

## Evidence for policy



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## Customary Land Rights of Indigenous People in Nepal: Issues and Lessons

### Key Policy Messages

- Globally, indigenous peoples (IPs) have different types of customary land practices with a diverse setting of livelihood strategies. The IPs in Nepal have also developed their particular customary land use and tenure systems through time, which have existed since time immemorial and continue to be practiced until today.
- The recognition, protection and fulfillment of IPs' right to land seems more crucial dynamics of Nepal's identity politics, post-disaster rehabilitation, conflict management, social movement, and State-restructuring in a highly polarized political interests.
- However, legal recognition of the IPs do not always guarantee the practical implications at the grassroots level for the full-fledged enjoyment of individual and collective rights of IPs as provided in national/ international instruments. Consequently, they continue to face land dispossession and exclusion on a wide scale.
- In the post-constitutional context, Nepal needs to respect the economic, social, cultural and identity values and importance that IPs attaches to their lands, territories and resources, and take immediate steps with a wider collaboration of State actors, policy makers and civil society groups.

### Introduction

Indigenous peoples (IPs) across the world are known by different names and legal identities: first nations, ethnic minorities, hill people, up-landers, tribes, scheduled tribes, *adivasis*, cultural communities and religious minorities. While there is no universal legal definition of indigenous peoples, there have been some local narratives, symbols and attributes applied to its scope. Most of the literatures and legal provisions, conceive that the IPs have distinct defining attributes, which include: (i) self-ascription or self-identification, (ii) a definable territory, (iii) historical resistance to colonization, and (iv) continuing cultures and traditions that have historically been differentiated from the dominant majority (Kingsbury, 2008, p. 126-130). However, critics further maintain that the self-descriptions, historicity and customary identity of the IPs often portray a resistance to non-ethnic heterogeneity, colonialism, State power, and impositions by dominant cultures and religions.

Sociologically, the construct of IPs in Nepali society posits a unique combination of heterogeneous features and differentials involving social, cultural, economic and political dimensions. The 2011 census identified 126 different ethnic groups, over 123 languages and great religious diversity. The Nepal Federation of Indigenous Nationalities (NEFIN) classified the 59 IPs (*adivasi/ janajati*) recognized by the government into five categories based on a set of socioeconomic indicators: 'endangered', 'highly marginalized', 'marginalized', 'disadvantaged' and 'advantaged'. NEFIN defines IPs or "indigenous nationalities" as communities or people as those ethnic groups and communities that 'have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own' (NFN, 2013). Despite its larger coverage, this definition has been criticized over its due focus on socio-cultural aspects rather than economic and class dimension. The level of marginalization is also questionable. Furthermore, the classification of the IPs on the particular basis of land tenure system has been also missing aspect.

## The Matrix of land: Multi-dimensional

Land creates a political-economic basis of power structure in most of the developing countries. It plays a central role in the culture and survival of IPs. UN Permanent Forum on IPs has recognized land as 'the foundation of the lives and cultures of indigenous peoples all over the world' (UNPFII, 2007). For most of the Nepal's IPs, land is more than just an economic asset or commodity. Land is life itself, rooted to a territory and history. It provides the foundation for self-identity, personal security, faith, culture, livelihood and self-governance. Land is where one's ancestors are buried and where sacred places are visited and revered. They have lived sustainably with their environment over generations, and have evolved their own customary property regimes with multiple resource-use systems and corresponding rights and responsibilities over farming, foraging, mining and grazing. Customary land tenure, thus, comprises of the systems where some social authority or local political entity exercises administrative rights over the land. In most of the Asian countries, the customary practices cover different practices and traditions over range lands, plains, river systems, forests, coastlines, traditional waters and fishing grounds<sup>1</sup>.

To understand customary land rights in Nepal, one should give due attention to the history of unification and modern State-building marked by a systematic process of disenfranchisement of IPs in many regions of the country. The indigenous peoples lost their autonomy and self-rule with the territorial unification of Nepal in 1769 under the monarchy. The imposition of discriminatory land tenure systems such as the *Birta* and *Jagir* (land grants given by the king to favored individuals) and *Guthi* (land allowed to the religious institutions) allowed the dominant caste (i.e. the Bahun-Chhetris) and senior government officials to own and control lands of the poor people from Dalit and indigenous community. These forms of land tenure system were abolished from 1959 to 1963. The *Kipat* system which was communal/collective land tenure system of IP's over their traditional and ancestral land was abolished in 1968 (Regmi, 2002; Paudel, 2015).

