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INNOVATION IN A HYBRID SYSTEM: THE EXAMPLE OF NEPAL

L Heckendorn Urscheler*

1 Introduction

Nepal has been attracting mountain climbers as well as people looking for spiritual experiences of different kinds since (or even before) opening its borders to foreigners in the 1950s. Those adventurers were soon followed by development workers. Comparative lawyers, however, have shown a much lesser interest in the country, as the discipline of comparative law has traditionally (though not exclusively) focused on comparisons within the Western legal tradition (or the two Western legal traditions: common law and civil law).¹ Nepali law has therefore been regarded more as a field for anthropologists than for lawyers.² It is only more recently that this has begun to change, probably for two reasons: first and foremost, the activities of developing agencies and international organisations expanded from mere technical assistance to areas directly linked to law, especially in the fields of human rights and constitutional law.³ Second, the discipline of comparative law is increasingly willing to include "the rest of the world" in its scope, and more and more scholars are showing interest in non-western legal systems on a more theoretical level.⁴ The present analysis aims to provide further insights on this second level, while offering some possible tools for a more practical development analysis.

Nepali law is particularly interesting for the comparative lawyer studying mixed (or hybrid) jurisdictions in the broad sense (ie as combining elements of different legal

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1 See *inter alia* Twining *Globalisation* 184-186, who talks about "The country and western tradition"; Örüçü 2008 www.ejcl.org; Mattei 1997 *AJCL* 1, 8.

2 See eg MacDonald 1968 *L'Homme Revue Française d'Anthropologie* 62-69.

3 See eg the UNDP Date Unknown www.undp.org.np containing different contributions for the constitutional process, such as Ghai and Cottrell Date Unknown www.undp.org.np; on Yash Ghai see Twining *General Jurisprudence* 406-423; see also OHCHR's involvement in Nepal, OHCHR Date Unknown nepal.ohchr.org.

4 Of course, practical and theoretical interests can often go hand in hand, such as in the case of constitutional law; see in this regard eg Malagodi 2008 *Studies in Ethnicity and Nationalism* 433; see also Twining *General Jurisprudence* 173-201, 438-442.

traditions or families),⁵ and it also offers some material to the comparatist examining mixes of common law and civil law, more particularly as continental European law "overlaid with Anglo-American law later in time".⁶ In fact, Nepali law is marked by a variety of traditions – both Western and non-Western (customary, Hindu).⁷

The influence of Western traditions in Nepali law is more subtle than in most other legal systems. It did not come through the forceful imposition of a colonising power - an exception in the South Asian region⁸ - but rather through conscious choices and geographical proximity. In addition, the Western influence is not an exclusively common law influence as one might believe given the geopolitical situation and the British and Indian influence in the region.⁹ In fact, it was the French Napoleonic Code that served as a model for a fundamental legal reform in 1854, inspiring the (hereditary) Prime Minister to codify the law in a single "Country Code"¹⁰ (*Muluki Ain*) – an approach that, in its substance, rather resembles early pre-"enlightened" Western codification (such as the Swedish experience) more than systematic 19th century codification.¹¹ The English-Indian influence became more important in the second half of the 20th century as the first Nepali lawyers were educated in India; and India remains the main foreign place for legal education still today, with England and the US occupying a more important position recently. The education of Nepali lawyers therefore very often takes place in a common law background. Nepali lawyers educated in a common law system must then face the codification of their laws, ie a legal tool not suited to their legal education. This reminds one of issues in a mixed jurisdiction. However, as the codification is not based on civil law principles or structures and as it is complemented by different statutes in core areas (such as contract law), little opposition between civil law and common law can be felt. In

5 Örüçü 2008 www.ejcl.org 11-16.

6 Donlan "Comparative La" 9-10, 12-14; Palmer 2008 www.ejcl.org.

7 See more extensively Urscheler "Multidimensional Hybridity".

8 Malagodi 2008 *Studies in Ethnicity and Nationalism* 435.

9 The University of Ottawa World Legal Systems Research Group qualifies Nepali law as a mixture of common law and customary law, though it is not clear whether it is a geopolitical analysis or the role of legal education that dictates that classification. See University of Ottawa World Legal Systems Research Group Date Unknown www.juriglobe.ca for the Introductory Remarks on the basis of classification.

