

# Defending shifting cultivators' rights to common property resources: how applicable is ILO Convention No. 111 (Employment and Occupation)?<sup>1,2</sup>

E.E. Kerkhoff<sup>3</sup>, K.P. Aryal<sup>4</sup>, S. Webster<sup>5</sup>

## Abstract

In integrated shifting cultivation, as practiced by many indigenous peoples in the Eastern Himalayas, common property regimes are of vital importance. They regulate natural resources management and ensure social security, but government policies fail to recognise their importance. This is a longstanding debate, but what is new is the increasing formal recognition of indigenous peoples' rights, including in the Conventions of the International Labour Organisation.

The study presented here examines how the ILO Conventions No. 111 (Employment and Occupation) and No. 169 (Indigenous and Tribal Peoples) can be applied as tools to defend the right of indigenous peoples to practice shifting cultivation, if they wish to do so, and maintain their common property resources, using a case from Nepal. Convention No. 111 protects shifting cultivators against discrimination in employment, and in accessing the means required for it. Shifting cultivation is considered a traditional occupation for indigenous peoples, and so the rights to land and other resources and to traditional common property regimes are recognised. The convention is strongly interlinked with Convention No. 169, which also emphasises the right to common property resources and regimes.

The conventions are found to be very applicable to point to issues of discrimination and specific shortcomings in the policy environment. As such, they can be a useful tool to defend common property related rights of shifting cultivators. This is important in Nepal, which currently does not meet its obligations under Convention No.111. While blanket policies do exist to address the needs of the poor, they fail to address the specific needs of shifting cultivators. Most issues identified in the case study will remain relevant even if (ex-) shifting cultivators decide to engage in other occupations or use the land for other purposes. Capacity building is needed to help use the conventions at a wider scale.

**Keywords:** *shifting cultivation, land rights, policy, ILO Convention No. 111 (Employment and Occupation), ILO Convention No. 169 (Indigenous and Tribal Peoples), Nepal*

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<sup>3</sup> Agroforestry Expert, ICIMOD, P.O. Box, 3226, Kathmandu, Nepal

<sup>4</sup> Agriculture Expert, ICIMOD, Kathmandu, Nepal

<sup>5</sup> Coordinator, PRO 169, ILO-SRO, New Delhi, India

## 1. Background

In Nepal, shifting cultivation is locally known as *khoriya* or *bhasme* (in the eastern part). It is a traditional farming system for many indigenous peoples including Chepang, Magar, Sherpa, Rai, Limbu, Tamang and Gurung (not in order of importance). Indigenous peoples or “nationalities”, as they are known in Nepal (*Janajati* in Nepali) account for almost 40% of the population and comprise 59 distinct groups, each with their own language, culture and belief system. For several of them, shifting cultivation is strongly linked to their culture and identity; only certain ethnic groups have the expertise to make it work. This expertise is based on their indigenous knowledge as well as their specific cultural customs and practices.

Shifting cultivation is mostly practiced in areas where permanent cropping is not possible, because of steepness, mostly in areas with more than 30 degree slope. In fact, the term *khoriya* refers to land that is too steep for permanent (terrace) cultivation. This is one reason why shifting cultivators generally belong to the poorest farmers. Fields are cleared of (forest) vegetation on a rotational basis after which they are cultivated for one or two years. After the cropping phase, the land is left fallow and forest regenerates. Land clearing is usually done through slashing and burning, which is why the term slash-and-burn is often used instead. Customary common property regimes are a basic tenet of shifting cultivation systems, although the customary institutions governing them have deteriorated in recent times for various reasons, and the land has been privatised or come under government control. The main benefit of holding land in common property in shifting cultivation systems is that it makes it easier to manage agricultural plots in rotation with forest fallows. The disadvantage, however, is that it is not compatible with government land and property policies.

Although shifting cultivation is practiced in many hilly areas of Nepal, the government and development organisations have been discouraging it and ignoring its existence. It is seen as a sign of underdevelopment, with the result that most policy makers claim it no longer exists in Nepal. They have criticized it as being unproductive, destructive of forests and wildlife and wasteful of natural resources. Even the current state and prevalence of shifting cultivation in Nepal are not well known, although it is reported to be practiced in over 20 districts out of 75 (Regmi et al 2005).

Despite government efforts to do away with shifting cultivation, whether by banning it or replacing it with alternative options, millions of farmers have maintained their practice across several countries in the eastern Himalayas, leaving the impression that there should be something to the practice that makes sense. The uptake of alternatives has disappointing results, and farmers’ traditional practices are increasingly discouraged, so the International Centre for Integrated Mountain Development (ICIMOD) and its partners were interested in research to find farmers’ own innovations and good practices as a way out. Policy dialogue was initiated as well, because the unsupportive policy environment was found to be the main reason for increased poverty and land degradation in shifting cultivation areas, rather than inappropriate land use by the farmers themselves. Allowing shifting cultivators to carry on as it is without external

influence, as advocated by some, ignores the problems farmers are facing. Rather, the call is for a practical approach to improving shifting cultivation, as opposed to replacing it with alternatives, and this has been advocated ever since.<sup>6</sup> The International Labour Organisation brings a new aspect into the discussion, namely the possibility to advocate for improving shifting cultivation through the rights-based approach using the ILO Conventions Nos. 111 (Employment and Occupation) and 169 (Indigenous and Tribal Peoples). This case study presented in this paper explores how this works out in practice in Nepal, with a focus on rights to land and natural resources. It is part of an overall ILO study on indigenous peoples' rights to lands, territories and resources and discrimination in employment and occupation.

## **2. Objective, Methodology and Concepts Used**

### **2.1 Objective**

The objective of this study is to see how the provisions of ILO Conventions Nos. 111 (Discrimination in employment and occupation) and 169 (Indigenous and tribal peoples) can be applied to defend the land rights of indigenous shifting cultivators in Nepal.

### **2.2 Methodology**

The study approach included: (a) a literature review; (b) field visits to interview and interact with the shifting cultivators and make observations; and (c) consultations with government representatives, relevant institutions and other concerned stakeholders. Ten days were spent in the study site, in which we tried to meet as many farmers as possible, sometimes individually and sometimes in focus groups, including men and women, elders and children, and members of the IPs concerned, as well as many others. At the district headquarters, the relevant district-level government offices and development agencies were visited or telephoned. In Kathmandu, the relevant government agencies were visited, as well as a considerable number of key experts and institutes. Extensive desk research was done to review literature, analyse the various relevant policy documents and understand the working of the ILO Conventions. Intensive interaction with the experts at ILO and the parallel research team in Bangladesh were also very important to ensure the scientific relevance and significance of this research.

### **2.3 Study Area**

The case study concerns the Sherpas, Rais and Shingsas in Sankhuwasabha district in eastern Nepal. Sankhuwasabha is one of the districts where shifting cultivation is still found on a comparatively larger scale (Regmi et al, 2004). Its indigenous groups are Sherpa, Rai and Shingsa, and shifting cultivation is still practiced among all of them. It is one of the wettest areas of Nepal, with an annual rainfall of up to 4000 mm in parts, which mostly falls in the monsoon (June to September). The natural vegetation in the area where shifting cultivation is practiced is generally characterised by high species diversity. There are subtropical and temperate mixed broadleaf forests, dominated by *Shima – Castanopsis*, *Rhododendron* and *Alder*. Nowadays, the main area for shifting

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<sup>6</sup> The findings of this initiative have been published in 'Debating Shifting Cultivation in the Eastern Himalayas: farmers' innovations as lessons for policy' (Kerkhoff and Sharma 2006), and in Kerkhoff 2008. The debate continues on the Jhumia Network at <<http://in.groups.yahoo.com/group/jhumias>>.

cultivation is the buffer zone area of the Makalu-Barun national park, which is on the northern border with the Tibet Autonomous Region of China. Although these areas were too far to reach within the scope of the study, farmers from these areas were interviewed, as well as the national park authorities. The three village development committees (VDCs)<sup>7</sup> that were visited for the purpose of this study were Num, Machhepokhari and Dhiding, which are not in the buffer zone. Here, shifting cultivation used to be a major practice in the past, but it is slowly being replaced by other land uses.

