Negotiating Access and Rights: Disputes Over Rights to an Irrigation Water Source in Nepal

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This chapter discusses a long-standing conflict between farmers of two neighboring villages in a hill district of Nepal over rights to tap water from a perennial, spring-fed stream. The farmers shop for and use the best strategy they believe is available to them in a specific situation. The strategies include negotiation, litigation, violence, and use of government-aided projects and officials. The strategies they employ depend on the social relations (e.g., power or 'good' or 'bad' relations) between the stakeholders, and the external resources they are able to deploy (e.g., links with powerful government officials) and the legal resources (law, courts, etc.) they have at their disposal. Negotiation is only one of the means used to establish and protect water rights. Stakeholders do not negotiate or dispute over water rights in general but specific types of rights (rights to control and manage, rights to use, prior rights, etc.). The chapter also suggests that it would be useful to differentiate between rights, access, and acquisition of water.

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 (Benjamin et al. 1994; U. Pradhan 1990). 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 (Benjamin et al. 1994; P. Pradhan 1989; U. 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 the state more authority to control and regulate water management and use. Nevertheless, farmers continue to manage their irrigation systems and water resources relatively independent of the state. The irrigation systems discussed in this contribution are examples of such FMIS.

One of the major irrigation management activities is the acquisition of water from water sources such as rivers, streams, and springs. In farmer-managed irrigation systems, the farmers themselves have to acquire water. Whenever possible they 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 with just acquiring water; their long-term goal is to legitimize their access to the water source, that is, to establish rights to the water. In other words, irrigators attempt to get their claims to a share of water from a water source accepted by other users and competitors. Existing users usually employ 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. Or they may allow new users to acquire water but under specific conditions and for a limited time so long as they do not assert rights to the water source.

Many stakeholders are often not happy with the existing constellation of water rights to a water source, 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, and shifts in the balance of power between stakeholders. It is then not surprising that water rights relations are usually not permanent but provisional and subject to further (and frequent) negotiation and disputing.3

The farmers shop for and use what they believe is the best strategy available to them in a specific situation. The strategies they use depend, on the one hand, on the social relations between the stakeholders (such as power, kinship, economic, political, and also whether they have ‘good’ or ‘bad’ relations) 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 (District Administration 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 (c.f. F von Benda-Beckmann et al. 1997; Griffiths 1986; Merry 1988). 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 choose 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 (c.f. K. von 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, or interpret the same law differently. 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 a ‘legal’ framework. Negotiation then is only one strategy, and not always the most important or useful one, used by stakeholders in pursuit of their interests. It is usually used when the parties have good relations and are willing to compromise and not insist on strict application or interpretation of law.

The term water rights, like property rights, is a broad, encompassing concept which includes diverse kinds and levels of rights (F von Benda-Beckmann et al. 1997; Schiager 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’ (F. von Benda-Beckmann et al. 1997: 224). There often are diverse and different level of rights in a specific source, such as ownership rights, rights to participate in decision-making process (including decisions concerning allocation of water), rights to use without rights to participate in decision-making process, rights which may or may not be transferred, rights to use only for a specific season or purpose, senior or junior rights, individual rights and residual rights of community, etc. Concerning water sources, ownership rights, rights to allocate and use may be held by different stakeholders and may or may not be contested. For example, ownership rights of a spring may be vested in the owner of the land in which the spring is located but neighbors may have rights to use the water for drinking or irrigation purposes.

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 legitimized by law, whether state or local or both (c.f. Talbot 1997; Wiber 1992).
This is similar to the point made by Schlager and Ostrom (1992) that rights are derived from rules. People who have rights to water may be prevented from acquiring water, and conversely, people without rights may be able to acquire water either by force or by stealth. 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 Talbot (1997: 3–4): 'the freedom of 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.

Farmers negotiate, dispute, and use other strategies not so much to establish or protect water rights in general but specific kinds of types of rights. The strategy that the farmers use is 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 three cases.

In the first dispute, one village, in response to damage to their diversion weir and physical threat to their lives, filed a case in the courts to protect their rights to a water source, to which they claimed exclusive use rights. In the second case, the defendants in the first dispute destroyed the newly constructed gabion diversion weir to lay claims to the water source and also to force negotiation so that they could acquire water. In the third case, an NGO-funded drinking water project was used as a pretext to try to secure rights to use water for irrigation.
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. Thulo and Sano Andhi Khola join to form Andhi Khola. Baraha Kulo and Juasi Kulo divert water from Thulo Andhi Khola. 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, especially during the dry months, the Yampalis have to breach the diversion weir of the Satrasaya Phant or block the entrance of the Satrasaya Phant Kulo so that the water flows over the diversion weir.

