

## 7. NEGOTIATING ACCESS AND RIGHTS: A CASE STUDY OF DISPUTES OVER RIGHTS TO AN IRRIGATION WATER SOURCE IN NEPAL<sup>39</sup>

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### INTRODUCTION

Nepal has a long history of irrigation but until the middle of this century direct involvement of the Nepalese state in irrigation management and development was limited except when it benefitted the ruling elite (Pradhan 1990; Benjamin et al. 1994). Although the state did construct or finance the 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 regulations which encouraged and sometimes forced local elites and ordinary farmers, usually tenants, to construct and operate irrigation systems. Legal tradition and weak administration made it possible and necessary for the irrigators to construct and manage their irrigation systems with little interference from state agencies (Pradhan 1989; Benjamin et al. 1984; Pradhan 1990). The state has increased its involvement in irrigation development immensely over the last four decades. It has rehabilitated and enlarged existing farmer managed irrigation systems (FMIS), usually with international aid, constructed and managed new irrigation- systems (known as agency managed irrigation systems, or AMIS), and enacted new laws, regulations and policies which have given it more authority to control and regulate water

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management and use.<sup>40</sup> Nevertheless, farmers continue to manage their irrigation systems and water resources relatively independent of the state.

One of the major activities in managing irrigation systems and water resources is to acquire water from water sources and then to secure and protect rights to the water source. Given the limited involvement of the state, the farmers themselves acquire water and secure and protect rights to water mainly using their own resources and their own law. The farmers use different strategies to acquire water. Whenever possible the farmers divert water from new (uncontested) sources and if this is not possible they try to acquire water from sources used by others by negotiation, disputing, 'stealing' water on the sly, or forcefully acquiring water, often using political or administrative connections. The farmers are not satisfied in just acquiring water; their long term goal is to legitimise their access to the water source, that is to establish rights to the water. It is usually the case that existing users are extremely reluctant to allow new users to tap water from 'their' source(s), especially if water supply to their canals is thereby reduced, and often even when they have abundant water supply. They too use various strategies such as guarding their water sources, punishing 'water thieves', negotiation, or going to court, to prevent the new users from acquiring water, and more importantly, from establishing rights to water in their water sources.

Depending on the strategies used and the social and power relations between the stakeholders, the new claimants may be able to acquire water and sometimes even secure water rights; conversely, the existing rights holders may agree or be forced to allow the new users to divert water from 'their' source without accepting their claims to water rights or may have to grant them water rights. Many stakeholders are often not happy

with the existing constellation of water rights either because they have no access to water or access to a smaller share of water than they feel they have rights to, or because water rights relations were imposed on them by government officials, politicians, the courts or the dominant stakeholders. They attempt to change the existing constellation of water rights relations whenever opportunities are available, such as destruction of intakes due to landslides or floods, rehabilitation and extension of irrigation systems by the state or donor agencies, changes in law, shifts in the balance of power. It is then not surprising that water rights relations are usually not permanent but provisional and subject to further (and frequent) negotiation and disputing (see Benda-Beckmann, Spiertz and Benda-Beckmann 1997; Pradhan 1990; Pradhan and Pradhan 1996; Pradhan and Pradhan 1997; K.C. and Pradhan 1997; Shukla et al. 1997).

This paper describes a case study of a long-standing conflict between farmers of two neighbouring villages in a hill district of Nepal over rights to tap water from Thulo Andhi Khola, a stream fed by a perennial spring. The farmers of Satrasaya Phant claim rights to exclusive use of water from this stream which is their only source of water for irrigation. The farmers from Yampa Phant need water from this source to supplement their water supply for monsoon irrigation. The paper discusses the strategies used by the farmers to acquire water and establish rights to water from the disputed water source and the strategies used by the farmers of Satrasaya Phant to protect their water rights in the source. The farmers shop for and use the best strategy they believe is available to them in a specific situation. The strategies used depend on the one hand on the social relations (such as power, kinship, economic, political, and also whether they have 'good' or 'bad'

relations) between the stakeholders as well as the external resources (such as connections with powerful officials) they are able to use and, on the other hand, the legal resources they have at their disposal. Legal resources include both law, in the sense of cognitive and normative orders, and dispute processing institutions such as courts, quasi-judicial bodies (chief district office, for example), and village councils.

In Nepal, as elsewhere, individuals have access to different legal orders such as state law and state courts, local law and local dispute processing mechanisms. The coexistence and interaction of different legal orders in a social field (nation state, community, factory, or irrigation organization) is known as legal pluralism (cf. Griffiths 1986; Merry 1988; Benda-Beckmann, Benda-Beckmann and Spiertz 1997). The significance of legal pluralism, for the purpose of this paper, is that stakeholders have the option of using different legal orders or normative repertoires to justify and legitimize their claims. The normative order they chose depends on which legal order they believe best suits their claim at that particular time. Similarly, they have the option of shopping for the forum which they believe is most likely to settle the dispute in their favor (cf. Benda-Beckmann 1984).

Negotiation and disputes usually operate within the framework of law, even if the stakeholders do not agree on which law or rule is to be used. However, stakeholders do not always operate within the legal framework; they may use illegal or non-legal strategies such as 'stealing' on the sly (weapons of the weak) or diverting or protecting water by brute force (weapons of the strong). These strategies are often used when they are unable to acquire water or establish or protect water rights by operating within the framework of law.