### 3. ILO Conventions Nos. 111 and 169

#### 3.1 ILO Convention 111 on Employment and Occupation

The objective of Convention 111 is to provide everyone with equal opportunities and equal treatment in accessing employment and occupation, with a view to eliminating any discrimination in respect thereof. The rights to employment and occupation include: (a) access to particular occupations and to the terms and conditions of employment, (b) the right to engage in the work or occupation of one's choice, and the right to practice one's traditional occupation, and (c) equality of opportunity and treatment in respect of wage employment, but also self-employment in informal and subsistence economies such as community-based industries and other traditional livelihood activities. The latter is covered in the term "occupation", which means the trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which he or she belongs or his or her professional status (ILO 1996). The right to freely choose one's occupation becomes relevant in light of the many efforts by government and non-governmental organisations to control shifting cultivation, which they consider an unsustainable and unproductive type of land use.

Convention 111 defines discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." (Article 1.1.a.) In accordance with this definition, a situation or treatment is discriminatory if it involves the following three elements:

1. **Facts** which constitute a difference in treatment.
2. A **ground** on which the difference of treatment is based (sex, race, etc.).
3. The negative **result** of the treatment: an impairment of equality of opportunity and treatment. (this means no special measures need to be taken for rich members of indigenous peoples, even if they are of the same group)

Intent is not a necessary element of qualifying certain acts or situations as discriminatory.

Upon ratification, a national policy in the context of Convention 111 needs to be developed, to create a conducive environment for allowing indigenous and tribal peoples to engage in their traditional livelihood activities, if they decide to do so. Under the Convention, the government is required to repeal any directly or indirectly

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<sup>7</sup> VDCs are the smallest administrative units at village level in Nepal

discriminatory legal provisions, policies or practices. It must end discrimination that is done by public authorities but must also ensure that mechanisms are in place to address discrimination perpetrated by private actors.

### **3.2 How does the Convention relate to shifting cultivators?**

Shifting cultivation is considered as a traditional occupation of certain indigenous peoples, and this is how the Convention applies to it. The Convention applies to them as farmers, as well as to them belonging to indigenous peoples. As farmers, they are recognised as non-wage-earners. Provisions that apply to them include access to material goods and services required to carry on the occupation in question (ILO 1996). Among them, access to land and natural resources as a means to carry out their occupation, is the most important, but also the most problematic.

Shifting cultivation is mostly practiced by indigenous peoples, and only for them can it be considered to be their traditional occupation. Discrimination based on ethnicity or belonging to an indigenous people is covered under the grounds of race, colour and national extraction. Convention No. 169 complements Convention No. 111 by providing details of necessary measures to ensure that the specific human rights and dignity of indigenous and tribal peoples are respected. It is therefore important that the principles of Convention 169 are taken into account when promoting equal opportunities and treatment of indigenous peoples within the framework of Convention No. 111.

Many issues affecting shifting cultivators are covered in the ILO Conventions Nos. 111 and 169. They include rights to: practice shifting cultivation, land and resources, government support and services, employment and traditional economies, access to employers' and workers' organisations, consultation and participation in decision-making, customs and traditions and customary law, and education and vocational training. For the purpose of this paper, the focus is on those related to land and resource tenure. An overview of the relevant Articles and provisions is given in Table 2. The first column presents the issues, the second column shows how these issues are covered in Convention 111, and the third column gives the relevant articles from Convention 169 that apply.

Table 2: Rights covered in ILO Conventions No. 111 and 169

<b>Issues</b>	<b>Rights covered in C. 111 (based on ILO 1996)</b>	<b>Relevant articles in C. 169 (based on ILO C. 169 and ILO 169 Manual)</b>
<b>Right to practice shifting cultivation</b>	Right to practice a traditional occupation and right to freely choose an occupation	Arts. 14.1, 19 and 23 Traditional economies  Art 5. To recognize, protect and respect values and practices of IPs
<b>Land rights</b>	Access to resources required for their occupation	Arts. 13, 14, 17, 18 and 19 on Land and Land Rights

<b>Displacement</b>	Related to access to land, because they are displaced from the land they know to unknown land, where their traditional knowledge and practices are not applicable.	Art. 16 on Displacement
<b>Natural resources and minerals</b>	Access to resources required for their occupation	Arts. 7.3 and 7.4 on environmental impact and protection Arts. 15.1 on Natural Resources and 15.2 on Minerals Art. 23 on hunting, fishing, trapping and gathering
<b>Customs and traditions and customary law</b>	Terms and conditions of employment include social security (this is not just provided by employers, but in case of indigenous shifting cultivators also by the customary institutions and cultural dimension of the practice)	Art. 8 on customs or customary law; Art. 24 on social security

### **3.3 Concepts Used**

#### **3.3.1 Shifting cultivation**

For the purpose of this study, it is important to understand shifting cultivation as in integrated farming system with certain basic tenets. Shifting cultivation is characterised by a short ‘cultivation phase’ of a few years followed by a relatively longer ‘forestry phase’, usually referred to as the ‘fallow’. Fujisaka et al. (1996) define ‘traditional’ or ‘integrated’ shifting cultivation as the form in which indigenous communities clear and cultivate secondary forests and leave parcels to regenerate naturally via fallows of medium to long duration. This is the type of shifting cultivation that is common in Nepal (Kerkhoff and Sharma 2006). The term shifting cultivation is often used interchangeably with the terms ‘slash-and-burn’ or ‘swidden’ agriculture, but the practice in Nepal should not be confused with slash-and-burn as a mere land clearing method (Kerkhoff and Sharma 2006).

A key aspect of the system is the rotation of crops and forests, which takes place both in time and in space. Forest fallows are the most important component of shifting cultivation farming systems, because they are the main basis for the productivity of the land. A particular plot is cleared and cultivated for one or two years with annual crops. Usually other perennial crops are grown in between or after these, before the land is left for the forest to regenerate and the farmers clear the subsequent plot. After the forest has sufficiently regenerated, or when the land is needed again, it is cleared once again.

Farmers usually clear a new plot for annual crops every year, but the other plots are by no means 'abandoned'. They are managed as fallows, because the farmer will be using them again in a couple of years. In space, this results in a patchy landscape of plots with annual crops, perennial crops, bamboo (early fallow species) and forests. Rotation requires access to much larger areas of land than permanent agriculture, which is often not understood by outsiders.

Customary common property regimes too form a very important part of most shifting cultivation systems. The main benefit of holding land in common property in shifting cultivation systems is that it makes it easier to manage agricultural plots in rotation with forest fallows. In traditional (undistorted) common property regimes, customary governing bodies regulate the land use planning at the village level, and the allocation of land to the households of the community. They hereby ensure that all community members have access to means of production, and that the land is used optimally while certain fragile areas are protected. The customary bodies are guided by traditional knowledge of the land and resources, as well as traditional rules, regulations, and other institutions.

### **3.3.2 Indigenous Peoples**

'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'

(Jose R. Martinez Cobo, UN 2007)

The ILO takes a practical approach to identifying indigenous and tribal peoples. ILO Convention No. 169 does not actually define who are indigenous and tribal peoples, but instead describes the peoples it aims to protect. The Convention covers both 'indigenous' and 'tribal' peoples, elements of which include:

- Traditional lifestyles
- Culture and way of life different from the other segments of the national population, e.g. in their ways of making a living, language, customs, etc.
- Own social organisation and traditional customs and laws
- Self-identification

The distinction made between 'indigenous' and 'tribal' is that along with the above mentioned criteria, 'indigenous' may also imply 'living in historical continuity in a certain area, or before others "colonised" or came to the area. However in terms of treatment, no distinction is made between the two. Rather, the challenge is 'to improve the living and working conditions of indigenous and tribal peoples so they can continue to exist as distinct peoples, if they wish to do so' (ILO 2003: 7). The use of the term "indigenous" is controversial for many governments in Asia and Africa, who claim that their entire population is 'indigenous' to their country.

