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Rule of Precedent

Custom and Law in Colonial Ghana

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This thesis prepared for review and comment by the history department of Fisk University. Herein is discussed the intersection between English law and Akan law during the period of British colonization, as represented in J. M. Sarbah's compilation of Fante Law and Custom. This work prepared toward a fuller understanding of legal syncretism in systems of indirect rule.

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Introduction:

In the following discussion I hope to elucidate the unique role of Ghanaian attorney J.M. Sarbah's *Fanti Customary Laws* as an authoritative statement of legal precedent. By analyzing the process of legal synthesis of "English law" and "Ghanaian law" into Anglo-Ghanaian law and contextualizing the publication of Sarbah's work, the author intends to express the importance of its role as an expression of African agency.

The legal history of Ghana[1] represents the coming together of two auspicious legal traditions. When the English first came to the shores of what would become the Gold Coast colony and then Ghana, they existed by mere sufferance, laying claim to no more than the land taken up by their forts and trading outposts. Were it not for local exigencies caused by the desire of the Fante ethnic group for allies against the belligerent Asante, the English sphere of influence might have remained restricted to the coast. In fact in 1828 the British government, after defeating the Asante in battle, intended to abandon their forts altogether, due to great difficulty in getting along with the surrounding people.[2] Previously, these disputes had gone decisively against the British, with one governor of the British settlements being killed, and two others flogged.[3] The merchants however, true to their craft, found it inexpedient to depart just when it appeared that they were in a position to receive a return commensurate with their investment and

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[1] Ghana and Gold Coast will be used somewhat interchangeably, with a tendency to use Ghana when referring to either the modern state or in an all-encompassing sense to the entire history of the region, and Gold Coast when referring specifically to the colonial period.

[2] W.E.F. Ward, A History of Ghana, (London: George Allen and Unwin Ltd, 1966), 189.
The reasoning behind leaving after winning a battle was that this would allow the British to withdraw without appearing weak.

[3] Henry Meredith, An account of the Gold Coast of Africa: with a brief history of the African Company, (Oxford: Longman, Hurst, Rees, Orme, and Brown, 1812), 175.

risk, free from the fear of Asante conquest. Beginning with Captain George Maclean's tenure as governor of the British settlers on the coast (1830-1836), the British, at the behest of Fanti elites, began to assume a greater though limited role in the affairs of their African neighbors.[4] Overtime, Maclean's successors began to expand this voluntary interaction into a system of indirect rule which got progressively more authoritative as time went on.

Analysis:

Indirect rule as opposed to full-scale settler colonialism presented unique challenges for British administrators. In the first place, as African elites never tired of reminding their would-be colonizer, they had never formally been conquered and therefore from a constitutional perspective, their relationship was that of equals.[5] The root of this discrepancy can be found in the two documents which formalized the relationship which Maclean had initiated. On the British side, the Foreign Jurisdiction act of 1843 authorizes British officer to exercise any power they have already or would in the future exercise: "*in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory."* When this language is compared to the "Bond of 1844" concluded between the British authorities at Cape Coast castle and an assembly of Fante chiefs the roots of conflict are apparent.[6] The latter

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[4] John M. Sarbah, "Maclean and Gold Coast Judicial Assessors," Journal of the Royal African Society, 9, no. 36 (1910): 349-359,

[5] John Mensah Sarbah, Fanti Customary Laws, (London: Frank Cass and Co. LTD, 1968), vi.
G.E. Metcalfe, Great Britain and Ghana: Documents of Ghana History, (London: Thomas Nelson & Sons Ltd, 1964), 475.

[6]The use of the term "chief" here is used notwithstanding J.E. Casely-Hayford's critique of the indiscriminate use of the term by foreigners in *Gold Coast Native Institutions*. Unfortunately, it would be inexpedient to critique every use of the term in primary sources to determine whether a chief, king, headman, or other elite is being referred to. Therefore, except where otherwise denoted, I adhere to the standard though greatly inadequate usage.
J.E. Casely-Hayford, Gold Coast Native Institutions, (London: Sweet and Maxwell Limited, 1903), 63.

document merely authorized the British authorities to continue to try criminal cases as they had previously done, which was the full extent of their exercised authority, stating: "*Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland,……we.....do hereby acknowledge that power and jurisdiction."* The Bond, which the Fante rulers and the British officers signed, certainly did not posit the type of expansive and greatly expandable authority which the Foreign Jurisdiction act firmly put in place. The bond sets the groundwork for legal pluralism by stating that: "……*offences, will be tried and inquired of before the Queen's judicial officers and the chiefs of the district, moulding the customs of the country to the general principles of British law."* Prince J.H. Brew of Dunkwah summed up the perspective of certain Ghanaian elites when he said *"The jurisdiction, rights and powers hitherto exercised by the Government over and in the Gold Coast Protectorate have been 'by usage, sufferance, and usurpation.*'[7] In addition, indirect rule, by definition implies that homegrown institutions survive in order to be controlled. The limits this imposed on the British as they sought to advance their vision of colonial control are further elucidated in Thomas Spear's *"Neo-Traditionalism and the Limits of Invention in British Colonial Africa."* In essence, African institutions could not be reduced to mere puppets of British power (even after the British in the late 19th early 20th century gained the capacity to impose themselves by force.) To do so would have rendered the Africa institutions utterly useless as effective loci of authority indigenous authority through which the British could exercise power, a degree of independence