Negotiation and disputes are not about water rights in general but specific kinds or types of water rights. Water rights, like property, the broader encompassing concept which includes diverse kinds and levels of rights, (Benda-Beckmann, Benda-Beckmann and Spiertz 1997; Schagler and Ostrom 1992; Wiber 1992). In most general terms, "there is some differentiation between rights to control, regulate, supervise, represent in outside relations, and regulate and allocate water on the one hand, and rights to use and exploit it economically on the other" (Benda-Beckmann, Benda-Beckmann and Spiertz 1997, 224). There often are diverse and different level of rights in a specific source, such as ownership rights, rights to use which may or may not be transferred, rights to use only for specific season or purpose, senior or junior rights, individual rights and residual rights of community, etc. These rights may be sanctioned by or based on state law or local law or both. Depending on the law used, different stakeholders may claim the same rights to a resource and stakeholders who have only limited use rights under one law may claim rights to control and allocate under a different law. Changes in law, especially state law, or intervention by the state for example in irrigation systems, often provides opportunities to those with no rights or limited rights under local law or old state law to claim rights of ownership, control, or use (Pradhan and Pradhan 1996; Pradhan and Pradhan 1997; Pradhan, Haq and Pradhan 1997; Wiber 1992).

There is an important difference between having rights to water and being able to actually acquire water by virtue of mere physical access to the resource. Rights 'exist' in the realm of law; they are claims (or interests) which are socially accepted and legitimised by law, whether state or local or both (cf. Wiber 1992; Talbot 1997). This is similar to the point made by Schagler and Ostrom (1992) that rights are derived from rules. Acquisition of water is the

actual appropriation of water from a source by whatever means; it may be licit or illicit, carried out by those who have rights or do not have rights in the water source, or whose claims are contested. The term acquisition is similar to the term access as used by Tilbot (1977,3-4): "the freedom or ability to obtain or make use of. . . It includes the socially sanctioned and the illicit, the de jure and the de facto, the right as only part of the ability." But access is still at the level of potential; not all who have access to a water source can actually appropriate water from it. Further, in plural legal situations rights may be differently constituted and different rules may be applicable in different legal orders. Some farmers may claim that they are acquiring water legally from a water source, justifying their action by reference to one interpretation of a law or one legal order whereas other farmers may perceive that action as illegal based on another legal order or a different interpretation of the same law. Claims which are accepted as legitimate (rights) according to one legal order, for example, state law, may not be accepted as legitimate in another, such as local law.

The strategy that the farmers use is also influenced by the types of water rights they want to secure or protect and whether they want to secure or protect rights or acquire water or prevent others from acquiring water. These issues feature strongly in the following case.

## THE SETTING

Satrasaya Phant and Yampa Phant are adjoining villages in Tanahu District, west of Kathmandu. Both Satrasaya Phant and Yampa Phant were probably cleared for cultivation about the same time, some 200 odd years ago. The fields in Satrasaya Phant are irrigated by a canal known as Satrasaya Phant Kulo which was constructed by five farmers over 150 years ago. The canal originally irrigated approximately 9 ha of land owned by the five farmers. By

1989 the canal irrigated 16.72 ha of land. The command area of the irrigation systems was increased to 29 ha after the completion of the irrigation system rehabilitation and extension project funded by World Bank and implemented by the Department of Irrigation. The number of beneficiary households increased from the original five to 45 households just before the implementation of the project and to 73 households after the project. The command area was enlarged both in the tail end and the head of the old command area.<sup>41</sup>

Yampa Phant is divided into two parts, the upper part is known as Jaisi Phant and lower as Baraha Phant. Formerly, each phant (relatively flat land in the hills) had its own canal. Jaisi Kulo irrigated fields in Jaisi Phant and Baraha Kulo in Baraha Phant. Both canals were constructed and managed by farmers. Informants were not sure when these canals were constructed but they believe that it was probably around the same time as Satrasaya Phant Kulo. In the absence of historical data, both villages claim that their canal is older. The original command areas of these irrigation systems are not known but in the Cadastral Survey carried out in 1933 the total cultivated area of Jaisi Phant was estimated as 22.15 ha of which only 8.4 ha was irrigated whereas the whole cultivated area of Baraha Phant, 14.35 ha, was irrigated. Another survey carried out in 1972 recorded that the irrigated area in Jaisi Phant was only 1.6 ha and 11.48 ha in Baraha Phant. The irrigated area gradually increased after 1972 when farmers from other villages began buying land and settling in the village. More land was irrigated after the canals were rehabilitated and improved as part of the Hill Food Irrigation Development Project (HFDIP) in 1988 and 1989. The two canals were combined to form a single system with one diversion structure and two main branches. The irrigation system irrigates 37 ha of land and benefits 65 households.

