

# **Land Legislation and Pastoral Adaptation to Climate Change - The Example of Mongolia**

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This paper addresses the impacts of climate change in Mongolia asking what legal instruments can help to assure the adaptation of pastoralism - being the predominant economic activity and mode of life of the rural population - to the changing conditions.

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## **Introduction**

Mongolian herding is a proven livelihood system that has been reliable and successful for a long time, adapted to the local conditions; around 30 % of Mongolian households make a living directly from livestock breeding. However, it has always involved risks related to weather and climate variability. During the *zud* – the harsh winter and spring – of 1999/2000 and 2000/2001 Mongolia's herd was reduced by over two million livestock. Thrown into the new system of a market-oriented economy, which due to the omission of many state jobs brought many people to try their fortune as unexperienced and poor herders, leading to an important heterogeneity of the pastoralist society, and deprived of the former intensive Soviet assistance through hay reserves and transportation facilitation for long movements of herds pastoralists were not able to cope with the occurrence of these extreme climatic events. These events have drawn the attention to the devastating role that risk plays in the pastoral economy.

Climate change is likely to increase the frequency and intensity of climate hazards in such an already extreme climatic region as Mongolia. Located in the northern latitudes, Mongolia is part of the regions where the highest global warming is occurring. The 1.9C temperature increase since 1940 has led to short, rapid warming and melting of snow cover occurring in winter. As the ground is then still frozen, the melted water creates ice sheets on the ground surface, impeding animals from both grazing and using snow as a substitute to water.

Adaptation and disaster risk management options for pastoralists will become more and more crucial. Due to the socio-technical system of pastoral livelihoods, these options are mainly determined by the possibility of accessing natural resources, mainly pasture, water and salt licks. Besides numerous customary patterns, the access to pasture land is regulated by the land tenure legislation. The real capacity of a legislation to solve problems does of course depend on its implementation and on the quality of governance in a country. However, the existence of an adequate legal framework regulating the access to pasture land is of particular importance in the attempts to allow pastoralists to adapt to increasing risk as a consequence of climate change. This paper will describe the development of pastoralism, property rights and land tenure legislation in Mongolia. Potential solutions to the issues of land degradation - with the consequence of shortages of usable land - and vulnerability to extreme events will be brought into relation to possibilities offered by the land related legislation. Good starting points as well as weak points of this legislation will be analyzed and other factors impeding the use of existing possibilities will be emphasized, leading to the presentation of ways ahead.

## **The Importance of Access to Vast Areas of Pasture Land**

As pastoralism is a system of animal husbandry often exerted in extreme environments and on marginal soils, there is a need for mobility and flexibility of access to land and other natural resources in order to create options for disaster risk management and adaptation to climate change. At the same time, the ongoing degradation of Mongolian pasture land makes it important to create incentives to prevent pasture from degradation in order to not further increase scarcity of resources. To combat this scarcity, it is important to reactivate remote pastures as well. Thus, the regulation of the access to pasture land is of overriding importance.

## **Options for Access Regulation to Pasture Resources**

The traditional access regulation system in Mongolia has largely disappeared as a consequence of the socialist time of complete state regulation and the following transition to a market economy

with the almost abandonment of any kind of regulation and a situation of de facto open access. In the international debate different options are discussed to regulate the access to pasture resources: The reestablishment of a strong state regulation, privatization and land titling, or a community based management based on herder groups. Privatization of pasture land is unsuitable for a country where around one third of the population relies economically on the flexible access to this resource for their pastoral livelihoods. In addition, it is in contradiction with the current Mongolian constitution and not accepted in the public opinion. A mere state regulation will be impossible to handle for the state due to a lack of financial and personal resources, and the complexity of the issue because of extreme local variation and the geographic extension of the country. The past 18 years have shown that the state alone cannot cope with this issue. Therefore, the option of an access regulation through user groups is preferable.

