

Local Law and Customary Practices in the Study of Water Rights'

*F. von Benda-Beckmann, K. von Benda-Beckmann,
H.L.J. Spiertz²*

“Science and her generalized statements cannot remove individual responsibility by replacing belief; subjectivity, struggle and guilt. Science can only broaden and clarify the conscience of those engaged in practice, their appreciation for the consequences of their actions and of the meaning of what they are doing” (Baumgarten 1973:xxxv, rephrasing Max Weber 1917).

The quotation from the work of the famous sociologist Max Weber points at the potential tension between scientific research and analysis and their value for pragmatic action. Scientific statements, Weber warns us, will rarely lead directly to a certain course of action; it can only be one of the fundamentals of knowledge upon which political actors - whether they are legislators, NGO activists, consultants or common people - can draw in their attempts to choose a particular course of action. Such choices are inevitable, Weber says, and should not be hidden behind or masked as scientific statements. This tension also colours the studies on water rights in Nepal and India which are presented in the various contributions in this volume. Most of these studies are strongly motivated by some form of activism which aims at changing the current conditions of water rights and water management practices. While differently phrased, the ultimate objectives are shared: a concern for a more efficient use of water, with a more just, equitable, distribution of access to water, as well as for sustainable water use practices. These objectives are based on the observation that the current conditions are lacking in these respects, and that something has to be done about that. The strong future orientation of action research in which the descriptive and teleological orientation dominate brings with it the danger that the explanatory objectives of the research remain under-exposed. Research focused on water rights and water management should not stop at making an inventory of current legal rules, of state and customary laws and the practices of water allocation and distribution; it also needs to analyze the significance of these rules in the processes of social and economic change leading up to the current conditions.

As experiences in other parts of the world has shown, if such questions are not addressed, the starting point for action may be a somewhat distorted conception of the situation one wants to change, and an equally distorted construction of the causes of that perceived situation. In the logic of development intervention, whether from above or from below, policy goals often come first, and the conception of reality is constructed as its negative condition that has to be changed. Hitchcock's remark that "[p]eople rely on their goals to guide their thinking about what already exists. In such circumstances, planners re-invent the traditional as a negative stereotype; they derive it from their goals, rather than the other way round" (Hitchcock 1980:1), aptly characterizes mainstream development intervention planning, with its legal engineering centred perspective.³ In the case of bottom-up activist research, we find almost the opposite position, the negative stereotype being that of the state and state law; the positive, unquestioned one that of 'community' and their customary laws.

The purpose of this paper is to discuss some of these issues and show what a legal anthropological perspective may contribute to the understanding of the water problems the studies in this volume are concerned with. We shall relate our ideas as closely as possible to what we think are the *basic assumptions* which usually are behind action oriented research and which also largely underlie the research presented in this volume and shall refer to cases in this volume to illustrate some of our points. Adopting a legal anthropological perspective means giving primary attention to description and analysis of the current legal situation and trying to understand the significance of that legal situation for the actual forms and practices which water rights and water management assume. It means asking about the interrelations between law and social practice, rather than engaging in conventional doctrinal legal science, stating what the correct interpretations of the law are and how decision making in courts should proceed according to the law.

We shall start our paper by a discussion of the concept of water rights and the laws through which water rights are defined. We then discuss what law means in a context of legal pluralism which we encounter in Nepal and India where we are not simply confronted with a single, unitary legal system but with a complex co-existence of normative systems. Special attention will be given to notions of "customary law" and "customary practices" which play such an important role in ongoing research on water rights. This will bring us to a more general consideration of the relationships between legal complexity and social practices, in which conflicts and disputes, and procedures of dispute management have an important place. Then follows a discussion of the implications of our considerations for water management policies that aim at improving equity, effectivity and sustainability in water management. Finally, we shall venture some ideas about the implications of our analysis for the pragmatics of future policy making.

WATER RIGHTS AND LEGAL PLURALISM

Water has many fundamental functions in human life and social organization: It is both essential as drinking water and as an ingredient for food processing. It is also an important means of production in a variety of enterprises: for irrigation agriculture, for industry, for the generation of hydro-electric power. Water can also be primarily relevant as the habitat of other resources (fish, marine resources) or as a means of transportation. Besides, its many ecological functions are more

and more becoming a subject of scientific and political concern. In situations where water is scarce or over-abundant or if its flow is not properly controlled, it almost inevitably becomes subject of conflicts and disputes. Conflicts due to water shortage tend to bring violent, short term action because water problems often require immediate action. Because of its importance and to limit the number and scope of conflicts, local communities as well as governments have enacted regulations which establish rights to water, i.e. legitimate ways of control, administration, appropriation, use and transfer. The various kinds of regulation are not always congruent; **state regulations may differ** from regulations of local communities. **As** the examples of this volume show, regulations concerning irrigation water are subject to frequent change in Nepal (Shukla et al. in this volume; K. von Benda-Beckmann, Spiertz and F. von Benda-Beckmann 1996). Whenever new canals are built, when existing infrastructure has been destroyed by floods, when new crops are introduced, and when existing systems are rehabilitated and enlarged, new rights are established and new regulations have to be made to accommodate the new situation. These are periods of intense negotiation among the interested parties, situations in which the government may envisage different regulation from the rules proposed by local authorities, and where at least some of the users feel squeezed out of their legitimate interest. The resulting changed allocation, distribution, operation and maintenance systems distribute the burdens and profits in very different ways. Rehabilitation projects in particular are often felt to be imposed upon local communities, in which users do have not a voice, and in which they feel their interests and rights are not being fully taken into account. This is a complaint that is heard in particular from the old users. **As** the Dang case shows (see M. and R. Pradhan in this volume), new users may profit from the projects and from the fact that it is made by the government, because that gives them a legitimation for their use of the system which they did not have previously.