The water source of Satrasaya Phant Kulo is Thulo Andhi Khola, a stream which is fed by Barahi Andhi Mul, a perennial spring, located about three kilometers from the command area and half a kilometer above the intake point of the canal. As part of the rehabilitation project, the old, temporary brushwood diversion structure was replaced by a gabion structure and parts of the canal were lined to reduce seepage. The increased flow of water in the canal after the completion of the project ensured better and more reliable water supply to the old command area. The main water source of Baraha Kulo and Jaisi Kulo (now combined into a single system) is Sano Andhi Khola, a small stream which is virtually dry from February until the onset of monsoon in June. The Yampalis have always depended on Thulo Andhi Khola as an additional water source for their rice irrigation, especially if the monsoon is late or there is drought. To be able to utilize water from this stream for their irrigation, they have to divert water either by breaching the diversion weir of the Satrasaya Phant Kulo or tapping water above the weir (see Pradhan, Haq and Pradhan 1997,115-121). We do not have any firm evidence about how and whether the two villages shared water from the water source. According to old informants in Satrasaya Phant, they had heard from their fathers that the Yampalis requested water from them for their monsoon crop if there was drought. Depending on the state of their relationship, they were either allowed to divert water to their canal from the weir or refused permission. If they were refused permission, the Yampalis usually stole water by breaching the temporary diversion weir. The Satrasaya farmers then repaired the weir and destroyed diversion weirs and the rice fields of the Yampalis to punish them for 'stealing' water. Some of the older informants in their late seventies and eighties recall taking part in such activities when they were young. As one informant recalled, "I forgot the year but on one

occasion 22 persons, including myself, destroyed the rice fields, bunds and diversion weirs of the Yampalis to punish them for stealing water."

The Yampalis claim that they have been regularly tapping water from Thulo Andhi Khola for a long time. One old informant claimed that during his father's time, relations between the two villages were good on account of a marriage between elite families of the two villages. They were allowed to tap water from the water source. Later the Yampalis required more water for irrigation because they had converted their upland fields (*barf*) to irrigated lowland fields (*khet*). They had requested an influential person in Satrasaya Phant several times to use his influence to convince Satrasaya Phant farmers to allot them a small share of the water from Thulo Andhi Khola but he refused to do so and instead told them that they did not have any rights to the water. They would be allowed to tap the water, but only if the Satrasaya Phant farmers agreed. Satrasaya Phant farmers usually did give them permission to divert the water.

For over 75 years, the Yampalis have used various strategies to acquire water and establish rights to water from this source. The strategies used by the Yampalis varied from negotiation when relations with the Satrasaya Phant farmers were cordial to using force and stealing water when relations were bad. They also tried to use government and project officials. The Satrasaya Phant farmers have not stood idly but negotiated, threatened and punished Yampalis, and filed cases in courts to protect their rights. The following sections describe the strategies used by Yampalis and Satrasaya Phant farmers in three separate disputes: a court case, a dispute over the destruction of the diversion weir, and a dispute over the source of the drinking water project.

## THE COURT CASE

Towards the late 1940s, relations between the two villages had deteriorated. The Yampalis began to steal water regularly. Tension between the two villages, specifically the elites, worsened because of the conflict between the Adhikaris of Satrasaya Phant and Hari Prasad Shrestha of Yampa Phant over another issue, not related to water.

Ramnath Adhikari's father had built a public rest house (*sattal*) in Bandipur, a small trading town some hours walking distance from the two villages. The Adhikari were a rich family who owned large tracts of land in Satrasaya Phant. Hari Kumar Shrestha renovated his ancestral house behind the rest house and then petitioned the governor of the district for permission to demolish the rest house and construct another one elsewhere because it blocked the view of his house. Mr. Shrestha was a rich man, who owned much land and also farmed on contract. He had taken on contract a huge tract of land in Yampa Phant which belonged to a powerful Pande family of Kathmandu. Mr. Shrestha had given most of these fields on subcontract to tenant farmers. The governor granted him his request and he built another public house elsewhere. But the Adhikaris complained to the governor that the new public house was not as good as the old one. The governor then ordered Mr. Shrestha to demolish his house and to construct a public house in the original place. This dispute led to bad blood between Mr. Shrestha and the Adhikaris of Satrasaya Phant. It was during this period of bad relations between the two villages that an incident occurred which led to the court cases described below.

Monsoon was late in 1952. The Yampalis were worried because they depended on the monsoon rains to flood their fields and until their fields were flooded they could not transplant monsoon paddy seedlings. Delay in monsoon also meant that water discharge in Sano Andhi

Khola, their main source of water for irrigation, was very low. The only alternative they had was to acquire water from Thulo Andhi Khola. Unfortunately the dispute between the Adhikaris of Satrasaya Phant and Mr. Shrestha had soured relations between the two villages and it was certain that Satrasaya Phant farmers would not give them permission to divert water from the stream. Puma Bahadur Gurung, a tenant farmer who worked for Had Prasad Shrestha, afraid that he may not be able to transplant rice in time, breached the diversion weir of Satrasaya Phant Kulo to divert water to Sano Andhi Khola to irrigate his fields. Some Satrasaya Phant farmers caught him in the act and fined him five rupees. Mr. Gurung reported this incident to Mr. Shrestha, who had probably instigated him to 'steal' water. The next day, Mr. Shrestha, together with a few other farmers, destroyed the diversion weir of Satrasaya Phant Kulo. By this act they were claiming rights to water from the disputed source.

