WRITE-UPS

RESISTING JURISTOCRACY IN GHANA: WHY THE SUPREME COURT'S DECISIONS ON PROPERTY RIGHTS OF SPOUSES HAVE NO CONSTITUTIONAL BASIS

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ABSTRACT

The 1992 Constitution of the Republic of Ghana, in its Article 22(2), tasked Parliament to, "as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses." It has been judicially acknowledged that Article 22 (3) (a) & (b) of the Constitution gives an inkling of what the said legislation should contain. Clearly, the lifeblood of the provisions in Article 22 (3) (a) & (b) is drawn from the legislation to be enacted under clause (2) of the same Article. Over three decades since the coming into force of the Constitution, Parliament has inexplicably failed to enact a law to regulate the property rights of spouses. To do justice to spouses who throng the judicial corridors to vindicate their property rights upon divorce, the Supreme Court has not only lamented the parliamentary sluggishness to enact a law on the property rights of spouses, but it has, under the guise of constitutional interpretation, taken the plunge to judicially implement the provisions of Article 22(2) and (3) of the Constitution in the absence of any legislative framework. The Supreme Court has evolved equitable principles for the distribution of matrimonial property upon divorce without any underlying statutory framework. This article accuses the Supreme Court of unwarranted incursions and trespass into domains specifically committed to Parliament by judicially implementing the provisions of Article 22(2) and (3) of the Constitution without an underlying legislation.. It is argued that the Constitution does not create any substantive right known as 'property rights of spouses', and that the interpretation placed on Article 22(2) and (3) of the Constitution by the Supreme Court is wholly unjustifiable and unsupported by the letter and spirit of that provision. It is the firm view of the present author that when Parliament went to sleep, the Supreme Court assumed legislative functions and purported to implement the provisions of Article 22(3) of the Constitution through constitutional interpretation. The article concludes that the decisions of the Supreme Court on property rights of spouses purportedly based on the provisions of Article 22(2) and (3) lack constitutional anchorage. The Supreme Court has succeeded in weaponising its interpretive jurisdiction, and dangerously reduced our democracy to juristocracy – 'a government of unelected judges'. The article adopts a doctrinal analysis of the relevant provisions of the Constitution, judicial decisions and opinions of jurists on the subject.

Key words: divorce, property rights, jurisprudence, juristocracy, fundamental human rights, constitutional interpretation, legislative functions, Separation of powers

INTRODUCTION

> *It would be worthwhile at this stage to mention that Parliament has till this day, not enacted legislation to regulate the distribution of jointly acquired property of spouse upon divorce, as the Constitution mandate… In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament.*[2]

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2 Quartson v Quartson [2012] 2 SCGLR 1077; [2013] 54 GMJ SC 56, per Ansah JSC

One of the doctrinal pillars of the 1992 Constitution of Ghana is the doctrine of separation of powers, which posits that all the three arms of government must keep to their respective mandates textually committed to them under the Constitution. The Constitution vests the executive authority of Ghana in the President, and this extends to the execution and maintenance of the Constitution and all laws made under or continued in force by the Constitution.[3] The legislative power of Ghana is vested in Parliament.[4] What this means is that it is only Parliament that has the power and authority to enact laws. The judicial power of Ghana is vested in the Judiciary; and the President and Parliament or any organ or agency working under them are expressly prohibited from exercising final judicial power.[5] Thus in Ghana, justice is administered in the name of the Republic by the judiciary, which is independent and subject only to the Constitution.[6]

The Supreme Court of Ghana is the only body constitutionally mandated to interpret the Constitution.[7]The power of constitutional interpretation is so crucially fundamental to our understanding and the growth of constitutional law that, without it the constitution or a large part of it would remain a dead letter without meaning. In the execution of this noble constitutional agendum, the Supreme Court has been committing inexcusable and unconstitutional trespasses into domains constitutionally reserved for Parliament. This judicial conduct of the Supreme Court is what is euphemistically referred to as judicial activism. The burden of this article is to expose the judicial incursions and trespasses committed by the Supreme Court into legislative domains specifically reserved for Parliament, particularly regarding property rights of spouses.

