

THE PERFORMANCE OF LITIGATION: ASANTE CUSTOM AND THE JUABEN COURT

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Abstract

Providing an overview of Asante legal and philosophical principles establishes that the performance of litigation in Asante is more than simply the resolution of a dispute, but is an exercise in identity and citizenship. Focusing on Juaben and the Juabenhene's court, we see that utilizing the courts affirms an individual's position in the cultural system even as it addresses a conflict. Not only are the concepts and principles of the Akan cultural system the basis for the legal practices of the court, but a litigant enacts a particular role (narrates the story and shows respect) and engages with others in specific roles determined by the discourse of the court. Through its operation, the court recreates an Asante reality and identity, equally as influential on the litigants as the outcome of the case brought before the court.

Résumé

Une vue d'ensemble des principes légaux et philosophiques des Asante montrent que le déroulement des litiges parmi les Asante n'est plus seulement une résolution des disputes, mais aussi une pratique d'identité et de citoyenneté. En prenant en compte la cour de Juaben et de Juabenhene, il est évident que le déroulement des litiges dans la cour affirme la position d'un individu dans le système culturel surtout quand il s'agit de la résolution d'un conflit. Les concepts et les principes du système culturel Akan, ne sont pas seulement les fondements pour les pratiques légaux de la cour, mais aussi un contexte dans lequel le plaideur joue un rôle particulier (raconte l'histoire et montre son respect au pouvoir) et engage des rôles spécifiques déterminés par le débat de la cour avec les autres. À travers ses opérations, la cour recrée une réalité et une identité Asante, qui influent également sur les plaideurs et sur le résultat du conflit en question.

Introduction

On January 18, 1960, *LIFE* magazine, the American news weekly featuring full page photography and a large scale format, began a series of articles on democracy around the world. Part 1 featured the newly independent nation of Ghana (1957), and the cover photograph was Augustus Molade Akiwumi, the Speaker of the House in Ghana, dressed in British style wig and robes. The title of the feature article read, "Ghana's Leap from Stone Age to Eager New Nationhood." For a national magazine in 1960 this title reflects a shocking ignorance of African cultures. Inside, the article focuses on law, directing attention to the introduction of modern Western law and linking it to progress, democracy and modernity. It explains that "Courts are being built, and in lower courts the temporary local judges are being replaced with more qualified appointees to settle local disputes and initiate the people in the mechanics of Western justice." (87) A full page photograph of Ghana's first chief justice who held law degrees from two English universities, Sir Arku Korsah, dressed in wig and robes, accompanies the article.

In sharp contrast to the characterization of pre-colonial Ghana as "Stone Age" the Akan peoples of present day Ghana developed a complex, hierarchical society centuries before Europeans ever arrived on the continent. At the end of the seventeenth century the Asante (one of several groups who constitute the Akan), solidified their power and transformed the various towns of the region

into the Asante state, the foundation of which was a dynamic set of legal practices.¹ (The Asante state, including its royalty and regalia, ritual and courts, were certainly no secret to the West, making the naiveté of the *LIFE* magazine story all the more striking.) In spite of the effects of British colonialism and the substantial efforts made by the early and subsequent Ghanaian governments to substitute Western justice for local practices, in contemporary Ghana these legal practices are still relevant. Modified by several centuries of history, they are embedded in the institution of chieftaincy and utilized by a significant population who choose to follow *custom*, the label for indigenous cultural practices. These customary legal practices constitute the subject of this paper. More specifically the paper considers the place of *custom* within the anthropology of law and addresses the question of its relevance in contemporary Ghanaian social life.

Counter to the Western model which predicts the disappearance of indigenous culture with the introduction of modernization, the significance of chieftaincy and the practices of custom continue with vitality today, alongside modern systems of politics, law, religion, artistic expression, and education. Together these systems constitute the multiethnic state known as Ghana. The Parliament, President, and national government represent all of the regions of the country. Ghana has an official state juridical system with courts, judges, and lawyers, and the University of Ghana law school trains lawyers for practice in these courts. Moreover, the Constitution recognizes customary law and the courts of the chiefs and queen mothers as a feature of chieftaincy.² The government monitors the affairs of chieftaincy through the Ministry of Chieftaincy. Historically, the institution of chieftaincy was developed by the Akan peoples, and in the Asante state the institution evolved into an elaborate bureaucracy. Under colonialism chieftaincy was introduced to all ethnic groups and utilized for the purpose of indirect rule; consequently, today all of the various groups in Ghana have chiefs. They meet together in regional houses of chiefs and at the national level in the National House of Chiefs. These Houses were established when Nkrumah became President of newly independent Ghana in 1957, and they continue as vital institutions today.