## **4. Current policy environment and debate in Nepal**

### **4.1 On shifting cultivation**

In Nepal there is no specific policy to deal with shifting cultivation, but the practice is affected by a diverse range of policies, varying from forest and agriculture to rural development. While there are examples of favourable policies, in general the thrust is against the practice either in the policies themselves, in legislation or in their implementation.

The policies that affect shifting cultivation were documented by Regmi et al (2005). Land tenure laws constitute a major constraint upon environmentally sound agricultural/land management practices in Nepal. The initial land survey and mapping process did not allow the registration of shifting cultivation land. Furthermore, the Land Act and Land Management Act have made provisions for land registration for permanent farming, but complexities in the bureaucratic process make it difficult for farmers to actually do so (Bajracharya et.al. 1993). Families without registered land also have difficulty in obtaining their Nepali citizenship. Other relevant policy areas include: (a) forest nationalization and management and community and leasehold forestry; (b) land use related policies including on soil conservation, watershed management and pastureland; (c) the Ninth and Tenth National Five Year Plans (resp. 1997-2002 and 2002-2007); (d) the Agricultural Perspective Plan (1996-2016); and (e) the Environmental Action Plan (1993) (Regmi et al 2005).

There is a clear gap between farmers' reality and government policy. Land and land-use policies are generally insensitive to the specific needs of shifting cultivators and implementation in shifting cultivation areas has therefore been slow. Many of these are blanket policies that are not supported by informed decision-making; they are often political and do not reflect ground realities of local farmers (many of whom are indigenous) and their practices. Some government programmes have ignored the shifting cultivation areas altogether, stating that conflict with farmers or with other government agencies prevents successful implementation. Many policy- and decision-makers at lower administrative levels think that shifting cultivation does not exist anymore (Regmi et al 2005).

### **4.2 On land tenure**

Land and resource tenure regimes have changed a number of times in the history of Nepal. This has affected the management of the shifting cultivation farming system and led to some of the issues that have arisen today. Below we elaborate on the details of each system.

#### **4.2.1 Kipat**

In the past, the area under study belonged to a kingdom called Manjhi-Kirant or Middle Kirant which was inhabited by the Rais. Old records indicate that the Rais formerly occupied a much larger area than that in which they are found today, especially towards the north-west (Bista 1967). The land was managed under a common property regime called *kipat*. The term *kipat* refers both to the way the common property was customarily arranged as to the type of land right given by the King. When King Prithivi Narayan Shah conquered these parts to unite Nepal, both Rais and Sherpas got the *kipat* right to



the lands they traditionally occupied. "Almost all Kirati land used to be under the *kipat* system, whereby the people exercised inalienable communal rights over the land. The Kiranti *kipat* was tax free and included dominion over all cultivated lands, forests, streams and rivers within its bounds." In this system, taxes were not raised from the land, but from each household. (Bista 1967). Each Rai family used to have its own land, which it would work itself. A Rai farmer on this land was called a *kipatiya*, but any farmer of another ethnic group on the same *kipat* was called *raiti* and subject to taxes on this land, which he paid to the *Rai* (headman) of the village (Bista 1967).

#### **4.2.2 The Rana and Panchayat regimes**

In the second half of the 19<sup>th</sup> Century, other powerful people who were patronised by the King got feudal rights to land, called *birtha*. These feudal rulers were called *jimmawals*, and they had *mukhiyas* who worked as revenue collectors, maintained law and order, and solved local conflicts. Even the headmen who managed the *kipat* system became revenue collectors. During this time, many of the common property regimes got dismantled. The *mukhiyas* were the ones who distributed the common property land among individual households, thereby fixing the plot boundaries community members adhere to till this day. To demarcate their land boundaries, people chipped a little bark of boundary trees, or used stones and other natural materials. Farmers still have records of land tax payments made during this time. The size of the land that was allocated depended on how much tax they could afford to pay, and traditional use patterns. Individual land holdings made it possible for farmers to sell their land to non-*kipat* holders and use it as collateral for getting loans from wealthy people. It facilitated taxation and from then on the land could be inherited, sold, and mortgaged.

In 1957 the feudal system was abolished, as well as all *kipat* rights. Farmers' land was to be surveyed and titled, while the remainder became government forest land. All the land in Sankhuwasabha has been surveyed and since then farmers can get their plots registered and titled. However, in reality, many communities still adhere to the traditional boundaries, as was explained to us by all farmers we talked to. As is confirmed by Daniggelis (2003), some communities still maintain the customary *kipat* system of land management and tenure among themselves, even though the *kipat* right has been abolished by the government.

One of the reasons for maintaining the old boundaries is based on a sense of indigenous peoples' rights. Therefore, the status of the *kipat* right is still debated in this region. Feudal rights were granted to strengthen the Rana's control over the country, whereas the *kipat* right was granted to specific indigenous peoples so they could maintain customary management of the land under common property. With the abolition of the feudal system, the *kipat* right was removed as well, although historically it was given for a different reason and purpose.

There are practical reasons too for maintaining the old boundaries. In fact, the rotation of fields and fallows has always gone through a fixed pattern, which has been established through long-term experience with the quality and characteristics of the land. Before land reform, farmers always had the same rights to all plots, whether they

were under crop, early, or mature fallows. Even fallow plots will one day be cultivated again, so they too are considered as part of their agricultural land. If after land reform they would have to restrain themselves to their current crop fields (for which they have been able to get land rights), it would mean they couldn't open up new fields anymore. However, they cannot stay on the plot where they were, because it can only be cultivated for 2-3 years. Therefore, they maintain traditional boundaries, unless such unregistered land is allocated to another form of land use by the government. To date, farmers have not entered into community forests or the national park to clear land for shifting cultivation, as was verified by the district forest officer. This makes sense too, because the forests there are usually mature and clearing them is considered very labour intensive.

After the land reform process, herding has reduced considerably too. Herding was an important traditional occupation, but since the rights to *kharkas* were no longer recognised, and pastures were reforested under the community forestry programme, free grazing and trade caravans have been much reduced.

#### **4.2.3 Cadastral survey and land registration**

The cadastral surveyors aim to cover the entire country in cycles of 40 years. They measure all the plots, give them a registration (*kita*) number and classify them into one of five classes, based on land use at that time. This classification is used to assess to the level of tax that needs to be paid. Shifting cultivation as such is not officially recognised as a type of land use, nor are fallows identified as fallows. Instead, all plots that are identified as shrubbery, bushes or degraded land are most probably shifting cultivation fallows. Since the land survey, farmers can register their land in their name. The farmer is required to demonstrate that he has traditionally occupied the land by showing crop or crop residues or ploughing marks. It is not possible to register land as common property.

#### **4.3 On tenure and management of natural resources**

The government identifies all non-registered land as 'government forest'. However, this includes large tracts of land that have been used or occupied by indigenous peoples since generations, but for which they have no registration certificate. Communities whose villages fall within recently demarcated 'protected areas' are banned from clearing their land using slash and burn techniques (Regmi et al 2005).

##### **4.3.1 Community forestry**

Government forest in the hills is required to be handed over to the communities as community forest. This community-based forest management policy was first manifested in the Master Plan for the Forestry Sector (1988) and legally backed by the Forest Act 2049 (1993) and Forest Regulation 2051 (1995) (Regmi et al 2005). As a result of this policy, much of the unregistered, previously shifting cultivation, land has now come under the community forestry programme. While the government claims that it is giving government forest back to the people, there are some households whose entire area of land used for shifting cultivation land comes under 'community forestry', leaving them landless. This said, the community forestry programme has been beneficial for most local communities, especially for securing the availability of fuel

wood and other forest products. It has also helped put a halt to forest degradation. Problems of elite domination in forest user groups are increasingly dealt with by introducing good practices for equity and good governance.

In terms of Convention No. 169, which protects the rights to lands traditionally-owned and occupied by indigenous peoples, it is likely that most of the land currently handed-over as community forests was previously occupied by indigenous nationalities. One reason for this is that prior to unification of Nepal, most land would have been part of the ancestral land of one or more of its indigenous peoples. Secondly, the land handed over is the land nearest to current settlements, which communities have been using traditionally for forest products and to which they have relatively easy access.