All the courts in Ghana have the power to apply the clear text of the Constitution, but where there is the need to interpret any of the constitutional provisions, it is only the Supreme Court that has the power to do that. In the exercise of its power of interpretation, the Supreme Court has the power to restrict or enlarge the meaning of the legal text. The judicial decisions wrought on the anvil of interpretation become controlling for future cases, sometimes to the extent that those decisions virtually supplant the enactments themselves. The Supreme Court has interpreted various aspects of the Constitution by reading in words, deleting words, limiting the meaning of words, enlarging the meaning of words, correcting errors and generally filling in gaps. While all these are permissible, the Supreme Court does not have the power to do what has been clearly assigned to be done by Parliament. In the old case of *Marbury v. Madison*,[8] the law has been clearly settled that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." But the interpretive function of the court cannot be exercised unless there is some constitutional or legislative text that calls for interpretation. We know that the courts are to keep from the arena of legislative functions. This is the dictate of separation of powers.

3 Article 58(1) and (2) of the Constitution
4 Article 93(1) of the Constitution
5 Article 125(3) of the Constitution
6 Article 125(1) of the Constitution
7 Article 130(1)(a) of the Constitution
8 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803), at p.177

JUDICIAL CREATION OF PROPERTY RIGHTS OF SPOUSES

Perhaps, article 22 of the Constitution has suffered the worst form of violent textual abrasions and fractures wrought under Supreme Court's interpretive power. The framers of the Constitution clearly saw the need to provide a legal framework for spousal right to property. Indeed, the framers of the Constitution intended to create some rights to be known as "Property Rights of Spouses" under Article 22 (2) of the Constitution. The property rights of spouses envisaged under the Constitution are of two species. The first category of property rights of spouses, contained in Clause (1) of Article 22, deals with the right of a spouse to a reasonable provision out of the estate of a deceased spouse. The exact words of this provision are these: *"A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."* Thus, this provision relates to the right of a spouse to be given a reasonable portion of his or her deceased spouse's estate. This is a substantive constitutional right which is enforceable only upon the death of one spouse. There is little or no trouble at all in understanding the remits of this right.

The second specie of property rights of spouses is the right of spouses to share matrimonial property upon divorce. Concerning this second specie of spousal rights, the Constitution did not expressly create any substantive right in a spouse to a share of matrimonial property upon divorce. What the framers of the Constitution did was to simply task Parliament to enact a law to regulate those rights. Clause (2) of Article 22 provides thus:

> Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

What is clear from this provision is that the Constitution did not create any property right of spouses upon divorce. Rather, the provision mandated Parliament to *"enact legislation regulating the property rights of spouses."* It is submitted that until Parliament enacts a legislation to regulate the property rights of spouses pursuant to Article 22(2) of the Constitution, it can be said there is no statutory law on the subject. Unlike the other fundamental human rights expressly created and enshrined in Chapter Five of the Constitution, the right of spouses to matrimonial property upon divorce was intended to be created in a statute to be enacted under the authority of Article 22(2) of the Constitution. Until that enactment is made by Parliament, there is no such right as property right of spouses upon divorce. In the whole of its Chapter Five, the Constitution did not leave any right to be created by Parliament in a separate enactment, except the property rights of spouses. Property rights of spouses are therefore not part of the fundamental human rights expressly created and enshrined in the Constitution. That right is required to be created and regulated in a legislation to be made by Parliament.

Clause 3 of Article 22 of the Constitution gives an idea of the legislation envisaged by the framers of the Constitution under clause 2 of Article 22. It provides as follows:

> (3) With a view to achieving the full realization of the ***rights referred to in clause (2) of this Article -***
>
> (a) Spouses shall have equal access to property jointly acquired during marriage.