10 Litteral translation; the Nepal Law Commission uses "General Code".

11 Pradhananga *Homicide Law* 214-215; Acharya 2003 *KSL Journal* 63-64; Malagodi 2010 soas.academia.edu 3; as to the substance, I do not know of any influence of Anglo-Indian rule; substantively, however, Western norms play only a minor role, with some French and possibly some Indian-English influences. For French influence, see Sangroula *Criminal Justice System*; for possible Anglo-Indian influence see Höfer *Caste Hierarchy*.

addition, while the doctrine of precedent is codified to some extent in the constitution, dealing with the sources generally seems influenced by the culture rather than a common or civil law approach.¹² This might change if the parliament passes the current draft Criminal and Civil Codes, ie systematic codifications based on the continental understanding.¹³ It will be interesting to see how the rather common law education and a civil law style of legislation will combine, especially whether or not patterns observed in classical mixed jurisdictions will be repeated.

When it comes to the non-Western traditions, the Hindu legal tradition dominates the formal law of Nepal. In the historical context, rulers used the formal (Western) concept of law as a means to unify and control the nation in a "state-driven process of Sanskritisation".¹⁴ However the diversity of the Nepalese society (with over 90 different languages and ethnic groups) and the inaccessibility of the terrain made it necessary to allow for different customary regimes, at least in fact, and the pluralism inherent within the Hindu legal tradition¹⁵ probably facilitated this approach – even if many of the ethnic groups are not Hindu. Still today, many ethnic groups live according to their traditional norms and values, and disputes are often settled within them without having recourse to state authorities. This fact should not be underestimated when speaking about innovation, as it could serve both as a source of solutions and as an inhibiting factor.

When analysing how innovations take place (and how they might be possible), the role of the various "components" of the legal system is particularly important. Setting aside what is probably the most important task of legal reform currently at hand in Nepal, ie the drafting of a new constitution,¹⁶ as well as the radical innovation practised during the Maoist insurgency from 1996 to 2006,¹⁷ this paper will analyse

12 Based on personal observation, the author believes that the common-law case-law method is little taught and not systematically applied in legal education in Nepal. See Urscheler 2008 www.ksl.edu.np 81.

13 A Japanese Advisory Group, founded by the Japanese International Cooperation Agency, seems to have played an important role in that regards. See Jica 2010 www.jica.go.jp.

14 Malagodi 2010 soas.academia.edu 3.

15 Menski *Comparative Law* 202-203.

16 For a discussion of the constitutional processes, see Malagodi 2010 soas.academia.edu; see also Töpferwien 2009 www.forumfed.org.

17 The Maoists started to apply their own (written) law based on equity and popular perceptions of justice in their own courts in the territories under their control. See (in the absence of other sources) Haviland 2006 news.bbc.co.uk. These court practices, appreciated by some because of

two areas in which significant legal innovation has taken place or might take place in the future: first, family and succession law; and second, the law of compensation.

In the area of family law, two examples of change will show the innovative role the judiciary can or cannot play in a field where different traditions meet. In the second part, potential approaches to future reform in the field of tort will be discussed.

2 Judicial innovations: constitutionalisation in family law

In the area of family law, case-law has proven increasingly innovative. The courts have nevertheless remained conscious of the traditional layer of the legal system. The following discussion concerns two groundbreaking cases: one belonging to family and succession law, the other, to family law and same-sex couples.

2.1 Partition of property

The traditional formal Nepalese law provides for a system of "partition of property" rather than of succession at the time of death. The partition of property can be requested even during the original owner's lifetime. According to the current law, however, as between children and parents, this is possible only in a case of mutual agreement, and a married woman cannot unilaterally require her share, though failure to provide adequate maintenance will always lead to a right to the partition of property.¹⁸

The entitlements to a share of property (the succession rights) are determined by traditional Hindu concepts. According to a first understanding, the husband and father of a family, as the wage earner, is the owner of the family's assets. The wife has rights only with respect to certain types of property, and the extent of her interest is different. According to a second understanding, the woman leaves her own family upon marriage and becomes a member of the family of her husband. All ties to her

their speed, feared by others due to the fact that the court decisions were sometimes implemented with violence, were reported to the author even after the Maoists had joined mainstream politics in 2007. Nevertheless, due to its violent approach and what appears to be the Maoists' temporary nature, this radical way of innovating will not be analysed further.