Even if the farmer who previously used land now utilised for community forestry becomes a member (called 'user') of the forest user group, the benefit he gains from the land and forest are greatly reduced. For one thing, community forestry is practiced under strict rules, including bans on annual crops, the use of fire, hunting and extraction of stone and sand. Furthermore, the forest is managed as common property; benefits have to be shared with all other users. And lastly, since those farmers who lost their land are usually among the poorer, more marginalised sections of society, they are usually not in the executive committee of the forest user group, where power is concentrated. Therefore, forest user group membership does not make up for the loss of large tracts of shifting cultivation land. There are no cases of shifting cultivation being practiced in community forests, although there may be rare cases of accidental spread of fires during burning.

#### **4.3.2 Protected area network**

The National Parks and Wildlife Conservation (NPWC) Act, 1973, is the key instrument in protecting biodiversity within the protected areas system in Nepal, which is administered by the Department of NPWC. It recognises six categories of protected area, including national park, conservation area and buffer zone. Section 3 of the NPWC Act prohibits hunting any animal or bird, building any house, hut or other structure, clearing or cultivating any part of the land, harvesting, cutting, burning or damaging any tree, bush or other forest product, and mining within national parks or protected areas. Other legislation and regulations are: (1) the Aquatic Animals Protection Act, 1961; (2) the Himalayan National Park Regulations (HNPR), 1979, and (3) the Buffer Zone Management Regulations, 1996, and Buffer Zone Management Guidelines, 1999 (HMGN/MFSC 2002).

The HNPR, 1979 provides for people living within national parks to collect natural resources for their daily requirements and allows people to graze their domestic animals on park rangelands. No provision has been made for handing over parcels of park land to communities, however communities "can organise harvests and grazing plans so long as they are consistent with the parks' objectives." (HMGN/MFSC 2002: 67). The latter might mean an opening for negotiation for shifting cultivators, but considering the current perspective of the conservation community, it is unlikely that anything related to shifting cultivation would be acceptable to any parks' managers (HMGN/MFSC 2002).

The Buffer Zone Management Regulations (1996) and Guidelines (1999) intend to facilitate public participation in the conservation, design and management of buffer zones, among other things and makes provisions for 30-50% of the park revenues to be retained for community development activities in the buffer zone (HMGN/MFSC 2002).

## **5. Case of the Sherpas, Rais and Shingsas of Sankhuwasabha**

### **5.1 Characteristics of shifting cultivation in Sankhuwasabha**

Sherpa, Rai and Shingsa (also known as Lhomi and often simply called 'Bhote' by the Nepalese) are indigenous communities of this area. Shifting cultivation, wild food collection and hunting are the traditional occupations of these groups, whereas at higher elevations, Sherpas and Shingsas are further known for their yak-based pastoralism. In the area of the study, it is the Sherpas who are most dependent on shifting cultivation. Their shifting cultivation areas are still very large, probably because their land is less suitable for other forms of land use; which means it is in less demand from other communities. The Rais, who used to practice shifting cultivation on lands at a slightly lower elevation, have hardly any land left for this purpose as most has been converted to cardamom plantations and community forests.

According to Nepali *et al* (1990) shifting cultivation is a traditional farming system practiced by 10-20% of the population in the Makalu-Barun National Park and Conservation Area. Sharma and Khatri-Chhetri (1995), in their study of Makalu and Yaphu VDCs, found that in 1995, out of 31 villages, 16 were fully dependent on shifting cultivation, 9 were equally dependent on shifting cultivation and rain-fed terrace cultivation and in 6 villages shifting cultivation was practiced only for the production of millet seedlings. These figures are still relevant, as farmers tell us that shifting cultivation is practiced like before in the buffer zone, though not in the actual park.

In the case of Sankhuwasabha, each farmer has a number of plots in different places across the landscape, one of which is currently used for crops, while the others are under fallows in of increasing age. Certain communities organise their plots in 'blocks', where all the plots that need to be cleared and burned in a particular year are adjoining, but this is not the case here. The fields of one household are not adjoining either. Rich farmers have more or larger plots, on some of which they may have a land title. Many shifting cultivators have home gardens and rain-fed terraces as well.

The rotational cycle varies from four to twelve years in length, including one year of cropping and three to eleven years of fallow. Settlements remain in one place, but small makeshift houses or "yakshas" can be erected in faraway fields when there is a lot of work to do or in the season when the crops need protection. In Sankhuwasabha, the practice is restricted to those areas that are too marginal for permanent agriculture. Sharma and Khatri-Chhetri (1995) report shifting cultivation being practiced on slopes of > 40%, with shallow soils. Considering these factors, a farming practice that can still be productive can hardly be considered unsophisticated. If the land available to a family for shifting cultivation is reduced, there are three coping options: (i) they can shorten the fallow length; (ii) reduce the plot size per year; or (iii) open up a plot in selective years

only. Richer farmers tend to do the latter, while poorer farmers do a combination of the first two and look for land to borrow from others. The choice also depends on labour availability. If the plot size is too small, cardamom may be a better option, but money is required for the initial investment.

In the past, the Rais and Sherpas of Sankhuwasabha managed their land under a common property regime called *kipat*, which prevents the fallows from being cut-up into too many small patches. While tenure has become more individualised, customary village-level arrangements still play a role in allocating fields to different families according to labour availability and other factors. This is confirmed by Sharma and Khatri-Chhetri (1995).

In recent years, the productivity of shifting cultivation land has gone down in those areas where traditional practice have become distorted, such as in Dhiding and Machhepokhari. Farmers from Dhiding estimate a reduction of about 40%, stating that land that used to give five *pathis* is now producing only three. Shifting cultivation land size is measured not in area, but according to how much maize or millet can be harvested from it. This reduction in productivity is caused by several factors, including the conversion of land to other purposes, notably cardamom farming and community forestry, and increased population pressure among others.

Livestock is an important component of the shifting cultivation farming system in most places here. Farmers may own a few cows and goats, which can graze on the fallows or on specified grazing areas. Not all shifting cultivators have livestock, because in some areas the land is too steep, but for many it forms an important source of livelihood as well as soil fertility. In the past, the specified grazing grounds called *kharkas* used to be officially recognised by the state; livestock owners paid taxes and had user rights, but now these areas are considered government forests and mostly taken up in community forests.

The *parma* system of labour sharing is still common among the Rais and Sherpas. Farmers can work their own land, but also borrow or rent others' land based on mutual understanding. When the season starts, farmers form groups and find out available land which they can work. Most land holders accept gifts of *raks*<sup>8</sup> or a chicken in return, but this also depends on the success of the harvest; for example, in some places up to a third of the harvest is given to the land holder. This system is different from share cropping where the land owner would get half the harvest. The strong coordination and close community ties within the communities, especially those where shifting cultivation is still common, make this form of informal arrangements possible. Community members often meet to make plans and resolve any problems that may occur. In Mude village, the Sherpas still have this land and labour sharing system. In the past, when the land was managed as common property, the plot size was adjusted to the labour availability of the group. Nowadays, with the land being allocated to individual households and partly titled, group size is rather adjusted to the land available.

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<sup>8</sup> Locally distilled liquor, made of millet or rice

For a considerable number of indigenous farmers in Sankhuwasabha, shifting cultivation is their major source of livelihood; with some farmers depending on it completely as a means of livelihood. This is mostly in the northern VDCs, where many farmers' entire land holdings are unsuitable for permanent agriculture or even livestock. In Num, Machhepokhari and Dhiding the area under shifting cultivation is reducing, with cardamom cultivation and community forestry coming up in its place. However, it continues to form a major part of farmers' livelihood and food security. In Num, the idea of having to give up shifting cultivation is unthinkable for the farmers who practice it. In Machhepokhari and Dhiding, extensive rotation is no longer possible, because the original plots have become too small and intersected. However, controlled burning on a small scale is still used for finger millet germination and *chiraito* cultivation.