Although Ghanaians and some Ghanaian scholars recognize the power of chieftaincy, both in the lives of the common people and in contemporary business and political life, it is not unusual for Westerners to perceive it as a ceremonial and decorative institution only and to discount its influence, or, in some instances to frame it as an obstacle to democratic government. Writing in the preface to his recent book, *Nkrumah and the Chiefs: The Politics of Chieftaincy in Ghana 1951-60*, British historian Richard Rathbone admits to holding a view of chieftaincy when he was a young scholar and Ghana was a newly independent nation (1957) as "...harmless, romantic flummery which had precious little to do with the brave new world for which *real* Ghanaians strove." (Rathbone, 2000: viii). He came to realize in the course of his further research that there was an important story in the records concerning the way that nationalists and nationalist governments had sought to control the countryside of Ghana, and that chiefs and their institutions lay at the center of those struggles (Rathbone, 2000). In contrast to the view of chieftaincy as "romantic flummery," he concluded that the evidence insists that chieftaincy "...was and is part of Ghana's long history and part of what makes Ghana distinctive and remarkable" (ix). His work notwithstanding, some individuals, Western and Ghanaian, have continued to perceive of chieftaincy as a survival from the past, and, to a certain extent, chiefs are comfortable with this curtain of oblivion as it frees them from external scrutiny into their affairs.

Among the Akan peoples the term *Custom* is widely and loosely used to refer to the indigenous system of political organization, legal practices, religion, artistic forms, and other domains of culture, in contrast to those systems of law, religion, politics, and art derived from the West. The political system is characterized by dual gender leadership – a male and a female leader. At the head of the Asante hierarchy are the king and queen mother of Asante (the *Asantehene* and the *Asantehemaa*), and at the next level of the hierarchy are the paramount chiefs and queen mothers, and each of these has authority over the smaller towns and villages in their division, who also have

¹ See Ivor Wilks (1975) and T.C. McCaskie (1995) for authoritative historical studies of precolonial Asante.

² The government recognizes "customary law" under the category of common law, and defines it as "the rules of law which by custom are applicable to particular communities in Ghana" (1992 Constitution of the Republic of Ghana: 10).

male and female leaders at the local level. In this manner the system is replicated throughout the culture.

At every level the *stool* is the symbol of authority, parallel to a throne in Europe. A chief or queen mother is *enstooled* or placed *on the stool*, and can also be *destooled* if violations occur. The *Golden Stool* is the symbol of the Asante nation and of the king of Asante. Once an individual has been selected (from among other qualified members of the royal family) and placed on the stool, he or she assumes responsibility for dispute settlement in their communities or throughout the division, whether it be a major dispute among chiefs or a case centering around an insult delivered in an everyday interaction (an actionable offence). Not only do the most prestigious chiefs and queen mothers hold formal courts on a weekly basis, but queen mothers and chiefs of small towns and villages are responsible for dispute settlement as well.

History and Specificity of Time and Place

Widely recognized by scholars today is the historical circumstance that linked law to colonialism. According to Martin Chanock, a historian and lawyer who worked in Malawi and Zambia, law was a major tool utilized by the European colonizers:

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities which were undergoing basic economic changes... (Chanock, 1998: 4).

In recent decades scholars and lawyers have begun to explore legal institutions and practices with an emphasis on the larger context in each local setting and with an understanding of major differences among the African regions, depending on the specific African culture, the history of contact relations, and relations between local legal systems and that of the state. On the subject of legal systems and context, Keebet von Benda-Beckmann argues that a legal system consists "of more or less integrated clusters of rules, principles, procedures and institutions, full of contradictions," which are nested and connected to other clusters; context is, then, a complex set of nested and connected clusters (von Benda-Beckmann 2003: 308-313). With regard to the theoretical orientation of legal anthropologists, Martha Mundy and Tobias Kelly note developments of the late 20th century. Particularly influential has been the concept of "legal pluralism", the attempt "to conceptualize local processes and norms within the wider context of state laws and domination," and a second represents a move to history and away from the emphasis on dispute settlement in the Durkheimian sense of social control. Another recent development of theoretical significance has been the emphasis on power in legal relations and the culture of law; additionally, attention to speech and writing in legal form, identifying the relationship between performative form and the social construction of legal truth, has directed attention to the performance of litigation, in contrast to the study of law in the abstract (Mundy and Kelly, 2002: xvi-xvii).

Of particular significance in Ghana due to the complex political/legal system developed by the Akan peoples and that of the Asante state especially, the emphasis on history and specificity of time and place, local and supralocal, is especially relevant. Recognition of this perspective holds the key to any understanding of the contemporary practices of custom because, unlike Western systems of social organization, in precolonial Asante the political system was not separable from the legal system, and they both rested on the kinship system, while religion and belief were integrated throughout. Moreover, the history of contact relations with Europeans is relevant as it affected the context in which colonialism, and legal systems in particular, developed. It is worth noting, therefore, that the historical legal framework, as well as contemporary legal practices in Ghana differs from that of some other African regions also colonized by the British.

Turning to the work of a historian, Roger Gocking, who compared colonial rule and what he calls "the legal factor" in Ghana and Lesotho (1997) we discover remarkable differences. He demonstrated the wide variation between the two British colonies with regard to the colonial judicial continuum, emphasizing that in the southern Gold Coast, which had experienced European

contact for centuries, the codification of customary law never solidified into 'hard prescription,' as it did in Basutoland, another British colony that followed a dramatically different path with regard to the 'legal factor' (1997: 61-86). Gocking and other recent scholars have argued that the law courts of the colonial era were more contested arenas than scholars have thought previously, especially when taking into account the differences among African regions (1997: 61-63).