### **Building User Groups**

User groups can be formed either on kinship or following a territorial approach (Fernandez-Gimenez et al. 2008). The kinship approach allows for an easier communication between the members of the smaller and socially related group, which maintains transaction costs for agreements low. However, they pose the problem that social and spacial boundaries may not be well in accordance with each other because usually, not all herder households on one same territory will be part of the same group. This problem can be avoided with the territorial approach meaning that all inhabitants and resource users of a certain territory should form part of one group. However, it has to be acted with caution in order not to create parallel structures to the existing political structures, especially the structure of the *bag*<sup>1</sup>. This danger could be alleviated by giving groups an economic function, e.g. as producers' cooperative, which distinguishes them from the mere political and not rent-seeking function of the *bag*. State support can be useful in the phase of establishment of these groups, and for inter-*sum* and inter-*aimag* agreements, especially if access to additional pastures will be needed in case of disasters.

### **Key Principles for a Legal Framework for Land Management Based on User Groups**

Law is certainly not per se a representation of a common will and not neutral to the political and economic interests of parts or groups of the population, nor is it always enforced neutrally through independent state institutions (see e.g. Benda-Beckmann 2005, Benda-Beckmann 2009). Besides the official law of the state and international law, there are often traditional and religious legal orders and a wide variety of principles and procedures generated by non-state actors. However, state law is a crucial aspect of governance.

Experiences and lessons learned from other examples of pasture management frameworks as well as from the forestry sector in Mongolia show that an adequate official legal framework is extremely helpful in order to allow for the formation and operation of user groups. It must meet with some key principles.

A concrete procedure for granting tenure rights should be in place, those tenure rights should be exclusive rights for the respective user groups and adequately secured. Furthermore, groups should be provided not only with tenure but also with management rights to enable them to carry on the responsibility of sustainable maintenance of the resources allocated to them.

With regard to the organization of the groups themselves, clear criteria for membership status and

<sup>1</sup> Smallest administrative unit at rural level, including less than thousand individuals, sometimes only 30 to 50 families.

corresponding rights and duties should be in place as well as working mechanisms for intra-group dispute resolution.

Concerning the external relations of groups, there should be clear provisions for the legal recognition of groups and the formation of land possession contracts, and procedures for resolution of conflicts with other groups or with the land owner – the State – should be provided. In addition, the responsibility of the State for a subordinate coordination through a broad land management plan at *aimag* and national level and the coordination of land allocation to the various groups must be clearly determined. Ultimately, adequate capacity building must take place in order to make all regulations available to the knowledge of the stakeholders and enable them to participate in their implementation.

### **Historical Context of Land Tenure Legislation in Mongolia**

It is important to understand the historical context of land tenure legislation in Mongolia as well as the general current legal frame in order to analyze if the Mongolian land regulations meet the listed principles and are an adequate tool facilitating the needed access of pastoral user groups.

In Mongolia, individual private ownership of pasture land has never existed. Before the communist revolution in 1921, pasture allocation and use were governed in many areas by a combination of formal regulation imposed by ruling nobles – secular princes or important lamas in the Tibetan Buddhist church - and informal norms and customs.

After the revolution in 1921 the concept of pastoralist lifestyle was included in the socialist concept by the Mongolian People's Revolutionary Party. Although pasture use was regulated by the state through the mechanism of the so called *negdels* - the collectives each of which managed pastoralism in an entire *sum*<sup>2</sup> -, the decisions of the *negdels* were often influenced by customary patterns of use and tenure. Important investments were made in water supply, winter shelters, hay and fodder production and transportation for the pastoral technique of *otor* by which herds are repeatedly moved over distant and lesser-used pastures as a method of intensive feeding. Summarizing the property rights situation of that time, land was owned by the state, use was managed by the collective's leaders, and within the areas allocated to each collective, pastoral households made use of recognized areas of pastures.

With the end of socialism in 1990, pasture use was initially not formally controlled. In 1992, the *negdels* were dismantled, and collective and state-owned livestock and other assets were privatized by issuing share coupons which employees could use to claim a share of the collectives assets. Land, however, remained a public resource in state property. Its use by local pastoralists should have been regulated by local government, but during the first years of this transition period it can be said that- despite the fact that all land was in state ownership - there was rather a situation of de facto open access to the resource.

### **Property Law and Land Legislation in the Current Legal System**

One of the most remarkable results of the transition in Mongolia is the establishment of a new system of law in which the property law is incorporated. The current system of Mongolian law borrows from the Romano-Germanic legal tradition and is therefore divided into private and public law. There are manifold customary norms. They are not considered to be a principal source of official law. However, some evidence of the importance of customary rules can also be found in

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<sup>2</sup> Local government district, including something around thousand households.