## **5.2 Change in land use and tenure**

There are a number of drivers of land-use change in this area, including the need to cope with and adjust to recent socio-economic, demographic and political changes as well as the emergence of new options. In Sankhuwasabha, the land reform and privatisation process coincided with the emergence of community forestry and cardamom cultivation. This raised the interests of non-traditional users for marginal shifting cultivation land, resulting in land grabbing. The three combined have greatly changed local land use practices, causing a reduction of the land area under shifting cultivation in the less remote areas.

### **5.2.1 Land registration problems**

The cadastral survey was done very late in Sankhuwasabha district, as compared to other districts (only in 1993-95). This is one of the reasons why there is still a lot of land left to be registered in people's names. In shifting cultivation areas, the land registration rules have caused much confusion and resentment. A major reason was that land could not be registered if it was to be used for shifting cultivation. Secondly, fallows - especially those with mature forests on them - are not recognised as agricultural land, because there are no signs of any agricultural activity. With a fallow phase of around ten years and the cropping phase one or two years, only one or two out of 11-12 plots were eligible for registration. For the remainder, farmers could not prove that they traditionally occupied the land, so registration was not accepted.

Apart from this, it has been widely recognised that the land registration process was unfair and inaccessible for many. Rich and powerful people could register large tracts of land, even forested parts, while poor people who did not pay bribes could not even register their crop land. Marginal farmers, especially from remote areas, often did not understand how the registration process worked. The rich and powerful claimed more land than was theirs, including that of others. Even those who had sufficient proof of their ownership, such as previous land tax receipts, could not register all their land. This shows the inefficiency and partiality of the staff and officials involved in the process. Furthermore, there is a land ceiling of 3.75 ha for rain-fed farm land in the hills. Sustainable shifting cultivation which produces enough and which has long rotations requires much more than that.

An example of the difficulties with the land registration process is given in the case of Mude. To date, only around 70% of the land is officially registered. When the land of the Sherpa community from Mude was registered, they could not find out how the surveyors and land administrators were operating. The way they have delineated the land is completely different from the traditional boundaries, and many people's land has been registered in other people's names. This caused major conflict in the community, with the result that the community has now decided to stick to their original boundaries. However, they fear that if the survey office comes again, conflict will ensue. A complication is that the land tax has to be paid by the person who has registered it, whereas it is used (for free) by the traditional owner. This has gone well until now, but the question is what will happen when the land is converted to a cardamom plantation, as is already happening in places. This increases the value of and income from the land, and so the sharing of benefits will come under debate again. The change of land value is reflected by the fact that land can be borrowed against a token fee for shifting cultivation, but for cardamom plantation the share-cropping system applies. Some people have already started planting cardamom on their land, which has actually been registered by others.

### **5.2.2 Land grabbing**

There are a number of land disputes involving mostly local elites, in which they have claimed large areas of government land/ community forest for various reasons. Most have also paid bribes to the land registration office to get the land registered in their name. For example, there was a person who had first registered a small parcel of land (2-4 *ropani*) at the land registration office, but now on the map 200-400 *ropani* of land are shown under that registration (*kita*) number. Another person had registered 4455 sq m of the land for cardamom cultivation and a processing plant, but later it appeared on paper as 24455 sq m! When it was discovered, it was filed in the court for further action. Other farmers plant cardamom in forest that is not legally theirs. They say they will be able to register it, when the cadastral survey will come around again, because then they can show their crops.

Land grabbing does lead to conflicts in the communities, but it is very expensive for poor farmers and even for forest user groups to take such cases to court or ask for the land and boundaries to be surveyed again. Still, several cases have been reported and filed in the district court. Copies of the land registration maps are kept at district, regional and national level; comparison among these shows where such land claims have been granted illegally at the district level. The Federation of Forest User Groups of Nepal (FECOFUN) provides legal support to forest user groups in such cases of conflict.

There are indigenous local leaders who claim land because it was their *kipat* and others who claim it as their shifting cultivation land. However, they usually belong to local elites and take the role of absentee landlords, who have large tracts of land in their name, but never come to care for it, leaving the work to the wage labourers. They may slash and burn the forest once, before using the land for permanent cultivation or cardamom plantations.

It is difficult to estimate how much of the original shifting cultivation land has been registered; the estimate by the group from Mude was around 70%. One person from Dhiding stated that of his land only one-fifth was registered, while the remainder was turned into '*panchayat* forest' and now community forest. However, it is not possible to say how representative these figures are.

The communities were also asked how much of their traditional shifting cultivation land had come under community forestry, how much had been planted with cardamom and how much was still remaining. The response was that during the land registration of 1993, large tracts of land were not titled and subsequently got taken up under community forestry. On land that was registered, cardamom has been planted in suitable places, with the main limiting factor being the cash or credit to fund the planting material.

### **5.3 Role of government programmes and services**

Among the government organisations that implement the ban on shifting cultivation in Sankhuwasabha are the Makalu-Barun National Park and Conservation Area (MBNPCA), and the District Forest Office. The MBNPCA was established in 1992 and includes an adjacent inhabited conservation area as a buffer. In the national park area, local communities who previously inhabited the area have been banned. However, in the conservation area (or buffer) local people do practice shifting cultivation, even though it is officially illegal. District-level government officials report that shifting cultivation is no longer a major practice in the Makalu-Barun national park, while farmers claim to be practicing it as they did in the past. There is no specific programme on shifting cultivation, but the park authorities do try to raise awareness on conservation. However, no one has worked in the park for the past 10 years because of the Maoist conflict. The park officials are under the impression that farmers do it for additional income, and that therefore banning should not be a problem. They are unaware of the strong dependence of the farmers on shifting cultivation for their livelihood.

In the areas outside the national park, the forest district office is responsible for the controlling the shifting cultivation. Farmers report that rangers from the nearby range posts would sometimes punish or fine them for clearing land, although their offices were also closed down with the increasing conflict situation. In the perception of the current District Forest Officer, shifting cultivation is a traditional kind of agroforestry, which is not necessarily negative. It is not the shifting cultivators who are causing encroachment, but rich and powerful people from the district headquarters who appropriate land for cardamom plantations. They may also use slash-and-burn for land clearing, so may resemble shifting cultivators.

In districts where there are many land disputes, the so-called 11 "Kha" Board Act provides for a board to be set-up to deal with land claims and check the land survey. Per case a committee is formed with the DFO and people from the CDO, the survey department and others, as well as one or two representatives from the respective VDC



and community. There is already a large file with all the cases, but it is mostly better off people who make use of this facility.

The DFO is aware of the fact that in the past only people who paid a bribe got their land registered. However, it is only the people who can afford and understand the procedures that make use of this regulation, so it is mostly about cases between (rich) farmers and the government - which means the Forest Office. Cases involving land rights or land claims of subsistence-level farmers have, so far, never come before this board. The procedure is that an individual (and also a forest user group), can file an application for the board to look into a boundary dispute. The committee looks into the case, usually by involving the local community and asking them if the individual has a rightful claim based on historic use. If needed, the district level files can be compared with those that are kept at regional and national level. If after the committee decides, the applicant is not happy, the process is taken to the court. If a forest user group wants to make an application, they can pay for it from their funds, and FECOFUN provides them with legal support. In community forest areas it is getting easier to control the land grabbers, especially if the forest user groups are strong. This has implications for the previously good relations between the forest and the Land Survey Office. However, outside the community forests - like in the shifting cultivation areas - it is very difficult for farmers to get their land rights. The federation of community forest user groups (FECOFUN) is a grassroots-based organisation, which also advocates for forest user groups rights and related issues at the national level. A similar organisation for farmers does not exist in Nepal. No figures are available on the representation of indigenous peoples in this organisation. In Sankhuwasabha, it supports forest user groups to resolve conflicts with powerful individuals in case of land grabbing. They have already won two cases, revealing corruption in the land titling process, causing the government staff concerned to lose their jobs. The chairman confirms that there is no conflict between forest user groups and shifting cultivators.

