

A RESTATEMENT OF KIPSIGIS CUSTOMARY LAW

A Dissertation

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By

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ABSTRACT

A Restatement of Kipsigis Customary Law

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The thesis discusses the process of change in legal reasoning.

Legal reasoning is understood as a process whereby the facts of a case are categorized by precedent in order to effect a settlement. Precedent is understood as a range of phenomena - ideology, customs, standards of behaviour, laws, prior cases, etc. It is suggested that the nature of the judicial decision-making process is dependent in part on the degree of precision in the statement of the precedent. Two types of decisions are considered - compromises and unilateral decisions. While compromises are associated with imprecisely stated precedents, unilateral decisions are associated with precisely stated precedents. The process of change in legal reasoning is to be seen in the restatement of precedent in terms of greater precision.

The Kipsigis of Kenya are a politically acephalous society. In the absence of coercive sanctions and precisely stated precedent in certain domains of litigation, efforts are made to achieve equitable compromises in order to maintain the peace. This is achieved by

categorizing the case by a number of alternative precedents until a satisfactory compromise emerges.

Contact with the British radically affected the Kipsigis economic system, as expressed in a movement from a predominantly pastoral economy to one based on mixed farming and peripheral association with a network of national markets. Within 30 years, Kipsigis economic interests shifted from a focus on cattle to intense interests in land and cash. In the traditional economy land was communally owned for grazing, but it is now individually owned. It was during this period that the Kipsigis developed a corpus of land law.

This development was not achieved through legislation by the colonial authorities, but was generated out of the restatement of certain principles indigenous to the customary law. Customs governing usufructuary rights in land for secondary cultivation were restated in greater precision so that the end product was a series of precise qualifications determining individual land ownership. These restatements were responses to meet the contingencies deriving from land enclosure and disputes arising out of conflicting claims of ownership. Rules of land inheritance were derived analogously from rules of cattle inheritance and were appropriately restated.

The British maintained a "dual" system of courts, which sanctioned the administration of customary law in the African courts. It was the interaction between the indigenous remedy agents and the formally constituted and sanctioned courts that facilitated the formulation of these more precise precedents, in lieu of legislation. The relationship between court and traditional remedy agents has served

to maintain the persistence and development of customary law. The court will not try a civil case without a prior hearing at the local level and in the majority of cases there is concurrence in the decisions at both levels.

The growth of precisely stated precedent has led to a higher frequency of unilateral decision making in the judicial process. This is demonstrated in the study of three Kipsigis communities that display markedly different economic structures. The first community is representative of the traditional pastoral economy. The second, a reserve community, represents a mixed farming economy peripherally associated with the national economy, while the third community, a government settlement scheme, is also a mixed farming community but is more closely linked to the national economy and the bureaucracy. The nature of legal reasoning in each community, given the different economic bases of disputes, are significantly different. This poses a model of a continuum through which the changes in Kipsigis legal reasoning are demonstrated.