The Physical, Social and Legal Status of Water

Water confronts us in different manifestations, in different functions, beneficial uses as well as nuisances, or even as calamity. To a large extent these can be captured in physical categories that distinguish water according to physical criteria or according to its actual social and economic uses. Thus we can distinguish water in more or less natural states - as water flowing in streams, as surface- or ground water - from water in man-made technological artifacts - water in irrigation canals, in dug or bore-wells, or in artificial lakes. According to its uses, we can distinguish drinking water, irrigation water, hydroelectric water sources, etc. However, when talking about the uses and functions of water, we are confronted with a possible distinction between the *actual* uses which people make of water, and the *normatively defined* functions, which give specific water resources a specific destination: to be used as drinking water or irrigation water, or for industrial production. These *normative* definitions invest such water with a specific legal status. The legal statuses given to water may pertain to the totality of 'one water complex', such as a lake, a river, a well, water in irrigation canals, but it can refer also to a specific volume or a proportion of such totality. Water 'rights' often relate to such legally defined categories of water, and not to the natural resource water as such.

Water and its Environment

Another important aspect in the construction of water rights is the relationship of water and the physical and social environment of which it is part, and of rights pertaining to other elements of that environment. Land, and the water on or under it, may be constructed as one comprehensive category of property rights, or rights to water may be derived from the right to land on which it is, or vice versa. From the cases of irrigation water and drinking water in this volume, it is obvious that the land on which the water stands, or along which it flows, or where the water source is located, is an integral part of peoples' constructions of water rights. Because such rights may vary with the different relations of water to particular plots of land and/or technological artifacts, we will have to ask also questions like: to what extent are water rights conceived of as isolates or related to rights pertaining to its environment; to wells and the land on which the wells are; to rivers or rivulet beds, or to drainage and seeping trajectories or, of course, irrigation canals, weirs, division blocks, tubes etc. (see also U. Pradhan 1994). There appears to be great variety in the construction of water rights. Such differences in legal constructions of water or land rights influence the ways in which conflicts are conceptualized and disputes are framed.

The Range of Water Rights

Given the many different forms and functions of water it is obvious that the concept of water rights can never be more than an "umbrella concept", which includes quite a variety of different rights to different kinds of water. There is a wider range of different types of rights to water, which embody sanctioned social, economic and political powers of different scope and intensity. Legal systems define these different types of rights and lay down the conditions under which a social entity can or must become a right holder. These conditions may tie rights to a specific legal status such as being a "citizen", a member of a village community or an association like a Water Users Association. They may also tie the acquisition and continuation of such right to the fulfilment of specific obligations. This is particularly so in most irrigation systems where rights and participation in labour and monetary contributions to the maintenance and repair of the system are intimately linked. The 'bundle of rights' metaphor is a useful tool for analyzing the different elements summarized by such an umbrella concept (F. von Benda-Beckmann 1995 with further references). Looking at the *total range* of water rights, in all societies 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 (see also Schlager and Ostrom 1992, F. von Benda-Beckmann 1995).

Public and Private Rights

Socio-political control rights are usually vested in institutions and positions of socio-political authority which, according to peoples' constitutional theories, represent the community. In state organized societies, it is also embedded in the notion of sovereignty (Beitz 1991: 243). In contemporary states and state legal systems, these dimensions are distinguished and systematized in terms of public and private law. This distinction is, of course, a normative one which not always corresponds to a clear-cut and mutually exclusive division of property rules and rights into public or private ones. In fact, most rights have both public and private aspects. In societies with less hierarchical political organizations than our state organization, there may not be such a sharp

distinction between public and private law spheres; aspects of socio-political authority and of use and exploitation, however, usually are distinguished: 'In many societies, these rights may also be construed in a layered or tiered fashion, with supreme but largely residual rights vested in the highest political authority (the state, the Crown, the King, the chief, the village republic government) and provisional rights derived from the residual right and delegated to public authorities at lower levels of political and administrative organization. 'Communal' or 'common' (supra-individual) property rights in third world societies, to varying extent, have both private and public aspects.

Internal and External Water Rights

Where groups are the holders of water rights, one will always have to look at external and internal water rights. External water rights specify the range of rights of the group (the state, the village community, the family, the Water Users Association) in relation to individuals and groups which are not group-members. Internal water rights specify the rights of the group members vis-à-vis each other and the group or group representative. In the private law sphere, the external unity of water rights - water rights as common or communal property of groups - was translated as group (family) or common ownership, and the group members' rights to the property were constructed in terms of European legal concepts of joint or co-ownership. The interpretation of local property rights as communal, implicitly on the basis of European legal notions of ownership obscured individual rights in local societies (Clammer 1973, F. von Benda-Beckmann 1979, Snyder 1981, K. von Benda-Beckmann 1985, Wiber 1991).

The distinctions between public and private, external and internal property relationships are helpful for our understanding of individual and supra-individual forms of property rights. Failure to make these distinctions has regularly led to grave misunderstandings of property rights in academic comparison, but also in the application of 'customary law' in the colonies or independent states in the third world.

Rules and Principles

Water law and water rights are usually seen as being established by legal rules. However, the legal provisions that indicate the conditions under which individuals or villages have access to water sources are rarely clear-cut rules with which one could determine whether or not such rights exist or must be given. Normative concepts such as "a field closer to the source has a prior right over the fields further away", "first users have priority over newcomers" or "a new intake may not be built in such a way that it lessens the water intake of existing systems; it must be built at a sufficient distance from a downstream intake" rather have the character of principles. These principles provide a repertoire of accepted justifications and options for possible arrangements. But the principles do not lead unequivocally to specific solutions, because they may be mutually exclusive. It is not always certain which principle has priority over another; in fact this is usually subject to contention and negotiation. In the agreements and settlements that are reached in negotiations it is established which of the principles are followed and in which hierarchy. In other words, legal principles require concretisation in terms of decision making processes as water rights in relation to the concrete ecological and socio-political situation.