Historically, settlements and livelihood engagements of the IPs are around the remaining frontiers where biodiversity and forest ecosystems have been kept intact over many decades through customary practice, traditional management and sustainable use. In many indigenous communities (e.g. Tharu, Kumal), multiple land-use systems have evolved with corresponding rights and governed by different sets of rules, e.g., land rights for foraging, shifting cultivation, wet and rain-fed rice agriculture, labour exchange and

grazing. However, as the customary rights to land and territories are not recognized, IPs increasingly face many external pressures and further marginalization by continued immigration of settlers, expansion of commercial agriculture and forestry, installment of large-scale infrastructures including road and hydro-power and the expropriation of lands for development projects and tourism. In this context, the following issues are highlighted:

### Issue of development interventions:

Today, the recognition and protection of indigenous lands has become even more complex with the process of industrialization, urbanization and initiation of development projects. Cases of forcible eviction cause the loss of lands and livelihoods, community disintegration and conflict, and environmental impacts. The new conflicts brought about by the industries established without the community consent and State concessions add a new layer of issues to the unresolved indigenous people's rights to land of the past. With few exceptions, however, the IPs, Dalits and women in Nepal have been participated for access or user rights in community forests and other development projects. Still, there is replication of elites in such positive discriminations.

### Issue of citizenship and access to the resources:

In Nepal, some IPs lack citizenship certificates, making it difficult for them to access basic government services such as being the member of user groups in forests and other common property resources. It further hinders the process of land ownership. According to the UNHCR in Nepal, an estimated 800,000 individuals still lack citizenship registration and are therefore considered de facto Stateless (NFN, 2013). It is contradictory to the fact that there is not any legal discrimination in citizenship provision for the IPs. Moreover, the role of indigenous communities in protecting biodiversity and forest ecosystems is still not fully recognized. Many are evicted, denied entry, or denied grazing and harvesting rights in forests designated by government authorities as national parks, protected areas and buffer zones. Meanwhile, the loss of land and forced displacement has resulted in the dissolution of many indigenous communities. In recent years, the issue of displacement has become a public due to a heterogeneous cultural setting in Nepal.

### Emerging ethnic movements and land movements:

With the political movement of 1990, the struggle of IPs in Nepal tended to regain control over their traditional domains and cultural spaces of secularism which grew from localized and community-specific agitations. This was brought about by two parallel developments. First, there was the massive incursion of identity consciousness into the national political

discourse, with a massive increase in public consciousness and emergence of non-State actors<sup>2</sup>. Second, the movements in Nepal have also come as part of political and social movements including the movements of 1990 and 2006 and Maoist movement and subsequent agitations after 2006. Their actions moved from protest to proactive demands for recognition of the economic, environmental, cultural and land rights of IPs.

Indeed, most of the movements of indigenous groups in Nepal (e.g. Tharuhat, Tamsaling, Khambuwan, Magarant, Tamuwan, etc.) are the claim of territorial land in refined version. The fight for autonomous area, protected area and special area for a particular community especially minority numbered IPs in the federal structure is basically inclined to the demand of territorial land rights. However, critics say that these movements do not largely respond the factors including market forces, ethnic elitism and donor-driven motives.

### International Policy Frameworks on Customary Land Rights

Nepali policy discourse on customary land practices should learn from the international experiences, best practices and legal provisions. In Cambodia, there is still conflict between indigenous peoples and state government due to the non-consideration of customary land tenure system as per the customary law. In case of Guatemala, the civil war was happened from 1954 and ended in 1995 whose core agenda was to protect the rights of the 23 different Native American groups in the country. In India, ongoing armed conflicts in many States including Nagaland, Jharkhanda, Chhatisgad and Assam are also associated with the issue of land. The Indian Constitution has provisioned the sixth schedule for tribes of north-eastern region and the fifth schedule for tribal areas of other States. In many aspects, they restrict the entry and ownership of land and immovable resources in adivasi areas by non-adivasis and outsiders.

Amidst these examples, Nepal's State-restructuring process and policy discourse seem more critical in all layers of government: federal, provincial and local. Moreover, Nepal is also a part of global community, which is also legally obliged to a number of international legal conventions and frameworks including UNDHRs, ILO Convention 169 (Indigenous and Tribal Peoples Convention, 1989), UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples, 2007), CBD (Convention on Biological Diversity, 1993), and UN Human Rights instruments (ICESCR-International Covenant on Economic, Social and Cultural Rights, 1966; ICCPR-International Covenant on Civil and Political

<sup>1</sup>Asia is home to about 70% of the world's estimated 370 million IPs. In South Asia, they comprise an estimated 37% of the population in Nepal, 15% in Pakistan, 8.6% in India, and 1-2% in Bangladesh (ILO, 2015). Today, the remaining land and territories under customary use and claim by IPs cover up to 20% of the total land area in some Asian countries. For extensive review, see also UN-DESA, 2009; Quizon, 2013; AIPP, 2015

<sup>2</sup>Globally, ethnic movements brought their wider scope as a process of anti-colonization. To some extent, it has been a part of identity politics and post-structural agitation in many developing countries including Nepal (see also Perrera, 2009; Sapkota, 2015).