Among the most significant of these differences historically was the presence of the Asante state in the Ashanti region and the larger Akan cultural system which included the Fanti on the coast. As mentioned above also, contact between Europeans and the peoples of West Africa was long established before colonialism. Consequently, systematic documentation of the Akan system, including the legal practices, dates to the early nineteenth century, unlike other regions of Africa. T.E. Bowdich and other early European observers were sufficiently impressed with the political/legal institutions to record their observations, and they noted that chiefs were both the political leaders and the authorities in disputes. It is these published works that have served as the foundation for contemporary historians who have reconstructed the dynamics of the system.³ Even as colonial visitors continued to record and publish their observations, however, scholarly work was undertaken. This comprehensive political/legal system was the subject of two scholarly studies by a Ghanaian in the late 19th century and early 20th centuries. J.M. Sarbah, a political leader of the Gold Coast educated in England, published his first work entitled *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast* in 1897. This was followed by his second book in 1906: *Fanti National Constitution: A Short Treatise on the Constitution and Government of the Fanti, Asanti and Other Akan Tribes of W. Africa*. J.B. Danquah, another native of Ghana educated in Britain, published *Akan Laws and Customs, Cases in Akan Law*, and the *Akim Abuakwa Constitution*, all in 1928.⁴ In the same period R.S. Rattray, the British commissioner and anthropologist in the British colonial office, published *Ashanti* in 1923 and *Ashanti Law and Constitution* in 1929, as well as half a dozen other volumes. Today these works continue to be recognized and utilized, both by chiefs but also by the Supreme Court in relevant cases. This kind of indigenous system was not widespread in Africa, of course, and documentation such as that listed above did not occur in most colonial sites.

Although these differences resulted in very different outcomes, the British utilized the indigenous system of law for governance under colonial rule, and called the policy "indirect rule." They applied the label, "native law and courts" or, "Native Tribunals" to the indigenous system as it was still operated by chiefs and local people. The colonizers also introduced British law and courts as featured in the *LIFE* magazine article. To accommodate the cultures of the native peoples when they utilized the British style courts, however, the British introduced something they called *customary law*, selected legal practices that the British felt were consistent with indigenous culture. These "laws" were to be incorporated into the British style courts and applied as relevant.

A brief summary of the introduction of British law shows that the Gold Coast Colony was formally recognized by the British in the Bond of 1844, but that the influence of British law began even earlier. In 1874 common law and other doctrines were officially introduced, while the use of local customary law alongside British common law was recognized by the British authorities in the Supreme Court Ordinance of 1876. The Native Jurisdiction Ordinance of 1883 sought to regulate the powers and jurisdictions of native authorities, and the Native Courts (Ashanti) Ordinance of 1935 established the jurisdiction of chiefs' courts over civil and criminal cases in which the parties were natives (Allott, 1994; 1957; Gocking, 1997; Sinitsina, 1994; 1987).

As a consequence of these several categories of law classified and labelled by the British, and also due to the differences in the regions of Africa which often go unrecognized, terminological

³ See Akyeampong (1996), McCaskie (1995; 1998), and Wilks (1975) throughout for discussion of the works published or recorded by early observers in Ghana that include documentation of the legal practices. In addition to the major works, two others are valuable sources: Decima Moore and Major F.G. Guggisberg, *We Two in West Africa*, and Mary Kingsley, *Travels in West Africa*. (1993/1897: 201).

⁴ In some instances the term *handbook* is substituted for *constitution*. (See Rathbone, 2000 Bibliography).

confusion has developed with regard to legal categories. The Ghanaian people have rejected the term "Native" to apply to their indigenous courts and have selected the terms "custom," "customary courts and law," and "chieftaincy," to refer to all matters pertaining to the practices of indigenous Akan culture. However, the terms "custom," "customary law," or "customary courts" are confusing because of the different purposes they serve. One purpose directs attention to the official courts of the state and their incorporation of indigenous legal concepts into Western style justice; the other directs attention to local legal practices as implemented through indigenous forms (customary courts and procedures). These purposes reflect and parallel the occupations of lawyers and anthropologists/sociologists. Much discussed by lawyers and legal scholars of Africa and other regions of the world, these differences continue to cause confusion well into the present. Generally the lawyers' purpose is to establish a body of customary law that can be administered or supported by the legal institutions of the state and generalized for all litigants (used in the courts as guidelines), whereas anthropologists/sociologists attempt to comprehend and document the legal institutions and processes in a particular society, independently of their links to the state and independent of any application. Gordon Woodman, a British legal scholar of West African law, explains that the investigator of customary law may go either to the court records where judicial decisions set out principles of customary law, or to the villagers and townspeople, but there is disagreement about which is the better method. In any case, however, the two different approaches will not yield the same results, so he argues that the courts and the fieldworkers should each give up any pretense to exclusive validity with regard to the term (Woodman, 1994/1969; Roberts, 1994/1971; Allott, 1994/1953; 1957). These dual definitions continue to create misunderstandings, making it necessary to clarify the disciplines and purposes of any individual scholar, and to investigate just what it is that ordinary people refer to when they use these terms. Addressing the terminological issue and regional differences, Sally Falk Moore (who worked in East Africa) argues that the rules and practices of customary law differ from one place to another and from one period to another and therefore "the unit of analysis in the study of such interdigitations must encompass both local and supralocal entities, and it must do so within a historically conceived framework" (S.F. Moore, 1989: 299-300).