Principles, Rules and Actual Rights-relationships

When speaking about water rights, another distinction thus has to be made. We need to distinguish the legal constructions of water rights from the actual social relationships that connect concrete right holding individuals, groups or associations with concrete and demarcated resources. Water rights and the legally defined conditions under which certain social entities can acquire such rights are part of water law; the actual constellation of social relationships between concrete social entities and concrete water resources on the other hand are quite different social phenomena. This distinction is important. If it is not made, there is no room for looking at interrelationships between legal forms or types of property relationships and the concrete manifestations of property relationships in social and economic life. Questions concerning the relationship between types of water rights and their distribution cannot be dealt with systematically. For instance, whether certain types of property rights are likely to lead to concentration and accumulation of property by a few (see Berry 1988, Bruce 1988, Sugarman 1983), whether they have stronger or lesser functions for social and economic security (Chambers and Leach 1989, F. von Benda-Beckmann 1990, van de Ven 1994), or are likely to lead to more or less sustainable resource use cannot be answered.

Water Rights Relationships and Other Social Relationships

Water rights in the narrow sense of the word usually are intimately related with other rights as well as with other social relationships. They are related to land rights, to "citizenship" rights, rights that establish who is an original settler and who is a newcomer, kinship, etc. Law thus embodies power positions and power relationships. Merely concentrating on water rights in the narrow sense is not sufficient to understand how water management operates: It is more useful to look at all the rights and social relationships that pertain to water. In other words, an important aspect of water rights is the extent to which they are differentiated from other legal as well as social, political and economic relationships, or to which they are one aspect.

Legal Pluralism

Another complicating factor in the perception of water rights is the condition of "legal pluralism", the situation in which in the same socio-political units there is a plurality of normative ordering. In a plural legal situation, constructions of water rights may be duplicatory with respect to all components of water rights. What water "is", and what kind (drinking water, irrigation water) can be defined differently for legal purposes. Land, groundwater, irrigation water and irrigation infrastructure may be treated as separate property objects in one legal system, and at the same time as one in another. There is also variation in the construction of property holding units, of the legal capacity of individual persons, associations and groups. Of course, there are also differences in the relations, in the types, substantive content and bundling of different rights. In many third world countries, local legal systems in themselves may be plural. Older and newer versions of "traditional" or "customary" property relations may co-exist, and local village versions of customary property law may co-exist with customary law creations of state courts or legal science! In a plural legal system there may be more than one construction of "customary law". Local people are not the only category of actors which thus classify and label rules as belonging to a legal system. "Customary law" in most legal systems is also a category of which the

characteristics and substantive content is defined by law makers, judges or other experts. In legal anthropological literature, therefore, it has become common to distinguish “people’s customary law” from “lawyers’ customary law” (see Clammer 1973; Snyder 1981; Woodman 1987).

CUSTOMARY LAW, LOCAL LAW, AND PRACTICES

Within the context of legal pluralism and water management, the notion of customary law is a problematic one because of three interrelated assumptions. First, many researchers start from the assumption that in every society or ethnic group there exists a coherent set of norms that can be labelled customary or traditional law. These ‘deeply ingrained’ legal systems are supposed to govern local peoples’ behaviour **as** well as their response to outside intervention. Second, all law which is not enacted and applied by state institutions usually is conceived of being “customary” law, that is based upon customary behaviour patterns that find their origin and legitimation in history. Third, in the notion **of** customary law, law and behaviour or practices are considered to be more or less identical. The terms customary law and customary practices are often used interchangeably. **As** some of the studies presented in this volume show, these assumptions are not warranted, and therefore provide a unproductive guide for devising research as well as policy.

Local Law

From the studies carried out **by** the IIMI-FREEDeAL team it has become apparent that all researchers were confronted with the problem that in real life, even in the most isolated villages, different kinds of rules co-exist. Customary or traditional rules **of** behaviour, of allocating and distributing water rights are, and probably always have been, intermingled with norms emanating from other sources **of** power and authority, generated outside local communities, such **as** the state and government agencies, or religious teachings at various levels. If we look at the totality of rules and norms in rural communities, we see that some norms are customary, in the sense of being based upon long-standing and hardly changed traditions. Others have only recently come into existence and are not customary in this sense but also accepted as valid. They may be adaptations of earlier state or customary rules, or new forms **of** self regulation. Yet other norms are derived from the law of the state or government agencies. The same holds true **for** the institutions involved in water management. Some are based in traditional leadership positions and councils, others, like Water Users Associations, are quite recent institutional developments in which state administrative regulation with more traditional ideas over decision making powers are amalgamated. We suggest that this totality of legal regulation in specific local settings be called “local law”.

This local ‘mix’ of legal rules usually does not form a uniform and consistent system. There may be different interpretations of local law and of state law used at the same time. Much of the law consists of very general and abstract principles which allows many different interpretations when applied to a concrete situation. Moreover, original settlers may have different interpretations from newcomers; persons from lower classes have different interpretations than higher classes; full time farmers may have different notions than villagers who work in government service. And some persons expect more protection from the law of the state, however distorted their knowledge of state law may be, than they expect from customary law. They will try to play off state law against

customary law if that suits them. An example of this can be found in the Dang case described by M. and R. Pradhan (in this volume). Villagers who did not have access to irrigation water before the rehabilitation of the system took place claim that the customary first rights of other villagers were extinguished because the authority over the canal was transferred to the Government. They reason that, since the rehabilitation of the canal was a government project, the canal no longer is the property of the existing right holders but of the State. Therefore they should now be given access to the canal according to state law, an access which was denied to them under customary law. Whether or not this was a correct interpretation of state law is not relevant here. In fact, with the help of Panchayat officials, and perhaps some other advisors in the local irrigation offices and other local experts, they appear to have thought up an entirely new legal device, which they attributed to the state legal system, a legal device which, if accepted, becomes part of the repertoire of local law.