We do not have any firm evidence about how the two villages shared water from Thulo Andhi Khola in the past. Informants provide contested versions but it appears that when relations between the two villages were good, the Yampalis were allowed to acquire water from the disputed source and when relations were bad, they 'stole' water. The Yampalis 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. Other Yampalis claim that during their fathers' time, they were allowed to acquire water from the disputed source because relations between the two villages were good on account of a marriage between two elite families in the two villages. Later they required more water for irrigation because they had converted some of their upland fields (bati) to irrigated lowland fields (khet). They had requested a powerful 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. Some Satrasaya Phant farmers assert that the Yampalis were never given permission to tap water from their water source and that they (the Yampalis) stole in the past and continue to do so today. However, many Satrasaya Phant farmers do acknowledge that the Yampalis were allowed to use their water source for limited periods. According to some old informants, the Yampalis requested water for their monsoon crop if there was drought. 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. A few informants in their late 70s and 80s 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 were not too happy about having to depend on the goodwill of the Satrasaya Phant farmers for water. They could steal water but this method of acquiring water was not always successful and moreover they were often punished for it. The Yampalis therefore used different strategies to acquire water and, equally important, to establish rights to use 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 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 and the Yampalis had to resort to 'stealing' water to irrigate their monsoon rice crop. Tension between the two villages, specifically the elites, had increased because of a dispute between the Adhikaris of Satrasaya Phant and Hari Prasad Shrestha of Yampa Phant over another issue, not related to water. The Adhikaris were a rich family who owned large tracts of land in Satrasaya Phant. Mr Shrestha was a rich man, who owned much land and also farmed, on contract, a large tract of land in Yampa Phant owned by a powerful Pande family of Kathmandu. It was during this period of bad relations between the two villages that an incident occurred which led to the court case described below.

The 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 Thulo Andhi Khola, their main source of water for irrigation, was very low. The Yampalis felt they had no alternative but to steal water from the disputed water source because Satrasaya Phant farmers would not give them permission to divert water from Thulo Andhi Khola on account of the strained relations between the two villages. When a tenant farmer attempted to breach the diversion weir of Satrasaya Phant Kulo he was caught by a few Satrasaya Phant farmers and fined Rs 5. He reported this incident to Mr Shrestha, his landlord who had probably encouraged him to 'steal' water. The next day, Mr Shrestha, together with a few other farmers, destroyed the diversion weir. By this act they were claiming rights to use water from the disputed source.

As soon as the Satrasaya Phant farmers were informed 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 vanished. 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 also not sure when and how the Yampalis would retaliate and negotiation was not possible because of the antagonistic relations between the leading families of the two villages. A few of the leading Satrasaya Phant farmers therefore filed a case against Mr Shrestha and 33 other Yampalis in the court. In seeking the protection of the court, they used state law 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 (c.f. F. von Benda-Beckmann et al. 1997: 231). 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. They further argued that the Yampilis had never diverted water from the disputed water source and that there was no written agreement about water sharing. This argument is ingenious in that in most instances such agreements, if they existed, would have been verbal and not written and signed agreements. The Yampilis, naturally, could not provide written evidence. The petitioners alleged that the Yampilis had damaged their diversion weir and petitioned the court to award them compensation of Rs 100 for the damages.

The Yampilis insisted that they too had rights to use water from the water source. They asserted, though they were not able to provide written proof, that their canals were older than Satrasaya Phant and that it was well known to everyone that they had been sharing water from the disputed source. They maintained that they did not damage the diversion weir; all they did was to acquire water that had traditionally diverted from the water source.

Two state laws are relevant here. First is the provision in Chapter on Land Reclamation in the National Code which deals with the rights and obligations of irrigators. Briefly, the provision states that prior appropriators have first rights to water from the source. In normal circumstances, this means that diversion weir may be constructed upstream of the existing intake structures only if water supply to the existing downstream canals is not adversely affected. The petitioners used this law to justify their rights to deny the defendants access to water from the water source. The defendants used the same law to argue that they have rights to the water source because they appropriated water before Satrasaya Phant farmers. They had allowed the petitioners to construct a diversion weir above their intake structures on the condition that water supply to their canals 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 such as water or land if they can prove that they have been using the resources from 'previous times', even if they do not own 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 District Administration Office or the Village Councils. 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 and therefore have rights to divert water from the source.

