

INNOVATION IN A HYBRID SYSTEM: THE EXAMPLE OF NEPAL

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SUMMARY

The Nepali legal tradition is a legal hybrid in many regards. Nepal was not colonised by a Western state, and the Hindu legal tradition therefore dominated all areas of law until the middle of the 20th century. Since the 1950s there has been a strong influence of Indian common law. It is probably for this reason that comparative classifications that include Nepal see the legal system as a mixture of common law and customary law. However, other mixtures mark the Nepali legal tradition. French law inspired the ruler in the 19th century, and that influence can still be found in the formal law. In addition, the plurality of Nepalese society made it necessary to provide space for different customary regimes to coexist with the formal Hindu law. When it comes to innovations within the legal system, including international law, the different ingredients interact.

In family-related matters, the case-law of the Nepali Supreme Court illustrates the confrontation between international legal standards and the traditional rules. The Supreme Court has referred to the culturally conditioned discrimination against women and called for a thorough (political) analysis in order to eliminate discrimination without a radical change of culture. In the area of discrimination against homo- and transsexuals the Supreme Court took a more innovative approach. It remains to be seen, however, if such a change is effective beyond the courtroom.

In the area of private financial compensation for wrongs, the formal (written) Nepali law does not have a general concept of tort. Compensation is generally integrated

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within the ambit of criminal law. Field research indicates that it would be possible to resort to existing customary principles of compensation rather than to the relatively complex common law of torts favoured by some Nepali scholars. However, this approach might not be without difficulty, as it might imply admitting the “superiority” of the customary practices of ethnic groups of lower standing in society.

The example of Nepal shows that innovation in a hybrid system is often marked by the difficulty of – at least apparently – contradictory elements and layers of the legal system. There might be a tendency towards choosing the dominant or the most easily accessible solution. This paper suggests that the hybrid nature of the legal system offers opportunities that could be taken in order to achieve effective change and appropriate solutions.

KEYWORDS: Nepal; hybridity; hybrid legal system; Indian common law; law of torts; customary practice; ethnic groups