18 *Muluki Ain 2020* (1971) (Country Code) Chapter 13 – On Partition, Number 10.

previous family are therefore severed. In other words, according to the Nepali Supreme Court a woman has double status in Nepalese society: she has the status of a daughter living in her father's house prior to her marriage, and that of a wife in the husband's house after marriage.¹⁹ With respect to the partition of property, this implied for many years that only sons and (after 15 years of marriage) wives were entitled to an interest in the family's assets, with an exceptional provision for daughters having attained a certain age (beyond which the likelihood of marriage is small).

The inequality between men and women embodied in these traditional concepts might be significant to a Western audience of today, as the controversies on the application of some Islamic succession concepts in Europe illustrate. In Nepal, however, these traditions are (still) deeply engrained in the culture of a large part of the population, and evolution towards more equal norms has been a long ongoing process of small innovations. In that respect, the process of attempting to achieve gender equality is not fundamentally different from that in many Western countries. The legal reasoning within the process might be different, however, especially in its continuous reference to outside sources.

Perhaps the first step towards gender equality might have been the introduction of women's inheritance and property rights in 1975, ie International Woman's Year. A more important if not decisive step was the provision, within the Constitution of 1990, of a prohibition of discrimination on the basis of gender, as well as the ratification in 1991 of the *Convention on the Elimination of all forms of Discrimination Against Women* (hereafter CEDAW) of 1979.²⁰ This international framework proved to be essential for further innovation.

In fact, shortly after the ratification of the Convention, a writ petition was filed in the Supreme Court requesting the annulment of the provision granting partition rights only to unmarried daughters above a certain age, on the grounds that the provision was discriminatory and therefore in violation of the Constitution and CEDAW.

19 *MS Meera Kumari Dhungana v HMG Ministry of Law, Justice and Parliamentary Affairs* Writ No 8392, 2050 BS (1993), published in English in Timalsena (ed) *Landmark Decisions* 164, 169.

20 Adopted in 1979 by the UN General Assembly, entered into force on 3 September 1981.

The Supreme Court held that simply declaring the provision void would mean that the daughter would benefit twice – once through her father and again through her husband, thereby giving rise to another form of inequality. In addition,

making sudden changes in traditional social practices and in matters of social norms pursued by the society since long ago may create problems in connection with adjustment in the society.²¹

In short, the Supreme Court appeared to be reluctant to make a sudden innovation. For this reason the Court simply directed the government to analyse the law on property as a whole by holding broad consultations with interested organisations, lawyers and sociologists and "by studying and considering the legal provisions of other countries also". The Government was then directed to submit an appropriate Bill to Parliament within a years' time.

For a comparative lawyer, it is interesting to note that the Nepali Supreme Court called for the use of foreign law in the analysis. Someone aware of the plural (or mixed) nature of the Nepali system might, however, notice one element that is lacking: reference to other norms applied by certain ethnic groups in their matrimonial property and partition regimes.²² While the existence of these different potentially progressive customary norms (see below, 2.4) must have been clear to the judges, they either thought the practices to be irrelevant or extra-legal (in the sense of not having character of law). According to the conception of the judges (and probably of many Nepali lawyers even today), this area of (formal) law might (even sub-consciously) be seen as reserved to (and controlled by) the Hindu tradition, as shaped by its upper castes. In other words, an occasion for innovation within the mix of the tradition was not used.

As to the fate of women, a general reform concerning the legal rights of women was passed by parliament in March 2002 only (ie more than six years after the Supreme

21 *MS Meera Kumari Dhungana v HMG Ministry of Law, Justice and Parliamentary Affairs* Writ No 8392, 2050 BS (1993), Timalena (ed) *Landmark Decisions* 173.