[7] G.E. Metcalfe, Great Britain and Ghana: Documents of Ghana History, (London: Thomas Nelson & Sons Ltd, 1964), 475.

in theory and in fact had always to be extended to them, lest the people lose all regard for their "natural rulers" in which case anarchy would ensue, and indirect rule would collapse.[8]

It was in this environment, with Ghanaian elites on one side acting on the legal assumption, based on the Bond of 1844 that they had not been conquered, and had ceded nothing to the British but the right to try criminal cases alongside African elites, that John Mensah Sarbah wrote his groundbreaking work, of legal advocacy and comparative jurisprudence. *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,* published in 1897, is a combination treatise toward on the ethics of the Fante ethnic group, and an attempt at creating a standardized body of legal precedent for the application of Fante custom as law in British courts. The Bond of 1844 established: *moulding the customs of the country to the general principles of British law*...as a matter of Anglo-Ghanaian judicial policy. This posed a very basic problem. How does one ascertain what customs are sufficiently binding to justify enshrinement in law? Initially a loose complex of "expertise" came into being to determine what custom was law. Parties to disputes would produce their own experts to attest to the centrality of a custom "from time immemorial," in addition judges had their own experts which they would consult, as well as works of ethnography created by Europeans. Eventually it came to be understood that repeated citation by European courts *made* customs legally binding.[9] As the British increasingly marginalized

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[8] Thomas Spear , "Neo-Traditionalism and the Limits of Invention in British Colonial Africa," The Journal of African History, 44, no. 1 (2003): 3-27,

[9] A. Hannigan, "Native Custom, Its Similarity to English Conventional Custom and Its Mode of Proof," Journal of African Law, 2, no. 2 (1958): 101-115,
A.N. Allot, "The Judicial Ascertainment of Customary Law in British Africa," The Modern Law Review,, 20, no. 3 (1957): 244-263,

African institutions in the judicial process, the idea of speaking custom into law by operation of the wheels of justice ultimately left the power of ascertaining custom largely in English hands; with no standardized corpus of precedent. Incalculable progress toward solving this problem was achieved by the publishing of J.M. Sarbah's work. *Fanti Customary Law* begins as a detailed, ethnographic study which offers a philosophical framework for the customs cited in the latter section. The rest of the work is a compilation of 87 cases which represent the "correct" application of Fante law by British courts. The authority with which his work was treated renders it essentially a ready-made body of precedent. By ascertaining in scholarly fashion what customs were binding law and which court cases rendered them so, Sarbah gave those who would resist the encroachment of British as well as those who would desire a comprehensive authority for their application of customary law an invaluable tool.[10] The book itself serves doubly as a source, most obviously, as was the author's intent, the book illustrates how and when certain "customs" came into being as law. [11] As a primary source, the cases contained therein are worthy of examination because of their forming the first standardized body of precedent for the Gold Coast legal system. As a set of cases, tried in British courts applying customary law, which was compiled by and African, the book itself is an instance of legal syncretism.

It is important from the outset to make the following point about usage. Rather than risk creating a false hierarchy between what is typically called English law or Common Law and

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[10] Hollis Lynch, "Fanti Customary Laws," Africa: Journal of the International Africa Institute, 39, no. 2 (1969): 196-197,
H.M. Feinberg, "The Akan Doctrine of God by J.B. Danquah; Fanti Customary Laws by John Mensah Sarbah; Fanti National Constitution by John Menah Sarbah," African Historical Studies, 2, no. 1 (1969): 149-151,

what was during the colonial period called “native law” or “native custom” or “customary law” all these terms will from hereon be rejected. Aside from the perjorative implications of the term “native” the general inaccuracy of the terms “native law” “native custom” and “customary law” are rendered problematic by a nuanced understanding of the Anglo-Ghanaian legal situation. The term customary law rather than striking a reasonable middle ground between calling European legal ideas “law” while calling African legal ideas “custom” actually adds to the problem of terms by failing to distinguish between custom and law. To simply call all Ghanaian legal ideas “law” does not solve the problem because, as Tom McCaskie shows in *Custom, Tradition and Law in Pre-Colonial Asante,* Ghanaians themselves distinguished between negotiable ideas (*aman bre)* and fundamental notions (*aman mnu)*.[12] As was previously stated, the general legal understanding in colonial Ghana was that there was “native custom” “English Law” and “native law”. Native custom, according to British authorities, became native law through recognition by the courts. This conception is not worthy of being reproduced here through the terms utilized, because it posits that beliefs and convictions held and defended by whole nations of African peoples from time immemorial only achieve the dignity of being called “law” by the approbation of minor European colonial officials.[13] Therefore, the usage of African and European actors notwithstanding, the term “precedent” will be used in place of the more vague and ill-defined terms “custom” and “law”[14] as in “English precedent, and “African/Ghanaian Precedent.

