

Analysis of Supreme Court Cases and Decisions Related to Water Rights in Nepal'

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INTRODUCTION

Water is one of Nepal's most important natural resources and is available in almost all parts of the country. However, the availability of water varies according to season and location. In the past the demand for water was low as the population was low and the people were unaware about the multiple uses and benefits of water. Water was used for drinking, washing and irrigation. And since water was sufficient for these uses, there were hardly any disputes relating to consumption, distribution and other uses of water. Consequently, water related disputes were not regarded as significant and the state did not concern itself much with such disputes.

With the growth of the population and the development of the idea of multiple uses and benefits of water as well as the growth in demand, especially for irrigation, issues and disputes relating to water were raised from time to time in different parts of the country. The state then began to institute conflict resolution processes through preventive as well as judicial methods. As part of preventive method, the state appointed officials, many of who were revenue collectors, to look after water management (allocation, distribution, maintenance, etc.). These officials were known as Dhalpas, Birtawalas, Mukhiyas, Jimidars, and so on³. The state delegated power to these officials to hear and resolve conflicts within their (territorial) jurisdictions. Normally the Royal Court was not entitled to hear water related disputes. The legacy of King Ram Shaha's edict that the '*conflictraised due to the sharing of drinking water and canal water should not be heard by the royal court*' played dominant role until the modern history of Nepal⁴. However, some important cases relating canal water (forwarded by the local level authorities and advisers) had been resolved by the Prime Minister's court in the late Rana regime.

With the beginning of democratic exercise since 1951 the courts in Nepal were kept separate from executive and other form of influences. At first, the *Interim Government of Nepal Act* of 1951 and the *Pradhan Nyayalaya Act* (Apex Court Act) of 1953 constituted a separate appeal court. The process of separating subordinate courts was underway till the promulgation of the Constitution of the Kingdom of Nepal 1958 (and legislation relating to administration of justice thereunder). As a result, judicial responsibility vests upon the judiciary as constituted by some enactments. Hence disputes which need judicial settlement could be filed in the court of law. However due to various reasons people use non-formal adjudication (not the judicial process) in large number of cases. The Supreme Court (known as Pradham Nayayalaya from 1951 to 1956) was the apex in the judicial hierarchy.

As per the Nepalese legal system there was and is little scope for filing water rights related cases in the Supreme Court because water rights related cases as well as other cases were (are) first heard by the concerned local bodies (village level units) or District Courts or quasi-judicial bodies. And appeal against the decisions of these bodies are/were heard by the concerned District Panchayat (now known as District Deveopment Committee [DDC]), District Court or Appellate level courts. The Nepalese legal system has adopted "one step appeal" system which allows little room for water related cases to reach to the Supreme Court. However, the Supreme Court can hear water related cases in two ways. First, it can hear such cases under the provision of special leave for appeal, i.e., with the prior approval of the Supreme Court an appeal against the decision of appellate courts can be filed in the Supreme Court. Second, under writ jurisdiction, if the citizens' fundamental rights are infringed and there does not exist proper and efficient legal remedy established under the existing laws, the Supreme Court can hear writ petitions even related to water rights.

This paper presents a preliminary analysis of cases decided by the Supreme Court between 1980 and 1990. The study team first went through all the cases, published and unpublished, for which the Supreme Court had given its judgements during the period mentioned above. The study team faced great difficulty in locating cases related to water rights because water rights is not category used to classify cases either in *Nepal Kanoon Patrika* (*Nepal Law Reporter*), the journal published by the Supreme Court, or in the court register. We were able to locate 91 cases which were somehow related to water rights issues and which were published in the above mentioned journal. In this paper we discuss these cases briefly under different headings. In the following section we will briefly discuss the classification of water related cases used in this paper, the title (category) under which the cases were registered, the origin of the dispute, the dispute resolution processes followed before the cases were filed in the Supreme Court and the composition (caste/ethnic group as well as individuals/ institutions) of the claimants and defendants. We will then briefly discuss 21 cases which we believe are directly related to water rights and in the last section we present our conclusion.