> (b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage. [emphasis supplied]

The unimpeachable import of these provisions is that the law expected to be enacted by Parliament would give spouses two distinct but related rights, viz, (1) equal access to property jointly acquired during the marriage, and (2) equitable share of property jointly acquired during the marriage upon divorce. It is important to observe that these rights under clause (3) of Article 22 were never created in Clause 2 of Article 22; rather, they were merely "*referred to in clause (2)*" of Article 22. This 'reference' relates to the rights to be created under the law which Parliament was instructed under clause (2) of Article 22 to enact "as soon as practicable after the coming into force of this Constitution". The fundamental question that begs an answer is: since the coming into force of the Constitution, has Parliament enacted any law to regulate the property rights of spouses in Ghana? The answer is obviously NO! The plain meaning of Article 22(3) of the Constitution is that the rights referred to in that provision can never be enforced until an enactment is made to provide for them by defining their nature, remits and effects. In *Mensah v Mensah,*[9] Dotse JSC assigned the proper meaning to Article 22(3) of the Constitution when he opined: "*It is also important to note that Article 22 (3) (a) & (b) give an inkling of what the said legislation should contain.*" The learned judge also said this provision gives a "*directive*" which Parliament "*has as yet not complied with*". Thus, far from creating an enforceable right, Article 22(3) of the Constitution only gives a 'hint', 'cue', or 'clue' of the law to be made by Parliament. That provision merely offered a legislative guide to Parliament as to the nature of the right to be created in the intended legislation; it never created any right that may be enforced judicially in the absence of the parent statute to be enacted.

What is clear is that Parliament has failed to carry out the directive so expressly given under Article 22(2) of the Constitution. The least said about this inexplicable inaction of Parliament, the better. Judges of the Supreme Court have openly lamented the sluggish and lackadaisical attitude of Parliament towards the implementation of the important legislative duty cast on them by Article 22(2) of the Constitution. Writing for the Supreme Court in *Mensah v Mensah,*[10] Dotse JSC observed:

> From the above provisions of the Constitution, it means that, the framers of the Constitution mandated the Parliament to enact relevant legislation to regulate the property rights of spouses. It is a sad reflection that since 7th January 1993 when this 4th Republican Constitution came into force, the above directive has as yet not been complied with. Suffice it to be that, there is now before Parliament, a Bill in fulfillment of this Article 22 (2) of the Constitution. It is also important to note that Article 22 (3) (a) & (b) give an inkling of what the said legislation should contain.

Similarly, in *Quartson v Quartson,*[11] Ansah JSC lamented the inaction of Parliament as follows:

It would be worthwhile at this stage to mention that Parliament has till this day, not enacted legislation to regulate the distribution of jointly acquired property of spouse upon divorce, as the Constitution mandate. This fact will be revisited later, but for now it would suffice to mention that due to Parliament's inaction the courts have, over the years, carved out the

9 [2012] 1 SCGLR 391
10 [2012] 1 SCGLR 391
11 [2012] 2 SCGLR 1077; [2013] 54 GMJ SC 56

principle of substantial contribution as the litmus test for determining whether or not a case can be made for joint ownership of property.

Continuing his lamentation, the learned judge said:

> In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament.

Adding his voice to the chorus of judicial lamentation on the inaction of Parliament to effectuate the property rights of spouses, Date-Bah JSC observed in Arthur (No. 1) v Arthur (No. 1):[12]

> It should be stressed that the preferable route to giving effect to Article 22(3) of the 1992 Constitution is for Parliament to discharge its obligation under Article 22(2) to enact legislation that provides for the courts a comprehensive framework that guides their decisions on the property rights of spouses… It is in the absence of Parliament's implementation of the principles embodied in Article 22(3) that this Court has sought to implement them through constitutional interpretation in *Mensah v Mensah* (supra).

In her dissenting opinion in *Adjei v Adjei,*[13] Dordzie JSC did not hide her disappointment in Parliament's failure to enact a legislation on the property rights of spouses. At page 73 of the record, the learned judge underscored the sad reality that the Parliament of Ghana had failed to comply with Article 22(2) of the Constitution almost 30 years after the coming into force of the Constitution. The learned judge explained that the court, being an institution committed to doing substantial justice to the citizenry of this nation, had taken steps to develop equitable principles of determining property rights of spouses, bearing in mind the changes in social values and practices that modernisation had introduced to societies globally.