The court gave its decision four years later. The court ruled (a) that the water should be used as per previous practice (sabik bamojim); (b) that the defendants should pay compensation of Rs 100 to the petitioners; and (c) that the defendants should not destroy the diversion weir without the court's permission. 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 decision of the lower courts.

In the post-trial stage of court cases, the decision has to be implemented in the social field where the dispute originated (K. von 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. Further, the disputants may interpret the court decision differently. In this case, the decision relating to compensation was not contested by the litigating parties. The Yampilis acknowledged that they had damaged the diversion weir and they were willing to pay compensation as demanded by the petitioners. As the case described below shows, the Yampilis did not always follow the court's ruling that they should not destroy the diversion weir without the court's permission.

The first part of the court decision was equivocal: 'water is to be used as per previous practice or use (sabik bamojim)' whereas the point was whether the Yampilis had been using water regularly from this source in the past and therefore had rights to continue diverting water. The court threw the ball back into their own court, that is, the disputing parties were to resolve this question themselves. The disputants did not agree on the interpretation of this part 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 favor and use the court decision as a form of truth to justify their actions and claims.

Outside the court context, some Satrasaya Phant farmers are willing to concede that the Yampilis did divert water from the disputed source but they were careful to point out that it was only under specific conditions and with permission. In other words, they did not concede that Yampilis had rights to water from the source. Similarly, a few Yampilis admitted that they probably never shared water
equally (and did not have rights) but that they were allowed to acquire water for specific periods when they had good relations with the Satrasaya Phant farmers.

The Supreme Court decision did not resolve the conflict. The Yampilis 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 took turns to guard the diversion weir, especially at night, during the rice season (P. 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 made it difficult for them to negotiate a settlement.

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. The new diversion weir was more difficult to breach and allowed less water to seep through than the old one and made it more difficult for the Yampilis to acquire water. The Yampilis were not informed, much less consulted, about the construction of the weir. They could not prevent the construction of the weir either by negotiation with the Satrasaya Phant farmers, given the hostility between the two villages, or by appealing to higher authorities because they could not prove that they had rights to the water source. Moreover, the construction of the gabion weir was part of the World Bank project, which had been sanctioned by and implemented by the Department of Irrigation, allegedly due to the lobbying efforts of a Satrasaya Phant farmer who had influential contacts in Kathmandu.

Given the limited options available to them, the desperate Yampilis did not take recourse to judicial or quasi-judicial process but resorted to a strategy used elsewhere in Nepal to both claim and protect water rights (Pradhan and Pradhan 1996; Pradhan et al. 1997b): they damaged the diversion weir. The Yampilis 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, especially government projects. As far as the Yampilis were concerned, they had once again asserted their claims to rights to water from the disputed source. By demonstrating their willingness to use force, they hoped to get the Satrasaya Phant farmers to negotiate a compromise.

The Yampilis later tried to negotiate with their adversaries, suggesting that they would pay for the construction cost of the diversion weir provided it was destroyed. The Satrasaya Phant farmers did not agree to the suggestion but they repaired the damaged gabion structure. The disputants did not pursue the matter further.

In this dispute, the Satrasaya Phant farmers used the opportunity provided by the state-aided project to construct a more permanent and stronger diversion weir and to reinforce their claims to exclusive rights to the water source. As has been observed by others (Ambler 1990; K.C. and Pradhan 1997) one way to protect or augment water rights is by constructing better physical structures which are more difficult to damage and allow less seepage of water. Physical structures also provide material proof of water rights.

The two parties did not attempt to negotiate before or during the construction of the diversion weir or before the Yampilis damaged it because of the bad relations between them. They negotiated after the fact, as it were, but could not reach a compromise. The Yampilis had strategically 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 irrigate their fields. But the Satrasaya Phant farmers were not taken in by this stratagem. Had they agreed, after a few years of litigation using the source, the Yampilis could have claimed in court that they have been legally using this water source and demand rights to use water from this source as per previous practice (sabik bamojir). The Satrasaya Phant farmers were in a strong position to ignore the demands of the Yampilis because the structure was being constructed by the Department of Irrigation. The government would come down heavily on anyone who damaged or destroyed government-aided 'developmental' structures, especially those funded by foreign donor agencies (see Pradhan et al. 1997b).
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 were able to acquire water when they needed it for irrigation. Perhaps emboldened by the lack of retaliatory action against them for damaging the diversion weir, 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. They planned to use Barahi Adi Mul, a perennial spring, for the project because it was the most reliable water source of water in this area. The problem was that the Satrasaya Phant farmers claimed exclusive rights to Barahi Adi Mul, the water source for Thulo Andhi Khola, which in turn was the water source for Satrasaya Phant Kule. 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 that they were not informed whereas the Yampalis claim that they had discussed their plan with the chairman of the Satrasaya Phant water users committee. In any case, as related by informants from Satrasaya Phant, they forcefully prevented the Yampalis from digging and laying pipes. The Yampalis reported this incident to the District Red Cross office and later filed a complaint against them with the District Administration Office (CDO) and the District Police. The Yampalis present a less adversarial version. They claim that 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 DSI, the chairman of the DDC and officials of the Red Cross to mediate.