SUPREME COURT CASES ON DISPUTES RELATED TO WATER RIGHTS

Classification of Water Rights Case

From the view point of the subject matter of the cases filed and the verdict of the Supreme Court, cases have been classified into three categories (a) Directly related, (b) Indirectly related, and (c) Partially related cases. Directly related cases (23% of the total cases) include cases in which the petitions were put forth with claims or defenses relating to water rights and the Court's decisions also were limited to water rights issues. Indirectly related cases (55%) consist of cases which originated from of water rights issues or were somehow related to use or disposal of water but neither did the disputing parties ask the court to decide on water rights issue nor did the court do so; and also, those cases in which the disputing parties raised issues relating to water rights but the court did not speak on that issue or decided the cases on "procedural" and other 'technical' grounds. Partially related cases (22%) include those cases which are not related to water rights but were partially related to water resources or some how linked with water resources.

Registered Title and Origin of Supreme Court Cases

The analysis of Supreme Court cases (excluding partially related cases) shows that the majority of water related cases (more than 63 %) were registered as Writ of Certiorari. The other major headings under which the cases have been registered are Canal Water (5.6 %), Land Encroachment (5.6 %), Injunction (4.2 %), and Murder (8.5 %). (See Table-I).

Table I : Supreme Court Cases by Registered Title

REGISTERED TITLED	DIRECT	INDIRECT	TOTAL	
	Nos.	Nos.	Nos.	%
1. CANAL WATER	1	3	4	5.6%
2. CERTIORY	15	30	45	60.4%
3. ENCROACHMENT	2	2	4	5.6%
4. INJUNCTION	3		3	4.2%
5. COMPENSATION		1	1	1.4%
6. DEFAMATION		1	1	1.4%
7. HOUSE DISPUTE		1	1	1.4%
8. LANDED PROPERTY		1	1	1.4%
9. MANDAMUS		1	1	1.4%
10. MURDER/ATTEMPTED MURDER		6	6	8.5%
11. PASTURELAND DISPUTE		1	1	1.4%
12. TERMINATION OF SURVEY		1	1	1.4%
13. TERMINATION OF TENANCY RIGHT		1	1	1.4%
14. TERMINATION OF DEED		1	1	1.4%
TOTAL:	21	50	71	100.0%

The study of the Supreme Court cases from the view point of origin of the cases reveals that about half of the cases registered (49.3 %) are related to canal water, followed by pond (21.1 %) and drain (15.5%) (See Table II). Among the canal related cases, the majority of the cases were related to sharing of canal water and construction of new/or branch canals in the system, which comprises 43% and 29% of the cases, respectively. The other major causes of conflicts were damage of canals and diversion of canals. Similarly in pond related cases, the notable issues of conflicts are encroachment of ponds and transfer of rights, which comprise 33% and 47% of the pond related cases respectively. Drain related cases are urban phenomena which occur from the problem of drain access, construction and encroachment of drain, roof water, etc. In addition, easement rights issue (drinking water for domestic animals) has also been found as one of the important causes of conflicts. Two other interesting causes of conflicts are conversion of *bari* (upland, usually unirrigated fields) to *khet* (Paddy fields), and sharing tap water.

Conflict Resolution Procedures Followed Before Registering Cases at the Supreme Court

Various formal and informal dispute resolution processes are generally followed before cases are registered in the Supreme Court. Out of the total 91 cases registered in the Supreme Court, 25 cases were registered directly in the Supreme Court and 66 cases after passing different stages of conflict resolution processes. Village Judicial Council (VJC), District Judicial Council (DJC) and quasi-judicial bodies are the prominent agencies which generally first attempt to resolve water related conflicts at the local level. The cases which they were not able to resolve and were taken to the Supreme Court constitute about 44 per cent of the total water rights related cases in the Supreme court.

Claimants and Defendants

Individuals, Groups and Institutions

The analysis of claimants and defendants of the Supreme Court cases reveals that the majority of cases were filed by individuals (82 %), whereas the majority of the defendants were institutions (54%). The cases filed by group of individuals or by institutions are very limited. They comprise of 12% and 7% of the total claimants respectively. Similarly, individual and group defendants comprises of 26 % and 21 % of the total defendants respectively.

