village under investigation occupy almost all of the important offices in the Panchayat: Pradhan Pancha, Upapradhan Pancha, Village Secretary, Mukhiya and Jimmawal,¹⁴ and even the post of Area Member. They all belong to the local clan which founded the village, and which was in former times the official holder of the *kipat*. One main endeavour of these Panchayat functionaries, assisted by the village committee (*amal*), is to prevent the alienation of land to strangers by arranging good deals between kinsmen.¹⁵ In addition, they enforce the norms of traditional inheritance against official Nepalese law. The results of their decisions are evident: 90 percent of the ancestral land is still owned by Sunuwars, 80 percent is owned by members of the local clan, land is still distributed unequally among brothers, and, except for widows, women do not own land.

The Kiranti in Nepalese history and the *kipat* system of land tenure

The history of east Nepal remains obscure up until the formation of the Nepalese state. Most of the Kiranti groups and subgroups were probably incorporated in, or affiliated with, some of the adjacent Hindu principalities, but the historical sources suggest that they had largely disposed of political and cultural autonomy. Even without information on the internal organization of the Kiranti groups, we may assume that they were organized in village communities, where villages were mostly identical with unilineal descent groups with a corporate character and loosely bound together through relations of marriage; they probably also formed temporary alliances against a common enemy (Caplan 1990: 135).

13 This corresponds with data from other places in the Okhaldunga district (FNF 1988: 63).

14 At the time of my research these latter two were still in charge of tax collection.

15 The same praxis is described by Neef (1999: 14) for Niger and Benin.

My assumption is that the former organization of the Kiranti groups does not differ fundamentally from the situation we can observe in many contemporary traditional Kiranti villages.

Even before the Gorkha conquest in the late 18th century, members of the Hindu castes migrated into the Kiranti area, and the different systems of land tenure which were later practised by the Gorkhali were already known. Later decrees by the Gorkhali rulers do not provide evidence for the introduction of new laws and regulations, but seem to be guarantees of rights which were formerly granted (Regmi 1978: 537). Between 1772 and 1774, Gorkha incorporated east Nepal within its actual boundaries, but far-reaching autonomy was given to the original inhabitants of the area (Regmi 1978: 626). This policy of non-intervention was in no way disinterested. Some of the subordinated groups, such as for instance the Limbu, represented serious military potential; to others, such as the Sunuwar, the Gorkhals felt a debt of gratitude because of their support in the course of the conquest (Stiller 1973: 136).¹⁶

The basic item of Gorkhali policy of non-intervention in East Nepal was the guarantee of the traditional form of land tenure called *kipat*.¹⁷ Unlike other forms of land tenure, such as *raikar* and its sub-categories,¹⁸ where the state acts as the superior owner and grants titles to its citizens,¹⁹ *kipat* is a form of communal land tenure, where the state signs over the title to a certain territory to a certain group. In practice, this was done by signing over land titles to local headmen in the names of their respective groups (Regmi 1972: 50).²⁰

The most important trait of the *kipat* system was the prohibition on the alienation of land to non-group members (Regmi 1978: 535).²¹ In his study of the Mewahang Rai, Gaenszle writes: "[p]robably the *kipat* system is due to a tribal customary law based on some kind of religious notion of ancestral land; and the Hindu rulers of the day integrated this law in their administrative order" (1991: 57). As Caplan has pointed out, *kipat* was more than a system of land tenure; it was the basis of identity for the different Kiranti groups (1991: 313).

16 This was mentioned in a document of 1791/92 (Müller 1984: 40).

17 According to Regmi, this right was granted only to c. 4% of the entire Nepalese population (see Pfaff-Czarnecka 1989: 68).

18 *birtā*, *guṭhī*, *jāgir*, and *rakam* (Regmi 1978: 17).

19 Regmi has called this "state landlordism" (1978: 864).

20 Sometimes these were lineages, sometimes clans or members of several clans in the same locality.

21 This was made compulsory for the first time in the written law in 1883 (Regmi 1978: 549), but, according to Gaenszle (1991: 57), the prohibition of alienation expresses the "essence" of the *kipat* system, "even if the rule was not observed strictly all the time".