That day the Satrasaya Phant farmers were busy ploughing their fields which they hoped to flood in preparation for rice transplantation but they were unable to irrigate their fields because there was no water in the canal. As soon as a goatherd informed the farmers that the diversion weir had been damaged, they rushed to the site to repair the weir. Mr. Shrestha, who was guarding this site with a few Yampalis, tried to scare them away with his rifle but they were not frightened. On the contrary they threatened to kill Mr. Shrestha if he used his rifle. Seeing how determined these farmers were, the Yampalis ran away. The farmers then repaired their diversion weir, irrigated their fields and transplanted rice seedlings.

Satrasaya Phant farmers had successfully defended themselves against the threat to their water source on this occasion. But they were not sure whether they could continue to defend their water source by show of force. They were not sure when and how the Yampalis would

retaliate. Antagonistic relations between the leading families of the two villages precluded negotiation. The destruction of the weir gave the Satrasaya Phant farmers the opportunity to seek judicial redress.

A few of the leading Satrasaya Phant farmers filed a case against Mr. Shrestha and 33 other Yampalis. In their petition, they argued that they had been diverting water from Thulo Andhi Khola from ancient times. The defendants diverted water from Sano Andhi Khola. In 1952 they requested us to give them some water because they had insufficient water to irrigate their crop. We replied that we had never allowed them to divert water from the source and we will not give them water because then we will not have sufficient water. They then destroyed our diversion weir because they were angry that we had refused to give them water. How can they claim that they have rights to the water in the absence of written agreement between us? If they had been using water they should have filed a petition in the court instead of breaking the diversion weir. We petition the court to award us a compensation of Rs. 100 for the damages caused to our diversion weir, to be paid equally by all the defendants and also to punish them in accordance with law.

The defendants replied that it is well known that water had been tapped from Thulo Andhi Khola to irrigate fields in Yampa Phant for at least 200 years. Satrasaya Phant Kulo was constructed later. The brushwood and stone diversion weir of Satrasaya Phant Kulo was built above our intake point but we were allowed to tap sufficient water for our irrigation needs. We shared water from this source equally. But later the petitioners diverted all the water to their fields. All we did was to acquire water we had traditionally diverted from the source. We did not damage the diversion weir as asserted by the petitioners.

The court gave its decision four years later. The court ruled that the water should be used as per previous practice (*sabik bamojim*) and that the defendants should pay compensation of Rs. 100 to the petitioners. The defendants appealed against the decision in the court of appeal which upheld the decision of the lower court. The Supreme Court also upheld the decisions of the lower courts.

The petitioners put forward two arguments to support their claim to exclusive rights to the water source. First, they asserted that Satrasaya Phant Kulo was older than the canals of Yampa Phant. They were thus claiming rights of prior appropriation in accordance with the extant law. But more importantly, they argued that the Yampalis had never diverted water from the disputed water source. The defendants argued that their canal was older than the petitioners and that they had been sharing water equally from the water source.

Two state laws are relevant here. First is the provision in the Chapter on Land \_ Reclamation in the National Code.<sup>42</sup> Briefly, the provision states that prior appropriators have priority to water from the source. Others may not divert water from this source if water supply to the prior appropriators is reduced. In normal circumstances, this means that diversion weirs may be constructed upstream of the existing intake structures only if the existing downstream canals are not adversely affected. Local communities translate this rule to mean that diversion weirs may be built at least 100 or in some cases 300 meters upstream of existing intake structures. The distance varies according to locality and water discharge in the water sources. The important point is that water supply to the prior appropriators should not be affected. From the arguments of the defendants it seems a diversion weir had been allowed to be

constructed above the existing one with the condition that water supply to the existing canal would not be affected.

The second state law is based on court decisions. The courts have repeatedly upheld rights of persons to continue using resources if they can prove that they have been using the resources such as water (or land or road) from 'previous times', even if they do not own the resource or have 'rights' to the resource (Khanal and K.C. 1997). This law is relevant mainly in the courts or with quasi-judicial bodies such as the Chief District Office. The petitioners claimed that the defendants had never used water from the disputed source whereas the defendants asserted that they had been using about half the water discharge from 'previous' times.

In this case too the courts upheld the rights of the farmers to use water as per 'previous practice' but did not define how (and whether) the disputing parties had been sharing water. Since the ruling was not specific at least as regards the issue of water sharing, both of the litigating parties claim that this part of the decision was in their favour. Even 30 years after the decision by the Supreme Court, the disputants continue to give different version of the ruling. Khagendra Adhikari from Satrasaya Phant asserted, "We won the case because we have been tapping the water from the source for at least 150 years. They (the defendants) have not been able to provide any proof that they had been using the water (legally) from previous times. They stole water in the past and they continue to steal water." A few informants claimed that they were willing to allow the Yampalis to divert water if they could prove that they had been appropriating water from the disputed source on a regular basis but they were unable to do so. However, some Satrasaya Phant farmers do agree that Yampalis were sometimes allowed to acquire water from the disputed source but during drought years and if they asked for

permission and they tapped water which leaked or seeped from the Satrasaya Phant Kulo intake structure.

The Yampalis too assert, but with less confidence than the Satrasaya Phant farmers, that the court's decision was in their favour. They claim that they have always tapped water from the disputed source. Some of them even assert that they tapped half the water from the water source but unfortunately they do not have documents to prove this.