## **6. Issues related to ILO Conventions Nos. 111 and 169**

In this chapter we relate the findings from the field cases to the provisions of ILO Conventions Nos. 111 and 169 to come up with lessons for policy and development practice. Because of limitations in the scope of the study and in the available secondary, data, it may not be possible to demonstrate clear-cut cases of discrimination. However, there is ample scope to raise awareness on emerging issues and their urgency.

Lessons for policy should reveal how the rights of indigenous peoples to practice shifting cultivation as their traditional occupation are protected in the current government policy environment. The focus is on the government, even though there are many other policy players and decision makers, because it is the government that has ratified ILO Conventions Nos. 111 and 169, thereby accepting the responsibility for their implementation. Most lessons learnt and recommendations will concern policy content, although some attention is also given to the possible processes involved in implementing some of the recommendations. According to Borrini-Feyerabend et al (2004), policy content exists in the form of objectives, statements and instruments,

whereas the policy process entails policy making, implementing and reviewing. Furthermore, it is important to understand how policy works as a political process; who are the key players, what is their position or opinion and influence, and how can they be convinced?

Policy gaps and issues can arise for example in the case of: (a) differences in priorities and perspectives between decision makers and those affected; (b) misunderstandings or unawareness about opportunities and problems on the ground; (c) lack of legal provisions and neglect; (d) lacking or failing implementation of otherwise agreeable policies; and (e) conflicting policy statements and instruments.

### **6.1 The right to practice shifting cultivation**

The right to practice shifting cultivation (like the right to belong to an indigenous people) is based on the principle that people should be allowed to practice shifting cultivation if they wish to do so. Convention No. 111 provides for the right to practice a traditional occupation and the right to freely choose an occupation. Convention No.169 provides for the right to shifting cultivation, acknowledging it as part of the culture that identifies the indigenous peoples who practice it and that they have the right to “maintain” and celebrate that culture.<sup>9</sup> In fact, the agriculture-culture link works both ways; traditional culture (including knowledge, practices and beliefs) makes people who are indigenous to an area better at farming there. In turn the benefits from that agriculture enrich their culture, be it with food products, a home for their ancestors and spirits, or by supporting the necessary social fabric. The strong link between shifting cultivation and culture is shown in celebrations, festivities and rituals that accompany work in the fields, and by the many specific words and names in the language of the people who practice it.

There are no outright references to shifting cultivation or slash-and-burn as a farming system in any legislative documents in Nepal. This is mainly due to the fact that most policy decision makers are under the impression that the practice no longer exists in Nepal. There are however, many ways in which shifting cultivation as a practice is made “legally impossible” in official acts and other legislation, irrespective of who practices it. Basic tenets like fallowing are made impossible, because forest clearing and controlled burning are officially banned across Nepal, even in private forests. Officially, anyone who wants to cut down a tree, even in their own back yard, needs permission from the Forest Department.

Common property tenure is legally impossible and fallow forests are greatly discouraged; the better a forest grows, the sooner the government will claim ownership and control over it. In many places where shifting cultivation is traditionally practiced, the growing of annual (staple) crops is officially prohibited, such as in government and community forests. The same is true for hunting and fishing, which are important sources of animal protein and food security for many shifting cultivators and indigenous peoples.

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<sup>9</sup> Relevant articles include Articles 2, 4, 7, 13 and 14 (14.1 specifically mentions shifting cultivators) *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169)*.

Legal provisions are one thing, while their implementation is quite another in many cases. Most of the above-mentioned rules and regulations are not actively enforced, particularly as government presence in inaccessible shifting cultivation areas is minimal and of low priority. Government programmes, on paper, may acknowledge the existence of shifting cultivation, but it is mostly referred to in derogatory terms and identified as a problem to be eradicated. It is mainly the District Forest Offices who are reported to actively punish shifting cultivation related activities. District Forest Offices, the Makalu-Barun Conservation Area Project and other projects have organised awareness programmes to discourage shifting cultivation, pointing to its alleged negative impact on wildlife.

Most policy decision-makers and implementers can be said to be unaware of or ill-informed about the subject of shifting cultivation and its functioning. This is also true of those line agencies who are supposed to be the direct service providers at the district level. The agriculture officer in Sankhuwasabha, who had never heard of shifting cultivation, is a case in point. Similarly, the majority of others interviewed seemed to equate shifting cultivation with just slashing-and-burning for land clearing. Despite this limited understanding, perceptions and decisions perpetuating the negative stereotype of shifting cultivation are easily made and accepted, because public opinion in general sees shifting cultivation as a “primitive practice for lazy farmers”, which has little benefit to anyone.

In this context, a relevant question is why farmers continue to practice shifting cultivation in the face of so much adversity? Our field-based findings show that most farmers practice shifting cultivation because it is the only viable option on their marginal land and because they are good at it. This challenges the widely held views that the practice can be controlled by providing shifting cultivators with the same options as other farmers, because what may be suitable for other farmers may not be suitable for the marginal lands where shifting cultivation continues to be practiced. In places where other viable options are available, farmers (including shifting cultivators) will adopt these if they are found to be better. However, such options should not be forced on people. This is linked to the core principles of Convention No. 169 - the right to consultation, participation and the right of indigenous peoples to decide their own priorities for the process of development<sup>10</sup>.

Farmers do not practice shifting cultivation because it is simple and cheap, nor because they are primitive or backward. In fact, shifting cultivation is very hard work and many farmers live below subsistence level. Therefore, while shifting cultivation may require low external input, it cannot be considered cheap in regards to labour input. The cases, as well as appreciative literature (e.g. Kerkhoff and Sharma 2006; Daniggelis 1994, 2001, 2003) show that shifting cultivation is a sophisticated integrated farming system, which depends on strong community organisation. Proof of sophistication is that it sustains entire communities on some of the world's most marginal steep slopes.

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<sup>10</sup> See Articles 6 and 7 of ILO Convention No. 169.

Protecting the right to practice shifting cultivation has several implications for the government. For one thing, it means that the government should accept shifting cultivation as a *bona fide* land use type, just like irrigated terraces, rain-fed terraces, or community forestry, and provide it support to an equitable extent. It further means the government should not try to make them adopt other options just for the sake of controlling shifting cultivation. There are examples where new options have been forced on communities with disastrous results for farmers' livelihoods and resource degradation. Experiences of this from Nepal as well as other countries are documented in Kerkhoff and Sharma (2006).

## **6.2 Land rights**

Loss of land rights is the main issue for shifting cultivators in Nepal, as is evident from the case examined here. Most land used for shifting cultivation is not registered, cannot officially be registered for various reasons described above, and as a result is allocated to other purposes by governments (e.g. community forestry or protected areas). If this is not the case, the land is likely to be 'grabbed' by rich and powerful people. From our field visit it became clear that farmers only practice shifting cultivation on the land they have customarily held, which was delineated during the Rana times. This contradicts notions found in literature and held among policy makers that shifting cultivators are forest encroachers, or that they use slash-and-burn to secure land for future generations (Sharma and Khatri-Chhetri 1996).

Farmers who do not have land ownership certificates face several problems. First of all, they are perceived as encroachers on government land if they use it for agriculture or grazing. Secondly, all the government forest land has in recent years been turned into community forests, with the result that access and control of 'traditional users' has, in many cases, been lost. Third, only registered land can be used as collateral to get loans from banks, including the Agriculture Development Bank. Tenurial insecurity has a strong impact on land management and food security. For example, some farmers reported that if they could secure a land title, they would make terraces on those lands where appropriate. However, given the current situation of insecure tenure, such a major investment is too risky. In cases where farmers risk being evicted from their lands, tenurial insecurity can also lead to over-exploitation and reduced fallow phases. Those farmers who do not have ownership certificates face the risk of being evicted from the lands they have traditionally occupied.