The *kipat* system and individual ownership

While the existing research largely agrees on these points (Regmi 1978: 538, 1972: 49; Burghart 1984: 109), there is no consensus with respect to the question of whether it is possible to speak of 'property' under the *kipat* regime. For Caplan, it is "misleading to speak of 'owning' *kipat* (as one owns *raikar*) since ownership objectifies the thing owned... It is a case of 'owning' the land and 'being owned' by it" (1991: 313). In the same sense, Pfaff-Czarnecka writes, "[t]he allocation of land was managed within the group ('collectively'); de jure it was signed over to entire localized segments of ethnic groups for common usufruct. A representative of the group established contacts with the rulers. Therefore one cannot speak of property in respect of *kipat*" (1989: 68f.). In contrast to this, and together with McDougal (1979: 14), I take the view that it is possible to speak of 'property', i.e. collective as well as individual property.²² To what extent it is possible does not depend on the special issue of Nepalese history in the first place, but upon the question of the existence and significance of property in tribal society. This is also the perspective taken by Caplan, and I agree with his perspective, but not with his conclusions. I will return to this question later in this discussion.

Another characteristic of the *kipat* system is the special legal authority that is assigned to the local headmen by the state. Local headmen were appointed to allocate the land to the *kipat* co-owners, to collect the taxes and—with the exception of the five cardinal crimes—to administer justice. They were also entitled to levy compulsory labour, fines, and special payments from their *kipat*yas and new settlers in their own favour. In times of sufficient land reserves the *kipat*yas supported the immigration of new settlers, hoping to transfer these burdens to them. At that time the local headmen enjoyed quasi-sovereignty within the feudal order of the Gorkha state and were respected as "younger brothers of the king" (Sagant 1978: 75).

For a long time, the *kipat* system offered political and cultural autonomy to the Kiranti groups and the remembrance of the 'original' *kipat* times is still an important part of Kiranti identity (Jones 1973: 65, Gaenszle 1991: 60, Caplan 1990, 1991). On the other hand the same system contributed, especially through the influential status of local headmen, to the integration of tribal groups into the state. The formal abolition of *kipat*, first for irrigated fields (*khet*), and then in the 1960s for all kinds of fields, merely accompanied a development among a majority of Kiranti groups which had been unleashed mostly by themselves. The state-controlled immigration of Indo-Nepalese (Regmi 1972: 50ff.), at first largely welcomed by the tribal population, went hand in hand with developments whereby *kipat* land was left to Hindu immigrants for usufruct, or the local population, not versed in the use of money, became encumbered with debts and gave land as mortgages to the immigrants. The step to legalize this kind of provisional transfer was not a minor one

²² For more accurate definitions of common, communal, individual, private, and state property, etc., see Bromley and Cernea (1989: 11-19).

in a state where Hindus were privileged. Or, in another scenario, the land given to the immigrants was immediately registered as *raikar*, i.e. private property. Also, the illegal annexation of land by immigrants, especially of pasture land, is often documented. In the same measure as the local groups lost control over land, the legal competence of local headmen was also restricted, so that in legal matters immigrants could increasingly approach regional courts which generally favoured Hindu applicants. These processes were first investigated by Caplan (1970) for the Limbu and by Müller (1984) for the Sunuwar.

The formal abolition of *kipat* went hand in hand with the immigration of Indo-Nepalese into tribal areas. But where there was no immigration, the formal abolition of *kipat* had few effects in practice, and even today we may find localities where land is *de facto* mainly controlled by those groups which were formerly assigned as *kipat* owners. Even under the conditions of private property, tribal law, on which the *kipat* system was based, is still alive.²³ Such localities are mostly to be found in sites which are disadvantageous for paddy cultivation, a practice preferred by the Indo-Nepalese immigrants. We can take the criterion of 'disadvantageous site' in this respect as an important precondition for the survival of the *kipat* system. In my opinion, the question of which macro-sociological and cultural factors have the same impact depends mainly on one's assumptions about the extent to which it is appropriate to speak of (individual) property in a tribal society. It would be absurd to assume a continuity of traditional property rights if these rights were only of a collective kind. In a short departure here, I wish to clarify for the purposes of this article the question of the coexistence of individual and collective rights in land in tribal society.

The coexistence of individual and collective rights

From Plato to Morgan, property in 'primitive' society was considered to be 'weak' or non-existent, and land in particular was considered to be a collectively owned good. Lowie (1947 [1920]) was one of the first to criticize this view. By recourse to a large variety of ethnographic examples, he not only emphasized the coexistence of individual and collective property rights and the impossibility of understanding history or evolution as a continuous transition from one category to the other, but he also pointed out that common property could be found everywhere. Contemporary researchers agree that collective as well as individual property rights can be found even in hunter and gatherer societies (Barnard and Woodburn 1988: 10); the creation of individual rights is believed to be largely a consequence of individual labour (ibid.: 23ff.).