22 See in that sense Turin *Nepali Times* 17, reviewing Kandel *Property Rights*.

Court's decision was handed down).²³ The new provisions allow a married woman to use her earnings and dispose of the property given to her. However, the legislative provision more closely related with the Supreme Court case, providing for a right of partition of family assets only for unmarried daughters who have reached the age of 35 years, was abolished only with a second wave of legislative modification in 2006.²⁴

In summary, then, the innovation in the laws on the partition of property came about mainly through inspiration from an "external" source, ie international law. The Court played an important role in the innovative process but it left the final decision to the legislator, arguing that "tradition" should be taken into account to a greater extent than could be done in court proceedings. It was then effectively the legislator that carried out the innovation. Its impact within the law in action should be evaluated more thoroughly somewhere else.

2.2 *Same sex marriage*

In a case decided in 2007,²⁵ twenty years after the case described above, and under a new Constitution (though one not substantially changed in the relevant areas), the Nepali Supreme Court became even more active in an area closely linked to cultural and social norms. The case concerns an issue that has given place to (sometimes controversial) innovation in many Western legal systems – same-sex marriage - though it goes beyond that.

In a far reaching writ petition to the Supreme Court,²⁶ representatives of four different organisations requested an end to discrimination against homosexuals and transsexuals. They claimed, *inter alia*, the right to indicate their gender on citizenship certificates as well as the right to marry the person of their choice. The Government simply argued that there was no discrimination.

23 *Eleventh Amendment of the Country Code 2058 BS* (2001, published 2002).

24 *Amending Some Nepal Acts to Maintain Gender Equality 2063 BS* (2006).

25 Translated version not published, but available from the author.

26 *Writ No 917 of the year 2064 (BS)* (2007).

On a procedural note, the Supreme Court accepted jurisdiction on the grounds of a constitutional provision expressly giving powers "for the settlement of any constitutional or legal question involved in any dispute of public interest or concern"²⁷ (Public Interest Litigation). The concept of public interest litigation has been developed to a remarkable extent by the Indian Supreme Court. The Indian experience has significantly influenced Nepali law, with the present case referring explicitly to the Indian case-law.

With respect to the substance, it is first interesting to note that the Supreme Court extensively quoted Human Rights Soft Law (reports of the UN High Commissioner on Human Rights, special rapporteurs, meetings of experts, publications of NGOs in the field of human rights (Human Rights Watch, International Commission of Jurists) as well as case-law (and other material) from the UK, Australia, the South African Constitutional Court, the US Supreme Court, and the Constitutional Court of Ecuador, as well as the European Court of Human Rights. The wealth of foreign and international material was used to illustrate definitions of homosexuality and gynecophilia to explain that homosexual and transsexual behaviour was natural and not an illness,²⁸ to provide examples of discrimination, and also (and probably most importantly) as examples of decisions holding the criminalisation of homosexual behaviour as being contrary to international human rights law.

After a lengthy analysis the Supreme Court made a directive order requiring the Government to analyse the situation and then either prepare new legislation or amend the existing law to make sure that people of different gender or identity and sexual orientation could enjoy the same rights as other people. The Court also recommended including a clarification within the constitutional documents that sexual orientation and gender identity should not be grounds for discrimination.

As to same sex-marriage, the Supreme Court decided that an adult had the right to have marital relations with another adult, the sole element necessary being free consent. However, as same-sex marriage should be viewed taking into account not

27 Article 88(1) *Constitution of the Kingdom of Nepal* 1990.

28 A belief still widely held in Nepali society, even among educated people, as some remarks made in classroom discussions (in the presence of the author) show.

only the specific people concerned but also society as a whole, the Supreme Court ordered the government, by means of an expert committee, to carry out a study on the legal provisions and practices of other countries as well as an analysis of international instruments relating to the human rights and the values recently developed in the world in this regard.

The Nepali decision is remarkable, as it widely uses international and foreign sources in order to introduce radical innovation within the Nepali legal system. This was probably one factor that contributed to the very open attitude of the decision. It is likely that the reasoning of the decision and especially the recourse to international and foreign sources was substantially influenced by the argument of the petitioner, represented amongst others by a Nepali lawyer²⁹ who had studied international human rights law in the UK after his studies in Nepal and in India.