Various institutions have been involved in mediating or hearing cases related to water rights. And, as mentioned above, the majority of the cases filed in the Supreme Court were against the decisions of these institutions. Of the 49 cases where the defendants were institutions, ten cases (20 per cent) were against District Judicial Councils (DJC). The other institutions which were defendants in the Supreme Court cases were Land Revenue Office (LRO), Town Panchayat (TP), His Majesty's Government (HMG), Village Judicial Council (VJC), and Chief District Officer (CDO). (See Table III).

Table II: Supreme Court Cases by **Origin** and Cause of Conflicts

REASONS	DIRECT	INDIRECT	TOTAL	PERCENT	
CANAL RELATED:	9	26	35	100.0%	49
Canal Construction	2	8	10	28.6%	
Canal Damage	2	1	3	8.6%	
Canal Water Sharing	2	13	15	42.9%	
Canal Diversion	2	2	4	11.4%	
Canal Flow Area Ownership		1	1	2.9%	
Canal Side Access/Path	1	1	2	5.7%	
DRAIN RELATED:	4	7	11	100.0%	15.5%
Drain Access	1	2	3	27.3%	
Drain Construction	1	1	2	18.2%	
Drain Encroachment	1	1	2	18.2%	
Drain Location		1	1	9.1%	
Drain for Roof Water	1	2	3	27.3%	
POND RELATED:	6	9	15	100.0%	21.1%
Pond Demolition		1	1	6.7%	
Pond Encroachment	2	3	5	33.3%	
Pond Right of Ownership	2		2	13.3%	
Pond Transfer of Right	2	5	7	46.7%	
OTHERS:	2	8	10	100.0%	14.1%
Breach of Contract	1		1	10.0%	
Change Bari to Paddy field		1	1	10.0%	
Easement Right		4	4	40.0%	
Public Tap Area		1	1	10.0%	
Public Well Encroachment	1		1	10.0%	
Ratification of Treaty on River		1	1	10.0%	
Tap Water flow Sharing		1	1	10.0%	
TOTAL:	21	50	71	100.0%	

Table 111: Different Institutions Involved in Supreme Court Cases

INSTITUTIONS	DIRECTLY RELATED	INDIRECTLY RELATED	PARTIALLY RELATED	TOTAL RELATED	
1 Chief District Office (CDO)	1	3			8.2%
2 District Judicial Council (DJC)	2	8			20.4%
3 Land Revenue Office(LRO)	1	1			
4 Town Panchayat (TP)	2	3			10.2%
5 His Majesty's Government (HMG)		6			14.3%
6 Village Judicial Council (VJC)	1	4	5		10.2%
7 Others	4	1	4	9	19.4%
- Village Panchayat (VP)			1	1	
- District Court (DC)			1	1	
- School		1		1	
- Power Office			1	1	
- Land Reform Office (LRFO)			1	1	
- District Panchayat (DP)	2			2	
- Regional Court	1			1	
- Zonal Court	1			1	
TOTAL	11 22.4%	26 53.1%	12 24.5%	49 100.0%	100.0%

Ethnicity/Castes of Claimants and Defendants

Analysis of the ethnicity\ castes of claimants and defendants shows that more than 50 percent of claimants and 44 percent of defendants were of Brahman and Chhetris, followed by the Newars who comprises 20 percent of claimants and 24 percent of the defendants. The reason why most of the claimants and defendants are Brahmans, Chhetris and Newars is that they more aware of their water rights then other communities because they are more privileged and have more exposure to the administrative and judicial areas than the other communities.

SUMMARY OF THE DIRECTLY RELATED CASES

A total of 21 cases fall under this category which are described briefly below under different sub-headings. It will be noted that the decisions of the Supreme Court are not always directly related

to water rights issues (which they were at the lower courts\ institutions). Many of the cases are about the jurisdiction of local bodies or lower courts to hear cases or make decisions: other cases are about (court) procedural issues: and a few cases are about property relations (ownership and use rights). In all these cases, the disputes were originally about water (pond, lake, canal, drainage and roof water) which were later transformed to other issues (jurisdiction, etc.) by the time they reached the Supreme Court. As a result, the Supreme Court has made very few decisions directly on water rights issues, at least during the period in review (1980 to **1990**).