Roberts' view that people would not develop an intense relationship with land under conditions of swidden agriculture (Roberts 1981: 105), which was formerly also prevalent among the Kiranti, is wrong, as Richards showed for the Bemba of Zambia in the 1930s. As soon as someone is cultivating a parcel of land, he not only possesses this particular parcel or has rights of usufruct in it, but also has full ownership of it, and he may inherit

²³ The survival of the *kipat* system after its official abolition is also considered by McDougal (1979: 30), Gaenszle (1991: 69), and Forbes (1999: 120).

the land (Richards 1939: 10). A general problem with which we are still confronted in hunter and gatherer societies is that "in some instances we cannot divide up sorts of property according to whether they are individually or communally held. The problem is that, often, analytically separate individual and group rights exist in the same item of property" (Barnard and Woodburn 1988: 10).

In the early 1940s Gluckman dealt with this problem in relation to agricultural societies with more intensive methods of cultivation, and his conclusions for his African cases seem to be valid for the Kiranti as well. According to Gluckman, the fact that land is distributed relatively evenly in tribal societies and that each individual has a right to a parcel of land does not mean that land is owned 'communally' by groups (Gluckman 1983: 4, 10). Also, cooperation does not reduce the individual claim (*ibid.*: 23); it may only create additional collective claims. Among the Barotse the right of the group consists mainly in a prohibition on the alienation of land, but this restriction is not an argument against the existence of individual property. Gluckman also made the point that a criterion for property can be seen in the possibility of inheritance (1969: 59ff.). To facilitate an appropriate comprehension of complex relations of ownership, Gluckman distinguished between "estate of rights of administration" and "estate of production" (*ibid.*): the first qualifies property in respect of the collective or its representative as a king or local headman, the second qualifies it in respect of individual labour.

As Bromley and Cernea have stated, the term 'common property' "has been largely misunderstood and falsely interpreted for the past two-three decades. Common property regimes are not the free-for-all that they have been described to be, but are structured ownership arrangements" (1989: iii). A widespread confusion of the notions of 'property right', 'right of possession', and 'right of usufruct' in tribal society seems to come from leaving the topic of the continuity of property out of consideration (von Benda-Beckman 1979). We are dealing with property in agriculturally used land. Among peasants, whether tribal or 'modern', land is still acquired largely via inheritance (e.g. Neef 1999: 90). The continuity of property is guaranteed and regulated by rules of inheritance. If it is a commonplace among European jurists that "property without the law of inheritance is unthinkable" (Piotet 1978: 2), and if inheritance law is considered to be "a very clear measure for the significance of property" (Wesel 1985: 107), we cannot doubt for one moment that individual property exists in agrarian societies of all kinds.

Another point of view goes further in so far as it denies the possibility of using 'our' notion of property for tribal cultures. The Bohannans declared that the Tiv do not know property (in land), not only because land is alienable but because "the relationship between people and things, which in English is translatable into a set of 'ownership' ideas, backed by 'property' law and deep regard for the property of others, is seen as a social relationship by Tiv" (1968: 92). The relativism of the Bohannans is based on another widespread misunderstanding. If property is seen as "a relation between a person understood as an absolute control" as Baur interprets the Roman law (1983: 222), there are indeed only two alternatives: either one denies property in tribal society or one accepts

only common property. But property in modern states as well as among the Tiv is *not* a relationship between a person and a thing, but a relationship between persons with reference to that thing (Benda-Beckmann 1979: 42, Bromley and Cernea 1989: 5, Weimer 1997: 3). Property implies a control over things, but it cannot be reduced to this. Relations between persons vary from society to society. They are not the same among the Tiv and the Sunuwar, in tribal societies and in modern nation-states. Therefore, instead of supporting a sharp relativism, we have to take into consideration the relativity of the notion of individual property in general, even if its codification in Roman and modern law suggests its absolute character. In this perspective, taking into account the likelihood that social relations and functions may coincide in certain contexts, it is obvious that forms of property, which are at first sight quite divergent, may coincide in fundamental principle as well.