Nevertheless, while the decision makes it clear that discrimination is not permitted, notwithstanding the existence of differing social attitudes in the country, it does not directly establish the result itself. It (again) leaves it up to the government to "make the law". This shows that the judges were concerned with the Nepali context in a decision that was founded mainly on foreign and international experience. It might, however, also just be an illustration of the reticence of the judges to be more active in a very sensitive field where there is a high probability that a decision would hurt common perceptions of justice – though many fundamental (and controversial) issues had already been decided by the judiciary.

It is noteworthy that the changes came about more quickly than the procedure established by the Supreme Court. Soon after the verdict, religious ceremonies between gay people began to be celebrated. As the Nepali legal tradition – due to its mixed character – does not require formalities to be fulfilled for the celebration of marriage but recognises marriages celebrated according to different religious or ethnic custom, these marriages are likely to be valid.

29 Advocate Hari Phuyal.

On a formal legal basis, however, it may well be that the progressive attitude of the Supreme Court will be questioned through legislative procedure. According to some newspapers, it appears that the current draft criminal codes revert to the original position and punish same-sex partnerships or marriage.³⁰ If parliament passes these draft codes in their current form, it will be interesting to see whether (and how) the Supreme Court will react in order to safeguard its innovation.

We have now seen two examples of innovation through international and foreign law. While the impact of international law is a widespread phenomenon, the cases have illustrated attitudes of the judiciary that might well be shaped by their perception of their own legal system (and its potential for change). It is nevertheless important to realise that international law is not the only (and not even the most common) way for innovation to take place. The second part of this article will therefore analyse the potential for innovation in a different field where international law plays a lesser role: that of tort law.

3 An introduction of Nepali tort law?

In Nepali law, at least according to the accounts of most Nepali lawyers, the category or the concept of tort law does not exist. It is true that no piece of legislation or no part of the Country Code (*Muluki Ain*) is dedicated to tort law. However, a more casuistic analysis shows that compensation provisions exist, though they are scattered in acts of different scope and nature (2.1), and also the public perceives the need for compensation (2.2), which might explain why compensation is actually paid (2.3). All of this needs to be taken into account when thinking about legal reform in the area of tort law.

3.1 Compensation provisions

The formal (written) Nepali law is characterised by a Hindu legal tradition shaped by the upper castes, generally integrating compensation within the ambit of criminal law. In fact, provisions for compensation can be found either alongside or integrated into

30 Anon 2011 articles.timesofindia.indiatimes.com.

many criminal provisions of the Country Code (*Muluki Ain*), in the chapter of the country code on four-footed animals of the *Muluki Ain*, and in special legislation such as the *Vehicle and Transport Management Act* 1991, the *Consumer Protection Act* 1998, the *Human Trafficking and Transportation (Control) Act* 2007,³¹ or the recent *Caste Based Discrimination and Untouchability (Offence and Punishment) Act* 2011.³²

An analysis of the different provisions on compensation reveals four different types. In the first type, the victim receives a **part or the full amount of a fine** provided for under the criminal law as compensation. This is the typical means of providing compensation in case of physical injury. The second type **fixes a specific** amount as compensation. This type is closely related in its effect to the idea of the victim receiving part of the fine. The third type of provision provides for a **reasonable amount** of compensation, giving the judge considerable discretion in assessing the extent of compensation to be awarded to the victim. Sometimes reference is made to actual loss or physical and mental suffering, but also to the seriousness of the offence. In other cases (traffic accidents) no guidelines are provided. The final type provides for compensation to the **extent of the value of the property** (*bigo*). This is the most common type in cases of offences against property.³³

Three factors might explain the differing provisions:

- **Time:** More recent provisions generally provide for a reasonable amount, potentially even referring to actual loss as a basis for calculation. Examples are the *Consumer Protection Act* 1998 or the *Caste Based Discrimination and Untouchability (Offence and Punishment) Act* 2011, as far as treatment expenses and "additional damage" are concerned (section 9); the one exception to this trend is the recent *Human Trafficking and Transportation (Control) Act* 2007.

31 Available at Nepal Law Commission Date Unknown www.lawcommission.gov.np.

32 Available at Nepal Law Commission Date Unknown www.lawcommission.gov.np.

33 Nepali law does not distinguish between criminal and civil cases. However, there is a distinction between procedures in which the state is party and others where the state does not act as a party. See *State Cases Act* 1992.