Fishery Development in a Sacred Pond Does not Infringe Right to Religion

A writ petition was filed in the Supreme Court against the decision of Jhapa District Panchayat claiming that the use of the sacred lake known as Birat Pokhari for fishery and demolition of the temple located in the middle of the lake violated the fundamental right to religion of the petitioners. The petitioners urged the court to revoke the decision. The respondent, Jhapa District Panchayat, contended that under the prevailing law, **all** ponds and lakes located in the district and not owned by any individual are its property. **It** therefore has the authority to use them as it wished. The respondent requested the court for the dismissal of the claim on the above mentioned ground.

The Supreme Court, in its decision, stated that the right to religion of the people should be protected but fishery development in a sacred lake does not infringe on the right to religions

Jurisdiction of Local Bodies

(i) **A** writ petition was filed on the ground that the respondents encroached on their land of easement through which water flowed and converted it into a farm land. Prior to filing the writ petition in the Supreme Court, the Village Judicial Committee (VJC) had ruled the action of the respondents unlawful. Thereafter, an appeal was filed with the District Judicial Committee (DJC) which refused to hear the appeal on the ground of lack of jurisdiction **as** the issue in dispute also involved entitlement **of** landed property. The respondents approached the Supreme Court urging for the dismissal of the DJC's decision. The DJC denied the allegations stating that it had no jurisdiction to hear the case.

The Supreme Court however, held that DJC is the authorized body to hear appeals against the decisions of the VJC and quashed the DJC's decision⁶

(ii) In another case, a claim was filed with the VJC for the damage done to a canal and the VJC held the defendant's action unlawful. The defendant filed a writ petition with the Supreme Court claiming that the VJC lacked the jurisdiction to hear cases relating to public canal and water. The VJC, in its counterclaim, contended that it had decided the case in accordance with the provisions of the prevailing law.

The Supreme Court held that the VJC is the competent authority to hear cases relating to public canal and water, appeals against which lie with the concerned DJC under Section 41 of the Village Panchayat Act 1961. The petition was dismissed?

(iii) A dispute arose in Dang district because a canal was constructed upstream of an existing canal which disturbed the users of the old canal made for the use of farmers in a different Village Panchayat. A case was filed with Tari VJC but the Tari VJC forwarded the case to Tulsipur VJC. The latter VJC held that water should be provided to the Tulsipur Village Panchayat. An appeal against the decision was filed with the DJC which disagreed with the appellant's contention. Hence a petition for special leave for appeal was filed with the Supreme Court and the division bench, allowing the leave for petition, revoked the decision of the DJC.

Following the decision of the division bench, a writ was filed on the ground that it was an age-old canal. The respondent urged for the dismissal of the decision of the division bench. The Supreme Court held that since the source of water is located in Tulsipur Village Panchayat, it has the jurisdiction to ~~hear~~ the case and the decision rendered by the Tulsipur VJC was held valid⁸

(iv) In another case, the issue in dispute was the diversion of canal water. A case was filed with the VJC which granted the plaintiff the right to use the canal water. An appeal was filed with the DJC which restricted the use of the canal water. Hence, a writ petition was filed in the Supreme Court to dismiss the decision on the ground that the DJC's power to hear an appeal on such a case had already been transferred to the District Court. The DJC contended that its decision was made in accordance with the prevailing law of the country.

The Supreme Court held that the decision of the DJC restricting the use of the canal water was unlawful on the ground that it had no jurisdiction to hear the case?

(v) However, in another case of similar nature relating to sharing of canal water the court disagreed on the point that DJC had no power to hear an appeal. It was ruled that the DJC is empowered to hear an appeal under Section 13 of the Administration of Justice (Reforms) Act, 1974.¹⁰

(vi) In another case, dispute arose because of the construction of a new canal, tapping water from a stream which was already used by the petitioner. The new canal reduced the quantity of water flowing to the petitioner's land. The case was initially filed with the VJC which restricted construction of the new canal. An appeal was filed with the Gorkha District Court urging for the dismissal of the decision by the VJC. The District Court did not entertain the petitioner's claim. He then filed an appeal in the Regional Court, Pokhara, requesting that the District Court's order be dismissed. The Regional Court did not entertain the issue. Finally, a writ petition was filed in the Supreme Court urging the court to quash the order of the Regional Court. The respondent refuted the charge, arguing that the VJC had decided the case under its statutory authority.