In 1988, when Caplan returned to the Limbu village he had studied in the 1960s, he was unable to find a vestige of the *kipat* system (1991: 312ff.). He interprets this observation in terms of a substitution of common property in land with private property as prescribed by Nepalese law. Because Caplan assumes that under the conditions of the *kipat* system no individual property was possible, he interprets Limbu history as a transformation from a tribal to a peasant society, basing his argument in addition on Gregory's dualism between two fundamentally distinct kinds of economy:

- (a) 'clan-based' economies, involving primarily non-commodity ('gift') exchange and
- (b) 'class-based' economies, characterized principally by the transaction of commodities (Gregory 1982: 18). In the former there is no private property, and people do not have alienable rights over things... In the latter, there is private property, implying alienable rights over things, thus requiring a sharp distinction to be drawn between a thing and its owner. (1991: 306)

Although Caplan refuses to assume a conception of linear evolution (1991: 307), Gregory's dualism induces him to reduce the variety of historical changes to one and the same process. In this perspective the question of whether and to what extent the *kipat* system has survived cannot be asked, and to search for conditions within which it has survived seems to be superfluous. If we take Gregory's two kinds of economy as 'ideal types' in the Weberian sense, they may serve as analytical tools; otherwise, they prevent a historical analysis.

Instead of adopting Caplan's dualistic perspective, which denies the possibility of a coexistence of common and individual property, we have to base a historical analysis on the possibility of such a coexistence. This is the criticism formulated by Moore of Caplan's earlier work. Moore also distinguishes between two kinds of property and she proposes a better understanding of the functional distinction between 'estate of rights of administration' and 'estate of production' as introduced by Gluckman (1978: 246). Only from this starting point does it become possible to investigate a heterogeneous variety of historical

developments,²⁴ and at the same time to discover the survival of the collective and individual rights characteristic of the *kipat* system beneath the surface of the private property of the Nepalese Code.

We have no access to historical sources which would inform us about individuals' rights and their workings within the *kipat* system in former times. But why should *kipat* work fundamentally differently from other tribal ownership systems? We rather have to search for reasons for the neglect of individual rights in these systems. On one hand this was a part of the 'terra nullis argument' used mainly by colonial powers while occupying the land of the locals (Le Bris *et al.* 1991 for Africa). In the case of Nepal it seems to be an adoption of the ideology of Kiranti headmen.²⁵ Forbes' description of the *kipat* system, taken from a Yamphu-Rai headman, is typical in this respect:

The most important features of the *kipat* system included unmarked boundaries around fields and a system of land tenure based on the categorization of people, not land. (Forbes 1999: 116)

There are no permanent fences... and... boundaries were not recorded. Each winter people build temporary fences around fields, ... but they tear them down again after the crops have been harvested. Stone walls hold up the irrigated rice terraces that have been sculpted onto the landscape, but these walls do not keep things in or out; they simply make the land more level.... Like bargaining over prices in the bazaar, rights to *kipat* lands depended more on the relationship among users and on the resource in question than they did on any fixed rules of tenure... [P]roperty boundaries were not marked physically or legally... *Kipatiya*... had the right to claim as much land as they could physically clear and farm... When *kipatiya* default on their taxes or die heirless, the *kipat* land reverts to the *jimmawal*. (Ibid.: 118)²⁶

This contrasts sharply with the description offered by another of Forbes' informants: "Everyone already had their land; the fields were already divided, and the *jimmawals* and their subjects knew which fields belonged to whom" (ibid.: 133), and another more realistic

24 Probably, one will find certain historical developments only in particular localities and among particular ethnic groups.

25 Among anthropologists as well as among locals. In the 1930s and 1940s there was a nativistic Limbu movement, called *satya hāngmā*, committed to the restoration of the *kipat* land that had been lost to Hindu immigrants. But, as Regmi has pointed out (1978: 583), behind the collectivist ideology of that movement there stood the interests of Limbu headmen who wanted to recover their former privileges.

26 This last argument is often used to deny the existence of individual rights in tribal systems of land ownership. But the heritage of a person without heirs as determined by the particular law of inheritance also goes back to the community or the state in many modern societies. This practice does not speak against private property.

statement by Forbes: "Most landowners can recite the owners of their fields back four or five generations, and *jimmawals* know which fields were part of whose *kipat*, which fields were acquired in some other way, and who the original owners were" (ibid.: 119). We cannot found our view of the *kipat* system on the views of headmen. Their privileges and their arbitrary behaviour should not be interpreted as evidence for the non-existence of individual rights of the *kipatiya*, as many authors seem to imply between the lines.

