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ABSTRACT

Staking a Claim: Politics and Conflicts between Statutory and Customary Water Rights in Nepal

by

Rajendra Pradhan and Ujjwal Pradhan

This paper explores two sets of issues: first concerning the consequences of state intervention and the second concerning the significance of law, for water rights. It discusses the (un)intended consequences of state intervention in farmer managed irrigation systems for water rights: the customary rights of the existing rights holders are no longer secure and made secondary to state rights. Further, opportunities are provided for new claimants to stake claims to water rights in irrigation systems or water sources from which they had been excluded.

The second set of arguments concerns the significance of law and the relation between law and social relations in staking claims, conflicts and disputes, and alteration of water rights arrangements. Law confers legitimacy to claims and rights but it does not by itself guarantee or alter water rights. Further, the question is not only whether to use law but which law to use and how and where claims are to be asserted. In legal plural situations, claimants can use different legal orders and normative repertoires (customary law, state (statutory) law) and different forums to justify, assert or protect their claims. Whether and how claims are made, accepted, disputed, or water rights arrangements altered depend not only on law but equally, or more importantly, on social relations between the claimants (relations of power, political rivalry, patronage, kinship ties, etc.). The claimants are influenced more by 'political' considerations than purely legal ones in their selection of law and methods to assert and protect their claims.

The paper briefly reviews the relation between state and locality in the development and control of water resources, especially for irrigation, and several water rights related state laws. This is followed by a discussion of claims, claimants and the normative repertoires (law) used to justify claims. We then describe several cases of conflicts and disputes between different claimants to property and water rights in a water source and an irrigation system. The concluding section discusses some issues raised by the case study concerning water rights and the study of water rights.

Paper to be delivered at the Sixth Annual Conference of the International Association for the Study of Common Property, Berkeley, California, June 5-8, 1996.

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I. Introduction

In Nepal, as in most countries, irrigation has developed through the involvement and interaction of the state and locality or local groups (Coward 1986; U.Pradhan 1990)2. The involvement of the state and local groups in irrigation development has changed over different periods of Nepalese history. Earlier the state's role in irrigation development was confined mainly to laws and policies, and, to some extent, finance. Most of the irrigation systems were constructed and managed by local groups (local elites and tenant farmers) mainly with their own resources (P. Pradhan, 1986; U.Pradhan, 1990; Benjamin, Lam, Ostrom, Shivakoti, 1994)3.

Irrigation development creates property relations and property rights in irrigation systems and water rights (Coward, 1986; U. Pradhan, 1990). The irrigation communities had property and water rights in their irrigation systems and in the sources of water tapped by their systems. These rights were locally negotiated, legitimized by customary laws and endorsed by the state, for example by the Law on Reclamation of Wastelands. As the state increased its involvement in irrigation (and drinking water and hydroelectricity) it increased its claims to property rights in water in the interest of the wider public and legitimized its claims by enacting new laws. Public or state rights in water expanded at the cost of private (individual or group) rights.

The intervention of the state in water resources, especially in farmer managed irrigation systems, as well political and social changes which occurred at the national and local levels, provided opportunities for new claimants to stake claims to water rights in the existing irrigation systems and\or sources of water. They often justified their claims with the argument that once state invests in an irrigation system it is no longer private but public property. The conflicts and disputes which arose as a result of these contested claims often altered water rights arrangements in farmer managed irrigation systems, especially those rehabilitated and extended by the state.

This paper explores two sets of issues: first concerning the consequences of state intervention for water rights and the second concerning the significance of law for water rights. It will be argued that state intervention in farmer managed irrigation systems has (un)intended consequences for water rights of the existing rights holders, namely that their customary rights are no longer secure. Another consequence is that state intervention provides opportunities for new claimants to stake claims to water rights in irrigation systems or water sources from which they had been excluded.

The second set of arguments concerns the significance of law and the relation between law and social relations in staking claims, conflicts and disputes, and alteration of water rights arrangements. It will be argued that whether and how claims are made, accepted, disputed, or water rights arrangements altered depend not only on law but equally, or more importantly, on social relations between the claimants (relations of power, political rivalry, patronage, kinship ties, etc.). Law is only one of the resources used to justify claims. The significance of law lies in the fact that it confers legitimacy to claims and rights but it does not by itself guarantee or alter water rights. Further, the question is not only whether to use law but which law to use and how and where claims are to be asserted. In legal plural situations, claimants can use different legal orders and normative repertoires (customary law,

state (statutory) law) and different forums, mediators, village councils, courts, etc, a process known as forum shopping (K. Benda-Beckmann, 1984). Claims may be justified by reference to other normative orders than those specifically concerned with water rights, equity for example, and claims may be asserted by taking to the streets or 'stealing' water. The claimants select different laws and methods to assert and protect their claims, their claims and mode of disputing influenced more by 'political' considerations than purely legal ones.

In this paper we will first discuss the relation between state and locality in the development and control of water resources, especially for irrigation. The next section briefly reviews several laws relating to water rights to show how the state has increasingly acquired more rights at the cost of local and customary rights. This is followed by a discussion of claims, claimants and the normative repertoires (law) used to justify claims. We then describe several cases of conflicts and disputes between different claimants to property and water rights in a water source and an irrigation system. The concluding section discusses some issues raised by the case study concerning water rights and the study of water rights.

The paper focuses on water rights issues in farmer managed irrigation systems, using surface water, and particularly those rehabilitated and extended by the state.

II. Relation between state and locality in water resources development

Until the middle of this century direct involvement of the Nepalese state in 'developmental activities' and control of natural resources, especially water, was limited except when the ruling elites benefitted. The administrative structure was small and underdeveloped and there were very few statutory laws concerning natural resources, especially water. Due to the weak presence of the state, local communities were relatively autonomous. Local communities, or rather local elites, controlled and managed natural resources in their locality mainly in accordance with their local laws.