Rights, 1996; and ICERD-International Convention on the Elimination of all Forms of Racial Discrimination, 1963 (Quizon, 2015).

Policy context and grassroots realities sometimes contradict severely in poor and developing countries. In Nepal, the government does not legally recognize indigenous and community conserved areas (ICCAs) as a designation of forest management or as part of the national protected areas system. Yet Nepal is rich in ICCAs, customary laws and community regulatory practices are no longer adapted both at policy and program level. A case in point is the Khumbu Community Conserved Area in Nepal which encompasses all of the Sagarmatha National Park and its buffer zone – a 1,500 square kilometer region which the Sherpa peoples manage and protect as a *beyul* (a sacred, hidden valley) and as their homeland.

In the same way, many IPs displaced from their lands and resources due to the laws of national parks and wild life reserves made in hills and plain land of Tarai. For example, the Chitwan National Park has displaced Bote, Kumal and Tharu people from their land. The land law of Nepal including forest law is displacing Raute from their traditional land, shelter, source of belief, basis for their life, tradition, economic cycle and culture. Likewise, the land laws of Nepal smashed the attachment of Limbu with their traditional communal (community) land that resulted poverty in them and question of existence of their identity, language, culture, traditional beliefs and customary practices (see also Basnet, 2015; Kandangwa, 2015 and Regmi, 2016; see also Table 1).

### Constitution of Nepal and Land Issues

Throughout the sixty-five years from the dawn of democracy in the country in 1951, political parties and the rulers put forward contending positions on land as their propagandas, which sometimes also became 'vote bank'. It is evident that peasantry, agricultural transformation and land reform have been cross-cutting issues for many political actors and movement groups. The issues were also vibrant during the Maoist conflict (1996-2006) and thereafter in the constitution writing process (2008-2015). After a long political turmoil, the then Constituent Assembly promulgated new constitution in September 18 2015. As reflected in Table 1, the Constitution has incorporated many progressive provisions on the land which virtually related with the rights of the IPs. Paradoxically, there are some contested issues in the Constitution which have been movement agendas for some of the ethnic groups and Madhes-based political parties, particularly in terms of specific instruments for ethnic identity and proportional representation.

Table 1: Provisions on the constitution related to land	
IPs and region	Practices
<b>Bote, Majhi, Mushar</b> (Nawalparasi)	Historically marginalized groups living riverside of Narayani river; fishery, boating and collection of herbs; affected with the Bhaisalotan Dam and Chitwan National Park; tending wage labour
<b>Sonaha</b> (Bardiya)	Living in ailani land (2 bigha, 32 HHs); main occupation as fishery and women engaged in screening of sand and search of gold; threatened livelihood due to establishment of bridge and Bardiya National Park
<b>Raji</b> (Kailali, Surkhet, Kanchanpur)	Endangered; most of them living in ailani land of riverside; traditionally engaged in fishery, collection of honey from forest, herbs collection and selling, buffalo rearing etc; highly affected due to market and modernization
<b>Chepang</b> (Chitwan, Makwanpur)	Endangered; very few land registered; customary and traditional land practices but less recognized as being khoriya and kipat system
<b>Danuwar</b> (Kamala khonch)	Historically the settlers of riverside of kamala river and cleared forest for the cultivation and settlement; most of them live in ailani land; victims of the floods and community forest
<b>Gurung</b> (Lamjung, Kaski)	Historically customary kipat system; communal, self-help and khoriya system in the past and now turned into terrace farming; land, forest and water resource as communal property; land tenure adjusted with Hindu Varna system and converted into individual private property
<b>Limbu</b> (Eastern hill districts)	Kipat land tenure system was the recognition of IPs land and indigenous peoples' rights over their traditional and ancestral land; abolished in 1968
<b>Tharu</b> (Western Tarai districts)	Aboriginal to Tarai region and categorized as marginalized group; historically owner of large-tract of land but gradually lost due to intervention of hilly migrants and internal elite structure of society; associated with the issues of Kamaiya and Kamlahari
<b>Raute</b> (Surkhet, Dailekh)	Endangered; hunting and gathering nomadic life; dependent on forest products; shifting customary land practice