Many of researchers have been struck by the ease and frequency with which people move from one kind of law to another and by the fact that different persons give different interpretations of local or customary rights, depending on their social position and the situation at hand. The whole constellation of norms, that are expressed and used at the local level, appears to be far more complex and dynamic than was originally expected.

Customary Law

This emphasis on the existence of local law does not mean, of course, that the notion of customary law could be replaced by the notion of local law, or that customary law would play no role of significance in rural communities. But customary law can be, and often is used in two meanings: The first meaning is a descriptive characterization of rules: One speaks of customary rules because these rules have been accepted and used for a long time. In the second sense, customary law refers to a system of legal rules so named. The use of customary law, without further qualification, thus can be very confusing because not all customary rules in the first sense need to be part of “customary law”; while not all rules said to be part of “customary law” need to be customary. Moreover, as we have mentioned before, there may exist different ideas about “customary law” in villages and court settings (see Spiertz and De Jong **1992**).

Thus when we look at the relationship between customary and local law, we can be faced with different situations. Many elements of local law may be customary in the first sense, based upon an (assumed) continuity of local legal tradition. Such rules and principles may, but need not be incorporated into the systemic category of “customary law”. Generally speaking, “customary law”, or different constructions of customary law, is part of the legal pluralism which provides the ingredients from which local law is shaped.

Customary Law and Customary Practices

Another source of possible confusion comes forth from the assumption that customary law and customary practices are identical. The terms are often used synonymously. This can mean two different things.

One would be that a general empirical congruence is postulated between rules or principles of customary law and the type of behaviour to which the rules and principles refer, that is customary behaviour patterns which are in conformity with customary law. Whether or not this is the case can only be determined by empirical research. Such research will have to answer the following questions: (1) what are the relevant behaviours in the field we are interested in? (2) is this behaviour customary, in the sense of continuing historically earlier behavioral patterns?, (3) is this behaviour in conformity with rules and principles that are held to be part of customary law and, moreover, whose customary law? It should be stressed that one certainly cannot simply assume such congruence, and many cases reported in the contributions to this volume show this clearly.

Secondly it can mean that within normative constructions, for instance in court decision making or academic writings, no distinction is made between customary law and practices. This can be the case, as for instance in the case of Yampa Phant - Satrasay Phant case as reported by IIMI/Free Deal in their preliminary report, the court actually says that a dispute should be solved by reference to "previous practices". Here practice patterns are given legal relevance; whether or not these patterns coincide with legal rules or principles is not in debate. This normative statement is a fact by itself; whether such normative statement reflects a corresponding actual congruence is a different question which again can only be answered by empirical research.

LAW, BEHAVIOUR AND DISPUTE MANAGEMENT

The mere existence of legal rules and principles, whether originating from government legislation, tradition or contemporary local law making, do not justify to draw direct conclusions with respect to the behaviour of people. They only become significant when people - farmers, government officials, project managers - orient their behaviour towards these rules when this orientation thus becomes one of the factors which influences their behaviour in matters of water management or indecision making processes. This often is the case **when people quite consciously** follow the ideas embodied in legal rules. However, the plural legal situation complicates matters, because following one rule, state law, often means contravening another, local or customary law. In plural legal contexts we therefore are always confronted with the question of the relative significance of one type of legal rules in relation to others, apart from the question which other, non-legal factors, play a role.

Legal rules and principles do not only become significant in water management if people behave according to the rules. Even when people's practices deviate from legal rules, they may function as a source of positive or negative motivation. And legal rules are used to legitimate claims to water or land when water rights are problematic or contested, and when people negotiate water rights or submit their contradictory claims to an institution with decision making authority. In ordinary life and activities, **ordinary people usually do not reflect much on the legal basis of their right. They** do not specify whether they think they have a right to water according to state law, to customary law or even to religious law and there usually is no need for doing so. **But** this is different when rights become seriously contested in disputing processes. Claims have to be justified, and this usually has to be done by reference to legal rules and principles. People may do so directly on the basis of their own knowledge of the rules involved, but they may also refer to experts or their

authoritative interpretations, which may differ substantially from the knowledge and experience of ordinary people. This is commonly recognized in relation to state law, which is primarily the domain of lawyers and administrators. But for customary law there are also many different kinds of self-proclaimed or recognized experts, among them local wise-men, priests, researchers, administrators or lawyers. Some base their expertise on an intimate knowledge of local conditions, others on sacred texts, yet others on academic or administrative status. In arena's like courts, the government administration, and parliament, but also in irrigation projects, these authoritative expert versions of customary law often become a powerful means of promoting or defending specific interests and constructing rights, quite irrespective of the local law on the ground.

Disputes

Such negotiations often develop into conflicts and lead to disputing. Researchers therefore quite rightly paid much attention to disputes. For a number of reasons, it is an important field of study. First, because disputing may occur frequently in the management and use of water management. Moreover, in disputes legal arguments, rights and obligations become discursive and are most clearly articulated by the contending parties, as well as by a decision making authority. Thirdly, the process of negotiating and decision making shows us which are the relevant dispute processing institutions, which of the often contradictory versions of law are selected as being valid and in which way abstract rules and principles are concretized in a specific problematic situation? Finally, the study of disputes and dispute processing are a rich source of information about the significance of law within and outside the court context. This last point can be illustrated with the case *Lilinath Acharya and Ramhari Archaya vs Durga Prasad Acharya* (Civil registration 34/184 2048/9/23 - 2050/5/9).⁶

Two years before the dispute came to court, the defendant, who had inherited land, started to cultivate rice on his inherited property. Plaintiffs, also relatives of the deceased person, claimed that as a result they had too little water to irrigate their land, and that their crops were damaged as a consequence. They also claimed that their irrigation water came from a reserve that was built upon the land of the deceased person, and accused the defendant of having destroyed the reserve and blocked a rivulet that allegedly conducted water to their fields. They also accused the defendant of illegally turning un-irrigated upland (*pakho*) into irrigated lowland (*khet*) and starting to grow rice, and by doing so taking away water from the neighbours downstream, who then no longer could grow rice.