- **Difficulty in calculating loss:** The value of property is generally very easily ascertained. It is therefore not surprising that compensation based on that value can be seen as a general rule, and there is even a specific term for such compensation (*bigo*). For bodily injuries, assessment is more difficult, especially if medical treatment is unavailable (and thus not calculable). The greatest difficulties arise in the context of pain and suffering. The recent compensation provisions concerning discrimination and untouchability (section 9 *Caste Based Discrimination and Untouchability (Offence and Punishment) Act 2011*) and human trafficking provide examples by setting amounts of "restitution" in the first case (between twenty-five thousand and one hundred thousand rupees) or a method of calculation in the second case (not less than half the fine).
- **Providing compensation rapidly:** The interest of obtaining a quick solution to compensation issues might be a reason behind establishing a concrete amount or part of the fine.

Even though it is possible to explain the differences between the various approaches to compensation, this does not render them acceptable. In fact, it can be argued that Nepali law actually lacks a rational approach to compensation. This does not mean, however, that compensation is absolutely absent from the legal system. Rather it signifies first the lack of independence of compensation provisions from other areas of law, and second, the lack of a coherent and consistent approach to compensation, leaving lacunae in many areas.

3.2 Perceptions concerning compensation

Field research has shown a slightly different picture. In interviews conducted by the author in 2008 on the street in different areas of the country (urban areas, rural areas, transit areas, ie Makwanpur, Kathmandu Valley, Dhangadi) about twenty respondents were asked to consider compensation in five different (concrete) situations: intentional bodily injury, negligent bodily injury, intentional damage to property, negligent damage to property, intentionally misleading/false advice. While

compensation was seen as an adequate (though additional) sanction for intentional bodily injury by only 30% of the respondents, compensation was viewed as a primary sanction (70% of the respondents) for negligent bodily injury, intentional damage to property (80%) and negligent damage to property (55%), though in the latter case, other consequences (such as an excuse) were more important. In cases of false/misleading advice, there was a significant degree of variation in responses, from those favoring punishment to compensation (35%) to other forms of sanctions such as requiring the perpetrator to apologise to the victim.

The data (admittedly based on a small sample) indicate that according to the common perception compensation is not an exceptional remedy. However, the data also show that to a certain extent public opinion reflects the pattern observed in the legislation. The large majority see the need for compensation in negligent property offences, while compensation is deemed less necessary for bodily harm.

When asked about the calculation of compensation, only one respondent indicated that a specific amount should be paid as compensation, thereby mixing punitive and reparative sanctions. All other respondents believed actual harm should be the main element in calculating damages. According to some respondents, the amount of compensation should even be used as a measuring rod for the punishment (twice the value) – similar to what the law actually provides. Thus, the legislative practice of assigning a specific amount as compensation is not approved of by common opinion. Overall, the respondents' perception of what the law should be corresponds to the legislation, at least when looking at general patterns. However, there is significantly stronger support for providing compensation based on actual damage in all cases, not only where property is damaged. Thus, while the sample is relatively small, there are indications that public opinion might support the notion of victims receiving compensation for actual damage.

3.3 Compensation practices

In the context of compensation practices in traffic accidents in particular, it is striking that actual damage is the general focus in cases of property damage (liability for

reparation costs for negligence) and bodily injury (strict liability for treatment costs). In case of accidental death, there is a tendency towards strict liability, but amounts are fixed in each case: factors such as insurance, public pressure or the financial situation of the owner of the vehicle involved might (but do not necessarily) play a role. As there is no assessment mechanism for compensation for the family of a deceased victim, there are enormous inequalities among amounts of compensation paid to different victims.

Overall, compensation practices in cases of traffic accidents are more similar to tort law than the legislation (see above, 2.1) in three respects. First, they also focus on actual harm in cases of bodily injury (though not in case of death) and not only in cases of property damage. Second, the compensation does not depend on criminal proceedings but has a certain independence, and third, the system is more consistent and coherent (with the exception of cases of death), leaving no victim without protection. However, compensation probably depends on the existence of public and police pressure to make drivers or owners negotiate with the victim.

