Restatement of indigenous law*

MW Prinsloo**

Professor of Law
Rand Afrikaans University

Purpose
This article investigates how the restatement of indigenous law in Southern Africa can be facilitated and considers a more efficient method of research with regard to time, costs and manpower. Reference will be made to the various methods and techniques of research used in restating or recording indigenous law, in order to indicate their usefulness.

Restatement entails a systematic, analytical, and comprehensive account of a branch of the law which is unwritten or is scattered between a variety of sources. It implies a re-arrangement, in improved form, of statements of the existing law. The result is not a legislative code, but a guide for juridical purposes.1

Sources of reference
The sources of indigenous law may be either written or unwritten.2

Written sources include legal works, such as textbooks, articles and other writings of lawyers; anthropological works; court reports, including published reports of superior courts and unpublished reports of superior courts and magistrates’ courts; records of chiefs’ courts and other traditional courts; reports of commissions of enquiry; official documents, such as departmental files and district note-books; legislation of the central and tribal governments; and writings of missionaries and historians.

Most existing written sources are not readily available. Legal text-

---

*Annotated text of a paper delivered at the Durban Congress of the Society of University Teachers of Law 29 June – 2 July 1987.
**BA LLD (SA)

books are rare, or in some areas of Africa non-existent. Until 1950 South Africa, Zaire, and Ghana were the best equipped in this regard. Nowadays the positions in Kenya and Tanzania would also appear to have improved. There is a need in Southern Africa for legal writings in which the legal system of the Zulu, Tswana and other groups is explained. Non-legal writings should be used with caution. Anthropological works may require transposition into legal terms. However, some books which may serve as outstanding sources have been written by anthropologists, for example the works of Schapera in respect of Botswana, and Cory and Hartnoll in respect of Tanzania. Judicial decisions of the superior courts may differ from the law practised by the relevant group and, it is submitted, should not necessarily serve as precedents which must be followed by lower courts. Until recently not many cases of traditional courts in Southern Africa had been recorded and most records of proceedings contain no reasons for the decision.

The unwritten sources of indigenous law may be explained as follows: oral information of experts which may be obtained by way of field-work or expert evidence in court; observation of the functioning of traditional courts and councils; observation of juridical acts and social behaviour pertaining to a particular rule, for example entering into agreements and marriage ceremonies. Obtaining oral information by way of field-work implies questioning an individual expert or panel of experts on the rules and court cases (real or hypothetical). Oral information is still the prime source of reference of indigenous law, but time is running out as regards the availability of traditional experts. A traditional expert is a chief, court councillor, or any other member of the relevant group with superior knowledge. It is advisable that the information of traditional experts be checked against the opinions and practice of the ordinary man. Nowadays expert evidence in court may also be given by professional persons.

**Necessity for restatement**

Restatement of indigenous law should be regarded as vital for legal certainty, legal development, the history of law, and comparative law. This would lead to an improvement in the standard of administration of justice, facilitate the unification between divergent indigenous laws and between indigenous law and western law within a country, and enhance the status of indigenous law. It may be added that since the abolition of the special courts and the application of indigenous law by the ordinary courts

---


which are not particularly familiar with it, the restatement of indigenous law has become more pressing.

An argument against reducing indigenous law to writing, is that it would fossilise indigenous law and little evolutionary adaptation to changing conditions would be possible. This undesirable rigidity may result when the form of the record is a code, but can be eliminated through restatement which is no more than a guide which should be revised periodically. 5

Methods of research

Past compilations of indigenous law have been described in the literature. 6 The Natal Code of 1878, later Law 19 of 1891, was based on material which was obtained from magistrates by means of a questionnaire. It did not reflect living Zulu law and was a failure. The text-books of Seymour, Whitfield, and Stafford were based mainly on law reports. 7 The information for Schapera’s work, A Handbook of Tswana Law and Custom (1938), was gathered from discussions with traditional experts, observation of everyday behaviour, and attendance at traditional courts. This book “was immediately and deservedly popular, it has gone through many editions and there are well used copies all over Botswana today in administrative centres and court rooms.” 8 The methods used by Cory and Hartnoll in Tanzania for their book, Customary Law of the Haya Tribe (1945), were singled out in 1948 as the most useful model for the recording of indigenous law by the African Studies Branch of the Colonial Office. 9 These methods comprised the compilation of a draft record in consultation with members of traditional courts and tribal authorities, comparison of the draft record with the records of traditional courts, and submission of the resultant draft to chiefs and people in council for their approval.