The state's involvement in the water sector prior to 1951 was confined mainly to irrigation development, primarily to increase state revenue and income of the ruling elites at the central and local Ievels4. Although the state did construct or finance construction or repairs of irrigation systems and managed or supervised the management of some systems, its main contribution to irrigation development was by means of laws and policies which encouraged and, sometimes forced, local elites and ordinary farmers (tenants) to construct and maintain irrigation systems. As several authors (P.Pradhan, 1986; U.Pradhan, 1990; Benjamin, Lam, Ostrom, Shivakoti, 1994) have noted, (state) legal tradition and weak administrative structure made it possible and necessary for almost all of these irrigation systems to be actually managed by the irrigators with little interference from state agencies..

The role of the state in developmental activities increased immensely after the despotic Rana family were overthrown in 19515 and especially when international aid began to flow into the country. The purposes of government were altered to provide public goods and services, at least in theory. The state instituted centralised and planned development of the country for which state control of natural resources, especially forestry and water, was considered essential.

The state became increasingly more involved in the development and control of water resources. The state (and international donor agencies) constructed new and large irrigation systems, hydroelectric plants and drinking water systems, all managed by state agencies. The state, again with international aid, also rehabilitated and extended existing farmer managed irrigation systems, especially after 1981. The administrative structures and budgets related to water resources expanded considerably (cf. U. Pradhan, 1990; Benjamin, Lam, Ostrom, Shivakoti, 1994 for irrigation).

New laws were enacted which gave legitimate authority to the state to develop, utilize and regulate use of water resources. These new laws, discussed below, which are based on and

justified by the rhetoric and principle of eminent domain (primacy of public over private rights), increased the divergence between customary and statutory rights and laws relating to water.

The increasing direct involvement of the state in irrigation development, especially in improving and enhancing farmer managed irrigation systems (FMIS), and the new state laws and policies had some important consequences, intended or unintended. In the case of farmer managed irrigation systems which were rehabilitated and extended by the state, less resource mobilisation was required for repair and maintenance, command area increased and, in some cases, irrigation management, especially regarding water distribution, was also improved. However, there were unforseen and unintended consequences. The security and legitimacy of existing rights holders to water rights were threatened by claims made by the state as well as other farmers. This frequently led to negotiations, conflicts and disputes between the different claimants and consequently existing property relations and water rights arrangements were often restructured (cf. U. Pradhan, 1990, 1994; R. Pradhan, Haq and U. Pradhan, 1996; M. Pradhan and R. Pradhan, 1996).

III. Statutory laws

A. The Law on Reclamation of Wastelands

The first set of laws applicable at the national level was promulgated in 1854 and known as Muliki Ain, (National Code). The code " retained customary practices relating irrigation, and also traditional customs of different local and ethnic communities in Nepal" (Benjamin, Lam, Ostrom, Shivakoti, .1994: 25; U. Pradhan, 1990:52). The section in the National Code, known as the Law of Reclamation of Wastelands, details rights in water for irrigation. The purpose of the law was to encourage land reclamation, especially for irrigated agriculture so as to increase state revenue. Irrigators were granted right-of- way to construct canal, against compensation; new canals could be constructed upstream of existing ones only if water supply to

the latter would not be reduced. The law assured security of water rights to those who had invested in constructing irrigation systems; prior appropriators had first priority (and senior rights) in water use but if they are unable to use water then others could use the water. Similarly, upcanal farmers had priority over downcanal farmers. At the same time, the farmers were obliged to maintain and repair canals; they could be evicted from their land if canals were not repaired for certain number of years. In short, " The state was cognizant of customary rights over water at the source as well as for allocation, and has incorporated stipulations for water allocation and use with the intent of curtailing potential water conflicts over priorities with the very irrigation sector" (U. Pradhan, 1994:190).

Although this state law existed, it does not mean that it was used and applied in the rural areas. As Benjamin points out,

> " the fundamental nature of governance in Nepal for a century and a half was central neglect...Whatever laws as existed in the capital, with the exception of those pertaining to taxation and order, were not necessary structures by which village people guided their lives " (Benjamin, Lam, Ostrom, Shivakoti, 1994: 25-6).In other words, local or customary laws 'guided' their lives.

The present law on Reclamation of Wastelands does not differ much from the 1854 law. The law is valid except for matters contradicted by new laws.

B. Canal, Electricity and Related Water Resources Act, 1967

With the change in the political system and purposes of the government, laws were enacted which vested the state with authority to invest directly in water resources and to regulate water use. The state, with international aid and persuasion, was 'committed[1] to providing public goods and services and new uses of water, particularly for hydroelectricity, were available. The first specific legislation for water resources is the Canal,

Electricity, and Related Water Resources Act, 1967 dealt primarily with the state's involvement in, and control of, water resources primarily in irrigation and hydroelectricity.

With this act, the state asserts the primacy of state (or public) rights over private and customary rights and is justified by reference to the principle of eminent domain (in national or wider public interest). The preamble to the 1967 Act states,

> " Whereas it is expedient to regulate the use of important national resources like rivers, streams, lakes, water-falls and groundwater resources in order to maintain the convenience and economic benefit of the people; and... to develop irrigation in an appropriate way by providing necessary legal system relating to irrigation..."

Though the term 'eminent domain' is not used, it is implied in the use of terms and phrases such as 'regulate', 'national resources', 'convenience and economic benefit of the people' and 'appropriate way'.