The decision relating to compensation was not contested by both the litigating parties. The Yampalis acknowledged that they had damaged the diversion weir and they were willing to pay compensation as demanded by the petitioners. The Satrasaya Phant farmers did not bother to collect the compensation awarded to them because the amount was too small to be worth the effort of collecting. More important than the compensation was the ruling made by the court that henceforth the Yampa Phant farmers should not destroy the diversion weir or do so only with the permission of the court. Even though the Satrasaya Phant farmers could not establish exclusive rights to the water from the source, they could claim that the courts decided in their favour based on this part of the decision.

The Supreme Court decision did not resolve the conflict. The Yampalis continued to 'steal' water from the disputed intake by breaching the diversion weir while they waited for suitable opportunities to secure rights to water from the disputed source. The Satrasaya Phant farmers organized themselves better to protect their water source. They turns to guard the diversion weir, especially at night, during the rice season (Pradhan 1989,20). They later hired a water contractor whose duty, among others, was to patrol the diversion weir. Animosity between the two villages on account of the court case precluded negotiation.

*Dispute Over The Construction Of The Permanent Diversion Weir*

In 1989, as part of the Satrasaya Phant Kulo rehabilitation and enlargement project mentioned earlier, the brushwood diversion weir was replaced with a gabion structure. As has been observed by others (Ambler 1990; K.C. and Pradhan 1997) one way to protect water rights is by constructing better physical structures. The new diversion weir was more difficult to break and allowed less water to seep through than the old one. The Yampalis were not very happy about the new structure because it made it more difficult for them to acquire water. They were not informed, much less consulted, about the construction of the weir. Given the hostility and the absence of cooperation between the two villages, negotiation was not a strategy that the Yampalis could use to prevent the construction of the weir. Further, the construction of the gabion structure was part of the project plan, funded by the World Bank and implemented by the Department of Irrigation. They could not appeal to higher authorities because they could not prove that they had rights to the water source and because the project had been sanctioned for the irrigation system, allegedly due to the lobbying efforts of a person who owned land in Satrasaya Phant but worked in and had influential contacts in Kathmandu. The Yampalis were desperate and resorted to a strategy used elsewhere to protect their water rights: they damaged the diversion weir (Pradhan and Pradhan 1997; Pradhan, Haq and Pradhan 1997).

Mr. Devi Prasad Adhikari of Satrasaya Phant recounted the incident thus:

"I was supervising the construction of the gabion intake structure when about 100 Yampalis came to fight with us. They told us, 'You do not have the right to construct the gabion diversion weir in this stream.'

"I then replied, I have a plough in my hand. I will break your skull if you touch the weir.'

"Whereupon one of the Yampalis replied, 'Do not behave like a drunk Magar.' "I retorted, 'Such is the law. Is the elephant scared when a winnowing basket is beaten? I am not afraid of you. If you want to go to court, I can do that too and if you want to use force, I can use force too.' The Yampalis then returned home.

"The next day they returned to the intake with the chairman of our Water Users Committee. When I overheard them telling the chairman that they would pay for the cost incurred in constructing the gabion intake but the structure has to be destroyed, I lost my temper and challenged them, 'Go file a case wherever you like (i.e., in the court or the chief district office).' "

The gabion structure was repaired and neither side pursued the matter further. As far as the Yampalis were concerned, they had once again asserted rights to water from the disputed source and having staked their claims in a dramatic way, they did not pursue the matter further. An attempt was made to negotiate with Satrasaya Phant farmers but they (or at least some of the leading figures) were not willing to negotiate. The Satrasaya Phant farmers were in a strong position to ignore the demands of the Yampalis because the structure was being constructed with government grant. The government would come down heavily on anyone who damaged or destroyed government aided 'developmental' structures. Another reason is that the court had ruled earlier that the Yampalis should not destroy the diversion weir without the court's permission.

Although the Yampalis were not able to establish rights to water from this source they did not totally give up their claim. They continued to 'steal' water and awaited a suitable opportunity to establish their claim. A drinking water project provided them with such an opportunity.

#### *Dispute Over The Source Of Drinking Water*

In 1992 the Yampalis received a grant from the Tanahu District Red Cross to install pipes to supply drinking water to their village. The most reliable source of water in this area is the large perennial spring known as Barahi Adi Mul, the source of water for Thulo Andhi Khola. Thulo Andhi Khola in turn is the source of water for Satrasaya Phant Kulo. The Yampalis planned to use this water source for their drinking water project. It is not clear whether the Yampalis informed or discussed with the farmers of Satrasaya Phant their plan to use this source for their drinking water project. The Satrasaya Phant farmers claim they were not informed whereas the Yampalis claim that they had discussed this with the chairman of the Satrasaya Phant water users committee. In any case, as related by informants of Satrasaya Phant, the Yampalis were digging and laying pipes when a group of Satrasaya Phant farmers under the leadership of Mr. Devi Prasad Adhikari forcefully prevented them from working further, grabbed their tools and filled up the ditch. The Yampalis reported this incident to the District Red Cross office and later filed a complaint against Mr. Devi Prasad Adhikari with the Chief District Office (CDO) and the District Police.