The Belgians restated indigenous law in two stages: the results of field investigations and discussions on leading court cases were published in journals; critical analysis of these materials and, ultimately, codification by expert jurists. By way of the journals a running record of indigenous law was kept and the process of clarification of the law was facilitated.

The ‘case method’ and the ‘rule-directed method’ are well-known and often criticised. The case method is based on cases as the starting point of legal research. Llewellyn and Hoebel, the first great protagonists of this method, executed their study for The Cheyene Way (1941) entirely on what

---

5See the discussion by the African Studies Branch 130; Allott and Cotran 27.
6African Studies Branch 130-133.
7Seymour Native Law and Custom (1911); Whitfield South African Native Law (1929); Stafford Native Law as practised in Natal (1935).
is called “trouble cases”. Another proponent of this school, Abel, collected more than 4,000 cases from forty courts in Kenya for his study on the customary law of wrongs in Kenya. The rule-directed method entails the obtaining of information by interviewing traditional experts. These two methods of research tie in with different theories of law. The case method connects with legal realism: law is viewed as a complicated system of social phenomena and therefore the emphasis of investigation is upon the courts and other institutions, and the procedures and techniques in settling disputes. The rule-directed method connects with positivism: law is viewed only as a system of rules.

The case method has certain limitations. Actual disputes as source of law are over-emphasised and the other sources neglected; it is unreliable to study the law from “trouble cases” only; how can one “record what law does without recording what law is”; the judgments of customary courts are lacking in judicial reasoning and it is difficult to see how the decisions were arrived at; cases do not provide adequate coverage of all the different aspects of the law and no series of cases can provide a complete system of law.

Investigation based on the rule-directed method only, cannot guarantee reliability and “legal reality”: the traditional experts often tend to prescribe ideal norms and not the real norms; they may be biased in favour of or against traditional practices; experts find it almost impossible to visualise law in the abstract unrelated to cases.

Suffice it to say that each method possesses its individual advantages for a study of indigenous law and they should be regarded as complementary rather than mutually exclusive alternatives for such an investigation. Information obtained through the one method should be supplemented with and checked against information obtained by means of the other method.

Allott refers to the intensive and extensive methods of research. The intensive method is typically used by the anthropologist, that is by restricting the geographical scope of the research and aiming at an exact description of all facts and events within this small area. The jurist primarily aims at stating the law for wider areas and his method is thus typically extensive. In the case of these methods too, the best answer is to combine them and to
confirm the findings of extensive investigation by the findings of intensive investigation.

The most effective scheme for research into indigenous law in Africa has been undertaken by the Restatement of African Law Project (RALP). Therefore, it may be fruitful to refer to the typical method used by RALP in Kenya. The investigation was divided into two stages: (1) a bibliography of published and unpublished sources on the law of the relevant tribes was prepared and published; (2) a draft statement of the indigenous law was compiled on the basis of the written sources. The draft statement was referred to a body of experts, a law panel consisting of African court judges, chiefs, local elders, one or two educated members, and, where possible, one or two women. A detailed restatement of the indigenous law was then drafted, indicating the general rules and local variations, together with modern developments. This detailed restatement was again considered by the law panel and, in the final stage of the investigation, circulated to those concerned with indigenous law, for example, judges, administrators, and district councillors.

This procedure followed by RALP aimed at the following: ensuring that the law panel was equipped with a text, “however provisional and inaccurate”, at its first session of discussions; maximum elimination of errors in the final restatement; duly involving the local population, whose law was being restated, in the project.