Allowing shifting cultivation requires policy makers to understand that shifting cultivators need more land area than for permanent farming, because of the need to rotate and grow fallow forests. Furthermore, they need to be able to clear these forests when it is time for the cropping phase. Policy makers also need to be aware that permanent farming is not possible on land where shifting cultivation is practiced, and that reducing the land area to the extent that they cannot have a fallow phase anymore is not sustainable for food security or the environment. Factors such as these are the rationale behind Article 14.1 of Convention No. 169, which states:

*"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures*

*shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.”*

One thing that needs to be said about land rights campaigns is that even under the available legislation, farmers can already register land which they are cropping. However, due to circumstances they are not able to access that right. There are no policy instruments available, for example, that protect people against loan sharks and other powerful people who want to cheat them off their property.<sup>11</sup> It is relevant to note that Convention No.169 provides for access to all ancestral lands, irrespective of current ownership, and the concept of ‘use’ is much broader than just for cropping. It includes, use for hunting, gathering, religious purposes. These aspects are completely missed in the campaign.<sup>12</sup>

A related issue is the right of peoples to own land under common property regimes. Common property of land is not possible in Nepal, were only private and government property land are accepted. In the past, strong common property regimes did exist, especially in the case of the *kipat*-holders in Sankhuwasabha, but these have mostly disintegrated over time. As is explained above, common property has several benefits for shifting cultivation, which is why farmers formally still adhere to it, like in Mude. Legal, tax and administrative obligations, however, create many problems.

Common property arrangements in shifting cultivation ensure universal access to land for all farmers of a community (Choudhury, 2004), whereas after privatisation there is a great risk for the poorest farmers to become landless. There are no provisions in Nepalese legislation that protect farmers against landlessness, but farmers are slowly becoming more aware on how to protect themselves against exploitive practices.

In practice, unclarities and disagreements about land rights result in conflict and resource degradation. Unruh (2006) therefore promotes the notion of ‘evidence landscapes’, in which features of the landscape are taken as evidence that stakeholders can use to prove their prior or current occupation and strengthen their claim to the land. This is useful to manage the disconnection between formal and customary tenure in situations where institutions are lacking, but such evidence can also be brought in formal courts. Landscape evidence can even be formally recognised in policy and legislation. In the case of shifting cultivation, evidence such as fallow forests (which are discernible from natural or primary forests) and sacred groves can be important for delineating farmers’ land, whether it is currently used or ancestral land.

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<sup>11</sup> Articles 17.3 and 18 recognise the need to protect indigenous and tribal peoples’ lands from: a) others coming into these lands for their own personal gain without permission from the relevant authorities; and b) outsiders trying to take the lands of indigenous and tribal peoples away from them through fraud or other dishonest means. *ILO Convention on Indigenous and Tribal Peoples, 1989 (No.169: A Manual)*, ILO Geneva, 2003, pp. 34.

<sup>12</sup> See Articles 13-19 on land rights.

### **6.3 Displacement**

In an attempt to conserve vulnerable resources, governments have considered moving communities (settlements) to other areas. For example, people are being encouraged to leave their homes in the Makalu-Barun National Park. So far in the area under study, this seems to have happened only at a relatively small scale and has been based on incentives rather than direct force. Convention No.169 recognises that 'removal from traditional territories has severe impacts on the ways of life, well-being and cultural identity of many indigenous and tribal peoples' (ILO 2003:44). Article 16 is explicit on the impact of displacement of indigenous peoples and provides detailed guidelines in the event that displacement is inevitable (see ILO 2003: 44-47). Experiences from across the globe have proven that the impact of displacement on (indigenous) peoples is usually severe and can include cultural disintegration, extinction and loss of livelihood resulting in vulnerability to exploitative labour practices. Furthermore, the fact that indigenous farmers have detailed knowledge and skills that are adapted to their own environment, having been passed on through generations, means that moving them to new areas that may not even be ecologically similar renders much of this knowledge redundant. In turn, their expertise with new resources in a new habitat will never reach the same level of knowledge and expertise.

### **6.4 Rights to natural resources**

Access to and control over natural resources is as important to shifting cultivators as access to land because they also depend on these for their livelihood. Denying or hampering this access is tantamount to discrimination in employment and occupation under Convention No. 111, as it results in their inability to practice their traditional occupation. There are many resources with specific qualities which shifting cultivators depend on for their food security and livelihoods, including (1) forest resources, (2) water resources, (3) agricultural biodiversity; (4) soils; (5) hunting and fishing; and (6) minerals. However, the major tenure conflicts concern the fallow forests, which are highlighted here. The main issue is that fallow forests should be allowed to be 'shifting forests', not just permanent as in community forestry, because they are the main and sometimes only source of soil fertility for the agricultural crops. Separating the crops from the fallows significantly reduces crop production. Furthermore, the early stages of the fallow, when there is grass, shrubbery, bamboo and open forest, provide a wide range of products, which do not appear in mature forests. In areas where the government officially owns and controls the forest (protected areas and government forests), and even in community forests, collection of many products is restricted.

### **6.5 Customs and traditions and customary law**

As was explained above in the section on social security, in the case of shifting cultivation, the customary institutions that govern the communities and their access to land, provide a traditional form of social security to all community members. This provides an important social safety net, which is especially important for the poorest/weakest members. Examples include the provision of land, which enables them to work under much more favourable conditions than share-cropping. The right to self-management recognised by Convention No. 169 (preamble) is relevant here – i.e. recognition that indigenous peoples are active agents in their own development.

## 7. Discussion and Conclusions

Shifting cultivation is a traditional occupation that is protected by rights enshrined in ILO Conventions Nos. 111 and 169. This is relevant for those indigenous peoples and individuals who still practice shifting cultivation and are discriminated because of it, but also for those who have already turned to other occupations, but still face discrimination because they once were shifting cultivators. Raising awareness on and advocating for these rights will therefore remain relevant despite the fact that many people may opt out of their traditional occupation in the future. What becomes clear from the case studies is that the government as well as the academic and development professionals are unaware of their responsibilities towards shifting cultivators. There is no government presence whatsoever in many areas, even before the Maoist conflict, and in the event that officials do come, their tendency is to 'control', rather than 'support' local communities. In light of some of the issues raised in this chapter, it becomes possible to elicit some practical ideas on what the government needs to do in order to comply with its obligations towards indigenous peoples under Conventions Nos. 111 and 169.

### 7.1 *Assessment of the policy situation*

It is doubtful whether the present policy framework for shifting cultivators meets obligations under Convention No.111 – which mandates equality of opportunity and the need to target vulnerable groups in order to bring them on same level as the rest of the population. The study has found that while blanket policies do exist to address the needs of the poor, as expressed in the 10<sup>th</sup> Plan, these policies fail to address the needs of the most vulnerable – in this context, shifting cultivators. These marginalised groups tend to fall through the net due to a legacy of structural discrimination. The objective of these policies is equality (everyone has the same rights), whereas indigenous people have the right to maintain their distinctive cultural identity, and to special measures to make them benefit equally despite the different situation they are coming from. There are examples of beneficial policies which can be used by shifting cultivators to claim or advocate for their rights, such the 11 Kha Board, but the majority are either unaware or not in a position to make use of them.

The need for providing equitable access to resources and services is still not widely accepted in the broader Nepalese society, which may be why political will and constructive implementation of existing policies are lacking. For example, there is no identification of the poorest or an established 'below-poverty line', which would help to target them. Reality is that targeting is not effective and benefits not reaching those who need it most. A positive exception to the overall negative picture is formed by those policy makers and administrators who, within the space given to them, dare to take responsibility and interpret existing legislation to the benefit of shifting cultivators (e.g. forest officers who keep out of farmers' fallows).

Some rights may seem impossible to fulfil, in some cases past harm cannot be undone, and in other cases it is difficult to establish whether a development has taken place with or without the consent of the concerned people. However, having a conducive policy environment is a start. Applying a convention is the government's duty. Even if the government fails to comply, if people aware of their rights, they can at least lobby for

their interests and negotiate viable options even in cases where conditions have changed. In the case of land rights, protecting current landholdings through registration is definitely possible, and so is protecting them from land grabbing by forest department and non-indigenous groups too. However, providing enough land to maintain the shifting cultivation practice as it was two-three decades ago, or till the unification of Nepal, is not possible anymore. In such a case, the government can at least acknowledge that the land was unrightfully taken and help farmers to cope with the new circumstances.