Two features of the act affect the water rights of the existing rights holders. First, water use is regulated by licensing. Licence is required to utilize water resources, except for purposes such as domestic use, irrigation and operating traditional water mills. The state recognized the rights of individuals and groups to construct but it is the state which grants them such rights. Second, primacy of state or public rights over private rights is asserted. Existing farmer managed irrigation systems may not adversely affect existing or future government projects. Further, the state can acquire farmer managed irrigation systems by paying compensation for "making large-scale and comprehensive arrangements" regarding irrigation (Clause 6, subsection 2 of the Act).

Other sections of the act deals with licence and procedures for private parties to construct and operate hydroelectricity, water tax and electricity charges in state or private projects,

environment protection, right of the state to develop water resources, and so on.

C. Water Resources Act, 1992

With increasing competition and conflict over water and increasing state intervention in irrigation as well as other water uses (especially drinking water and hydroelectricity) , The Water Resources Act, 1992 vested ownership of all water in the state and, listed priority in water use (drinking water, irrigation, and other agriculture use, etc.)6. As in the earlier Act, water users had to obtain licence to utilize water resources except for specific uses, such as domestic use and irrigation. Further, the state could itself develop and utilise water resources and it may acquire water resources and related land, building, equipment and related structures for purposes of extensive public use, which is defined as, "use which does not cause substantial adverse effect to the existing use and serves benefits to larger population than the existing population benefitted from it".

This act vests paramount water rights in the state. Water users only have use rights and that too subject to the conditions laid down by the state. As one of the co-authors, commenting on this Act, writes,

> As the state deems fit, it allows corporations, communities, or individuals to use the resources. People obtain water use rights either through licenses, or are "granted" free access to water for certain uses... individual rights become subservient to the terms and conditions imposed by the state...Since 'ownership[1] right is treated as the 'mother of rights' and other... (rights) as derivatives or secondary to "ownership" rights, the difference between "peoples' rights", and "state rights" become apparent (U. Pradhan, 1994: 191).

This Act has altered the customary rights of the existing water rights holders, at least in terms of state law. Villagers and local officials interviewed were not aware of this Act or provisions of the Act. They continue to utilize water for

irrigation and justify their claims and rights by reference to their local and customary laws. But when this Act is used by new claimants to water from sources already used by existing rights holders, for example for drinking water or hydroelectricity projects, or even for new canals by obtaining license from the government, there will be conflicts between the old and the new claimants.

IV. Claims, claimants and (legal) justifications

There are diverse claims and rights in objects of property such as land and water (Wiber, 1992; U. Pradhan, 1990; 1994). A river may be owned by the state or several villages but the water tapped by an irrigation system is owned by the farmer who have property rights in the irrigation system. Several farmers may hold property rights (ownership and use rights) in an irrigation system they constructed but other farmers may have rights to use water from it in times of drought. Or all the farmers in a river basin may have rights to use water from a river, owned by the state, but the farmers with land in the most upstream canal may have first rights to use water. Similarly different claimants may claim ownership rights or use rights, senior rights or junior rights in the same source of water or irrigation system.

Rights, claims and claimants to water rights in particular object of property differ over time. Farmers who do not have access to a water source or irrigation system but have not as yet voiced their objections often stake claims to water rights when they receive support from powerful politicians, or there a shift in the local power structure in their favour, or the state invests in the system. These claimants may claim ownership rights or only use rights.

The state is an important claimant to water rights but the nature of its claims is different from other claimants. The state claims rights to water in general, i.e., all water within its boundary, and usually not to specific water sources except when the sources are used for state projects. The state claims rights on behalf of the nation or public. Over time and in different contexts, the state may claim rights to regulate and

control water use, or first priority in utilising water resources for its projects, or\ and ownership rights.

Whether and how claims are accepted, contested, and disputed and the existing water rights arrangements altered depend on the nature of social relations between the community members and between them and the state, and the resources such as power, connections, law and money they are able to deploy, the state's role in development and control of water resources, and the opportunities provided by social, economic or political changes at the national and local levels.

From this perspective law is only one of the resources, and not always the most important, available to the claimants to protect or acquire rights. Other resources such as connections with powerful persons, can also be used for similar purpose. The significance of law as a resource lies not in the fact that it guarantees rights but in the fact that it confers legitimacy to claims. And rights and legitimacy confer power (Silliman 1981-2). Law is " a legitimating device to be used and manipulated in different settings" (F. Benda-Beckmann, K. Benda-Beckmann, Spiertz, 1996:5). Law is often used by disputants as a weapon not only, or not so much, to resolve but also to exacerbate conflicts and disputes and to serve their interests (Turk, 1978; Silliman, 1981-82).

By law we are referring not only to state law but also other types of law or normative orders variously known as folk law, customary law, indigenous law, religious law, etc: The coexistence of different legal orders or normative repertoires is called legal pluralism (Merry, 1988). Ignoring for this paper the question of the usefulness of these terms (Merry, 1988), we will use the terms statutory law (or state law) and customary law to distinguish law which is enacted by the state and which " exercises the coercive power of the state and monopolizes the symbolic power associated with state authorities" (Merry, 1988:879) from other (nonstate) normative orders. Customary laws are local forms of self-regulation; they are rules and norms

which emanate from within the community and are based on long tradition (or pretence to long tradition).

These different normative orders may be sharply distinguished in some contexts, as for example, in courts or by some state officials, but they are less sharply distinguished in the everyday life of local communities. At the local level, we find a mixture of different norms and rules, rules which are based on long historical tradition, i.e., customary laws, new forms of self-regulation, old or new rules derived from the state or government agencies. People move from one kind of law to another and different people give different interpretations. This whole mixture of norms and rules that are expressed and used at the local level is called local law (F. Benda-Beckmann, K. Benda-Beckmann, Spiertz, 1996: 3).