RALP’s method was criticised. First, it did not use the anthropological method of research, for example a very detailed reporting and analysis of actual “trouble cases” and concentration on one tribe at a time. Second, its use of the law panel system in Kenya. The replies to the criticism appeared realistic. First, it would take too long to study the law of each tribe on the basis of an intensive method – approximately three years to complete the task for each tribe. Second, in effect the law panel system of investigation is not very different from the “trouble case” method used by anthropologists, provided the investigator carries out the investigation properly and the members of the law panel are a reliable and fair local representation. It must be added that the members of RALP who con-
ducted the investigation in Kenya had proved their ability and experience in the techniques of interviewing experts. 21

The ideal method of field investigation for the purpose of a restatement of indigenous law appears to be a combination of interviewing a panel of experts, scrutiny of court records, and observation of jural behaviour, using one mode to supplement and check another. Where possible the jurist’s extensive method should be supplemented and checked by the intensive method. This approach has been confirmed by several distinguished investigators in this field. 22 Sanders states that “a full arsenal of investigative methods” should be employed for recording indigenous law and that “an integrated research strategy expressive of cultural and theoretical open-mindedness, is imperative” for comparative law and law reform purposes. 23

The methods used by jurists for the restatements of branches of indigenous legal systems in Southern Africa comprise the following: a study of the existing literature; compilation of a memorandum for the field investigation; the field investigation itself. 24 The purpose of the memorandum is to equip the investigator sufficiently for the discussions with the experts. The items for discussion are completely and systematically covered. Relevant statements in the written sources are furnished in the memorandum for discussions by the experts, and adequate examples are prepared beforehand for supplementation and checking. Preparation of the investigation includes a study of the various methods and techniques of field investigation. 25 The field investigation consists of discussions with local experts (mostly a panel of experts), study of court records, and observation of legal phenomena. Interviewing a panel of experts is the main method of gathering information in the field. Until now very few cases heard in traditional courts have been recorded and the investigator must also rely on the experts for case material. Observation is concentrated mainly on the functioning of courts and councils, actions of relevant authorities, and juridical acts by the ordinary people. In one instance the

---

21 Cotran (1966) 88; Allott and Cotran 36; compare especially Allott (1953) 175-176 and (1967) 15.
23 Sanders 329.
25 For guide-lines on methods and techniques of field investigation see for instance Allott (1953) 175-176; Coertze “Onderhoudvoering in diepte” 1983 Journal for the SAPRHS 13(1), 13-19; as well as works cited by Cloete 22.
draft restatement was referred to a special committee of experts for a final check.26

**Scheme for restatement**

Valuable contributions to the recording of indigenous law in Africa have been made by individual persons.27 The most significant scheme for the recording of indigenous law in Africa, was initiated by the School of Oriental and African Studies in the University of London by way of the Restatement of African Law Project established in 1959.

RALP’s aim is “to facilitate, and where feasible undertake or assist, the restatement of customary law in the Commonwealth African countries.”28 Its staff comprises the director, lecturers, research officers, and a bibliographical assistant. A research officer was in charge of each of the three regions: West Africa, East Africa, and Central and Southern Africa. First, a comprehensive bibliography of indigenous law on a country-by-country and ethnic group-by-group basis was prepared. Second, field investigation to supplement existing written sources was carried out. “Official customary law recording schemes (many carried out by the Project’s research staff) have made extensive use of law panels made up of local experts from the groups concerned.”29 RALP “is a self sufficient body, commenced as an academic initiative. However, where African Governments desire collaboration, RALP will give all the assistance it can, as has been done in Kenya and Malawi.”30

The governments of East African countries, in particular Kenya and Tanzania, are actively engaged in the study of indigenous law, in determining legislative provisions for its recording and reform.31

At present there is no institution for the restatement of indigenous law on a broad basis in South Africa and the TBVC countries. The Committee for Indigenous Law who advised the South African government on coordinating and financing research projects into indigenous law was dissolved in 1983. Most of the recordings done at the instance of this committee were done by anthropologists with the understanding that the results should be restated by jurists. This work is yet to be done. In a few instances a jurist and anthropologist worked together in the field. This co-operation is still recommended by some.32

The Centre for Indigenous Law of the University of South Africa has

28For the aims, staff, and functioning of RALP see Allott (1967) 12-13; Allott and Cotran 33-36.
30Allott and Cotran 34.
32See for example Ver Loren van Themaat 13; Jacobs 132-134.
since 1977 undertaken projects for restating indigenous law. Four books have resulted from these projects. In addition to these books on branches of the law in Bophuthatswana, Lebowa and KwaNdebele, two introductory works on indigenous law were compiled by the former project leader of the Centre. Although the Centre forms a subsection of the Faculty of Law (until 1983 of the Institute of Foreign and Comparative Law) of the University of South Africa, its honorary members, who are responsible for the research done by the Centre, include members of two other universities.