What is clear from the above observations by the Supreme Court judges is that over three decades after the coming into force of the Constitution, Parliament is yet to enact a legislation to provide for the property rights of spouses in Ghana. It is worth-noting that in 2007, Parliament awakened from its long slumber and drafted the *Property Rights of Spouses Bill*. Sadly, Parliament fell into slumber again and the Bill was never passed into law. The purpose of the Bill is captured in the Memorandum to the Bill as follows:

> The purpose of the Bill is to regulate the property rights of spouses in accordance with article 22 of the Constitution, particularly clauses (2) and (3). ***The Constitution imposes an obligation on Parliament under article 22 to enact legislation to regulate the property rights of spouses.*** The Constitution has been in force since 7th January, 1993 and though the preparation of the Bill has been protracted, it is to fulfill the obligation of the supreme law that this Bill has been proposed in the best interest of spouses [emphasis supplied].

The clear import of the highlighted sentence is that, rather than creating a substantive right under Article 22(2) of the Constitution, the framers merely imposed an obligation on Parliament to enact a law to regulate the property rights of spouses. This does not admit of any ambiguity at all. The

12 [2013-201] SCGLR 543
13 [2021] 172 G.M.J 1 SC

Memorandum states that Parliament had attempted to effectuate the provisions of Article 22(2) and (3) of the Constitution by drafting that Bill. Since the Bill was never passed into law, the provisions of Article 22(2) and (3) remain legally numb and incapable of implementation judicially without a legislative framework. In the absence of a legislation to regulate the property rights of spouses in Ghana, the Supreme Court decided to take the bull by the horn to implement the policies imbedded in the provisions of Article 22(2) and (3) of the Constitution. Thus, the Supreme Court decided not to throw its hands in despair when faced with cases involving the rights of spouses to property believed to be matrimonial property. By the power of constitutional interpretation, the Supreme Court has sought to formulate principles to effectuate the property rights of spouses in Ghana. Thus while Parliament slept, the Supreme Court 'inherited' legislative power and started making its own rules, principles and guidelines to implement the directive in Article 22(2) and (3) of the Constitution. And the Supreme Court has comfortably implemented these provisions through Constitutional interpretation. As Date-Bah JSC observed in Arthur (No. 1) v Arthur (No. 1),[14]

> It is in the absence of Parliament's implementation of the principles embodied in Article 22(3) that this Court has sought to implement them through constitutional interpretation in *Mensah v Mensah* (supra).

By judicially deciding to implement the principles embodied in Article 22(3) of the Constitution without any legislative framework, it may be said the Supreme Court has trespassed into domains exclusively committed to Parliament. In other words, by its decisions rendered pursuant to Article 22(2) of the Constitution, the Supreme Court has usurped the legislative role of Parliament. Clearly, it is submitted that the decisions of the Supreme Court elaborately wrought under the authority of Article 22(2) of the Constitution constitutes judicial legislation or judicial lawmaking. The Supreme Court has assumed legislative functions. It is not permissible for the Supreme Court to do what is properly and exclusively the mandate of Parliament on the altar of expediency. It is unfortunate that Parliament has not awakened from its slumber to carry out its obligation under Article 22(2) of the Constitution. However, it is more unfortunate that the Supreme Court has assumed legislative power conferred on Parliament. The failure of Parliament to act is no excuse for the judicial arm of government to turn itself into a legislative body. It is submitted that Article 22(2) of the Constitution imposes a legislative obligation on Parliament, not a judicial function to be executed by the Supreme Court. To borrow the words of the learned Archer JSC in *New Patriotic Party v Attorney-General*,[15]the Supreme Court is behaving *"like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it."* On the same page of the case, Archer JSC observed that: "The Constitution, 1992 gives the judiciary power to interpret and enforce the Constitution, 1992 and I do not think that this independence enables the Supreme Court to do what it likes by undertaking incursions into territory reserved for Parliament and the executive." In the case of *Appiah Ofori v Attorney General,*[16] Atuguba JSC cautioned that "…the supplemental role of the court in constitutional and other statutory construction must be closely watched if courts of law are not to carve out for themselves an unwarranted field of legislative power." Respectfully, the Supreme Court has been a trespasser under the provisions of Article 22(2).