During disputes claims are justified, usually by reference to legal rules. The disputants often use different normative repertoires in different contexts or forums depending on which law or interpretation of law is thought to be most likely to support their claims or be accepted as valid (K. Benda-Beckmann, 1984; F. Benda-Beckmann, K. Benda-Beckmann, Spiertz, 1966). Disputants justify their claims by using the same or different normative order and they may use either state law or customary law or a mixture of both.

Existing rights holders in Nepal usually justify their claims by reference to either customary or local law or by claiming long use, usually expressed as 'customary or previous practice (sabik bamoj im) ' or 'rights based on long use[1] (pahile dekhin hakbhog gareko]. The courts have sometimes accepted this justification as valid. The existing rights holders may also justify their claims by reference to statutory laws, e.g., property laws, as in the case described below when the dispute is taken to court.

The new claimants justify their claims usually on the basis of statutory law or sometimes by reference to local law: change in property relations due to state investment; or in cases where they too invested labour or cash, due to their investment.

Justifications need not always be articulated in terms of law. In one case, new claimants justified their claims to water rights in a stream by reference to the principle of equity. As one of the informants argued, "Why should we (only eat millet? We too, like them, have rights to grow and eat rice", i.e., we have rights to irrigation too.)

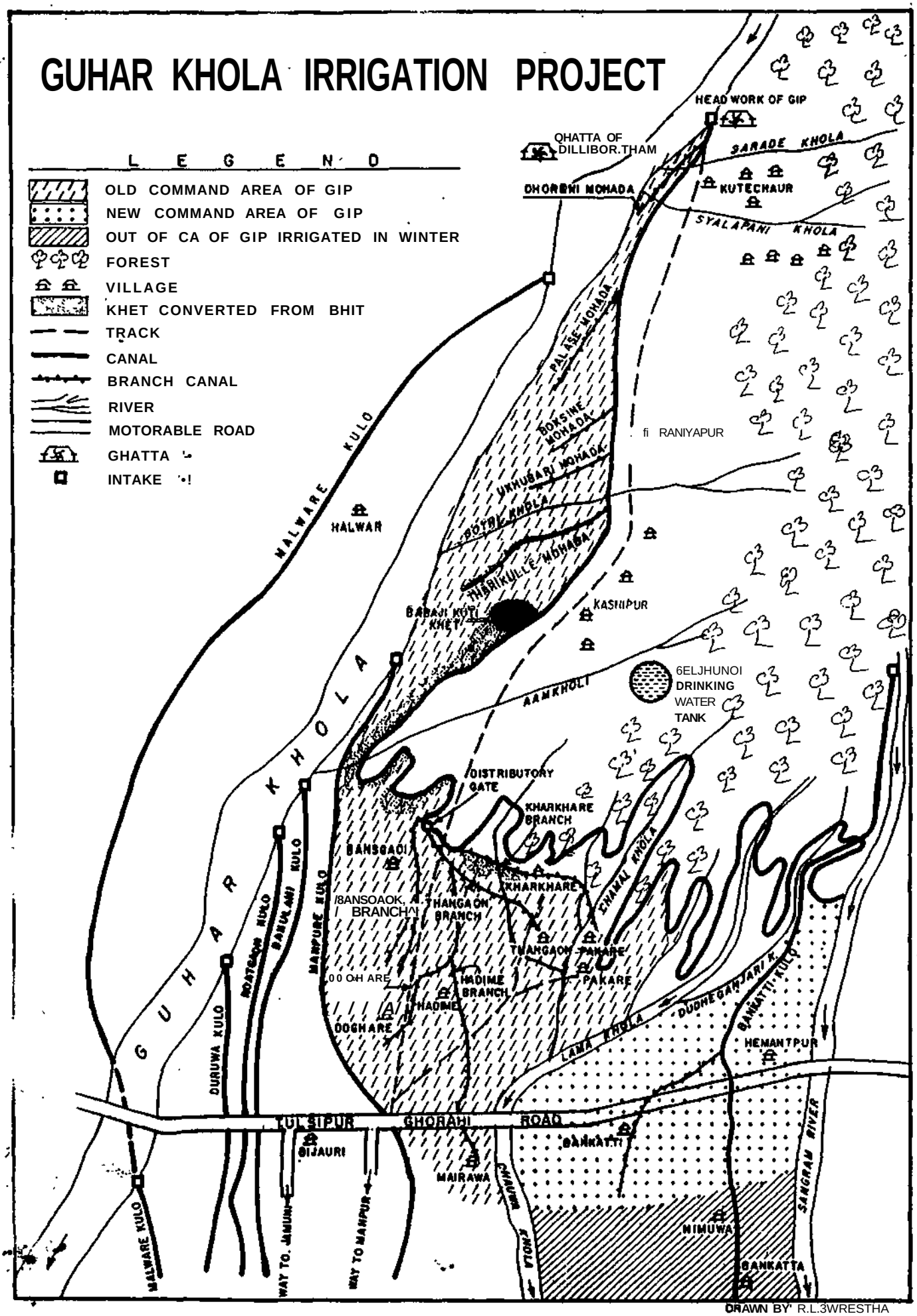
The state justifies claims by reference to statutory law which in turn is currently justified by reference to the principle of eminent domain or public (and national) interest. Sometimes, state officials justify claims by arguing that the state has invested for example, in an irrigation system, so it is owned by the state.

V. Conflicts in Telia Kulo (Guhar Khola Irrigation Project)

In the following section we will describe several cases of conflicts and disputes between existing rights holders and new claimants which occurred when the state rehabilitated and extended Telia Kulo, the uppermost canal sourcing water from the Guhar riverV. All these disputes are about water rights but the claims, (new) claimants, modes and forums of disputing are different. In all cases, the existing water rights arrangements were altered. Social relations and political considerations, more than law, determined how water rights were altered.