Other contemporary legal anthropologists echo this emphasis. Sally Engle Merry points to the importance of institutions in the continuity of legal systems:

... historical processes, particular cultural conceptions and practices become embedded in politically and economically powerful institutions such as legal systems (Merry, 2001: 46).

The interaction between continuity and change is especially evident in institutions and particularly relevant to the Asante. Rattray was aware of the changes imposed by the British and was not optimistic about the survival of the indigenous institutions. He reflected as follows:

In introducing indirect rule into this country, we would therefore appear to be encouraging on the one hand an institution which draws its inspiration and validity from the indigenous religious beliefs, while on the other hand we are destroying the very foundation upon which the structure we are striving to perpetuate stands. Its shell and outward form might remain, but it would seem too much to expect that its vital energy could survive such a process (Rattray, 1969/1929: ix.).

Contrary to Rattray's expectations, however, the vital energy has remained, but we must look further into the cultural history to account for this continuity. T.C. McCaskie, political historian of the Asante argues, "that the record must not only be recuperated... but must also now be interrogated at the highest sustainable level of analysis" and he proceeds to recuperate and interrogate the record with regard to the philosophy that accompanies the juridical system of the Asante (McCaskie, 1998: 42). His "Custom, Tradition and Law in Precolonial Asante," effectively interrogates the body of practices entitled Custom from the point of view of the construction of the jural superstructure that forms its foundation and identifies the relationship between law and identity for precolonial Asante citizens.

Established in the late 17th century at the inception of the state when the Asante defeated the neighbouring Denkyira who had previously ruled over them, this superstructure integrated the

legal, political, religious, and kinship systems into one, making it possible for the state to assume "discretionary control over the arena of jural corporateness" (1998: 36). McCaskie identifies as "operational premises," the rules and conventions that formed the basis of the social order *prior to the inception and elaboration of the Asante state*. These were directed by matrilineages and matriclans and included *the maintenance of jural corporateness and the resolution of conflict by consent and arbitration* (emphasis mine). Jural corporateness, "in effect the identity of *being an Asante with citizen rights*," was removed by the new superstructure from the purview of the lineage ordering of society and transferred to the agencies of the state.

According to the record, the superstructure was announced by the powerful priest, Komfo Anokye, also credited with bringing down the Golden Stool (the symbol of the Asante nation) from heaven, and took the form of 'Seventy-seven National Laws.' The Asantehene was charged with their enforcement (McCaskie, 1998: 28). Characteristic of this body of custom was an epistemological division between the essential and the contingent, expressed as *aman mmu*, immemorial custom (that which was not subject to fundamental change by legislative enactment), and *aman bre*, jural custom (that which might be adjusted by legislative act) (30). The state transferred jural corporateness to itself by codifying *aman mmu* and placing jural corporateness at its heart, and then making the state (in the person of the *Asantehene*) the guarantor of this arrangement, and assuring that it would not undergo change by guaranteeing the inviolability of *aman mmu* (34-36). As noted above, the process of conflict resolution by consent and arbitration was linked to jural corporateness (lineage identity) which was not subject to modification, but McCaskie argues that conflict resolution was considered one of several *contingencies* of jural corporateness, and therefore it was subject to legislation that would adjust matters relating to aspects of the social order (33).

Throughout the 18th and 19th centuries much of the attention of the *Asantehene* was taken up with the processes of monitoring and modifying that segment of jural custom defined as *aman bre*, as the state was "relentlessly interventionist in relation to" the social order. Moreover, in addition to negotiating the relationship between the Asante state and the social order in the 19th century, the king and the administration were engaged in battle with the British until they were finally defeated as the century came to an end. The British then exiled the *Asantehene*, the *Asantehemaa* and their entourage to the Seychelles for twenty-four years (1900-1924).⁵

Upon the return of the *Asantehene* the British personnel in Asante worked together with the *Asantehene* to restore kingship and chieftaincy, under British control. Although the institution was affected and transformed by colonialism and struggled through the early years of independence and the establishment of a modern government, it has survived and proven to be relevant in contemporary social life. That this should be the case is the result of a complex set of factors, according to Maxwell Owusu, including "the intrinsically familial, democratic, and popular character of the institution" (Owusu 1987: 169). It is its popular character that concerns us now – its continual presence as an institution which attracts participation from many segments of Asante society.

Power and the Popular

In her insightful article on popular legal culture, Barbara Yngvesson explains that anthropologists interpret legal culture as a local phenomenon, invented, negotiated, or made in local settings. Yet she states that this approach, known as interpretivist, fails to take adequate account of power, "the unequal distribution of the capacity to contrive reality..." and urges the incorporation of theories of power (Yngvesson 2002/1989: 188-189). These two approaches are both useful in the study of the popular Asante courts of chiefs and queen mothers where power is performed as disputes are settled in accord with law made in the local (Asante) setting. Such power is rooted in the power of naming, according to Bourdieu:

⁵ See Wilks 1975 for a full study of the Asante in the 19th Century.

Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects (Bourdieu 2002/1987: 142).

In Asante the foundation of the classificatory operations is the 77 Laws of Komfo Anoyke and the processes of *aman mmu* and *aman bre* as they have been shaped and applied over time into a body of legal practices known as *custom* today. Bourdieu (2002/1987: 142) states further that the judgment of a court belongs to the class of *acts of naming*. These judgments and other social practices of the law are the product of the functioning of a "field", the juridical field (120).⁶ In the Asante customary courts those with the authority to interrogate litigants and issue judgments constitute the elites who possess the knowledge of the juridical field and the expertise to resolve the conflicts brought before them by the commoners in accord with the reality of Asante classifications.

