BUCHBESPRECHUNGEN

BENNIE GOLDIN / MICHAEL GELFAND:
African Law and Custom in Rhodesia
Juta & Co. Ltd., Cape Town, Wynberg, Johannesberg, 1975. pp. XVI, 325. Index. R. 17. 50.

This volume, the joint effort of a medical authority and a judge, is a welcome addition to the number of written sources which concern students of customary law. It can be divided into two major parts: the history and background first, and secondly the part dealing with specific topics. The first part which is by far the most scholarly and detailed covers three parts. In turn these embrace some sixteen fairly well spaced chapters. The chapters deal with the history of Rhodesia generally and its legal system more specifically since 1889; the structure of tribes and tribal land; chiefs; headmen and kraal heads; African family and traditional tribal Government in Rhodesia. The authors devote the second part of the first broad category to the more specific question of application of customary law, and the concept of repugnancy of custom to natural justice and morality. Some time is devoted also to the role of district commissioners and to the problem which is quite familiar in Central Africa, the dual system of law and courts with all its complications. The authors come down to accept that notwithstanding the conflicts between the application of the same laws by different courts and the frequent departure from statutory obligations, the administration of justice operates smoothly and effectively. This is because the tribal courts may not always be consistent, "but they accord with the precepts of justice as understood, desired and expected by litigants". The final part of the first broad category deals with the organization of The Tribal Courts, how they are constituted, what jurisdiction they have, in what circumstances a case can be transferred from one court to the other, the criminal jurisdiction, procedure and rules of evidence and finally the control to which these courts are subjected (revision and appeals). As stated this broad category is most scholarly. It is well written and well documented with memorable and long quotations such as those which appear on pages 22 and 25 concerning the basic principles of customary law and justice (quotation from the Robinson Report 1961) and indeed on the historical beginnings of Rhodesia as summarized by Lord Sumner in Re Southern Rhodesia (1919) A. C 211 (see page 2 of the text). It is most surprising, although this was the pattern in the then Nyasaland as well, to discover that local authorities were neither recognized nor officially utilized for the purposes of settling cases until 1937. No thorough search has been made into the reasons for this policy. Elsewhere at the beginning, the writers state that the administration was primarily concerned with security and political and economic control of the natives and not with the preservation of tribal courts. In fact the administration doubted the ability of the chiefs to administer justice and the status of the chiefs was down graded to that of a constable within his tribal area. Inspite of this attitude the chiefs confined to administer justice in their localities. The Robinson Report explained that this was primarily because the basic principles of customary law and the understanding

by the natives of concepts of justice are materially different from such principles and concepts under the European legal system. The policy which the settlers adopted therefore could not have adversely affected the development and understanding of customary law. Although the policy is criticized in retrospect, sight should not be lost of the fact that this was the pattern in other jurisdictions as well. Elsewhere, it was only after this policy was changed that the colonial Government appreciated that it would be useful to rule through native institutions themselves. Thus in the then Nyasaland, the African Courts Ordinance of 1933 conferred formal judicial authority to the chiefs who were only just being recognized as agents for local governance.

In this major part, the authors fail to lay out a convincing methodological framework. They do no more than merely quoting Paul Bohannan and Jan Vansina to guard the reader. It is submitted that the authors should have explicated themselves by convincing the reader that their own methodology guarded against certain pitfalls which researchers fall into and that their own product is a result of empirical research. The successes and failures of text books on customary law are judged very much on the basis of the methodology they were based on.

In the first broad category, possibly the guide to the abbreviations of courts as appear on pages 74 and 76 and indeed the references to law reports which appear at odd ends inside the text should in a revised edition appear formally in a table of abbreviations after the table of cases at the beginning before the introduction.

The second broad category covers five parts: customary family, wrongs, contracts, crime and succession. The most conspicuous sub-category missing here is that of customary land which in Rhodesia has attracted a lot of newspaper and other informed comment. Land has been a subject matter for litigation and the subject is one of the key issues for the future of the country. The possible defence is that this is covered in chapter 2 within the first broad category. Less than three pages of material on land, however, is an injustice to this important theme. The five parts cover some thirty chapters, some of these are too brief and may appear somewhat uncoordinated to the casual reader in that, incest is dealt with at two places — pages 260 and 272. Similarly, rape appears at pages 199 and 269. The authors have a good explanation for this:

The same subjects are often dealt with twice e.g. Homicide, assault, rape. Each is dealt with in parts 5 and 7 of the book. In part 5 these subjects are dealt with as civil wrongs or torts, which entitle the injured party to compensation. In part 7 the same subjects are dealt with as criminal offences in the sense that compensation is payable to or punished by the State (or chief). Hence the distinction between Criminal and Civil law is explained at page 257.