Guhar Khola (River) in Dang, a valley in the Mid- Western plains of Nepal, is the source of water for several irrigation systems all of which were constructed by the local landlords and continue to be operated and managed by the farmers largely using their own resources. The most upstream and oldest of these systems is Telia Kulo which was constructed between 150 to 200 years ago by the Majhgainyas, one of the Brahmin families who had been gifted tax free lands by the local kings or chieftains.

In accordance with the dominant customary law, all the irrigation systems served by Guhar Khola have rights to acquire water from the river but Telia Kulo as the most upstream of the


GUHAR KHOLA IRRIGATION PROJECT
L E G E N D
OLD COMMAND AREA OF GIP
NEW COMMAND AREA OF GIP
OUT OF CA OF GIP IRRIGATED IN WINTER
FOREST
VILLAGE
KHET CONVERTED FROM BHIT
TRACK
CANAL
BRANCH CANAL
RIVER
MOTORABLE ROAD
GHATTA
INTAKE
HEAD WORK OF GIP
QHATTA OF DILLIBOR.THAM
SARADE KHOLA
KUTECHAUR
DHORBHI MOHADA
SYALAPANI KHOLA
PALASE MOHADA
BONSINE MOHADA
UKHUSARI MOHADA
POTHI KHOLA
THARIKULLE MOHADA
RANIYAPUR
MALWARE KULO
HALWAR
BABAJI KUTI KHET
KASHIPUR
AAMKHOLI
6ELJHUNOI DRINKING WATER TANK
GUHAR KHOLA
DISTRIBUTORY GATE
KHARKHARE BRANCH
BANSGAON
KHARKHARE
CHAMU KHOLA
BANSAOK, A. THANGAON BRANCH
THANGAON PAKARE
PAKARE
MADME BRANCH
MADME
DOGHARE
DUDHEGANJARI K.
BANKATTI KULO
HEMANTPUR
LAMA KHOLA
TULSIPUR GHORAHI ROAD
BANKATTI
BIJAURI
MAIRAWA
CHUMUN KHOLA
HIMUWA
BANKATTA
SANGRAM RIVER
DURUWA KULO
MANPURE KULO
BARUWANI KULO
WAY TO JAMUNI
WAY TO MANPUR
DRAWN BY: R.L.3WRESTHA

systems has first priority (senior rights) to water, even at the cost of the downstream systems. However, the farmers of Telia Kulo did not divert all the water from Guhar Khola into their irrigation system for various reasons. First, the diversion structure, made from brush wood, allowed water to seep through to the downstream canals. Second, they had an understanding with the farmers of the downstream canals not to use up all the water, except in times of extreme drought. Third, the farmers of Telia Kulo or their relatives owned land in the villages served by the downstream canals.

The farmers of downstream canals with a gross command area of 3984 ha and benefitting approximately 2900 households (landlords and tenants) had water rights in Guhar Khola even if their rights were junior to the rights of the Telia Kulo farmers.

The official command area of Telia Kulo is 450 ha (actual service area 265 ha, 177 ha of lowland (khet) and 88 ha of upland (bari)) and benefits 240 households. Telia Kulo has also been providing irrigation to 90 ha of upland fields, outside its official command area, for winter crops and, in times of drought, for the monsoon rice crop. In exchange for water these 160 beneficiary households provide labour for repair and maintenance of Telia Kulo system. These farmers have only use rights and not ownership rights in Telia Kulo. Further, several villages normally serviced by downstream canals fill their ponds with water from Telia Kulo during winter and the dry season to provide drinking water for their cattle.

A. Disputes between farmers of canals downstream of Telia Kulo and the state: law and politics

The customary water sharing arrangements between these irrigation systems were threatened when the Department of Irrigation initiated a project, financed by the ILO, to rehabilitate and extend Telia Kulo. The project was implemented due to the efforts of the farmers from villages such as Hemantapur and Bankatti east of the command area of Telia Kulo and not by the farmers of the Telia Kulo. These farmers had been trying for several decades to acquire water from additional sources, especially from Guhar Khola via Telia Kulo. Telia Kulo farmers, sensitive to the rights of the downstream canals, had refused to allow them use their canal on a permanent basis though they did supply water to two villages outside the official command area for winter crops and had sold water for a days annually to some villages for several years at the intervention of the local administrative office. The villagers were finally able to get a very powerful person, with close links to the palace, to intercede on their behalf and petition the king to sanction a project which would bring water from Guhar Khola to irrigate their fields.

The original plan of the project was to increase the command area of Telia Kulo by 525 ha. A permanent concrete headwork was to be constructed, the old canal widened and lined and extended by several kilometres. The project would have considerably reduced water supply to the downstream canals because the concrete diversion weir which was to replace the temporary brush wood structure would have tapped most of the water to irrigate the fields in the old as well as the proposed new command area.

The farmers of downstream irrigation systems were not informed, much less consulted, about the project perhaps because the officials feared that the farmers would protest to protect their customary water rights. By the time some of these farmers were able to know the purpose of the project, 'a lot of the construction work had already been completed. They rightly

feared that they would be deprived of their customary water rights.

This was likely to happen for several reasons. First, as mentioned earlier, the project was sanctioned due to the efforts of the farmers of the proposed new command area with whom the farmers of the downstream canals did not have water sharing arrangements. The farmers in the new command area would insist that more water be diverted to the canal to irrigate their fields, especially since Telia Kulo was the uppermost canal. Second, the Institute of Sanskrit, under the Ministry of Education, owned land in the new command area which it rented out to tenants. The dean of this institute had petitioned the king for the project. And third, the state, and more specifically,, the Department of Irrigation, claimed ownership of Telia Kulo which it renamed Guhar Khola Irrigation Project (GIF), because it had (or would be) rehabilitated and extended the system, i.e., invested in the system. The Department would ensure that the new command area was irrigated, even at the cost of the downstream systems.