As for those who choose to utilize the court, Bourdieu identifies the specific efficacy of law, attributable to the work of *codification*, but observes that this efficacy is exercised only to the extent that it is socially recognized and because it corresponds to real needs and interests (144). It is this long time recognition and the correspondence to everyday life that brings litigants to the courts where chiefs, queen mothers, *akyeame* (linguists), and elders listen to them narrate their conflicts and respond to their needs with a resolution based on Custom (Asante law, codified by Komfo Anoyke for the Asante state, and modified since for contemporary social life).

Ethnographic Focus: In the Court of A Paramount Chief

In their introduction to the 2002 edition of *Law and Anthropology*, Martha Mundy and Tobias Kelly articulate the continued emphasis on the ethnographic. They conclude from the scholarship of the previous decade that it will not be a unified paradigm or object of study that distinguishes the anthropology of law for contemporary scholars, but a continuing commitment to ethnographic description that privileges process and act over doctrine and is concerned with situating legal culture in society. They place the emphasis on specific institutions and ideologies and locate them in specific cultural histories that lead to broader issues (Mundy & Kelly 2002: xviii-xix).

Having explored the cultural histories and complexities of the Asante legal practices, I want to turn to a specific court. Recognizing the performance of litigation as a site where the field of law exercises active discourse and creates a transformation in social relations through the processes and practices specific to Asante, let me identify the major roles enacted in the court so that we can witness social relations as they are enacted juridically.

The undisputed authority of a court is the chief in a chief's court or the queen mother in a queen mother's court. But like all other Asante occasions in which a chief or queen mother appears in court, he or she will be accompanied by one or more *akyeame* (*akyeame* sing.), elders, and servants, and the interaction will be very formalized. The chief or queen mother is assisted in the juridical process by these other individuals, the qualified elites, and the litigants are commoners usually, ordinary people who have developed conflicts in their daily lives. The verbal communicative practices of the Akan that characterize the triangular speaking pattern involving a chief or queen mother involve a spokesperson for the chief who is called an *akyeame* (*akyeame*, pl). At all times, a litigant speaks to an *akyeame* who relays the message to the chief, or queenmother, and the chief

⁶ According to Richard Terdiman, Bourdieu's translator, a *social field* is the site of struggle, of competition for control; it locates the issues about which dispute is socially meaningful. In the case of the juridical field, this struggle leads to a hierarchical system within the field. Much of the struggle and competition in the juridical field takes place in the linguistic, symbolic and hermeneutic world where interpretation of the texts takes place. ("Texts" here includes customary procedures as well as written texts.) (Bourdieu 2002: 112-113).

speaks to the litigant through the *okyeame* who then repeats the message to the litigant and the court. These practices are maintained for all litigants regardless of their status in society.

In his book on the *okyeame*'s role Kwesi Yankah explains that the *okyeame* is the royal prosecutor and advisor for every case and his judicial knowledge and experience will have an influence on the verdict. One of the reasons for this formal speech pattern relates to protection. *Akyeame* are considered to be spiritually potent and therefore capable of dispelling any contamination or evil directed toward the chief; if an individual has any evil intent, then, it will be cleansed by the *okyeame* because all speech must be directed to him. He is thus the surrogate focus in all interactions in the court. Not only are *okyeame* responsible for protecting their chief or queen mother, but, they also must be capable of powerful speech. They must possess the rhetorical skills for interrogating and cross-examining litigants, and they must also have the ability to express the chief's opinions and judgments in the rhetorical style that will have the greatest impact. Litigants must also show respect for and maintain distance from the chief or queen mother through bodily practices. One must remove one's sandals and drop the cloth from the left shoulder, bow as the chief or queen mother passes or to them if one passes in front of them, and avoid eye contact at all times with the chief or queen mother as that would be considered verbal aggression (Yankah 1995: 97-103).

The Juaben Stool and The Juabenhene

The court of the paramount chief of Juaben, a major town and a major stool in Asante, is an especially important site for the performance of custom and the implementation of the judicial field. The Juaben (also Dwaben) stool (Oyoko clan) was one of the original major settlements of the region, the largest of the aboriginal towns, according to Bowdich. He remarks further on its prominence in the Asante state, specifically that the "Dwabin monarchy" was founded at the same time as the Kumasi monarchy by a cousin of the first Asantehene, Osei Tutu (Boitinne) and that they were firm allies in war and equal sharers in spoil and conquest, making disagreements subservient to their policy of common interest (Bowdich 1969/1819: 232).

Other early visitors to Asante also noted Juaben's position in the hierarchy, according to Wilks, always placing it among the top rank, often first among the four or five powerful towns, and occasionally according it a unique position or recognizing its autonomy as greater than others. It was consistently included in the towns classified as the five polities of the first rank (*akan aman nnu*) (Wilks, 1975: 95, 110-119).