The vernaculars used are misleading as it is not clear to the non expert in Shona and Ndebele whether a particular word is for one or the other of these languages. A way out would again be to provide a glossary of the vernaculars used with the translations indicating clearly that it is Ndebele or Shona. Page 10 contains one of the few clerical mistakes I was able to spot. „Learned" should clearly read "learnt" although perhaps modern usage of the terms is changing in favour of that adopted by the authors. On page 74 (Second line, last sentence) "an" should read "and". These may be are trivial. The real merit in this broad section is that the authors bring out the fine legal points which come out of the cases and they are able to blend these with the anthropological background within which the rules

operate. This may be the advantage of using authors from outside law. Thus family law is viewed in the context of the anthropological structure of the family, the latter explaining the traditional formation of the family and consequences thereof. The legal mind obviously is attracted by the cases such as concern the legality of a marriage without lobolo. We learn the familiar story of the failure of policy makers who try to interfere with lobolo, in the series of attempts narrated at pages 10—11 in the introductory chapters. One of the few problems one has relate to the statement on page 286 that an illegitimate son, that is one whose parents did not enter into a customary or civil marriage, is not entitled to succeed or inherit. In the patrilineal and patrilocal setting where the bastard stays with the mother this may be understandable although undesirable. Elsewhere in Central Africa, this problem would be avoided. For example in the matrilineal setting succession and inheritence by such a child is not a problem. One final problem which could have been avoided if more detailed research technique was used is the statement which appears on page 267. It is stated that if embracing or kissing takes place between brother and sister, it is dealt with by the administration of corporal punishment, the father carrying this out himself. No case is cited. The rule directed inquiry is likely to produce this statement whereas the true position would be a statement from the informant that this never happens except in towns where it may not be punishable because of the changing morals and the influences which western traditions have brought.

L. J. Chimango

Eberhard Klein:
Umweltschutz im völkerrechtlichen Nachbarrecht
(Schriften zum Völkerrecht 50), Duncker & Humblot, Berlin, 1976, 354 S., DM 79

Nachdem erkannt wurde, daß eine Erhaltung der Umwelt nicht allein mit nationalen Regelungen erreicht werden kann, hat sich die Völkerrechtslehre auch dieses Themas angenommen. Klein untersucht in dieser hervorragenden Schrift, welche Möglichkeiten das Völkerrecht zur Lösung von Konflikten im Bereich der Umweltbeeinträchtigungen bietet. Im ersten Teil gibt er eine umfangreiche Darstellung der Umweltbeeinträchtigungen, ihrer weiteren Folgen sowie der wirtschaftlichen und politischen Hindernisse. Im zweiten Teil wendet sich der Verfasser der völkerrechtlichen Problematik zu. Er bietet in Anlehnung an das Wassernutzungsrecht drei Prinzipien als Lösungsalternativen an: das Prinzip der absoluten territorialen Souveränität, das Prinzip der absoluten territorialen Integrität und ein vermittelndes Prinzip sich gegenseitig beschränkender territorialer Souveränität und Integrität. Als verfahrensrechtliche Lösungen wären Zustimmungserfordernisse, Konsultations-, Informations-, Verhandlungs- und Kooperationspflichten möglich.
Bevor sich Klein der gegenwärtigen Rechtslage zuwendet, untersucht er die zur Verfügung stehenden Quellen. Er zieht — unter bestimmten Voraussetzungen — die im (Gewässer-)Umweltrecht zahlreichen Verträge zur Feststellung von Völkergewohnheitsrecht heran (S. 89). Den Resolutionen internationaler Organisationen billigt er eine Beweisfunktion für bestehendes Völkergewohnheitsrecht zu und sieht sie als Wegbereiter für die Entstehung desselben an. Hiergegen läßt sich