In spite of the valuable work done by the Centre for Indigenous Law, and by universities individually, a much greater input is necessary to meet the need of restating indigenous law in South Africa and the TBVC countries. To my knowledge there is also no official scheme for the recording of indigenous law in the TBVC countries and national states, to supplement the work at present done by the academics.

**Unification of indigenous laws by means of restatement**

Unification of the law means creating uniform rules from divergent rules. Two kinds of unity are in question: unification between the different tribal laws within a country, region or ethnic group; and unification between the western law and the indigenous law. This discussion is confined to unification of different tribal laws.

The motivation for unification in African countries is partly political, and partly for convenient administration and for modernising the laws. The political argument is that building a nation means finding every support for national unity and eliminating every possible cause of national weakness or division, such as divergent tribal laws. Whether divergent indigenous laws impede national unity is doubted. Convenient administration relates to the problems of legal pluralism and unwritten law. Allott is of the opinion that complete unification of indigenous laws will only be practicable in areas that already possess substantial similarity in both laws and social circumstances. There is also a trend in African countries to consider the unification of some branches of divergent laws (criminal laws).
Restatement of indigenous law

offences and contracts) as essential and other branches (marriage, divorce, and succession) as unfeasible.  

The methods of unifying indigenous law include restatement, judicial pronouncement, codification and other legislative provisions.  

Restatement is the most important method for the unification of indigenous law. Even if no active attempt at unification is initiated, the restatements of the different indigenous laws will make an important contribution to unification, for example through restating of the corresponding tribal laws as general laws. Cotran reports that the technique of recording according to a prearranged uniform plan, results in greatly reducing the number of superfluous local variations. Allott and Cotran state that restatements of divergent indigenous laws will eventually lead through development by case-law and its administration by the same personnel, to the emergence of an indigenous common law. This may be strengthened by an integrated court system and the publication of selected cases.

Active attempts to unify divergent indigenous laws through restatement can be made. This was done in Kenya and Tanzania. The first stage in the unification of criminal law in Kenya was to compile restatements of the law in the various districts, the second stage was unification of the divergent laws by the provincial law panels, and the final stage consisted in incorporating these indigenous criminal offences into the statutory law of Kenya. Tanzania's projects aimed at producing a unified version of indigenous law and once a district law panel had accepted the unified version, the minister was empowered to apply it to the district by order in the gazette. However, the success of unification of laws depends upon the concurrence of the public. Law which is not acceptable to the relevant group will not be observed. In general, restatements of indigenous law have been more successful than codifications.

41Spalding 101.
42Cotran (1963) 4.
43Allott and Cotran 38.
44Cotran (1966) 91; Spalding 99.
45Compare Cotran (1963) 4-6; Allott (Towards the Unification of Laws) 376; Cotran (1966) 84-88.
46See Tanner 114-115; Allott, Epstein, and Gluckman 33.
47Allott, Epstein, and Gluckman 32.
Concluding remarks
In order to design more efficient methods for restating indigenous law in South Africa, methods used in other African countries should be considered. The following are examples: preparing bibliographies; publishing restatements in two stages, the provisional draft restatement in a journal and the final restatement in a book, in order to keep a running record of field investigations and to ease the process of clarification; including the information from the written sources in the field-work memorandum in the form of draft restatements in order to expedite the process of restatement; the use of a law panel system, as in East African countries, in interviewing experts and checking the final draft restatement; periodic revision of the restatement to conform to new modifications of the law.

Consideration should be given to the establishment of a body for the facilitation of restating indigenous law in South Africa and the TBVC countries by means of the following: co-ordinating the various projects researching indigenous law; organising a greater number of academic staff to undertake or assist in the restatement of indigenous law; advising the governments of South Africa, the TBVC countries, and national states on the restatement and reform of indigenous law; assisting the training of government personnel for research into indigenous law. For this purpose the present Centre for Indigenous Law at the University of South Africa may be reorganised, or a new body established.

The active involvement of governments in Southern Africa in the restatement of indigenous law is essential, for example in the form of undertaking restatement projects, cooperating with the Centre for Indigenous Law (or other body) in undertaking such projects, and assisting in the financing and organisation of the projects.