The current occupant of the stool, Nana Otuo Sereboɔ II, assumed the position of *omanhene* while still quite young. Shortly after he completed his Bachelor's Degree in engineering at the University of Science and Technology in Kumasi, the queenmother of Juaben, Nana Akosua Akyamaah II, (his biological mother) nominated him to become chief. The position of queen mother is defined to mean that she is the mother of the chief and the mother of all of the people in her domain. The title is, then, generally metaphorical, referring to the concept of mother as the one who holds wisdom and knowledge (especially genealogical), one who resolves disputes, and one who nominates a new chief and advises him once he is enstooled. Though both the chief and queen mother must be members of the royal family in a particular town, they are usually close relatives (aunt and nephew, cousins, etc.), but not mother and son. However, Juaben is an exception to the common practice. In the Juaben tradition one of the queen mother's actual sons is usually selected for the stool. It was the case, then, that the Juabenhemmaa, a powerful and politically astute leader, was successful in placing her son on the Juaben stool in 1971. He went through the enstoolment rituals (including confinement) and became the Juabenhene, paramount chief of Juaben.

In his 35 years as chief, he has distinguished himself as a leader. Widely respected for his leadership in traditional matters, he is equally highly regarded for his business acumen and is often characterized as an enlightened and progressive leader. To mention a few examples of his leadership he served as a member of the Constituent Assembly, (Chairman of the Business Committee), which resulted in the 1992 Constitution of the state of Ghana; he has also served on

advisory committees to the government in economic matters and on other national committees. His leadership and service extends to the National House of Chiefs where he has represented the Ashanti Regional House of Chiefs for some years, and to his Chairmanship of the Board of Governors of the Juaben Secondary School, membership on the Ghana Broadcasting Corporation Board of Directors, and a member of the Lands Commissions, as well as others. Among his most important duties is his close work with the Asantehene. Both because of the history of the relationship between the two stools and because Nana Otuo Serebo II is an effective leader and wise counsellor, he worked closely with the Asantehene, Opoku Ware, and is a close advisor of Osei Tutu II.

Generally regarded as one of the most influential chiefs in Ghana, he holds customary court once a week, at which time he wears cloth (the traditional southern Ghanaian men's dress) and hears the cases of people in his division; he also observes ritual events in Juaben, most notably Akwaseda, the day for honouring the ancestors, which occurs every six weeks. On other days of the week, however, he wears Western clothes and oversees his palm oil factory where he processes palm oil for sale on the international as well as the local market. As the recognized local leader, he has brought impressive improvements to his area (a new market complex, an improved water supply with a 50,000 gallon tank reservoir, new building plots for houses, and others planned for the near future, an electricity plant, drainage projects, a community bank, and a hospital, as well as many other projects for the city of Juaben.) These remarkable achievements came to the attention of the United Nations who recognized him with an award for his work with local farmers, the Juaben Oil Palm Outgrower Association. He received further accolades in 1996 when he and a host of friends and supporters celebrated the Silver Jubilee of his enstoolment with a grand celebration in Juaben.

The Performance of Litigation: The Court

The social organization of Asante legal culture, or, the judicial field, mirrors the hierarchical organization of Asante society. Divided into royals and commoners, only royals are qualified for the position of chief or queenmother, and royals or specially qualified individuals serve in their courts as *akyeame* (spokespersons) and elders and servants. These are people with the knowledge of custom and how it is to be administered. The majority who bring their cases to the customary courts are commoners though disputes concerning chieftaincy matters also come to the courts of the chiefs. The differences in status are explicit and are maintained through spatial relations, bodily practices (removal of sandals, dropped cloth, bow, averting the eyes), and verbal communicative practices.

At Juaben the court takes place in a large room inside the chief's palace with windows on one side. Chairs are arranged on two sides facing each other, and at one end is a platform with the chief's chair and an umbrella and a chair for the queen mother beside the chief's chair, all together creating the familiar three sided space. The *akyeame* sit on the front row on one side and elders on the front row across from them. Visitors and litigants sit in chairs behind the elders. The individual whose case is being heard and their witnesses stand in the empty space and narrate their story to the *akyeame*. The court fills with people before the chief and queen mother arrive and court begins.

The Juabenhene has eight to ten *akyeame* and numerous servants as well as another eight to ten elders who attend the court and participate in decision making. Furthermore, until his mother, the Juabenhemmaa, a pillar of strength who was well versed in custom, passed away in 1994, she sat at his left hand in every meeting of the court, also dressed in cloth. This is the traditional practice, and it signifies that the queen mother is the only person who can advise a chief in public. Every other member of the court also wears cloth to the court, and anyone who brings a case to the court should be dressed respectably, whether in traditional cloth or Western clothes.

The issues brought to the Juabenhene's court may concern chieftaincy disputes. As a paramount chief the Juabenhene has the authority to destool a chief who serves in a town in his division if it is determined that he has violated procedures or has been wrongfully placed on the stool. If he

concludes that a chief should be destooled, he will demand that he remove his sandals. With that act, the chief is instantly destooled. Such cases do come to the Juabenhene's court, but more commonly ordinary people bring a wide range of issues from everyday life to the chief's court.