An analysis of different **customary practices** in some ethnic groups reveals surprising results. According to interviews conducted with different representatives of the Tharu community in a village near Dhangadi, the local compensation practices resemble tort law mechanisms to a large extent. According to the customary practice of the Tharu community, the assessment of damages is based on actual loss, eg on the size of the neighbouring area that cattle grazed without the area's owner's permission, or on treatment costs. In addition, the damages are partially **independent from punishment**, as the local community decides on compensation but refers the case to the authority for matters of punishment, at least for crimes of a certain gravity. Thus, the Tharu community applies an efficient independent mechanism for compensation.

3.4 *An agenda for reform*

The lack of tort law in the Nepali legal system is perceived as a disadvantage by victims and by legal scholars alike. Introducing some form of compensation

provisions that do not depend on criminal law might be a valuable innovation. In fact, tort law corresponds to common perceptions of justice among the people as well as to actual practices in traditional communities and in some particular situations (such as traffic accidents). Moreover, Hindu philosophy requires compensation of actual loss in a case of damage to property or theft as well as reimbursement of the cost of treatment in a case of bodily injury. Paying compensation is thus part of *dharma*, a key concept of Hindu philosophy denoting good, appropriate, acceptable action, combining ritual, morality, ethics, law, justice and religion.³⁴

In addition, the inclusion of a law of torts would offer a way to improve the law. It is important to realise that the English (and Indian) concept of tort, based on a series of circumscribed torts, is not the only possibility. Taking over the English model might have the advantage of a common language, but it presents the disadvantage of a variety of different remedies which depend more on historical accident (the forms of action) than on logic or necessity.³⁵ Another option might be to look at general provisions such as the ones in French and Swiss law. In the Nepali context, this would mean that implementation would not necessarily require extensive legislation. In Sweden, for example, tort law developed for almost hundred years based on a compensation provision in the criminal code until the legislator passed the *Tort Liability Act 1972*.³⁶ The introduction of tort law might be accomplished by the adoption of a simple legal provision such as that found in France or Switzerland. One might even consider resorting 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 of another order, as it might imply admitting the "superiority" of the customary practices of ethnic groups of lower standing in society. In fact, resorting to foreign sources might be a way to overcome internal difficulties.

The fact, then, that according to oral information the draft codes significantly extend the right to compensation signals a welcome change. The success of such

34 Menski *Comparative Law* 205-219; Sangroula *Concepts and Evolution of Human Rights* 26; Doniger and Smith *Laws of Manu* xvi.

35 See Heusten and Buckley *Torts* 1-5, referring to Lord Atkin ("the ghosts of the past" and Maitland (they "rule us from their graves").

36 Skadeståndslagen 1972:207; see for its history Hellner 1974 *AJCL* 1.

provisions will also depend on the implementation mechanism used. That particular topic however, is beyond the scope of this paper.

4 Conclusion

The Nepali legal system is marked by different traditions, ranging from common law to traditional Hindu law. The examples of judicial innovation in the area of family law have shown that international and foreign law can act as a driving force or as an argument for innovation. This role of "outside" sources is to some extent common to many legal systems. However, it also seems that recourse to outside sources is more explicit and sometimes even exclusive, leaving aside potentially competing internal elements. Resorting to an outside source and/or argument might be a (sub-conscious) way to avoid a clear decision on what tradition within the legal system should prevail. This reluctance is accentuated by the fact that the judiciary also left the final decision to the legislator.

In other areas there might be a tendency towards choosing the "dominating" or the most easily accessible solution. In addition internal hierarchies, especially among different ethnic groups, might make identifying the most appropriate solution difficult. This could lead in the area of tort law to a preference for a rather complicated system with a relatively small likelihood of implementation. For this reason, and in order to achieve effective change, the hybrid nature of the legal system could be constructively used in order to identify the most appropriate solution.

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List of abbreviations

AJCL	American Journal of Comparative Law
CEDAW	UN Convention on the Elimination of all forms of Discrimination Against Women
EJCL	European Journal of Comparative Law
KSL Journal	Katmandu School of Law Journal
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNDP	United Nations Development Programme

INNOVATION IN A HYBRID SYSTEM: THE EXAMPLE OF NEPAL

L Heckendorn Urscheler*

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 within the ambit of criminal law. Field research indicates that it would be possible to

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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