And, further, the farmers of Telia Kulo did not object to the project plan. They did not object because they would benefit from the project (the permanent headwork and lining of canal would considerably reduce labour contribution for repairs and maintenance) and they feared that the project would be cancelled if they objected. They did not foresee the implications of state intervention in their system, namely that property and water rights in their system would be altered.

When the farmers realized that the project officials would not alter the project plans, they, led by the big landlords, began their struggle to protect their water rights. A crowd of about 500 farmers destroyed a part of the diversion structure while other farmers demonstrated in front of the project office and other government offices demanding that their water rights be protected. These officials were not in a position to stop or alter the project. The farmers then, assisted by the Member of

Parliament from their district, petitioned high level officials in Kathmandu and finally the Cabinet.

The Cabinet was in a dilemma. On the one hand, it could not stop the project because it was funded by ILO and most of the work had already been completed. Moreover, the project was allegedly sanctioned by royal directive. On the other hand, the project had created a law and order problem which needed to be defused.

The Cabinet sent a delegation to investigate and then directed the project officials through the concerned ministryS to a) reduce the size of the proposed new command area from 525 ha to 250 ha and to allocate water to this area only during the monsoon season (when they really needed water for the winter season); b) allocate water to the old command area only to the extent that it had traditionally received; and c) construct a sluice gate in the diversion structure such that the supply of water to the downstream canals would not be less than they had traditionally received.

Politics played a major role in this case. A person very close to the palace was used to get the project sanctioned during a period when the king was very powerful. The farmers of the downstream canals were able to alter the project plan and protect their rights by mass protest demonstrations and use of influential politicians. The cabinet's decision and directive were probably based on political considerations rather than law. The large number of villagers who would be adversely affected by the project was bad politics. The letter directing the project officials to uphold customary rights of the irrigators does not cite any law or law and order reasons for altering the project plan. It simply and tersely states:

"Due to the complaints of the people that water will be insufficient for the downstream canals and will affect them negatively due to the project, His Majesty's Govt. has decided on 40/2/2 (1983) to carry out the project as given below. You are informed and directed to carry out the project accordingly."

To protect their customary rights, the farmers protested, demonstrated, took law into their own hands by damaging the headwork, and used political connections to successfully petition the cabinet. The justification they used was not so much that they were being deprived of their customary rights but that thousands of families would be adversely affected by the project to supply to new users. They used these modes and forums of disputing instead of going to court because of several reasons. The three most important reasons cited by informants are: i) The judicial process takes a long time and is expensive and troublesome; ii) they believed that the court would rule in favour of the government because it had invested much money and moveover the courts usually favoured the government, and iii) they had connections in Kathmandu and believed that it would be better for them and quicker if they used administrative and political channels instead of the court. Once the project was completed it would be very difficult to alter the plans. Another reason could be that they were not sure about the law (statutory law) . The provisions in the statutory law is not clear about whether an upstream canal can be extended at the cost of downstream canals.

The Cabinet decision protected the customary water rights of the traditional users, i.e, of the farmers of Telia Kulo as well of the downstream canals. New users were also granted rights to water from Guhar Khola but only for monsoon crops which they did need because they had sufficient water from their own sources. The new users had wanted 'water rights especially for winter crops.

Although the Cabinet protected the customary water rights of the traditional users, the project altered property relations and rights of the farmers within the command area of Telia Kulo. The state claims ownership of Telia Kulo and new claimants have staked claims to, and acquired limited, water rights in Telia Kulo.

B. Disputes between the state and Telia Kulo farmers: who owns the system?

The state, or more precisely the Department of Irrigation, claims ownership of the system and classifies it as a joint farmer agency managed irrigation system even though the Department of Irrigation only provides a caretaker for the diversion structure and at times helps out in repair and maintenance. The government is legally empowered to acquire any irrigation system for "large-scale and comprehensive arrangement" and in the interest of the wider public but it has to pay compensation (The Canal, Electricity, and Related Water Resources Act, 1967). In this case the government has 'acquired[1] Telia Kulo but without paying compensation and renamed it Guhar Khola Irrigation Project (GIF). The farmers of the old command area, the original rights holders, however, deny that Telia Kulo is a government canal. They claim that it is their property because their ancestors constructed the system and they manage and operate the system. They insist that the irrigation system be called Telia Kulo. And as though to assert their claims, they have formed a water users' committee to manage Telia Kulo and have pointedly refused to include any representative from the new command area in the committee.

Department officials say that they want to 'transfer[1] management of the Guhar Khola Irrigation Project to the Water Users' Association but they are unable to do so because the Association has not been registered and officially recognized as a legal entity. It will not be registered and recognized until farmers from the new command area are accepted as members. The old irrigators are not willing to accept the farmers of the new command area as members of their Association because this would imply that they are co-owners of the system and have (equal) rights to water from Telia Kulo. The old irrigators argue that since Telia Kulo is their system which they have been managing by themselves, the question of the Department transferring management of the system to them does not arise.

The dispute over who owns the system has important implications for water rights. The farmers in the new command area and some within the old command area who did not have access to water from Telia Kulo as well as local bodies such as the Bijauri Village Panchayat claim that Telia Kulo is no longer a 'private[1] but a government (sarkari) or public (sarbajanic) irrigation system because the state had rehabilitated and extended it. This argument is used by these farmers to justify their claims to water from the system and by the Village Panchayat officials to justify their interference in water allocation and distribution.