Mongolian written legislation (Narangerel 2004). There is a prohibition on judicial interpretation in Mongolia (Lindsay et al. 2006). This means that judges are not allowed to fill in indefinite legal concepts. This is common in socialist legal systems, where law is only meant as another means of implementing governments' decisions. It will be difficult to preserve this concept outside the context of a planned economy, because many abstract legal terms are needed in order to be able to cover reality in its complexity and unforeseeable developments. A prohibition of judicial interpretation leads to a need of extreme concretion if a legal provision is to be applied efficiently. Property law is found primarily in Articles 83 to 152 of the Civil Code. It designates property - synonymously termed as objects - to legal subjects<sup>3</sup> who may be the owners or the possessors of this property. As in many countries' legal systems a distinction is made between movable and immovable property. Land is classified as immovable property as are assets such as buildings that cannot be used for their original purpose when they are separated from the land. The right to ownership of immovable property has to be registered with the State.

The core elements of Mongolia's land legislation are Article 6 of the Constitution, which deals with the possibility of private ownership of land, Charter 12 of the Civil Code, the 2003 Law of Mongolia on Land (LML) and the Law on Allocation of Land to Mongolian Citizens for Ownership (LALMCO).

Land tenure is regulated mainly by the Law of Mongolia on Land (LML) enacted in 1994, which was followed by a revised version in 2003<sup>4</sup>. As the LML contains provisions for leasing of campsites and pasture, it introduced some provisions for the regulation and management of pasture land. Leasing of winter and spring campsites began in 1998, but the local administrations were slow to divide and allocate grazing land. This was partly due to an impreciseness of the law concerning the issuance of certificates of possession over winter and spring campsites. Traditionally the right of a campsite entailed an implied use right for the respective winter and spring pastures in the surroundings within a radius of several kilometers (Sneath 2004). However, with the wording of the law it remains unclear if the certificates of ownership apply to these pastures as well. Most *sum* issued certificates only for winter campsites (Fernandez-Gimenez and Batbuyan 2004), thus for small point locations.

Summer and fall pastures must remain openly accessible, and so must water and mineral licks. The law empowers *sum* and *bag*<sup>5</sup> governors to enforce these provisions and to regulate seasonal movements and stocking rates, but few of them are aware that they have this authority, nor do they have the resources to carry it out (Fernandez-Gimenez 2006; Fernandez-Gimenez and Batbuyan 2004).

With regard to the use and possession of land by groups, the LML regulates the issuance of possession contracts. Land possession is provided for a duration of fifteen to sixty years through a license that may be extended for no longer than forty years at a time, Art. 30.1 LML. These land possession contracts are made with the *sum* land authority. They are thus only possible between a legal subject and the State. The possibility of leasing contracts between two legal subjects,

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<sup>3</sup> Legal subjects can be individual citizens, but also legal entities such as business entities or organisations.

<sup>4</sup> The primary motivation for revising the law was to make possible a - limited - land market for urban and peri-urban land, household plots (including herders' winter camps), vegetable gardens, hayfields and arable land, amounting to a total of around 2 % of Mongolia's land area. The basic provision concerning pasture land - that it shall be property of the state and protected from private ownership - remained unchanged. (Mearns 2004, p.144).

<sup>5</sup> The smallest administrative unit, covering only up to 1000 people.

transferring the right to use the land to a third party, or the possibility of sub-tenancy are not mentioned in the LML but are possible according to the Civil Code. The advantage of a land possession agreement compared to a mere use contract consists in the fact that the LML requires the government to compensate land possessors if their land has been given away or repossessed by the government. However, this applies only if the conditions for compensation are spelled out in the respective contract. Due to such ambiguities of the LML, it cannot be seen as sufficient to re-install a system of sustainable pasture use.

If land is allocated to individuals or groups the question if their tenure right is only a use right or a more secured possession right is of overriding importance. With regard to a potential future legislation specifically regulating the access to pasture land it should therefore be carefully taken into account that only awarding possession rights might provide land holders with the necessary security that makes them willing to invest in the long-term maintenance of the land.

