BOOK REVIEW

Ahonagnon Noel Gbaguidi, *Erbrecht an Grund und Boden in Benin: Betrachtungen zur Ermittlung des Erbstatuts in einem Mehrrechtstaat* [Law of Inheritance of Landed Property in Benin: Observations Towards the Ascertainment of the Rules of Inheritance in a Multi-Law State], Bayreuth African Studies. Bayreuth: Eckhard Breitinger, Bayreuth University (1994). (xii + 243 pp.)

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This book is a detailed, incisively argued study of a plural, and consequently complex area of a state law. Inheritance of land in Benin is governed in part by customary indigenous law in a form recognised and enforced by the institutions of the state, and in part by the French Civil Code introduced in the period when Benin was the French colony of Dahomey.

Notwithstanding the modesty of its subtitle, the work investigates its field thoroughly. After an introduction it is divided into two parts. The first part examines the basic principles of the different legal orders governing land and inheritance, and the question of the alienability of land on the death of the holder. The second part concerns the choice of the applicable law in cases of land inheritance. A number of customary laws exist in Benin. The author considers some of the ways in which they differ, and issues of choice between different customary laws, but he argues that for many purposes they are sufficiently similar in content to justify treating them as one.

The exposition of the substantive laws of land inheritance forms the bulk of the first part. To this reader, who has studied the laws of inheritance of Ghana and Nigeria but is as unfamiliar as most lawyers of those countries with the laws of their francophone neighbours, there are striking similarities between the laws of these west African states. They seem to differ only slightly in the practised customary laws and in the difficulties which arise when state courts attempt to observe and enforce those laws. For example, the issue of inheritability of land under a customary law in which the lineage, not the individual, normally holds the allodial title is discussed by Gbaguidi in terms which are largely applicable in

Ghana and Nigeria (63-79). He reaches conclusions which seem appropriate for the anglophone countries. Interests vested in a lineage are not inheritable because the lineage does not die. Rights and interests held by individuals are inheritable. Frequently an individual holds a subordinate interest in land while the ultimate ownership of that land is held by the lineage to which that individual belongs. There may then be restrictions inherent in the individual's interest, preventing his or her rights from passing to persons outside the lineage. But today an individual may also hold the ownership of land, in which case it is freely transferable.

In Ghana and Nigeria it appears that under most customary laws the lineage to which the deceased belonged selects the individual who is to inherit each item of property; but that customary law norms determine the decision which ought to be taken. These norms take account of factors such as the wishes of the deceased, whether expressed formally or otherwise, the personal obligations of the deceased, the reasonable expectations and the needs of a large range of kin and affines, the requirements of equity, and the source from which the deceased acquired the rights in issue. Similar norms apply to succession to the social functions of the deceased, which often has a determinative bearing on inheritance of his or her property. The appropriate weight to be given to each factor varies according to the circumstances. Flexibility of practice operates also in regard to the extent of the lineage which determines the issues, since these are segmentary lineages in which the concept of the lineage of the deceased is itself indeterminate.

There are manifold difficulties in giving effect to such a complex normative order in the courts of a modern state, in which the officials are trained in the reasoning processes of western types of state inheritance law. In Ghana and Nigeria it appears now to be generally accepted that under customary law as applied in state courts the lineage of the deceased (the extent of which, however, remains contestable to some extent), determines the destination of property rights which were held by the deceased. This view is sometimes expressed in the notion that the rights devolve on the lineage as its corporate property, but that the lineage then appoints an individual or individuals to enjoy it or to take care of it. This principle forms the starting point for further creative formulation of customary law by state administrators. The primary difficulty is to clarify the legal rules, if any, which govern the lineage exercise of its powers of disposition. Some case-law suggests that lineage discretion is legally unlimited. That view relegates to the category of mere morality the norms which indicate who is the appropriate individual to be appointed by the family. Other cases give some legal recognition to these norms, holding for example that certain close kin of the deceased must be given certain parts of the estate, unless there is a recognised justification for their exclusion, or unless a lineage decision to

exclude them follows a specific procedure of consultation and debate. On this view, decisions which infringe the norms are legally invalid. In any event it is clear that the courts of the state will not and cannot reproduce customary practices and norms of obligation in their entirety. All of these considerations are reflected in Gbaguidi's subtle and penetrating account of the basic principles of the Benin 'traditional law' in comparison with the 'modern law' (terms which he adopts after discussion of their problematic nature) (80-116).