A few days later the Yampalis came to Satrasaya Phant along with the Chief District Officer (CDO), the District Superintendent of Police (DSP) and the Chairman of the District Development Committee (DDC) to resolve the dispute. These officials suggested that the

Yampalis should be allowed to use water from the source for drinking purposes. Mr. Devi Prasad Adhikari, however, did not agree with this suggestion. He apparently told them, "They are laying claim to our spring instead of using their own spring which is their traditional source of drinking water. They should use that source." However, under pressure from the officials the Satrasaya Phant farmers agreed to allow the Yampalis to tap their drinking water from their but only if they did not break the diversion weir to irrigate their fields. The Yampalis, however, did not agree to this condition and used another source for their drinking water project.

The Yampalis have a slightly different version of the dispute. According to them, after informing the Chairman of the Satrasaya Phant water users committee and laying 100 meters of pipe they received a letter from the committee requesting them to stop work until they held a discussion. The Yampalis stopped work and requested the CDO, the DSP, the Chairman of the DDC and officials of the Red Cross to mediate. These officials visited Satrasaya Phant and suggested that the Yampalis should be allowed to use the disputed source for drinking water after considering the needs of irrigation for Satrasaya Phant. The Satrasaya Phant farmers agreed to allow the Yampalis to acquire water from the spring for the drinking water project provided they did not break the diversion weir to divert water for irrigation. The Yampalis did not agree to this condition because, as one informant put it, "We can use another water source for our drinking water project but not for our irrigation. The spring is a vital water source for our irrigation and for us irrigation is more important than drinking water. We would rather use the Barahi Andhi Mul source for irrigation than for drinking water." They therefore used another water source for their drinking water and continued to divert water (illicitly) from Thulo Andhi Khola for irrigation.

*Discussion and Conclusion*

Despite all the efforts of the Yampalis they were unable to secure rights to water for irrigation from the disputed source. The strategies they used ranged from negotiation to force to use of development project and administrative officials. Satrasaya Phant farmers punished Yampalis, organized themselves to guard the water source, filed a case in the courts and used development project to protect their rights. The strategies they used depended to a great extent on the state of social relations between the two villages, the resources (law, connections, etc.) they were able to deploy, and the particular circumstances of specific disputes.

The Satrasaya Phant farmers filed the court case in a situation of extreme tension between the two villages. The immediate cause of the tension was the violent confrontation between them due to the destruction of the diversion weir at a crucial time in the rice irrigation cycle during a drought season. Satrasaya Phant farmers had never faced an organized opposition and violent threat to their water source and indeed to their life. The destruction of the weir and the ensuing threat of violence occurred in a situation of tension between the elites of the two villages on account of another dispute not related to water. In such a desperate situation which could have led to more destruction and threat of violence, the leading families in Satrasaya Phant sought the protection of the court and in doing so they used state law to try to protect their water rights

Within the context of the court, both disputing parties used similar legal rhetoric (state law) to justify their claims. The difference lies in the interpretation of fact and evidence (cf. Benda-Beckmann, Benda-Beckmann and Spiertz 1997,231). Both parties referred to the law of prior appropriation as well as the law (based on court judgements) of previous use. Both parties claim that their canal is older. Satrasaya Phant farmers used this claim to justify their

control over the water source and to assert that Yampalis had never used the source for their irrigation. They further argued that there is no written agreement about water sharing. This argument is ingenuous in that in most instances such agreements, if they existed, would have been verbal and not written and signed. The Yampalis asserted that their canal is older than Satrasaya Phant's to support their contention that they had been sharing water from the disputed source. They did not have written proof so they supported their assertion by stating that this fact is well known to everyone.

The court decision was equivocal: 'water is to be used as per previous practice or use (*sabik bamojim*)' whereas the moot point was whether the Yampalis had been using water regularly from this source in the past. The court threw the ball back into their own court, that is, the disputing parties were to resolve this question themselves.

In the post-trial stage of court cases, the decision has to be implemented in the social field where the dispute originated (Benda-Beckmann 1985). In the local arena, court decisions may not be implemented or implemented only partially or differently than intended by the judges because state law may not be as significant as local law or social and power relations. In this case, the parties did not agree on the interpretation of the decision and were unable to marshal resources to have their interpretation upheld. Both parties continue to claim that the court decision was in their favour. Satrasaya Phant farmers claim that they never shared water with Yampalis and this was the 'previous practice' whereas the Yampalis claim that they shared water with Satrasaya Phant farmers and that this was the 'previous' practice.. The court decision is used as a rhetoric to justify their actions and claims.

In the second dispute, the Satrasaya Phant farmers used the opportunity provided by the state aided irrigation system rehabilitation and extension project to construct a more permanent and stronger diversion weir and to reinforce their claims to rights to the water source. They were supported by the District Irrigation Office (and the state) which implemented the project. The Yampalis could have gone to court to have the construction work stopped but they had very little legal grounds to do so, especially after the previous court case. They could have gone to quasi-judicial officials such as the Chief District Officer but state officials usually supported development projects. The Yampalis did not take recourse to judicial or quasi-judicial process preferring instead to take direct action as if to lay claims to their rights by force instead of by due process of law. This desperate and illegal act could have caused them trouble had the Department of Irrigation or Satrasaya Phant farmers filed a case or complaint with the court or quasi-judicial officials. We should remember that this conflict occurred during the end of the Panchayat era when the government offices were powerful but at the same time there was a lot of confusion because of the people's movement (*aandolan*) to overthrow the government. The Satrasaya farmers did not file charges against them for damaging the diversion weir. Perhaps they did not have anyone willing to get involved in judicial or quasi-judicial process which requires considerable resources in terms of time, money and connections. A local leader with political or other aspirations could have taken up their cause but such a person was not forthcoming.