The Supreme Court held that an appeal against the VJC's decision may only be filed with the DJC. The District Court and the Regional Court have no authority to hear such an appeal, and if heard, it is unlawful. The court quashed the orders given by the District and Regional courts on the ground that they had no jurisdiction to hear the case relating to sharing of canal water!¹

(vii) A writ petition was filed in the Supreme Court against Nepalgunj Municipality for refusing to grant permission to build a house on the ground that the construction site encroached a drain. The petitioner claimed that the municipality had no authority to resolve disputes relating to right

and entitlement of property. The respondent contended that no one should be allowed to construct a house by encroaching a public drain **so permission** was not granted in accordance with the Municipality Act **1962** and Rules framed thereunder.

The court, differing with the respondent's contention, held that the municipality did not have the power to resolve disputes relating to rights and entitlement of property and such cases should be resolved by the concerned court.¹²

Power of Local Bodies to Open a Drainage

(i) A writ petition was filed on the ground that Kathmandu Municipality had decided to shed waste water in a drain constructed through the petitioner's land. The petitioner claimed that the Municipality had no legal authority to decide issues relating to landed property. The Municipality contended that issues relating to drains should be resolved by the Municipality and it had performed its task in accordance with the law.

The Supreme Court held that the Municipality is empowered to resolve disputes relating to drainage and as the Municipality, in the present case, had decided only on the issue of the drainage, the action of the municipality was **valid**.¹³

(ii) Similar issues were raised when the respondent of a case started to construct a drain through **the petitioner's private land** to which the latter objected. The respondent filed a complaint with the CDO Office, Lalitpur which asked the petitioner to allow the construction work to continue. Hence, the petitioner, requesting the dismissal of the order, filed a writ petition stating that the CDO had no authority to decide such issues. The respondents contended that the dispute was not over the construction of a new drain but over the maintenance of the existing one.

The Supreme Court held that the CDO had no judicial authority to decide cases relating to drainage but only the Municipality could. The court held the action of the CDO **unlawful**.¹⁴

Consultation with the Disputing Parties is Compulsory

(i) A writ petition was filed in the Supreme Court on the ground that the defendant had diverted a canal to his land which made the petitioner's land dry. The case was at first filed with the local VJC but the VIC did not agree with the claim. An appeal against the decision was filed with the DJC which quashed the earlier decision **and established the petitioner's claim**. The defendant filed a writ in the Supreme Court contending that the DJC did not allow him the opportunity of explanation which was in violation of the principle of natural justice. The respondent contended that the decision made by the DJC under a statutory authority should be held valid.

The Supreme Court held that opportunity should be given to the disputing parties to present and defend their cases failure of which means the violation of the principles of natural justice under Section 202 of the chapter on Court Procedures of Muluki Ain (National Code). Hence the decision of the DJC was held **unlawful**.¹⁵

(ii) When a pond owned by a Village Panchayat (VP) was handed over to a school, some members

of the Village Panchayat challenged the transfer of ownership. The pond was returned to the VP but the Zonal Commissioner issued an order stating that the action of returning the pond was unlawful. The chairman of the Village Panchayats then filed writ petition in the Supreme Court urging for the invalidation of the Zonal Commissioner's order. The respondent contended that it was done to maintain security and also to make the school economically sustainable.

The Supreme Court held that the Zonal Commissioner had no judicial authority to quash the Village Panchayat's action without giving an opportunity for explanation hence it was declared as unlawful.¹⁶

Restriction on the Imposition of Levies by Local Bodies

An injunction writ petition was filed with the Koshi Zonal Court on the ground that the plaintiff had been asked by the District Panchayat to pay levies for the extraction of sand and stones from the Koshi river. The Zonal Court held that since the work was done under a bilateral agreement between Nepal and India, the District Panchayat had no authority to charge a levy. The chairman of District Panchayat filed an appeal in the Supreme Court against the decision. The respondent claimed that he did not have to pay any local levy or charge because he was supplying the stones and sand under an agreement reached between the two governments.