Frequent problems today and in the past as well concern the use of land for farming. A large literature is devoted to problems of land tenure, land use, and boundary disputes in Africa, and Ghana is no exception.⁷ Especially difficult are the problems created by the colonial government's attempt to regulate stool boundaries and make laws regarding family use of land (Firmin-Sellers, 1996). These laws are often in conflict with customary land law and the agricultural use of land by the general population. One particularly relevant source is the dissertation by A.A. Y. Kyerematen, *Inter-State Boundary Litigation in Ashanti*. As Meyer Fortes says in the Preface, one of the strengths of this work is the use the author makes of records of disputes "and decisions of the judicial authorities from the local Native Courts through the Asantehene's Courts right up to the West African Court of Appeal." (nd.: ix-x). Disputes over land can occur between chiefs where large timber interests are at stake, or a new chief or queen mother may shift land from one family to another in defiance of decades of land use. More commonly, individuals develop conflicts over small plots of land for farming, as happened in the case discussed below.

Gender and Access to Justice

Being a matrilineal society and one that can be described as having a dual gender political organization with the institution of queen mothers, Asante are quite conscious of gender, and of the positions of women and men. Many men consider women inferior to men, especially in certain domains, and men often describe women as "weak." However, people also commonly say that women are spiritually stronger than men, and this explains the more frequent witchcraft accusations against women. Yet, unlike some societies where women are considered inferior, women can and do come to the courts of Asante chiefs and queen mothers, and when they do, they speak for themselves just as men do. They expect to receive just consideration from the courts, and they are taken seriously. Moreover, a woman is able to bring a man to court if she has reason to do so, and her case will be heard, and in most instances women are the victors (see Obeng and Stoeltje, 2002). Generally it happens that women perform in the court with greater deference, arguably because of their inferior status and minimal education; yet, what is significant is that this legal culture does provide a space where women can be heard and in which they do have access to justice in spite of their disadvantages.

The following example from the Juabenhene's court involves commoners coming to the chief for the resolution of a conflict over agricultural land. A common occurrence, these individuals are engaged in a dispute over who will use a plot of land for farming. The case demonstrates the principle of court as a meeting place where royals and commoners come together to resolve a dispute. This particular case also involves women bringing a man to court, and in this it represents the power relations of gender in a society in which men are considered superior to women, yet women are able to have a voice in court and to obtain a victory over a male adversary. The case also demonstrates the significance of customary land law as the chief controls the stool lands and therefore he has the authority to assign the land to specific individuals for use. But, this case also emphasizes the relevance of continuity with the past, since the land was assigned to their grandmothers and has remained in the family for their use ever since. Finally, it indicates the power of the judgment. The chief makes a judgment and his *kyeame* declares it, an act of naming the land for use, consistent with the codification of Asante law and how it is administered.

THE CASE: This case involves six women against one man. It is a boundary dispute. The 6 women stand and narrate their problem. They say that the defendant, a man who is present, is

⁷ The following works are a very few selections out of the large literature concerning land use that are relevant to Ghana, whether they concern disputes among chiefs or those between individuals over access to land: Bentsi-Enchill (1995/1965); Berry (2001); Fred-Mensah (2003); Parker Shipton (1994).

attempting to take over the land that was given to them by their grandmother to farm. The man says that a particular chief, a sub-chief serving under the Juabenhene, gave him the land. This sub-chief, sitting in the court at the time of the case, denied any knowledge of the case.

The women claim that they are the granddaughters of the stool; that the land was presented to them (by their grandmother) as a favour from the Juabenhene at the time of their grandmother (the granduncle of the present Juabenhene). When someone else began farming on the land, they reported it to the caretaker chief, the sub-stool chief who watches over the land for the Paramount stool (the Juabenhene). The caretaker chief sent people to confirm the claim, and to inform the man that the land belonged to the women, but despite the notice, the man continued to farm on the land. Consequently, the women, all of the same household and descendants of the grandmother, have brought their case to the court of the paramount chief, the Juabenhene to resolve it. Having made a determination about the case, the Juabenhene speaks quietly to the *kyeame* who then announces that the chief will send his representative who knows the boundaries to make certain that each person stays inside the boundaries they have been assigned and does not invade the space assigned to someone else.

COMMENTARY ON THE CASE: An educated member of the court experienced in these matters offered me the following proverbial wisdom after the case was heard: that the women will probably win the case because "women don't tell lies." To the contrary, "men will tell lies for money." Moreover, "when there is money involved, a man will try to cheat a woman, when there is no man in the house." "A man will try to take advantage of a woman because a man is stronger than a woman always." Yet, the court knows that because women tell the truth always, the women will likely win the case, and the land will be returned to them for their use.

Discussion

This court and this chief embody the history and traditions of an especially important stool, and this case engages custom as it determines land use that involves generations of one family using land for farming. In this instance we also see a modern, educated, influential chief in his role as adjudicator of local affairs. Of equal importance, we are allowed a glimpse into the dynamics of gender and women's access to justice. Before the court, the litigants and their witnesses perform the narrative themselves that tells the story of the conflict, thereby entitling it. Using the discourse of custom and following the rules of speaking in court, the authorities negotiate a resolution. When the authorities of the court have announced a decision, the Voice of Custom has been confirmed, and one or the other of the litigants has been declared guilty and must pay a fine or agree to the conditions set by the chief. In this lengthy process by which social conflict is transformed into narrative performance, submitted to the authorities for close examination and perhaps redefinition, the authorities exert their power through the interpretation of custom, and the litigants achieve the satisfaction of bringing the conflict to an authoritative body for consideration.