What comes clear in the case is that what used to be two different fields, with or without a rivulet in between, was later registered as one field. This was a useful way of including the rivulet into the field and that in turn made it possible for the defendant to claim that he legitimately used water because it sprang from his own field. It looks very much like an evasion of water rules which say that you are not allowed to take water upstream if that hinders prior users downstream, and which forbids un-irrigated up-land to be converted into irrigated low-land if there is not enough water for the already existing irrigated low-land. By registering the two plots as one, the water was redefined as water from the own field. This was perhaps not entirely without reason, because on the field were several springs, at least some of the water was from the field itself.

This case illustrates some general points which we want to make about disputing processes and the role of law in disputes. They concern the way in which legally relevant facts are constructed, the transformation processes which disputes undergo when various institutions deal with them, the options available forums of dispute management, and the implementation of authoritative decisions.

Construction of Legally Relevant Facts

Most disagreements in legal disputes (in whatever country) are about matters of evidence, and about questions of whether certain behaviour is or is not in accordance with a specific norm (K. von Benda-Beckmann **1984**). The validity of the general content of a rule or principle **as** such is much less frequently contested. As the Lalinath case shows, all persons involved, parties as well as witnesses, use otherwise uncontested norms to emphasize why certain behaviour **is** or **is not** justified.

In this case, disagreement is not **so** much about the validity of a general rule, but about the question whether certain behaviour or Occurrences fall under the working of a rule. Nobody denies that *pahko* cannot be turned into *khēt* if downstream *khēt* will not receive sufficient water as a consequence. The question is whether turning a particular field into *khēt* does reduce the water of downstream *khēt*-fields. And whether levelling out a field means in fact destruction of a reserve and blocking a rivulet, or whether levelling is standard behaviour of a farmer who inherited a piece of land and *starts* cultivation. And whether water used to come from the disputed land onto the land of the plaintiffs. Some witnesses in support of the defendant deny this to be the case, others say that sometimes some water does flow over, but that is merely **surplus** water released from the defendant's land, suggesting that it is not water that was always used by the plaintiffs to irrigate their land, but merely to get rid of the **superfluous** water himself.

Studying the claims and defenses of parties and the testimonies of witnesses thus may reveal a lot about customary norms and about the way ordinary people use these norms to evaluate occurrences or actions for their legal relevance, and in order to justify certain behaviour. Law is a way to construct legally relevant facts, a way of 'imagining the real' as Clifford Geertz has noted (**1983**). It is also a legitimating device, to be used and manipulated in different settings, whether in courts, before government agencies, or village institutions, whether by civil servants, ordinary farmers, village leaders, or water officials. This is one way in which legal rules obtain significance in the dispute processes. However, the claims, counter arguments, testimonies and judgements tell us little about whether and how these norms motivated actual behaviour that is now under scrutiny. Why it is that the two fields were registered as one, or why claimants went to court, cannot be deduced from these rules.

The Transformation of Social Conflicts

The subject matter which is openly disputed in processes of negotiations and decision making, however, is not necessarily the conflict which makes the relationship between parties problematic. In this case it seems that behind the water dispute another dispute is lurking.

This was not the first time the parties were having a dispute. Some time before, the wife of the defendant had been accused by the plaintiffs of theft of jewelry, but it could not be proven. The defendant, a farmer, feels himself and his family harassed by the plaintiff and his wife who have a position as civil servants. One of the witnesses, a 'servant', even qualified the same behaviour as a 'conspiracy', again using a different idiom.

What looks like a mere water dispute, may also be a dispute about social relations and standing among relatives, about inheritance, or village politics, and perhaps much more which the official court material does not reveal. In general it can be said, and Nepal is no exception, that what appears to be the main issue in court is not necessarily the most important point, and may turn out to be only marginally relevant in the village setting.

Such transformation of the underlying social conflict may be due to the way the courts operate. The court may disregard the underlying social conflict and reduce it to its 'legally relevant' aspects. Case material collected in-court usually gives only one part of the whole story and further field research, difficult as it may be, is needed to reveal the full scope of the conflict (Felstiner, Abel, Sarat 1980; K. von Benda-Beckmann 1984). But a transformation of the dispute may be also due to the strategies of the parties who willingly or inadvertently misrepresent the underlying social conflict in court (see Cohn 1967). Thus, a conflict between neighbours may turn into a dispute about theft, brought before the police, a dispute about water stealing, brought before a group of village elders, and perhaps later before the civil court. Conflicts over land rights may be presented as water rights disputes, and vice versa.

Disputes do not always lead to authoritative decisions. Many are resolved through negotiations, ending in compromises between the involved parties. Negotiation and decision making processes over water rights inevitably become involved in wider networks of power relationships and become strongly affected by the relationship between the different power holders. As appears from many case studies in this book, 'good' relationships between zamindars in different systems or villages, if strengthened by relations of common descent or affinity, may facilitate easy negotiations of intricate problems. 'Bad' relationships may make the settlement of trivial disagreements impossible. Water disputes - 'inter system disputes' thus can turn to become disputes between 'rightist' and 'leftist' villages. The stability of compromises therefore is largely determined by the stability of the power network in which negotiations were carried out. Changes in the network, shifts in power balances between jurisdictions and changes in their personal composition, tendentially favour attempts to negate on earlier decisions. The changes in ecological and agricultural developments regularly provide occasions that can be readily taken up by the person intending to change earlier decisions anyway (see Shukla et al, in this volume, K. von Benda-Beckmann, J. Spiertz and F. von Benda-Beckmann 1996).