The two parties did not attempt to negotiate before or during the construction of the diversion weir, or before the Yampalis damaged the weir, because of the bad relations between them, especially because of the court case. They negotiated after the fact, as it were, but could not reach a compromise. The Yampalis had craftily suggested that they would pay for the cost

incurred in the construction of the diversion dam if they were allowed to use this intake to source their irrigation water. But the Satrasaya farmers were not taken in by this ruse. Had they agreed, after a few years of licitly using the source the Yampalis could have claimed in the court that they have been legally using this water source and demand rights to use water from this source as per previous practice (*sabik bamojim*).

In the third dispute, the Yampalis used a clever strategy to try to establish water rights in the disputed source. The Yampalis, emboldened by the grant given to them by the once powerful Red Cross, patronized by the Royal Family, decided to use this opportunity to lay claims to the disputed water source by tapping it for their drinking water project. They had hoped by establishing rights to use water from this source for drinking water, they could later establish rights for irrigation. However, on this occasion too the Satrasaya Phant farmers were not taken in by the strategy, nor were the officials. When the Yampalis were prevented from tapping water from the disputed source, they appealed to the district level officials to mediate. For these officials it was important that the project was successfully completed and a law and order situation resolved. If this meant that the disputed water source was to be used for the project, they could 'persuade' the Satrasaya Phant farmers to allow the Yampalis to do so. At the same time, they had to take into consideration the fact that Satrasaya Phant farmers had been using this water source for irrigation. They were careful to state that water could be used but only for drinking water and after considering the irrigation needs of the Satrasaya Phant farmers. The Satrasaya Phant farmers were willing to grant them rights to acquire water from their water source but only for the drinking water project in exchange for which the Yampalis would have to stop stealing water for irrigation. The mediation effort was not successful even

though Satrasaya Phant farmers were willing to compromise because the Yampalis did not want to give up their claims to use the water source for irrigation.

Throughout the past 75 years the two sides have not been able to negotiate a lasting compromise and in fact they do not seem to have made much efforts at negotiating. Even when relations between the two villages were good, Yampalis could not secure rights to water from the disputed water source. They had to ask for permission from Satrasaya Phant farmers every time they wanted to divert water and were punished if they did so without consent. Most of the time the Yampalis had to resort to stealing water for their monsoon irrigation. This mode of acquiring water is quite widespread throughout Nepal (cf. Pradhan and Pradhan 1996; Pradhan et al. 1997); it is one of the ways of gaining access to water, an illicit but quite common way of acquiring water when negotiation or other means fail. Stealing water is one of the ways of staking claims to water rights and in some cases the water 'thieves' have been able to secure rights to use water and even to have a say in water allocation and other decision making process (cf. Pradhan and Pradhan 1996).

In this case, after all the years of stealing water and disputing, it seems as though the Yampalis and Satrasaya Phant farmers have reached an understanding, a compromise, such that the Yampalis would be allowed to 'steal' water for a few hours a day for a few days for the monsoon rice irrigation so long as Satrasaya Phant farmers are not adversely affected and the Yampalis do not claim rights to the water source. From the perspective of Satrasaya Phant farmers, they have been able to avoid disputing and guarding their water source at least temporarily and to protect their rights to control, allocate and distribute water by allowing Yampalis to 'acquire' water. The Yampalis continue to insist that they have rights to appropriate half of the water supply in the disputed water source but they do demand from

Satrasaya Phant farmers that they be given their rightful share of water. By not asserting their claim, they are able to acquire the water they need from the disputed source, peacefully, confidently and without hindrance. From their perspective, they have been able to acquire only part of the supply of water to which they have rights. In the future they may be able to establish rights to use water from the disputed water source, that is rights acknowledged by Satrasaya Phant farmers.

## ENDNOTES

39. **This paper is based on research titled "Study of Water Rights in Nepal" carried out by the international Irrigation Management Institute, Nepal office and Legal Research and Developments (FREEDEAL), Nepal in 1994 and 1995. The project was funded by the Ford Foundation.**

40. For a review of water related laws in Nepal see Khadga 1997 and Pradhan 1995.

41. See Durga and Pradhan 1997; Pradhan, Haq and Pradhan 1997 for a discussion of conflicts and disputes before, during and after this project.