The Supreme Court held that the respondent is simply a contractor authorized to carry stones from the Koshi, the main parties being the Government of India and Nepal. Therefore, the District Panchayat cannot levy tax or fees under the District Panchayat Act.¹⁷

Individuals Cannot Prohibit Access to Public Drain Located in Private Land

A writ petition was filed on the ground that Kathmandu Municipality had not given permission to build a house on the ground that the proposed building site will encroach on a public drain. The person concerned disagreed with the Municipality's decision and filed a writ petition stating that the municipality did not have the authority to deny him the permission because the drain was constructed in his private land. The Municipality contended that no individual can claim ownership of the drain because it is a public property made for public use. Therefore, the petitioner should not be allowed to make a house on the drain site.

The Supreme Court held that although the drain was located in the petitioner's private property he cannot claim personal right over it and must give access to the public. Hence, the petition was dismissed.¹⁸

Right to Shed Roof Water in Other's Private Land Does not Create Ownership Right in the Land

On the northern side of a person's house there is three feet of open land. A case was filed on the ground that on the northern side of the plaintiff's house there was three feet open land where the roof water usually fell. On the basis mentioned the house owner encroached the land and claimed as his own.

The defendant contended that the plaintiff could not claim ownership on the land on the ground that the roof water from **his** house fell on the disputed land. The defendant claimed himself **as** the owner of the land.

The Supreme Court held that the legal right of the plaintiff could not be created only on the ground that roof water **from** his house fell on the disputed land.¹⁹

Ponds and Lakes Located Within the Territory of Local Bodies which Are not Owned by Anyone Are the Property of the Respective Local Body

(i) A writ petition was filed against a Municipality which claimed that the pond adjoining the petitioner's house **was** its property. **The petitioner claimed that** he should be regarded as the owner of the pond because he had **been** paying land tax for it. The Municipality contended that **as** per the Municipality Act, 1962, it is the owner of the pond and urged the court to dismiss the writ petition.

The Supreme Court, upholding the claim of the Municipality, ruled that the pond in dispute is the property of the municipality because ownership right of the pond was not claimed by **anyone**.²⁰

(ii) In another case, an injunction petition was filed on the ground that a pond constructed for religious purposes by the ancestors of the petitioner was claimed by the Village Panchayat **as** its property as per the provisions of the Village Panchayat Act. The defendant refuted the petitioner's claim and contended that the disputed pond was the Village Panchayat's property.

The Narayani Zonal Court dismissed the petition stating that an order for injunction could not be issued if it raised right and entitlement issues.

The Supreme Court upheld the Zonal Court's decision which ruled that the Village Panchayat had **no authority to claim ownership right over the private pond only** on a ground that it is located within the territory of the Village Panchayat?

(iii) A dispute arose when a lake, owned by Ram Janaki temple, was given to the plaintiff for use and exploitation of its products under an agreement reached between the plaintiff and the Ram Janaki Temple Management Committee. The Village Panchayat then claimed the pond as its property and restrained the plaintiff from using it. The plaintiff filed a petition for injunction on the ground that the Village Panchayat violated his civil rights. The defendant denied the charge and urged for the dismissal of the claim because the Village Panchayat Act clearly stated that Village Panchayats own ponds and lakes located within their territory.

The court held that the Village Panchayat can not interfere in the property of the temple because the pond has been its property since time immemorial. The court further stated that apart from having sacred and religious values, it was the property of the temple on the basis of custom and tradition. Therefore, the V P could not claim ownership of such properties falling within its jurisdiction merely on the basis of existing general legal provisions?

Customary Use of Water Sources Can Create Perpetual Use Rights

(i) A dispute arose when the petitioner constructed a boundary wall preventing access to others to the well in her land. The action resulted in shortage of drinking water for the people of that locality. On receiving a complaint, Kathmandu Municipality pulled down the newly constructed wall and made the well accessible to the local people. A writ petition was filed with the Supreme Court against the Municipality's action. The respondent, the Municipality, contended that it had pulled down the wall to make drinking water available to people of that locality.

