

Living Law or Zombie Law?

The Place of Customary Law in Asian and African Legal Pluralism

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Both socio-legal researchers and anthropologists have questioned the value of trying to standardise, restate or codify customary law in Asia and Africa, arguing that indigenous legal systems are too contingent and flexible to be laid down in such a static format. This critical argument appears reasonable in view of the fact that the Restatement of African Law Project, for example, adopted a rule-oriented approach. The project was introduced in a colonial context and sought to achieve the standardisation of customary law. Indigenous law as the integral whole of 'living law' was then dismembered and classified into several fragments, only a few of which were recognised as 'customary law' in the official legal systems. Customary law in this sense is no longer **living law**, but rather **zombie law**. In response to such critique, Anthony N Allot (the then Director of the Restatement of African Law Project, School of Oriental and African Studies, University of London) re-emphasised the significance of and practical need for written law. His defence is also reasonable.

There has been some criticism—informed or otherwise—about this type of project, which has been imitated in some of the African countries, and which currently forms the thinking of a number of them. This criticism is directed at the alleged rule-based character of the restatements produced, it being argued that these mean a divorce of the rules from the processes and the societies in which the rules are to operate...But, like it or not, judges proceed and decide by rule...when they decide customary law cases they need to know what principles they are to apply. Supplying this deficiency of knowledge is surely better than leaving them to flounder or misdirect themselves in ignorance. (Allott 1984: 136, quoted in Menski 2006: 458)

Quoting Allott's explanation above, Menski (2006: 459) added that the Restatement project 'exemplifies that any attempt to restate, record and codify customary laws would always only result in yet another competing set of rules about customary laws, but never a definitive collection'. It is worth considering these two commentaries of Allott and Menski. In post-colonial Kenya, Cotran's Restatement is often cited in official courts of law as an authority of customary

law. But for what purpose? It is clear that the courts seek a key to achieve certainty in the application of customary law. In other words, they require documents or other resources that may be relied upon as sources of legal authority. Magistrates, lawyers and other legal professionals who handle claims based on customary law should have basic knowledge of and access to adequate reference resources about the substance of customary law.

When the documentation of indigenous law adopts a reductive rule-oriented approach, it can hardly avoid anti-essentialism critiques. On the other hand, when it adopts a discursive case-oriented approach, the amount of documents accumulated becomes unmanageably large and may lead to another impasse. That is, book-length or 'thick' ethnographies may not satisfy practical needs of the legal profession, but merely lead to confusion. The danger of this type of impasse has discouraged legal anthropologists from making a practical contribution to or being involved in the development of customary law in modern African countries.

Nevertheless, I take the view that researchers of indigenous law, such as legal anthropologists, can play a more positive and constructive role in the process of applying customary law in official courts of law. Involvement in the court process as expert witnesses, for example, is one of the possible contexts in which researchers may make a useful contribution. Alternatively, their research findings (e.g. monographs) may be submitted as evidence. In either case, they should seek to make themselves understood in a reasonable manner. More importantly, they should be more conscious of the practical use of the products of their research (Matsuzono 2001). As Donovan (2008: 213) argues, legal anthropologists can have a role to play as expert witnesses and descriptive ethnographers.

This type of argument makes the research a likely target of criticism among anthropologists over the legitimacy of the idea that research output may represent a culture. The simple fact, however, is that indigenous law researchers do not hand down judgements in court. They are responsible for the quality of their documents and their accessibility to the public, but not for the judgement of the court. The processes involved in the preparation of the documentation should, in this context, not necessarily be reduced to academic research activities, but may be more participatory and open and accessible to the public (Hinz and Kwenani 2006). Since the courts of law are open forums for creating new social norms in order to achieve a satisfactory standard of justice, a large quantity of accessible and reliable documents is required to prevent the application of justice on an *ad hoc* basis and to ensure accountability-conscious application of customary law (see Okoye 2004). In this sense, Cotran's restatement has a positive value. Should his findings be updated and augmented by other conflicting findings and views, this may further serve the accountability-conscious approach of justice.

Indigenous law in Asia and Africa is indeed flexible and contingent as 'living law' and cannot be defined in essentialist terms. At the same time, however, it cannot be reduced to a contingent

product of limitless politico-legal negotiation. As Menski (2006: 396) indicates, African laws 'may be informal and plurality-conscious, but that does not mean that anything goes. They may be flexible, but there are limits to such flexibility.'

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