42. This section of the National Code has been discussed by Pradhan 1990 and Benjamin et al. 1994 among others.

## REFERENCES

- Ambler, John. 1990. The influence of farmer water rights on the design of water-proportioning devices. In *Design issues in farmer-managed irrigation systems*. Colombo, Sri Lanka: International Irrigation Management Institute.
- Ansari, N. 1995. Accomplishment and progress of ILC pilot project. In *Improving support services to farmer managed irrigation systems in Nepal*. Kathmandu: Research and Technology Development Branch and International Irrigation Management Institute.
- Benda-Beckmann, Franz von and Kabeet von Benda-Beckmann. 1996. A functional analysis of property rights, with special reference to Indonesia. Paper presented at the CERES/CPS workshop on Property Rights and Economic Development in South-East Asia and Oceania.
- Benda-Beckmann, Franz von, Kabeet von Benda-Beckmann, and H. L. Joep Spiertz. 1997. Local law and customary practices in the study of water rights. In *Water rights, conflict and policy*, eds. Rajendra Pradhan et al. Colombo, Sri Lanka: International Irrigation Management Institute.
- Benda-Beckmann, Kabeet von. 1984. Forum shopping and shopping forums: Dispute settlement in a Minangkabau village in West Sumatra, Indonesia. In *The broken staircase to consensus: Village justice and state courts in Minangkabau*, K. von Benda-Beckmann. Dordrech. The Netherlands: Foris.
- \_\_\_\_\_. 1985. The social significance of Minangkabau State Court decisions. *Journal of Legal Pluralism* 23: 1-68.

Benda-Beckmann, Kabeet von, H. L. J. Spiertz, and Franz von Benda-Beckmann. 1997.

Disputing water rights: Scarcity of water in Nepal hill irrigation. In *The Scarcity of Water.*

*Emerging Legal and Policy Responses*, eds. E. H. P. Brans, E. J. deHaan, A. Nollkaemper and J.

Rinzema. London: Kluwer Law International. Benjamin, P., W. F. Lam, Elinor Ostrom, and

Ganesh Shivakoti. 1994. *Institutions,*

*incentives, and irrigation in Nepal.* Burlington: Associates in Rural Development.

Durga, K.C., and R. Pradhan. 1997. Improvement and enlargement of a farmer managed

irrigation system in Tanahu: Changing rights to water and conflict resolution. In *Water*

*rights, conflict and policy*, eds. Pradhan, Rajendra et al. Colombo, Sri Lanka:

International Irrigation Management Institute.

Griffiths, J. 1986. What is legal pluralism? *Journal of Legal Pluralism* 24:1-50. Khanal, B. and

S.K. C. 1997. Analysis of Supreme Court cases and decisions related to water rights in

Nepal. In, *Water rights, conflict and policy*, eds. R. Pradhan et al. Colombo, Sri Lanka:

International Irrigation Management Institute. Merry, Sally, M. 1989. Legal pluralism. *Law*

*and Society Review* 22 (5): 869-896. Pradhan, Mahesh. C. and Rajendra Pradhan. 1997.

Disputing, negotiating and

accommodating as means to acquire and protect water rights: A case study of conflicts

in Dang. In *Water rights, conflict and policy*, eds. Pradhan, Rajendra et al. Colombo,

Sri Lanka: International Irrigation Management Institute.

Pradhan, Prachanda. 1989. *Patterns of irrigation organization in Nepal.* Colombo, Sri

Lanka: International Irrigation Management Institute.

Pradhan, Rajendra and Ujjwal Pradhan. 1996. Staking a claim: Law, politics and water rights in farmer managed irrigation systems in Nepal. In *The role of law in natural resources management*, eds. J. Spiertz and M. G. Melanie. 's-Gravenhage: Vuga.

Pradhan, Rajendra, Franz von Benda-Beckmann, Kabeet von Benda- Beckmann, H. L. Joep Spiertz, S. Khadga, K. A. Haq eds. 1997. *Water rights, conflict and policy*. Colombo, Sri Lanka: International Irrigation Management Institute.

Pradhan, Rajendra, K. A. Haq, and Ujjwal Pradhan. 1997. Law, rights and equity: Implications of state intervention in farmer managed irrigation systems. In *Water rights, conflict and policy*, eds. Rajendra Pradhan et al. Colombo, Sri Lanka: International Irrigation Management Institute.

Pradhan, Ujjwal. 1990. Property rights and state intervention in hill irrigation systems in Nepal. Ph.D. diss., Cornell University, Ithaca, New York.

. 1994. Farmers' water rights and their relation to data collection and management. In *From farmers' fields to data fields and back*, eds. J. Sowerine, Ganesh Shivakoti, Ujjwal Pradhan, Athutosh Shukla, and Elinor Ostrom. Kathmandu: International Irrigation Management Institute and IAAS.

Schagler, Edela and Elinor Ostrom 1992. Property-rights regimes and natural resources: A conceptual analysis. *Land Economics* 68 (2): 249-62.

Shukla, Athutosh, Narayan R. Joshi, Ganesh Shivakoti, Rabi Poudel and Narayan Shrestha. 1997. Dynamics in water rights and arbitration on water right conflicts: Cases of farmer managed irrigation systems from East Chitwan. In *Water rights*,

- conflict and policy*, eds. Rajendra Pradhan et al. Colombo, Sri Lanka: International Irrigation Management Institute.
- Talbot, R. 1997. Theorising access. Forest profits along Senegal's Charcoal Commodity Chain. Draft Manuscript.
- Wiber, Melanie G. 1992. Levels of property rights and levels of law: A case study from the northern Philippines. *Man* (N.S.) 26: 469-92.