The Supreme Court held the action of the municipality unlawful but ruled that the local people should be given access to the well because they had been dependent on it for a long time. The Supreme Court through this decision upheld use rights based on customary water use. Its decision allowed for the use of water located in someone's private property on the ground that they were long-term users.²³

(ii) In a dispute over land encroachment, a case was filed claiming that the defendant encroached upon the land and a pond located on the disputed land. The defendant denied the charge.

The Supreme Court held that the encroachment of the land by the defendant is unlawful but, at the same time, it allowed both the parties to use the water in the pond as per their convenience because they had been jointly using it for a long time. The Supreme Court upheld this principle on the basis of customary right to use of water by both the parties.²⁴

(iii) A petitioner filed a case in the Pyuthan District Court requesting that a) the defendant pay him compensation for damages to the wooden pipes he had installed to supply water to his canal and b) to establish his rights to use the canal water. The defendant denied the allegations.

The Pyuthan District Court ordered the defendant to pay compensation for the damage of the pipes. The Mid Western Regional Court held that if the new canal has disturbed the old one, no claim should be entertained. The Supreme Court held that all the farmers have equal right to use the disputed canal water. They can use the water as done traditionally and customarily, i.e., following the turn by turn rule which they themselves had made. They may face legal obligations if they violate this rule and deny some farmers access to water.²⁵

CONCLUSION

Laws relating to water resources in Nepal have a long history. However, due to sufficient availability and lack of multiple use of water, disputes relating to water resources had not been thought as a serious problem in the eye of the state. Besides, the disputes relating to water resources require quick disposal and, on the spot, if possible. Since long past most of the disputes relating to water resources in Nepal have been resolved by the local officials and influential persons like Thakali, Birtawala, Kipatia, Subbas, Jamindar, Chaudhari etc. In many occasions the state had delegated its power of resolving disputes to those personalities who played a role in maintaining

harmonious relations between the government and local people. With the beginning of democratic exercise in **1951** this method of settlement of disputes was gradually abandoned. However, even after **1951**, the **state left** these disputes to be resolved **by** local influential persons and to some committees at the village level. As a result, the chances to file cases in the state courts became minimal. However, from **1959** to **1981** the District (trial) Courts had the jurisdiction to hear water related disputes. In **1981** this jurisdiction was again transferred to approximately **4000** Village Panchayat Judicial Committees (VJC) and appellate jurisdiction was given to **75** District Judicial Committee (DJC). Hence, the scope for filing cases in the courts in general and the Supreme Court in particular become very limited.

The Supreme Court, therefore, has heard very few cases directly related with water rights issues. The percentage of cases relating to customary rights issues, especially, water rights related conflicts, is nominal in the Supreme Court in comparison to district and appellate courts.

From the review of these cases it **is** clear that the Supreme Court has explicitly recognized customary water use rights of the users, even going against the concept of private property and control over its use **by** the owner. The decisions of the Supreme Court also reveal that the members of local bodies (VDC, DDC, etc.) **are** confused about the jurisdiction **of** the local bodies. This fact clearly indicates the need for legal orientation programs **for** the district and village level quasi-judicials regarding exercise of their legal mandate and the basic judicial principles.

The water resources situated within the territory of a local body and not owned by any individual or institution and not used by the government is legally presumed to be the property of the concerned local body. The concerned local body is legally authorized to utilize such water resources and levy use-charge from its beneficiaries. The local body may even hand over such resources to others **by** concluding an agreement and levying some fees for their use. But HMG, by an agreement, may provide the right to use such resources to a foreign country or its citizens even without consulting the local body. Such an act of the government can suspend or terminate the legally awarded power of the concerned local body which may have financial implications for it.

If the decision of the Supreme Court regarding roof water falling on another person's private land is followed to its legal provision then we find a unique legal provision in this regard. Section 1 of the chapter on House Construction in the Muluki Ain (National Code) states that a house can be constructed in such a way that the roof water can fall on another person's private land. The owner of the land cannot prohibit such an act but if he constructs a house on such a land then he can cut the overlapping part of the neighbour's house. This legal provision restricts ownership rights of the land owner. However, the Supreme Court, further explaining this legal provision, states that the customary practice to let the roof water fall on other's land cannot create ownership right of the house owner from whose house the roof water falls.