Choice of Forums for Dispute Settlement

The way disputes are being treated, the forum in which they are processed, and their outcome depends, of course, on the kind of rules that are applied by the institution of dispute management. But it also depends on the type of relationships disputants, witnesses, mediators or adjudicators have in other social settings. For example, one of the witnesses of the Lilinath case, who was equally closely related to both parties, remained very vague in his testimony, while the others were

very vocal and explicit. In general, disputants who have multiple relationships, for example, as cousins, neighbours, and members of a water users' organisation, tend to keep their disputes within the village setting and do not easily go to court (Yngvesson 1985, Nader and Todd 1978, K. von Benda-Beckmann 1981). People having more simplex social relations, tend to go to external institutions more easily. Also differences in political and economic power are crucial for our understanding of the questions whether, by whom and with which success decision making authorities, functionaries of village institutions or state courts, can be mobilized, and what this means for the distribution of water rights. From other legal anthropological research it is known that the powerless have far more difficulty in mobilize law and legal institutions, whether state institutions or other, to defend their interests than for the powerful. The wealthy and powerful are better equipped to bring their disputes before the institution that applies the kind of rules that support their position best. It certainly is not unusual that poor peasants successfully invoke the law of the state against the interests of the powerful landowners, as happened in the Dang case (M. and R. Pradhan in this volume). But that does not mean that they manage to implement a favourable decision (Silliman 1981-1982; Turk 1978; Galanter 1974; Nader and Todd 1978).

The Implementation of Court Decisions

It is generally assumed that court decisions are implemented in the way the court, or another institution authorized to make decisions, has ruled. However, research has shown that many decisions are not implemented at all or in a very different manner (see for Indonesia, for instance, K. von Benda-Beckmann 1985). In order to assess the real impact of courts and other institutions, it is not enough to look at how frequently people turn to a court, it is also necessary to study the 'post-decision stage' of a case. Such a study reveals that courts and other institutions, though they make a decision, may not be very successful in settling a dispute. Court decisions may not be carried out at all and many years after the court has made a decision, a dispute may flare up again, because some of the central actors have come to a powerful position and think they can turn the balance in their favour.

IMPLICATIONS: HOW DOES PLANNING BENEFIT FROM RESEARCH ?

Where do these insights leave us when we try to suggest how improvements of the existing situations could be made, and by which means? In contemporary development policy it is seen as important to involve local people in the process of change and development intervention as well as take their customary institutions and laws seriously into account. Most of the research projects share this development philosophy. and, generally speaking, so do we. However, the above considerations show us that we move in a complex field of problems and dilemmas where no easy general answers can be expected. The expression "to take customary rules and practices into account" is itself ambivalent. In one sense, which we call *the normative sense*, it means that such rules and practices should be recognized as *deserving validity*, as valuable elements in the overall context of water management organization. But to take into account can also mean: seeing them as relevant factors in the multitude of factors that together constitute present reality, independent of any normative or moral evaluation. Obviously, both evaluations must be interrelated, because

the question of whether customary or local rules should officially be recognized should also be based upon an evaluation of its substantive content as well as its social functions. In the following we want to **spell out** some of the implications of our analysis.

Taking Customary Law into Account in the Normative Sense

When one talks about taking customary law and practices into account in the normative sense, one usually does so out of the conviction that these norms **are an expression of the people's own values**, and that intervention and legislation have to avoid measures that would weaken or contradict them. This normative assumption, we think, underlies many of the research and policy objectives of the water rights projects (such as the IIMI/FREEDeAL project) which are reported in this volume. Customary law is often taken to be inherently democratic, egalitarian, equitable and therefore to deserve to be supported, while state law or government regulations are not. Yet there is ample evidence from all research projects that unequal power relationships greatly affect the ways in which water is distributed and managed and the extent to which norms are being followed. All researchers have come across examples of powerful figures who took water before their turn, who chased away poorer people, although they had a right to draw water, who did not participate in the maintenance, who dug a channel without permission or blocked an intake or a rivulet, and who even successfully tried to change the distribution **rules** in their favour. In some instances, this may be an arbitrary (ab)use of power by individuals or groups, breaches of local and/or customary law by powerful people. Upon closer inspection, it turns out that local law establishes and legitimizes many differences in political power and rights over land and water resources. Unequal access to water may be a result of **'legal' unequal land distribution**, which in turn is a result of rules of kinship and inheritance and local forms of social stratification. Since such differences often have a basis in religious rules and categories (such as caste), these legal elements are often not seen as forming part of customary law, and therefore are easily neglected. Yet they are very customary, and they are very significant at local level.

Thus questions that seem not immediately relevant for the study of water rights come into focus such as: Are 'the people', or 'the farmers' a homogeneous category? **Is** there social stratification? How are power positions supported by customary law? Who are the social, economic and political elites? This then leads to questions concerning water rights proper, such as: Are rights to water different for different social classes? Different for men and women? Different for original occupants and newcomers? Different for people of different caste? And, very important, who profits from the existing arrangements? Almost all research projects have shown that there is a fundamental difference between original occupants, settlers, water **users**, and latecomers. Sometimes latecomers have obtained a strong political position, as research by IAAS has shown for some parts of the Terai, and have thus also obtained better water rights than in parts where latecomers belong to the lower classes (see Shukla **et al.** in this volume). The IIMI/FREEDeAL project has also shown that women usually do not have rights to irrigation water on their own account. Widows and divorced women have difficulties obtaining, or keeping access to water. **For** example, widows or divorced women are discriminated against in rotational distribution systems of water allocation. They may get a turn to water, but only at night. **Local** gender inequality is further enhanced by the fact that maintenance of irrigation infrastructure, intimately related to access rights, is very much a male concern. And the research has shown that there may be conflicts between **rights** to drinking water - female domain - and rights to irrigation water - a male domain.