### **7.2 Questions on how the Conventions apply to various stakeholders**

From the study, questions arise on the applicability of the ILO Conventions in the following cases: 1) elites from indigenous shifting cultivators, who claim (parts of) the previously communal land as private property; 2) indigenous shifting cultivators who use their land for other purposes; 3) those indigenous shifting cultivators who abandoned the practice to look for other employment; and 4) non-indigenous people who also practice shifting cultivation because it is appropriate for the land they have.

It is normal that there will be competing claims when individual and collective/customary property regimes come into contact, but both individual and collective rights are recognised by Convention No.169. There are many kinds of people who claim to have land rights for many different reasons. Sometimes it has happened that elite farmers had traditional rights to the land in the form of common property (*kipat*), but now they claim it in their own name and manage it privately. In other cases, rich farmers have cleared forest under the guise of shifting cultivation, and then used the land for monocrops or forest plantations. In order to sort out land claims, some form of land commission will have to be set up with all stakeholders fairly represented.

It should be noted that there is nothing to stop indigenous peoples engaging in other occupations if they wish to do so – it need not have an impact on their land rights or claims. They do not have to use land for ‘traditional purposes’ in the present in order to claim traditional rights. This is partly relevant, because common property is not recognised legally, but also because customary tenure regimes have dissolved.

What happens if people leave their traditional occupation for other work is also crucial to the argument on discrimination – i.e. when shifting cultivation becomes less profitable or sustainable, and indigenous peoples are forced to look for alternative options. When they are not given the right inputs and opportunities to diversify their occupations, they often end up discriminated against and vulnerable to exploitation in the mainstream labour market. The bottom line is they should have the choice to practice, or not practice, shifting cultivation, or any other traditional occupation.

## **8. Recommendations**

In a country like Nepal, with its extreme topographical and ecological diversity and high dependence on agriculture, the existence of many different indigenous peoples should be seen as a boon. They each bring their own expertise, traditional occupations and farming practices, which are adjusted to local circumstances. They are embedded in their culture and language. Decision-makers need to learn to appreciate the benefits of



a multicultural society in which different peoples bring in different sets of skills, knowledge and expertise, and find ways to tap into this wealth. For this it is important to respect the link between traditional occupations (including shifting cultivation) and ethnic and cultural diversity and survival, and to recognise the role of shifting cultivation in providing food security and livelihood for some of the most marginalised sections of society.

Furthermore, indigenous shifting cultivators should get equitable access to government services and justice. The pro-poor focus of the 10<sup>th</sup> Plan needs to be operationalised and implemented, even if it requires more effort to reach the poorest and address their needs first. This will necessarily need proper targeting, through consultation and participation of the peoples concerned. Equity requires special measures. Shifting cultivators have specific needs that stem from their distinctive culture, occupation, and the steepness and remoteness of their land. According to the ILO (2003), the objective of these special measures is to bring the living conditions of indigenous peoples to the same level as the rest of the national population, and to protect their cultures and traditions.

Based on these principles, the following recommendations have been formulated that are supported by the research findings.

- (I) Formally recognise shifting cultivation and accept that banning and discouraging this age-old and well integrated farming system is counter-productive in terms of development, food security and environmental conservation**
- (II) Recognise indigenous peoples' rights to the land and natural resources required for shifting cultivation, including collective rights**
- (III) Strengthen indigenous shifting cultivators' role in decision-making regarding their development and resources, through participation and consultation**
- (IV) Progressively implement ILO Conventions Nos. 111 and 169, and raise awareness on the applicability of these to protect the rights of shifting cultivators**

## **References**

- Aryal, K.P. and Kerkhoff, E.E. (2008, in press) *The right to practice shifting cultivation as a traditional occupation in Nepal: A case study to apply ILO Conventions Nos. 111 (Employment and Occupation) and 169 (Indigenous and Tribal Peoples)*, ILO and ICIMOD, Kathmandu (in press)
- Bista, D.B. (1967) *People of Nepal*, Kathmandu: Ratna Pustak Bhandar
- Borrini-Feyerabend, G., M. Pimbert, M.T. Farvar, A. Kothari and Y. Renard (2004) *Sharing Power. Learning by doing in co-management of natural resources throughout the world*, IIED and IUCN/ CEESP/ CMWG, Genesta, Tehran

- Choudhury, D. (2004) Scientist Incharge, North-East Unit, G.B. Pant Institute of Himalayan Environment and Development, Ittanagar, India, presentation at the 'Shifting Cultivation Regional Policy Dialogue Workshop for the eastern Himalayas', held in October 2004 in Shillong, India
- Daniggelis, E. (1994) "Jangal resource use: adoptive strategies of Rais and Sherpas in the upper Arun Valley of eastern Nepal". In: Allen, M. (ed) *Anthropology of Nepal: peoples, problems and processes*. Mandala Book Point (Kathmandu)
- Daniggelis, E. (ed.) (2001) *Hidden Wealth: the Survival Strategy of Foraging Farmers in the Upper Arun Valley, Eastern Nepal*, Kathmandu: Mandala Book Point and The Mountain Institute.
- Daniggelis, E. (2003) "Women and 'wild' foods: nutrition and household security among Rai and Sherpa forager-farmers in Eastern Nepal", In: Howard, P. L. (ed) *Women and plants: gender relations in biodiversity management and conservation*, Zed Books London
- Fujisaka, S.; Hurtado, L.; Uribe, R. (1996) "A Working Classification of Slash-and-Burn Agricultural Systems." In *Agroforestry Systems*, 34: 151-169
- HMG/National Planning Commission (NPC) (2003) *The Tenth Plan (Poverty Reduction Strategy Paper) 2002–2007*, Summary, Kathmandu
- ILO (1996) *Equality in Employment and Occupation*. ILC 83<sup>rd</sup> session 1996, International Labour Office, Geneva, Switzerland
- ILO (2003) *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual*, ILO Geneva
- Kerkhoff, E. and Sharma E. (2006) *Debating Shifting Cultivation in the Eastern Himalayas: Farmers' Innovations as Lessons for Policy*, Kathmandu: ICIMOD
- Kerkhoff, E. (2008, in press) "Debating Shifting Cultivation in the Eastern Himalayas: Farmers Innovations as Lessons for Policy". In: Sustainable Sloping Lands and Watershed Management Conference: Linking research to strengthen upland policies and practices, 12-15 December 2006, Luang Prabang, Lao PDR (in press)
- Nepali, R.K. *et al* (1990) "Community Resource Management". The Makalu-Barun National Park and Conservation Area.
- Ramakrishnan, P.S. (1992) *Shifting Agriculture and Sustainable Development: An Interdisciplinary Study from North Eastern India*. MAB Series, Volume 10, UNESCO, Paris
- Regmi, B.R.; Subedi, A.; Aryal, K.P; Tamang, B.B. (2004) *Documentation of Shifting Cultivation in the Eastern Himalayas: Case Studies from Nepal*. Report prepared for ICIMOD, Kathmandu, Nepal
- Regmi, B.R., A. Subedi, K.P.Aryal and B. B. Tamang (2005) *Shifting Cultivation Systems and Innovations in Nepal*, LIBIRD, Pokhara (unpublished)
- Sharma, C.; Khatri-Chhetri, J., (1995) *Slash and burn agriculture in Makalu and Yaphu VDCs of MBCPA*, Nepal. Dep. of National Parks & Wildlife Conservation (Kathmandu) NP; The Makalu-Barun Conservation Project publication series report 27
- UN (2007) Index of /esa/socdev/unpfii/documents  
<http://www.un.org/esa/socdev/unpfii/documents/?N=D>. Accessed on 2.4.2007.  
 United Nations

- UNDP (2004) *Nepal Human Development Report 2004: Empowerment and Poverty Reduction*, Kathmandu
- Unruh (2006) "Land Tenure and "Evidence Landscape" in Developing Countries". In *Annals of the Association of American Geographers*, 96(4), pp. 754-772