A few days later these officials, accompanied by Yampalis, visited Satrasaya Phant to settle the dispute. These officials suggested the Yampalis should be allowed to use water from the disputed source for the drinking water project, after considering the needs of irrigation of Satrasaya Phant. Satrasaya Phant farmers at first did not agree with this suggestion, however, under pressure from the officials they agreed to allow the Yampalis to tap their drinking water from the disputed source but on the condition that they did not break the diversion weir to irrigate their fields. The Yampalis, however, did not agree to this condition because, as one informant put it, '...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 project and continued to divert water ('illicitly') from Thulo Andhi Khola for irrigation.

In this dispute, the Yampalis used a clever strategy to try to establish rights in the disputed water source. The Yampalis, emboldened by the grant given to them by the once powerful Red Cross, patronized by the royal family, used this opportunity to lay claims to the disputed water source by tapping it for their drinking water project. They had hoped that 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. 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 and that they had prior rights to the water. 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 because the Yampalis did not want to give up their claims to use the water source for irrigation.

Discussion and Conclusion

The Yampalis have been trying for over 75 years to establish rights to use water from the disputed water source. The strategies they
used to acquire water and to establish water rights ranged from negotiation to force to the use of development project and administrative officials. Although the Satrasaya Phant farmers succeeded in preventing the Yampilis from establishing water rights in the disputed water source, the Yampilis continue to claim that they have rights to a share of the water. One way in which they have expressed this claim is by ‘stealing’ water from the disputed water source.

One of the common but illicit ways of gaining access to and acquiring water from disputed water sources is by stealing (Pradhan and Pradhan 1996; Pradhan et al. 1997a). This strategy is often used when negotiation and other strategies fail. In many cases, the ‘water thieves’ have been able to secure rights to acquire water and in some cases even to have a say in water allocation and other decisions (see Pradhan and Pradhan 1996). However, the ‘water thieves’ do not always succeed in establishing rights to use water; and sometimes, as in the case discussed in this contribution, they may be able to acquire water but are punished for it. In the past Satrasaya Phant farmers reacted strongly to water ‘stealing’ by the Yampilis. They punished them severely for this, in their eyes, illegal act. Later they guarded the diversion structure to prevent further theft, especially during the crucial monsoon months. Satrasaya Phant farmers, however, were more lenient, especially when relations were cordial, to the Yampilis’ requests for water so long as they did not assert that they had rights to it and diverted water only for a specified time. The Yampilis were thus given access to water, more specifically, they were given permission to acquire water but under strict conditions.

By allowing the Yampilis to ‘acquire’ water, Satrasaya Phant farmers, at least temporarily, have been able to avoid disputing and guarding their water source and to protect their rights to control, allocate, and distribute water. By not asserting their claims, the Yampilis 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.

Another method of asserting claims to water sources used in the present case and elsewhere in Nepal, is by use of force, more precisely by destroying diversion weirs (Pradhan and Pradhan 1996; Pradhan and Pradhan 1997). Physical structures such as diversion weirs are visible means of asserting and protecting water rights. Permanent structures block diversion by farmers whose claims are not accepted. Destruction of diversion weirs is usually a desperate act by the farmers who feel that the structure is not only a symbol of the denial of their claims, but equally, which makes it more difficult for them to acquire water (by stealing for example). We must not think that such destructions are always acts of resistance by the weak. This could be the case in the second dispute when the Yampilis damaged the new gabion diversion weir, but not so when in the first dispute the Yampilis damaged the brushwood diversion structures and then threatened the Satrasaya Phant with a rifle. Such acts usually had to escalation of disputes and deterioration of relations.