Factors supporting the survival of *kipat* rights

What are the characteristics of the tribal groups of East Nepal which support the survival of the traditional property system in the localities which are mostly badly sited and largely unaffected by immigration? The importance of landed property increases according to the scarcity of land and the intensity of cultivation, whether this is caused by more effective technologies or the pressure of the state (Goody 1976). In so far as we can assume that the tribal groups of east Nepal were familiar with plough cultivation in terraced and irrigated fields before the Gorkha conquest (Müller 1984: 71), we may conclude that a significant form of individual property existed in land in that era. According to Platteau's 'evolutionary theory of property rights' with the increase of land scarcity more and more fields were "owned and inherited by individuals" (Netting 1982: 471, Acheson 1989: 360).

The significance of property may also have increased because the main economic unit among the Kiranti is not a large kinship group but the household based on the nuclear family. The predominance of this kind of household seems to be a direct consequence of the marriage system and the high position it grants to wife-givers. To avoid conflicts between the newly married woman and her affines, a new household is usually founded. In addition, certain forms of inheritance law do increase the significance of property. Thus, a rule of unigeniture gives higher value to property than a rule of equal partition with its consequence of splitting. This kind of inheritance does not only affect the importance of property but may also contribute to the survival of traditional rights. Even if only 'preferential', a rule of indivisibility seems to be favourable for management as well as for productivity. This is also in the government's interest. These are the reasons why modern states still tolerate exceptional laws of property and inheritance for peasants (Lange and Kuchinke 1989: 1075). It is not by chance that in a decree given to the Sunuwar in 1824 certifying their ancestral rights to land particular mention is made of their traditional rule of inheritance (Fezas 1986: 173).

Preferential ultimogeniture as practised by the Kiranti is also a regulation which hampers social change from within, especially if it is complemented by a principle of primogeniture for succession to political and religious offices, and the additional rule that elder sons, as soon as they are in the position of household head, participate in the political influence exerted by the old. This ensures that the economically favoured principal heirs are excluded from political life on two counts. Although this system is an elegant solution to the problem of the support and care of elderly people, it reduces internal dynamics and their contribution to change.

The survival of ultimogeniture is also favoured by the opportunity of short-term migration for disadvantaged heirs (Goody 1962: 323). Among the Kiranti, service in the British Gurkha regiments is a traditional money-making opportunity which allows co-heirs to stay in the village. I was unable to find a single case of a youngest brother serving in the army in the village under investigation.

A further factor favouring the survival of the inheritance system of the Sunuwar—and I assume for other Kiranti groups as well (Gaenszle 1991: 98)—is the asymmetrical relations of exchange through which the principal heirs systematically compensate the disadvantaged co-heirs. A final factor can be seen in the strong ancestor ideology and its core, the ancestor ritual, which serves as the main instrument creating these kinds of exchange relations, but masks their asymmetrical character at the same time.

Concluding remarks

We know today that the introduction of private property in developing countries did not increase productivity, nor did it prevent the overuse of resources, as Hardin has assumed. This failure was often blamed on a neglect of the former efficiency of common property systems (Feeny *et al.* 1990). Before now staking everything on the common property card, we should reach a better understanding of this notion. In the footsteps of Hardin, common property was often confounded with systems of free access. Individual rights within common property regimes were excluded.

If common property regimes are “structured ownership arrangements” (Bromley and Cernea), this does not mean merely that there are “indigenous mechanisms to allocate use rights to members” (Feeny *et al.* 1990: 10) or, more abstractly, that “tenure systems are embedded in socio-cultural systems” (Platteau 1996: 75), but that they may go hand in hand with systems of individual property with which we are well acquainted from the experience with ‘our’ private property. Individual rights often differ only in degree from private property, and they may be found as effectively practised individual rights below the surface of private property as it is fixed in legal codes but not applied in practice. Just this discrepancy is a major trait of the legal pluralism that is often described for Africa (e.g. Sow Sidibe 1991). Neef shows the general counter-productivity of government interventions to resolve this discrepancy and the advantage of a laissez-faire policy in cases where traditional systems of ownership work properly without, or below the surface of, modern private property. The conditions determined by Neef for such cases and mentioned in the introduction seem still to exist in certain Kiranti villages of east Nepal.

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