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[12] "Custom, Tradition and Law in Precolonial Asante," Sovereignty, Legitimacy and Power in West African Societies: Perspectives from Legal Anthropology, ed. Werner Zips (Hamburg: LIT, 1998), 25-47.

[13] A. Hannigan, "Native Custom, Its Similarity to English Conventional Custom and Its Mode of Proof," Journal of African Law, 2, no. 2 (1958): 101-115,

[14] This usage may be varied where there is in fact a justified reason why one idea is called “custom” and another “law”, such a variance will be noted.

The first of the works which I will consider is J.E.Casely-Hayford's *Gold Coast Native Institutions,*

In order to elucidate the process of legal syncretism, and how English precedent and African precedent by being concurrently negotiated gave rise to an Anglo-Ghanaian body of law which would become Ghanaian law at independence in 1957, it is useful to examine a representative case from J.M. Sarbah's *Fanti Law and Customs.* The case is titled: *In re* ISAAC ANAMAN Deceased. This case decided in 1894 in an English court concerned the question of the enforceability of verbal wills and whether such could modify the legal rights of a widow. The facts of the case are these: Jacob Anaman claimed that Isaac Anaman on January 31, 1893, made a verbal testament to Jacob concerning the dispensation of his estate, and in doing so charged Jacob with the execution of his wishes. The next day Isaac died. When the deceased man's widow petitioned the court to grant her the administration of her husband's estate, Jacob Anaman claiming authority as the executive of Isaac's estate, requested the court to incorporate the content of Isaac's verbal will into the grant by which Isaac's widow would gain administration of the deceased's estate. It is interesting to note that in this case, J.M. Sarbah himself represented the petitioner J. Anaman. Sarbah contended that pursuant to section 19 of the Supreme Court ordinance of 1876, which enshrined the right of Ghanaians to have their cases settled according to the "laws and customs" then existing in the colony, the act's creation of a national supreme court notwithstanding. Sarbah therefore argued that as all parties to this case were Ghanaians, "native law", which affirmed the validity of verbal wills, must prevail and therefore his client's claim to be the executor of the estate in question must hold. The presiding magistrate rejected Sarbah's argument on the ground that Mr. and Mrs. Anaman were married according to the

provisions of the *Marriage Ordinance of 1884.* The ordinance provided for marriage according to English precedent which made no acknowledgement of verbal wills. Therefore, their marriage being made according to English precedent, the meaning of *"intestate"* contained in the Marriage Ordinance was binding in this case. As someone having only a verbal will would be considered intestate under English precedent, Isaac Anaman was therefore intestate and without executor. Therefore, grant was made to Mrs. Anaman without encumbrance.[15] This case is informative for several reasons. One, that Sarbah included a case in which he in his capacity as a barrister failed to secure a favorable ruling for his client. That Sarbah would nonetheless cite this case as fit to be enshrined in precedent speaks to a fascinating disinterestedness on his part which perhaps helps to explain the reverence with which this work was treated as a legal authority. Furthermore, the determination of which legal sphere would take precedent, an exercise which judging by the cases in Sarbah's text had to be undertaken very frequently, is of interest. Typically, Ghanaian precedent was most likely to be applied in cases dealing with issues on which English precedent was silent, vice versa for English precedent. This case sheds light on how articles of English precedent came to have effect in colonial Ghana, while Ghanaian precedent became universally binding law by being affirmed as such by English courts, English precedent became law by being proclaimed by the governor as statute with the "advice and consent" of the legislative council, composed of Ghanaian elites. It is worthy of note that neither side of the Anglo-Ghanaian equation had its legal precedent enshrined in the emerging body of colonial law *a priori.*

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[15] John Mensah Sarbah, Fanti Customary Laws, (London: Frank Cass and Co. LTD, 1968), 221.

Conclusion:

As a nationalist document, Sarbah's *Fanti,* is not without flaw. While attempting to standardize the body of Anglo-Ghanaian precedent with reference to Ghanaian custom, Sarbah's corpus of cases still posits the English courts as the fundamental sites of judicial creation. Later works in this tradition, however, move even further in the direction in seeking to privilege Ghanaian precedent and legal ideas. J.B. Danquah's *Cases in Akan Law,* is written in the mode of Sarbah, only based on the proceedings of so-called "native courts." In so doing, Danquah further challenged the European power to speak "custom" into "law." Between Sarbah and Danquah came J.E. Casely-Hayford's *Gold Coast Native Institutions* which contributed to the tradition started by Sarbah and did not appear to meaningfully modify it, being again, a compendium of cases decided in English courts.

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In conclusion, the history of the development of Ghanaian law is the story of the competition between, and the synthesis of, two highly developed legal traditions. The process by which Ghanaian elites negotiated the reality of British power in light of the twin reality of indirect rule represents a rich instance of African agency. While *Fanti Customary Laws* is nominally an example of legal ethnography, it is in reality a nationalist document.

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