The Law on Allocation of Land to Mongolian Citizens for Ownership (LALMCO) adopted in June 2002 has the purpose to allocate land to citizens for ownership, Art. 1 LALMCO. According to Art. 4 and 7 LALMCO, the allocation is limited with respect to the purposes the land will be used for and with respect to certain categories of land. The purposes provided by the law are restricted to family needs as well as agricultural and commercial purposes. With regard to the categories of land, grazing land and forests are exemplary mentioned by Art. 6.1.1 LALMCO. Furthermore Art. 6.1.2 LALMCO restricts the scope of the provisions on privatization to - tilled and untilled - agricultural land. Although this formulation seems to be contradictory, it has to be read in synopsis with Art.6 of the Constitution that bans the privatization of pasture land. In addition, Art. 7.1 sets the size of land that should be transferred for free to the particular citizen. These provisions reveal that the land privatization does not cover large areas of pasture land as the main resource of the pastoralist population. Thus, as a result of the controversial privatization debate privatization under the LALMCO is limited to non-pastoral land.

The recent draft of a Law on Pasture land can be a good starting point for a legislation helping to re-install a system of sustainable pasture use. It addresses for example delays in the issuance of possession contracts with a provision that demands the issuance of a possession contract within 5 workdays. However, it does not meet either with all of the key principles mentioned above.

### **Required Improvements**

Therefore, further legislative actions are necessary that connect the principles for group forming with those of land allocation in order to create better incentives for pastoralists to form user groups and to take over responsibilities for the management of land. They have to take into account especially the need of clear provisions for all procedural steps and a reasonable order of the requested procedure of the land possession contracting. In addition, the provision of model contracts is missing, which poses an obstacle for potential land managing user groups to become active. Making available such model possession contracts, as well as exemplary pasture land management plans would stimulate more effective group formation and operation of existing groups. Furthermore, in order to meet the key principles of tenure security and exclusivity, unintended overlapping land allocation must be avoided. In addition, detailed criteria for the possibility of land condemnation as well as concrete compensation regulations in the case of such

condemnation should be determined. To facilitate both, further efforts to develop a working land registry will be necessary, which will also allow for an adequate land valuation as a prerequisite for the calculation of equitable compensation payments.

Concerning the principles with regard to intra-group relations – clear membership criteria and provision of dispute resolution mechanisms – further research is necessary to evaluate whether the consideration of criteria based on the social structure and kinship, or rather of territorial criteria is preferable to determine membership in groups. Either way, overriding importance should be given to clearly determine and stipulate the respective criteria. Model user group charters would be very beneficial at this point. With regard to the dispute resolution mechanisms, third party reviewing of the results has proven beneficial. It would be useful to develop a set of rules that can guide third parties in such reviewing processes.

Similarly, efficient dispute resolution mechanisms for external conflicts must be established; above all ensuring not to create conflicts of interest due to a double role of one same governor being responsible for both, the land allocation and the following conflict resolution – possibly even with the State as the land owner involved as one of the conflicting parties - concerning the allocated land. To meet the key principle of subordinate coordination, the role of the State in this pasture management system based on user groups has to be regulated. The functions of the State are to draft broad land management plans at national and regional level, to take care of the inclusion of less capable or less wealthy herders, and to take into account the need of reserve pasture for incidences of disaster. These responsibilities of the State have to be clearly determined, while on the other hand its restriction to this role has to be made clear as well.

Ultimately, not only the legal but also a broader institutional framework for adequate information services and capacity building of stakeholders has to be implemented. A broad reform of the land management system cannot be achieved without the active participation of the persons concerned, the pastoralists.

### **Concluding Remark**

Without question, the formation of herder groups and the development of a user group based pasture land management system does not only enhance the adaptation potential of pastoralists, but also generally avoids further land degradation and consequential scarcity of pasture resources. This shows that adaptation to climate change is often accompanied by general development.

Although most of the proposed improvements of the legal framework, especially the creation of an adequate institutional framework for capacity building and participation, are rather long-term activities, there is no time to lose because climate is changing and degradation is increasing. Adaptation and land management are very pressing issues for a positive development and accumulation of wealth of pastoralists in Mongolia.

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