Moreover, in disputes and contacts with outside agencies, women are usually in a weaker position because men tend to function as the main intermediaries and brokers in the communication and interaction channels to these agencies (K. von Benda-Beckmann 1990/91). These differences in political and economic power also play an important role with respect to access to dispute management institutions. Local law thus may not be democratic at all, though it may be more flexible and adjustable than state law. This does not mean that local law is less equitable than the laws of the state or vice versa. In some respects local regulations may be more equitable and in others state regulation. The point is that only a careful examination of both state law and local law as used and applied in actual practice brings out the relative strengths and weaknesses of each kind of law.

What is to be Recognized: Customary Law or Local Law ?

The normative validation of customary rules, rights and principles is problematic also in another respect. When state legislators, judges, or sympathetic researchers are open to give more official recognition and sanction to non-state law, they tend to think of non-state law only in legal categories such as “customary law” or “ancient or previous practices”. Such constructions of customary law and customary rights are dogmatic constructions, usually only validated under the condition that they can be considered to be the historically grown rights at local level, free from interference of outside agencies such as the administrative agencies and if it is sustained by actual practice.⁹ At the same time these constructions are often framed in such language that they can be accommodated in the conceptual framework of the state legal system. In many contexts of rule and decision making of the state apparatus, it is these dogmatic constructions which count, and not the norms and values described in ordinary people’s own terms. Government legislators or judges may have little use for some ‘local’ law, certainly if social practices are not in accordance with these rules. This is nothing they wish to give validity to in the dominant legal framework they are operating in. But even if they wanted to, they may find it almost impossible to take it into account: As we have seen, there may be no generally accepted local law and what there is may not go back to ancient tradition.

This poses a dilemma upon researchers and legal advisors, who sympathize with local law, and who often are the persons who have, and want to produce the necessary evidence on customary law. If they want to make local law relevant in the court and policy contexts, they may have to adapt and thus change and distort their findings, framing them in a language which will be more readily accepted by policy makers. If not, they may risk that policy makers and judges will not find their research evidence relevant in their own framework of ‘customary law’ relevance.¹⁰ The researcher is thus easily attempted to change roles from academic scholar to an advocate for customary law, and risks becoming a bad scholar; or he remains a research scholar and risks becoming an unsuccessful advocate. The decision will usually be a pragmatic and political one; social science cannot help making this choice.

Customary or Local Law as Significant Factors

But whatever choice one makes in this dilemma, and however one may value local law and practices, they have to be taken into account as part of the elements which constitute reality. In

one's attempts to understand and explain this reality, they have to be taken into account **as** explanatory factors. Caste differences as normative principles, in combination with differences in economic wealth and political power, still largely determine access to water and the distribution of water and maintenance activities. Differences in land ownership determine differences in access to water. We may all wish these factors were irrelevant and we may not want to take them into account in the sense of accepting or legitimating their normative validity. Yet it is a factor not likely to disappear if 'not recognized', a factor that very likely will influence the consequences of whatever intervention is proposed."

This leads **us** back to re-examine what the reality to be changed is in our conceptualization of the problems and questions of research, and how local or customary law is seen as a factor influencing this reality. Do research questions aim at explanation in addition to description? For instance, the overall goal of the IIML/Free Deal project is 'enhancing local management ...and bring about equitable and productive development of water resource use'. It also assumes that 'customary practices must be taken account in legislation; otherwise practical problems will arise'. This seems to imply that, if local management is enhanced, equitable and productive development of water resources will be possible. Or that, if laws were formulated with the proper understanding of customary practices, **less** practical problems will arise. Implicit in these statements is the assumption that most problems are a result of government intervention that did not follow existing regulations. While government regulation undoubtedly can be blamed for a lot of problems, it does not seem entirely warranted to put all the blame there. What *then is* the assumed influence of customary rights and practices on local conditions? A positive one under which water management is more equitable and efficient? Or a negative one, causing the conditions to be changed? How have local laws changed, and why?

It seems to us that these questions must be answered before policy options are envisaged. Even where research is action and future oriented, historical and explanatory research must be carried out. For only such insights make it possible to work out feasible future scenarios. The explanatory questions become especially important when we look at the policy objectives which we all share, a concern for a just, sustainable and efficient management and use of water. Thinking through realistic possibilities for future developments, we need an understanding of what the role of local law and practices has been in these respects. A somewhat romantic picture of local affairs - if only left in peace to unfold their creative possibilities - on closer examination may turn out to be unrealistic **as far as** the nature and functioning of customary law with respect to these objectives is concerned. To be sure, such an attitude may not be entirely without ground. The researches carried out by IAAS researchers and their colleagues from Indiana University have shown, for example, that in general farmer managed irrigation systems function technically better than government operated systems (Lam, Lee and Ostrom 1994). This seems to suggest that customary law in this realm deserves support. But the research that has been done gives **us** also ground for doubt, for it does not mean that farmer managed systems are good in equal distribution. Could it be that these systems function better than agency managed systems, precisely because of the political and economic power differences shaped by **local**, or customary law? In the heat of the defense of suppressed people, it is easily forgotten that they may be **as** much suppressed by their own elites as by government agencies, and that efficiency **does** not necessarily imply equity.