The court is usually not a strategy, at least not the first strategy, the farmers use to protect or establish water rights. This is not only because of the time and expense involved but also because they are not sure how the court will decide. Equally important is that court decisions have to be implemented in the social field where the dispute originated. Here more important and significant than court decisions and state law are local law and social and political relations. It is difficult to implement court decisions without massive state backing, all the more so when the disputants are of relatively equal standing. In the first dispute, the equivocal decision given by the court made it difficult to resolve the conflict and implement the decision. Perhaps the judges knew too well that such disputes are best left to the disputants to resolve in their own ways.

The second and third disputes indicate how external intervention (government-aided rehabilitation and extension project and Red Cross-funded drinking water project), with all that these imply in terms of support from state officials, provide opportunities for stakeholders to attempt to alter or reinforce existing water rights relations (see Pradhan et al. 1997a). In the second dispute, Satrasaya Phant farmers, aided willingly or unwittingly by the Department of Irrigation, were able to buttress their claims to exclusive rights to the water source by constructing a diversion weir which was stronger and leaked less than the brushwood structure. This made it even more difficult for the Yampilis to acquire water (even by stealing), not to speak about establishing rights. Here, the Department of Irrigation possibly helped Satrasaya Phant farmers ignore state law.
In the third dispute, the Yampalis took the initiative in using the opportunity provided by the drinking water project to attempt to establish rights to a share of water from the disputed water source for drinking water purposes which they planned later to use for irrigation. Their strategy did not work because Satrasaya Phant farmers as well as the officials were aware of their subterfuge. Had the officials been more persuasive, they could have helped Yampalis establish rights to water from the disputed source.

In the disputes discussed in this paper, negotiation did not seem a viable strategy to establish and protect water rights because both parties did not budge from their claims. The two villages do not seem to have made much efforts at negotiating. Even when relations between the two villages were very cordial, the Yampalis were not able to secure rights to water from the disputed source.

It is important to note that the supply of water to their fields was not the major reason why the Satrasaya Phant farmers consistently refused to accept the Yampalis' claims to rights to tap water from the disputed water source. There was more than sufficient water supply in the water source for both disputing villages, as can be seen from the fact that (a) Satrasaya Phant still had abundant water when they allowed Yampalis to divert water when relations with them were good or when they stole water; and (b) the command area of Satrasaya Phant Kulo was increased by nearly 75 per cent using the same water source. The main reason why Satrasaya Phant farmers were not willing to grant the Yampalis rights to a share in the water was that they wanted to retain control over the water source and to allocate water as they pleased.

The Yampalis were not satisfied with being able to acquire water either with permission from Satrasaya Phant farmers or by theft; they wanted to ensure a guaranteed supply of water for their monsoon paddy crop by establishing rights to use water and also to control water allocation. Faced with the failures of their strategies to get their claims accepted by Satrasaya Phant farmers, they were realistic enough to seek ways which would make it possible for them to acquire water sufficient for their monsoon paddy crop while they awaited another opportunity to establish water rights.

In this chapter we have argued that negotiation is only one strategy among others, and not always the most useful or successful one, used by the farmers to establish or protect water rights. Negotiation seems to work mainly when relations between the disputants are good or, to put it differently, good relations are conducive to negotiated settlement of disputes. Other strategies are more effective in situations of bad, adversarial relations. The strategies used depend not only on the relations between the disputants but also on the resources (power, connections, legal, etc.) available to them and the type of rights sought to be established or protected. The strategy used also depends on whether the objective is to establish or protect rights or to gain access and acquire water (or prevent others from gaining access and acquiring water). Negotiation is more likely to be used and succeed when the issue of water rights is put aside or transformed into the issue of acquistion of water. It is much more difficult to reach a negotiated settlement on water rights issue than on the issue of water acquisition.

Notes

1. This paper is based on a research entitled ‘Study of Water Rights in Nepal’ carried out by the International Irrigation Management Institute, Nepal office and Legal Research and Development Forum (FREEDEDAL), Nepal in 1994 and 1995. Fieldwork for this part was carried out mainly by Durga K.C. The project was funded by the Ford Foundation. We would like to thank editors Ruth Meinzen-Dick and Brynn Bruns as well as the reviewer of this book for useful suggestions.


4. This term is derived from Scott 1985, which he used to describe the ‘everyday forms of resistance’ by peasants.

5. See Durga and Pradhan 1997; Pradhan et al. 1997b for a discussion of conflicts and disputes before, during, and after this project.

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

References

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