As promised on the State policy, Nepal has committed for scientific land reform. The Constitution have confined the rights of federal and provincial legislatures which seem contradictory with the provisions of Schedule 7 related to Article 57 (3), 109, 162 (4) and 197. Further, the model and process of such reform seems to be the more critical among other issues. In sum, the issues of scientific land use and data-base system, problems of squatters and tenants, rehabilitation of disaster-victims and issues of freed *Kamaiyas*, *Haliyas* and *Charuwas* are important part of land reform discourse along with increase in agriculture productivity and building a broad-based agrarian transformation.

Post-constitutional State - building is political in nature which is part of the resource allocation and practices of production. A modern State cannot negate the rights of people over the resources including land. Therefore, the issue of customary rights should be analytically envisioned within the given jurisdictions of federation, province and local-level of land governance. A broad-based political consensus should be developed among the major stakeholders to initiate the process of social justice and equity. It could then manage and address diversity and minimizes potential conflict recognizing the voices of different caste and ethnic groups, class and other deprived sections of community.

Table 2: Provisions on the Constitution
Art. 16 Right to live with dignity: (1) Each person shall have the right to live with dignity.
Art. 25 Right to property: (1) Every citizen shall, subject to laws, have the right to acquire, enjoy own, sell, have professional gains, and otherwise utilize, or dispose of property (2) The State shall not, except in the public interest, acquire, requisition, or create any encumbrance on the property of any person.
Art. 26 Right to religious freedom: (2) Every religious denomination shall, maintaining its independent existence, have the right to manage and protect its religious places and religious trusts in accordance with law.
Art. 29 Right against exploitation: (1) Every person shall have the right against exploitation.
Art. 36 Right to food: (1) Each citizen shall have the right to food.
Art. 37 Right to housing: (1) Each citizen shall have the right to appropriate housing.
Art. 38 Right of women: (1) Every woman shall have equal right to lineage without any gender discriminations.
Art. 51 (e) Policies relating to agriculture and land reforms: (1) to make scientific land reforms having regard to the interests of the farmers, while ending the dual ownership existing in the lands
Art. 51 (j) Policies relating to social justice and inclusion: (8) to make the indigenous nationalities participate in decisions concerning that community by making special provisions

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#### Disasters and customary land practices

Natural disasters and catastrophic events have become more common in recent years causing heavy losses in Asian countries, not exceptionally in Nepal. Nepal is affected by almost all types of natural disaster and its experience has great relevance to land and gender issues, given the shared context of geographical diversity, pressure from a rising population, poor preparedness and mitigation strategies. The Barpak earthquake and subsequent aftershocks in 2015 caused many impacts on political, economic, social and cultural dimension of social life. It has increased the risk in family protection and desperation for alternative livelihoods thereby promoting negative coping strategies among poor households of the IPs. The Gurungs, the Tamangs and the Sherpas in particular are heavily affected with the earthquake causing a severe threat in their livelihood recovery and customary practices. The interconnectedness between the land and life of the IPs has been distorted. Therefore, a comprehensive package of reconstruction and rehabilitation should be developed paying attention to the culture, land tenure and customary practices of the IPs.

#### Recommendations

##### A. Recommendations to the government:

- Recognize the rights of IPs in line with international human rights norms and State obligations [Article 3 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR)]
- Provide legal recognition and protection for the land and territorial rights of IPs in the State-restructuring process
- Strengthen the principle and practice of FPIC (free, prior and informed consent) with the full and effective participation of IPs before the entry of development activities in the domains of IPs
- Recognize and promote ICCAs with in-depth, varied and locally rooted indigenous knowledge of the natural resources in diverse cultural setting of IPs
- Strengthen disaggregated data on IPs including women in line with the principles of IP consent, ownership and access, particularly in land and forest resource
- Establish the accountability of private corporations in upholding human rights and "corporate social responsibility (CSR)"
- Build regional associations and SAARC programs on IP's rights and land governance

##### B. Recommendation to Civil Society Organizations (CSOs):

- Reduce ethnic elitism in the name of advocacy of the IPs' issues and rights
- Dialogue among CSOs and promote grassroots mobilizations
- Strengthen policy engagement and evidence-based research
- Learn from specific country experiences and best practices
- Work for more holistic reforms on land and resource governance

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**Disclaimer:** The views expressed in this policy brief belong to the author(s) concerned and do not necessary reflect the opinions of COLARP and ILC/CSRC.

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For more detail



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