C. Disputes between existing rights holders and new claimants: the politics of claiming and disputing

There have been numerous conflicts and disputes between the original rights holders and the farmers (most of who are recent migrants with small holdings) in the head sector of the command area. These small farmers have converted their upland fields to lowland fields and 'steal' water from Telia Kulo. The original rights holders, led by the big landlords, especially the Majhgainyas, fine or threaten to fine these farmers if they are caught 'stealing' water. Their justification for this action is their claim that Telia Kulo is their property.

While the big landlords were still very powerful, the small farmers did not protest against the fine because the local authorities did not support them. Their mode of claiming rights to water from the canal which passed along their fields was to divert water on the sly even if they were fined. But after Telia Kulo had been rehabilitated by the state and when a few Village Panchayat officials supported them, these small farmers were emboldened and attempted to legitimize their action (water 'theft') by arguing that Telia Kulo is no longer a private but a government canal (sarkari kulo) or public canal (sarbajanik kulo), i.e., state property, and, as such, they too have rights to water from it. A few Village Panchayat officials, especially the chairman and vice-chairman, supported the claims of the small farmers and on several occasions insisted that the fines be returned. Eventually some of these small farmers were granted

limited and junior water rights in Telia Kulo: they were allotted water for a few hours a day or 'allowed' to divert water for a few hours but many of them were not allowed to contribute labour for repair and maintenance for fear they would claim ownership rights in the system.

One of the reasons why these officials supported the small farmers is that they (the officials) were long standing political rivals and enemies of the Majhgainyas, the dominant family in the area. These officials had been involved earlier in lawsuits with the Majhgainyas over water rights in Telia Kulo, a case which they lost. And supporting the small farmers was one way of getting back at the Majhgainyas and at the same time being assured of votes for elections to the village council office. In other words, they shopped for disputes in order to advance their political interests (K. Benda-Beckmann, 1984)

The political rivalry between the Majhgainyas and other local elite families is one of the reasons why when the latter were elected village Panchayat officials they supported the claims of the farmers of new command area to water rights from Telia Kulo (GIF) for winter irrigation even though the Cabinet had given them rights only for monsoon crops. The Village Panchayat Act (1964) had empowered Village Panchayat officials to intervene in government irrigation systems and to adjudicate water related disputes. Using this law to legitimize their action, the VP formed Guhar Khola Irrigation Project Water Users' Association and sub-association in the new command area and allotted water to the new command area for winter crops.

The old rights holders reacted by filing a case in the Zonal Court against the VP, the Chairman of the VP, the Water Users' sub-committee and some leading figures of the new command area. They petitioned the court for an injunction to prevent the farmers of the new command area from acquiring water for winter crops. They appealed to the court to protect their water rights. They argued that Telia Kulo was their property (sampati) because their ancestors had constructed the canal with their own resources and their descendants had been enjoying exclusive use

of the canal for generations. Further, the cabinet decision (mentioned above) clearly specifies that the new command area was to receive water only for monsoon crops.

The main arguments of the defendants (not the Village Panchayat or the Village Panchayat Chairman) were that Telia Kulo was not the private property of the petitioners. A branch of Telia Kulo had earlier (1907) irrigated fields in the new command area but had later became defunct due to landslides. The alignment of the extended portion of the canal is on this old branch. Further, various government departments support the claims of the defendants.

It should be pointed out here that the cabinet decision protected use rights of the existing rights holders and granted use rights to new irrigators. It does not mention ownership rights in the irrigation system or source of water. As mentioned earlier, the state claims ownership rights to the irrigation system.

The case was dismissed on procedural grounds, namely that cases concerning property, i.e., establishing ownership, had to be first filed in the district court and not the Zonal Court.

The petitioners filed an appeal with the Regional Court of Appeal but they did not follow it up. Later, the petitioners and many of the defendants were involved in the movement to restore democracy and, being on the same side politically, they negotiated a compromise. According to the agreement, the farmers of the new command area would receive water for up to 15 days to irrigate mustard crops (but not wheat) after all the fields in the old command area were irrigated in exchange for which they would contribute labour for repair and maintenance.

Despite this compromise and even though the farmers of the new command area receive irrigation for their mustard crops, their water rights is still tenuous, at the mercy, as it were, of the farmers of the old command area. The original rights holders in the old command area have formed a Water Users' Association and Management Committee from which they have excluded farmers from

the new command area. They thus limit property rights in Telia Kulo to the original rights holders but grant the farmers of the new command area minor rights to utilize water from the system.

State intervention in the form of rehabilitation and extension as well as support by village panchayat officials, rivals of the dominant families in the old command area, provided the space and opportunity for new claimants (small farmers in the old command area and farmers in the new command area) to stake claims to water rights. The village officials were shopping for disputes to gain political advantage for themselves. The old rights holders did not easily give up their customary property and water rights in the system and in fact they did not concede much because they are still powerful and command considerable influence in the locality. By granting some rights to the claimants, they were able to contain disputes and conflicts, at least for the moment.

In all the cases described above, the claimants, claims, justifications offered for claims, the mode of expressing claims and of disputing are different. In the first dispute, the claimants are the farmers from canal downstream from Telia Kulo. Their claim is that they have rights to water from the river and their rights is prior and senior to the rights to the farmers of the new command area because they have traditionally acquired water from it; i.e., they are prior appropriators. They protested, demonstrated, damaged parts of the headwork, and petitioned state officials and politicians in order to protect their rights. The state which had initiated the project to irrigate fields in the new command area did not at first take into consideration the rights of the farmers from canals downstream of Telia Kulo. No justifications seems to have been offered for this decision because the project was allegedly carried out as per royal directive. Finally, the state upheld the customary rights of the existing rights holders justifying this decision on the grounds that people complained that the project affected water supply to their fields.