On the whole, the Supreme Court has been more realistic than legalistic in resolving disputes. In some cases the court has held that though the lakes and ponds within the territory of any Village Panchayat belong to the that VP but it cannot intervene if they are **used**, occupied or land owned by religious endowment for sacred or development purposes. The court has held that

encroachment of any individual's land for the construction of public canal to benefit the wider public is not unlawful. Similarly, in the case of construction of winter canal through a person's land the court compelled the land owner to give access to the canal every winter on the ground that this facility had been secured for a long time.

Likewise, in some instances the court has ignored the right to property of the defendant and upheld the customary rights to the people by supporting the decision to provide access to a drain in the respondent's land. Moreover, in other cases, the court held that the land owner should not deny access to drinking water from the well in his land.

However, in a few cases the Supreme Court has taken an escapist stance by not giving clear cut verdicts. In many cases it has refused to hear cases on the basis of jurisdictional error. The courts took this stance because during the earlier (Panchayat) regime, the courts had to face many difficulties in protecting civil liberties of the people.

NOTES

- 1 This is a revised version of the paper delivered at the workshop on Water Rights, Conflicts and Policy, held in Kathmandu, January 22-24, 1996.
- 2 Bishal **Khanal** is deputy Registrar in the Supreme Court Registrar's office and Santosh K.C. is Economist; both are also affiliated with FREEDEAL.
- 3 Khanal et al., 1991: 60-61; see also Bhattarai, this volume, for explanation of these terms.
- 4 Ibid. P. 132
- 5 NKP 2042. P. 100, Code No. 013.
- 6 Yogeshwor Rajure Vs. DJC Dang and others. NLR 2045, P. **509** Code No. 068.
- 7 Damber Bahadur Gurung Vs. Juddha Bahadur Gurung & others, NLR 2045 P. 670 Code No. 070
- 8 Indra Bahadur Shaha Vs. VJC Tulsipur, Dang and others, NLR 2045 P. 926- Code No, 072
- 9 Narayan Subedi Vs. Meen Bahadur Karki and others, NLR 2046 P. 188-Code No. 076
- 10 Yam Bahadur Khatri Vs. DJC Tanahu and others, NLR 2045 P. 667-Code 069
- 11 Bal Krishna Pandey Vs. Western Regional Court, Pokhara & others, NLR, 2046 P. 767-Code No-078.
- 12 Kedar Nath Tandon Vs. Nepalgunj Town Panchayat and others, NLR 2044 P. 1032-Code No-61
- 13 Dharma Ratna Sinurkar Vs. Suryamuni Sakya & others, NLR 2044, P. 636 Code No- 009.
- 14 Laxmi Shakya VCDO Lalitpur and others, NLR 2043, P. 151 Code No. 028.
- 15 Lalit Bahadur Rimal Vs. Nara Bahadur Rimal and others, NLR 2043, P. 517- Code No 035.
- 16 Mahendra Ray Yadav Vs. Zonal Commissioner, Janakpur & others. NLR ,2045, P. 824-Code No. 071- see also Baldev Shahu Vs. LRO, Bara & others, NLR 26, No. **4**- code No. 003.
- 17 Ramesh Shrestha Vs. Dhananjaya Prasad Acharya. NLR 2044 P. 593 Code No. 053.
- 18 NLR 2044 P. 768.
- 19 Ram Maya Shrestha Vs. Madhav Prasad Pradhan & other NLR 2046 P. 822-Code No-079.
- 20 Saukhat Ansari & others Vs. Jaleswor Nagar Panchayat and others, NLR 2046-P. 987-Code No-081.
- 21 Ram Babu Prasad Yadav & other Vs. Babulal Shaha Teli and other NLR 2047 P. 698-Code No. 087.
- 22 Kansi Thakur Bhumihar Vs. Hiya Shani Malaha & others, NLR, 2043 P. 941- Code 044.
- 23 Shanta Devi Shrestha Vs. Kathmandu Town Panchayat, NLR 2043 P. 636-Code No-039.
- 24 Ram Bahadur Tamang & other Vs. Krishna Raj Lama, NLR 2043. P. 465-Code No-034.
- 25 Ak Bahadur Maskey and others Vs. Punarnam Dhami, NLR, 2039- Code No. 096.

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