This formal litigation space where no words are exchanged between litigants and the chief, but where one is at all times aware of him and his queen mother sitting on a platform under an umbrella, orchestrates the display of status. Each individual performs in the role assigned them by their status. Members of the elite have different functions, depending on their status, and commoners differ as to gender, education, financial resources and other factors. Their interaction is mediated by the *kyeame* who fills the role of director and main actor, thus providing the dynamic force of the court, while simultaneously affirming the hierarchical structure of the society.

The participants accrue different benefits, but all come away with a sense of accomplishment for having performed in the court, independently of the outcome. The royals have enjoyed the opportunity to display authority and affirm their position in the community. For some this position may provide a small income, but it is the status they acquire that is the primary benefit. Not an empty display, however, members of the court are obligated to listen to the commoners relate their stories and to serve them by adjudicating their conflicts with their knowledge. For the litigants, they have the benefit of narrating their story to a body of authorities who listens and passes

judgment on the situation, of holding someone accountable for an injustice, and potentially to achieve resolution. In this judicial space, then, the interests of all who participate are served because those in positions of authority enjoy the display of their status and those who bring their disputes to the court enjoy the opportunity to tell their story and be heard, to bring someone into court to be held accountable, and to achieve resolution. In the process they are also exercising their rights as subjects of the stool, and this confirms their identity as well as their rights.

Conclusions

Although seldom identified as such, these legal practices affirm identity as a subject of the stool and a resident of Juaben and an Asante, providing a sense of cultural coherence. These interactions are possible because the concepts embodied in custom and laid down at the inception of the Asante state, which combined the operational premises of the segmentary lineage system (conflict resolution) with the principles of a centralized state (with chieftaincy as its institution) continue to serve their function, providing jural corporateness (essentially identity) within an integrated set of institutions that maintains continuity over time. Moreover, the two categories of custom laid out by Komfo Anokye allow for change to occur in the system in some domains while others should remain unaffected, thus creating space for both flexibility and stability. A more recent perspective on the dynamic of tradition and change comes from J.H. Kwabena Nketia who states:

Tradition itself is dynamic and not static, for as the Akan proverb puts it: *Ebere dane a, wodane wo ho* – when the times change, you change yourself. (Nketia 1999: 68).

This overview of the Asante legal philosophical principles establishes that performing litigation in Asante is more than simply the resolution of a dispute, but is an exercise in identity and citizenship. Utilizing the courts affirms one's position in the system even as it addresses a conflict, not only because the concepts and principles remain as the basis for the legal practices, but because the experience of a litigant, which involves enacting the role (narrating the story and showing respect) and engaging with others in specific roles, is determined by the active discourse of the court. Through its operation, the court creates a unique experience of reality, equally as influential on the litigants as the outcome of the case brought before the court.

Examining the performance of litigation in the context of Asante history and contemporary social life allows us to explore the system and discover its relevance. The example of the Asante argues that an ethnographic approach that takes account of power relations (including gender relations), and local circumstances, the required formal behaviours and historical continuities, reveals that several clusters of procedures and rules and culturally held concepts are activated in this legal culture. In the case of the Asante, these clusters of Custom permit individuals to maintain dual lives, one in the modern world which can be unstable economically and politically at any moment in time, and one rooted in Custom where status, networks, and institutions remain more stable than in modern situations. The institutions of Custom provides a context within which social and political life can flourish inside the boundaries of status and hierarchy, leadership can develop, and local needs for a social order can be maintained while it also provides a relatively secure cultural position from which to assess the degree to which the two domains connect. The clusters of Custom also bring the separate divisions or classes of the society, the royals and the commoners, together in one space where each of them enjoys some benefit from the other while at the same time the divisions are confirmed; this contributes to a continuity through time, it creates an opportunity for individuals from the different classes to encounter each other, and it fulfills the needs of both groups to occupy a position in this familiar institution. Further, the performance of litigation reveals a gender cluster whereby women, who are widely considered weaker than men, are also declared more honest than men and permitted to speak for themselves and obtain a victory over a man.

Pursuing Asante legal culture within its historical context and utilizing ethnographic methods focused on the performance of custom rather than on doctrinal categories of law and custom reveals the opportunities the customary legal system affords both elites and commoners. Additionally, it sheds considerable light on both continuity and change in the performance of

custom through litigation. Not only does the system allow for the continual making and remaking of the law in accord with custom, but it also reshapes and reinvigorates the community as individuals enact and negotiate values as well as legal and political concepts through the performance of Custom.

The beliefs, laws, practices and formal institutions such as the courts are relevant to both royals and commoners, the educated and the uneducated, those who possess power and those who do not, all of which is invoked in social relations. Not simply a set of rules and processes that invoke the past, custom and chieftaincy are expressed in forms of communication that embody relations of power; simultaneously, they offer ordinary persons the opportunity to be heard in a formal setting by authorities who possess knowledge relevant to their everyday lives and specific situations.

In this paper I have attempted to locate contemporary Asante legal practices in historical context and to provide an account of litigation in the system known as custom, as it is constructed, negotiated, and performed in the Asante setting. It is this ongoing process, focused on the performance of litigation and situated within a legal culture of longstanding and complex history, that shapes reality and identity for many Asante people. Moreover, an ethnographic and historical perspective reveals larger issues concerning the significance of power as it has been affected, adapted and is enacted through litigation, revealing access to justice in this system and how that access is implemented.

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