The discussion of choice of law in the second part might seem to involve a minor step on the route to the application of law in particular cases, the major task being the ascertainment of the substantive law examined in the first part. This assumption is belied by the fact that the second part is nearly as long as the first. Legal pluralism, even in the limited form of the coexistence of 'traditional' and 'modern' laws within a state law, requires a body of norms to determine the scope of operation of each of the substantive laws. In the states of west Africa these rules of internal conflicts of law, sometimes explicit, written or codified, sometimes tacit, have existed for over a century, but have received little attention in the legal literature. Gbaguidi's exposition places Benin ahead of its neighbours in this field. It is clear and persuasive, based primarily on the statute law but taking into consideration also a substantial body of court decisions.

The first chapter of this part is concerned with the determination of an individual's *statut personnel*. Gbaguidi uses the French term for the concept as there is no German equivalent. The corresponding concept in modern anglophone legal systems would seem to be that of a personal law. In Benin an individual acquires at birth the personal law of their parents, as in anglophone west Africa. Disputed questions in Ghana and Nigeria concern the means by which a person may subsequently change their personal law from a customary law of birth to common law. The contracting of marriage in a statutory, non-customary form is not today regarded as sufficient, although for long a specific statutory provision in Ghana and Lagos caused it to change the law of intestacy applicable to the parties and issue of the marriage. In Benin the issue can sometimes be simply determined because statute has provided defined, formal means for a person to renounce their customary law *statut personnel*. However, since that provision does not repeal any other methods which may exist, there remain uncertainties, which are examined by Gbaguidi with reference to both general principles and legal provisions peculiar to Benin (150-169).

That prepares the ground for the other chapter in the second part, which considers the determination of the law applicable in cases of land inheritance. In this process the personal laws of the deceased and other parties are frequently relevant, but not always decisive factors. Much of this chapter is given to a study of the ways in which a law may be applicable irrespective of any

individual's personal law. In Benin the status of the land in question a registered (*immatriculé*) may be relevant, whereas in Ghana and Nigeria th registration of title rarely affects questions of inheritance. In these states ther are two categories of factors other than personal law which commonly determin the applicable law. The first is the contracting of a marriage in a common law monogamous form, which, it has sometimes been claimed, may effect a chang in intestacy law. Apart from the now repealed specific statutory provisions jus mentioned, it was once argued that there was a general principle by which a common law, or Christian marriage changed the parties' personal law Apparently in Benin this cannot be argued. Legislation provides a forma procedure for a party to such a marriage to make a change of personal law at th time of the marriage. From this it is concluded that, if the specified procedure i not followed, no change of personal law occurs (158-160). The second facto which may determine the applicable law irrespective of personal law is th making of a will in common law form. The assumption is generally that th common law must be applied in accordance with the apparent intention of th deceased. This gives rise to the possibility of a testator using common law t avoid restrictions on the power of testation imposed by the customary law and s affecting others to their detriment. The issue has been considered in one leadin case in Nigeria (*Adesubokan v Yunusa*, *Journal of African Law* 1970: 56; 1972 82). This particular problem is discussed by Gbaguidi in relation to the makin of wills in civil law form (186-194), although one gains the impression that there has been relatively little will-making or discussion of the effects of wills in Benin. Only in cases where there has been no effective opting for the application of a particular law is it necessary in Benin to revert to the basic choice of law rules. These are examined in the final section of the work (198-220).

If this becomes the basic textbook on succession to land in Benin, law students and practitioners in that jurisdiction will be fortunate, for in addition to its authoritative exposition it contains more fundamental analysis than is usual in legal textbooks. If used by decisionmakers it may also provide the analytical basis for future reform and development of this law. But these statements have to be expressed in conditional form, because of the language in which the book is written. Since Gbaguidi completed this work at the University of Bayreuth with the support of its Special Research Field 214 on *Identity in Africa*, it was entirely right that it should be written in German. But this does not make it widely accessible in Benin, and it is to be hoped that the author will soon make it available in French. I would go further: since, as I have sought to show, it is potentially instructive as a comparative study to law reformers in anglophone African states, an English version of this excellent study would also be of great benefit.