The potential beneficiaries in the new command area were not able to acquire water rights, or rather acquired rights only for the monsoon season when they least needed water from Telia Kulo. They could not press their claims or justify their claims to water from Guhar Khola in this instance but they did stake claims to water from Telia Kulo later 'because they were supported by the Village Panchayat officials and moreover once the state had invested in the system, they could claim that it is a government or public canal, a claim made by the Department of Irrigation too. The farmers in the old command area, the existing rights holders, petitioned the court to protect their rights. Here the claim was not only use rights but ownership rights. The dispute was not resolved in the court but by compromise outside court for political considerations. The old rights holders granted the farmers of the new command are limited use rights but not ownership rights.

In the case of the small farmers in Telia Kulo, they claimed rights to water from the irrigation system. It is not known whether they justified their claims earlier but once the state had invested in Telia Kulo, they justified their claims, as in the above case, on the grounds that it was a state or public canal because the state investment in it. Their mode of expressing their claim was to 'steal' water and later when they were assured support from the Village Panchayat Office, to appeal to the village officials when they were fined. In this case too, many of them were granted limited use rights but not ownership rights.

In the case of the dispute between the Department of Irrigation and the farmers of Telia Kulo, both claim ownership of the system. The farmers justify their claims on the grounds that their ancestors constructed the system and that their descendants have managed the system with their own resources. It is not clear what justification the Department use, if indeed it uses any justification. The department has granted the farmers use rights and has not pressed it claim to ownership. The

farmers continue to operate the canal as earlier ignoring the claims of the state.

VI. Conclusion

The cases of conflicts and disputes described above raises several important issues regarding the consequences of state intervention for water rights in farmer managed irrigation systems as well for understanding the significance of law for water rights. As we have tried to show, state intervention in farmer managed irrigation systems alters existing water rights arrangements between existing rights holders and those without such rights. Existing rights holders often have to concede some rights to new claimants. Secondly, state intervention provides opportunities to new claimants to stake claims to water rights in systems from which they were formerly excluded. Customary law and customary rights often legitimize restricted and unequal access to resources, that is, rights are restricted to the select few, most often the local elites, or they have senior rights as compared to small farmers with junior rights. As Benda-Beckmann, Benda-Beckmann and Spiertz (1996:7) have argued, customary law (and local law) " establishes and legitimizes many differences, in political power and rights over land and water resources." State law and state intervention open up opportunities to the less privileged to stake claims and often, supported by state officials and politicians, they are able to acquire better access to water resources, at least in theory, if not in practice. This assertion is supported by several cage studies reported elsewhere (R. Pradhan, Haq and U.Pradhan, 1996; M. Pradhan and R. Pradhan, 1996; R. Pradhan, 1996). In other words, public or state rights, poses a threat to private rights (including rights of groups of irrigators) and allows access to new claimants.

Another set of issues concern the significance of law and politics or political power in water rights. It was argued that law confers legitimacy and is used to justify claims. However, law is not the only resource used to acquire or protect claims.

Social relations, especially power relations, are equally, if not more, important than law in some contexts.

It was also argued, following K. von Benda-Beckmann, that disputants shop for the best mode and forum of disputing available to them, which need not always be the usual forums or institutions which deal with disputes, such as village councils or courts. Methods and forums such as protests, demonstrations, and petitions or even 'stealing' water are used to stake claims or protect rights. At the same time, some of these forums, such as the village officials, or politicians, shop for disputes for their political advantage.

Political considerations are as important as legal ones in staking claims, disputing and resolving disputes, as the case studies of disputes discussed above show. Law is important, but it is mediated by the ongoing social relations, especially power relations, between the different claimants. As other studies have shown, " the powerless have far more difficulty in mobilizing law and legal institutions, whether state institutions or other, to defend their interests than for the powerful" (F. Benda-Beckmann, K. Benda-Beckmann and Spiertz, 1996:8). It is in this context that state institutions and officials can play a significant role by assisting the less powerful to gain better access to law and legal institutions and to natural resources such as water. At the same time the dangers and unintended consequences of state intervention for water rights of existing rights holders should not be forgotten.

NOTES

1. Rajendra Pradhan is a freelance anthropologist; Ujjwal Pradhan is Program Officer, the Ford Foundation, New Delhi.

2. This section is based primarily on U.Pradhan 1990; and on Benjamin, et. el. 1994.3. It is not known exactly how many farmer managed irrigation systems there are or the area they irrigate. According to one estimate, there are roughly 18000 farmer managed irrigation systems which irrigate about 72% (714,400 ha) of the irrigated land. These systems have command areas ranging from 10 to 15000 ha (U.Pradhan 1989: 3).

4. Mahesh Chandra Regmi has argued this point in several publications, and this view is well summarized by Benjamin and Shivakoti, " The purposes of government until 1950 were not dedicated to the provisions and production of public goods and services but, . . . extraction of revenue and maintenance of order, if not of law" (Benjamin et. el. 1994).

5. The Rana family ruled Nepal for 103 years as Prime Ministers. The king was merely a figurehead.

6. A study carried out by Agriculture Projects Service Centre (APROSC) for the Ministry of Law and Justice in 1985 had recommended that water be nationalized and drinking water be accorded first priority (APROSC 1985).

7. Fieldwork on which this case study is based was done by field assistants as part of the Ford Foundation funded project on water rights in Nepal, jointly conducted by IIMI/ Nepal and FREEDEAL. This and other case studies have been reported elsewhere (R. Pradhan, Haq, and U.Pradhan, 1996; M. Pradhan and R. Pradhan 1996; R. Pradhan 1996).

8. The letter was written by the Department of Irrigation, Hydrology and Meteorology, allegedly under the instruction of the cabinet. The informants interviewed were convinced that the cabinet had made these decisions. A few years earlier the cabinet had made similar decisions which protected the customary rights of the existing rights holders in another irrigation system when their rights were threatened by another state/ donor aided project (U.Pradhan 1990).

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