This poses another dilemma which can only be solved by a political choice and for which social sciences do not provide a solution. Are we primarily interested in sustainable management **of**

water, or is equal access to water equally or more important? How do we resolve the in sometimes contradictory concerns for equity, sustainability, and national economic growth? Wishing to attain all three objectives in a well-balanced way will not remove the actual constraints. Depending on the choice we make, the kind of intervention would be different. The equity issue is particularly difficult because rights to water, as we have seen, are so intimately related to wider sociopolitical organization. If, therefore, to bring about equity would require far more fundamental changes than seems feasible, a further choice has to be made, leading into the direction of redistribution of water, and, given the close connection of water rights with land rights, probably also of land. But we may take the local social-political constellation and the ways a local community is embedded in wider social and political networks for granted and make improvements within these margins. Even if the actual improvements would perhaps remain rather marginal, they could still be very significant if we would base our goals and expectations on a realistic analysis of the local situations, including the complexity of the interrelations between law and practices.

CONCLUSION

The complexity that emerges from research, and in particular from the research in this volume, cannot be directly applied or fully incorporated into restatements or changes of the law by policy makers or, in individual cases, by judges. But such research does provide a more adequate picture of local reality and provide some valuable explanatory insight into the reasons and causes which have led to the current situation. It will also provide some indications about the probable course of events in the future if no specific intervention would take place. And it will help forming a realistic assessment of the most likely outcomes of newly planned interventionist measures. All these are important preconditions for responsible policy making. While research does not contain clear directives for policy, and while it cannot provide guarantees for success, it allows for a realistic consideration of policy alternatives and their probable intended and unintended consequences. These considerations may be pretty pessimistic ones, for they may point to necessary changes that are politically nearly impossible to achieve. But this is pessimistic only if one compares a more realistic assessment with too optimistic expectations of social science and policy making. Thus, at the end, we come back again to Weber's warning mentioned in the beginning of the introduction to this volume: Science is in the position to show what people could reasonably wish to do, and what wereasonably can expect to be the consequences of their actions. But it cannot tell them, *what* they have to wish and to do. Decision and action is left to (individual) choice and decision making (Baumgarten 1973:xxxv, rephrasing Max Weber 1917). But in order to be able to make such choices, it is necessary that planning and research are continuing, and mutually dependent activities. It cannot be that research is a one time activity, after which one knows customary or local law for ever. Local law is dynamic and so are the interrelationships between law and social practices. Every time new policies are being proposed, new research is needed. This is not a message planners want to hear, but it is a necessary conclusion from the research.

NOTES

- 1 This paper is a revised version of the one presented at the IIMI-FREEDeAL-WAU-EUR-workshop on Water Rights. Conflict and Policy, Kathmandu, January 22-24, 1996.
- 2 F. von Benda-Beckmann is professor of law in developing countries at the Department of Agrarian Law of the Agricultural University Wageningen, The Netherlands. J. Spiertz also teaches law in developing countries in the same department. K. von Benda-Beckmann is senior lecturer in anthropology of law at the Sanders Institute, Faculty of Law, of Erasmus University Rotterdam, The Netherlands.
- 3 Hitchcock says this to characterize the Botswana grazing land policy. but it has a far more general validity, see also Dove 1986 with respect to Indonesia's agricultural policy, Bowen 1986 speaks of 'motivated *misrecognition*'.
- 4 See F. von Benda-Beckmann 1979:43. This distinction is not new, and most anthropologists report empirical manifestations in the societies they study. For further references see F. von Benda-Beckmann 1995.
- 5 There is a multitude of literature, both empirically and/or conceptually and analytically oriented. See F. von Benda-Beckmann 1979.1992. For systematic treatments of the conceptual questions. see Vanderlinden 1971.1989. Griffiths 1986, Merry 1988.
- 6 See K. von Benda-Beckmann 1984, Woodman 1987.
- 7 This is the main reason why decision making processes in disputes have become an important subject in the (legal anthropological) study of unwritten local laws; unwritten law even was defined as those rules and principles that could be observed as 'showing their teeth' in decision making. We should add, though. that lawyers and anthropologists interested in law tended to overemphasize the importance of disputes, neglecting the significance of legal rules and principles in other. not conflictive contexts. It is therefore certainly one of the virtues of the research projects that come together here, that they all include both disputes and ordinary social life in their research (see Hoebel 1954. Pospisil 1971; Epstein 1967. For critiques of the trouble-less approach see Holleman 1973; F. von Benda-Beckmann 1979; K. van Benda-Beckmann 1984, with further references.
- 8 This case was collected and translated for us by our colleagues from the Free Deal/IIMI project.
- 9 In Uttar Pradesh, the problem is ~~more complicated because of the settlements that were documented~~ in the late 19th century. Today, these are considered to be 'the' customary law, although, as the DCAP project has shown, they have little to do with presently valid local norms and values. The Nepal situation ~~seems to be different. since there are no settlements. In Nepal the term "ancient or previous practices"~~ seems to be used by state agencies. However, in both concepts references to the past are crucial.
- 10 The anthropologist Ken Maddock has discussed this dilemma in a very vivid manner with respect to the land-rights question of Australian Aborigines (Maddock 1986).
- 11 The sketched dilemma also suggests that researchers should be careful to frame their findings in such a way that chances are as small as possible that their own work will be used as a kind of settlement. This has happened in various parts of the world. Anthropologists such as Isaac Shapira and Hans Holleman who worked in southern Africa noted to their surprise that their book was used in court as a standard description of customary law as if it were a law book, instead of a book about law. This cannot be avoided, of course. Once a book is out, there is no way that its use can be controlled, fortunately not. But it does mean that one has to be extremely careful in pointing out that the report refers to one place and one time and that local law changes all the time.

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