14 [2013-201] SCGLR 543
15 [1993-94] 2 GLR 35, at p.49
16 (2010) SCGLR 48

As Justice Felix Frankfurter explained in his discourse on the scope of the judicial function, published in the book: *Judges on Judging* (1997) edited by David M. O'Brien at page 226, the judge's function in construing a statute

> is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in the elected legislature. The great Judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation.

It is abundantly clear that by judicially implementing the provisions of Article 22(2) and (3) of the Constitution, the Supreme Court seems to play the crucial role of bridging the gap between society and the law in a changing world. This is clear from the following words of Ansah JSC in *Quartson v Quartson,*[17] when he said:

> In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament.

In the courts' attempt to bridge the gap between society and the law, it is always important to note that it is the duty of the legislature to make the laws, and it is the duty of the judiciary to interpret the laws. This distinction is necessary for the survival of our democracy. Writing on the distinct roles of the legislature and the judiciary in bridging the gap between law and society, Aharon Barak has noted that:

> The two are branches of the state with different roles: one is legislator and the other is interpreter. Indeed, legislatures create statutes that are supposed to bridge the gap between law and society. In bridging this gap, the legislature is the senior partner, for it created the statute. But the statute itself cannot belongs to the judge. Through his or her interpretation, a judge must give effect to the purpose of the law and ensure that the law in fact bridges the gap between law and society. The judge is a partner in the legislature's creation and implementation of statutes, even if this partnership is a limited one.[18]

Barak entreats that the judge must act as a faithful interpreter of legislation. In a constitutional democracy like ours, it is imperative that the courts respect the legislative powers of Parliament. A respect for the legislative role should influence the formulation of a proper system of judicial interpretation, which would recognize the will of the legislature as an important factor in the interpretation of legislation.[19] Indeed, the Constitution is said to embody the aspirations and hopes of the people for fuller life.[20] There is no doubt that the people of Ghana wish to have an egalitarian society in which there is equality, where the rights and liberties of the people are respected. This

17 [2012] 2 SCGLR 1077; [2013] 54 GMJ SC 56
18 Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L R 19 at p 35.
19 William N. Eskridge, JR., Dynamic Statutory Interpretation 9 (1994)
20 Tuffuor v Attorney-General [1980] GLR 637 at 647

ideal must be achieved through legislation. Indeed, the people create a statute through their representatives in the legislature. The statute is designed to carry out a public policy that the legislature wishes to effect on behalf of its constituents. This policy should be taken seriously and should be given expression in the interpretation of the legislation.[21]

Since Abraham Lincoln defined democracy as 'government of the people, for the people and by the people', the global understanding of democracy recognises Parliament as the only state organ property constituted to make laws. No democracy in the world permits judges to make laws. It ought not to be forgotten that the historic decision to establish and entrench a legal regime and framework for spousal rights to property under our Constitution was taken not by the courts but by the elected representatives of the people of Ghana. It was those elected representatives who sought to extend the scope of constitutional rights to include spousal right to property. If Parliament had intended to effectuate spousal right to property through judicial interpretation, they would simply have expressly entrusted the courts with that role. Ours is a democracy in which laws are made by the people through their elected representatives. There is no place for a 'government of judges' or 'hegemony of judges' under our constitutional arrangement. Juristocracy is antithetical to democracy. The judicial power of Ghana vested in the judiciary is not without limitations. In administering justice, the judiciary is subject to the Constitution. Obviously, the Constitution does not permit the judiciary to make laws.

In a democracy, human rights require constitutional entrenchment with corresponding power on the part of the judiciary to not only enforce those rights, but also to void or derogate from any act or omission offensive to or incompatible with human rights. The judiciary cannot arrogate to itself the power to 'enact' a law which is constitutionally intended to be enacted by Parliament; neither can the courts purport to enforce a law that has not yet been enacted by Parliament merely because the policies and principles to be contained in that law accord with changing times. The failure of one organ of government to perform its mandate is no guarantee for another organ to perform that mandate not legally entrusted to it. Any attempt to do that would amount to trespass. The Supreme Court seems to enjoy an expanded interpretive jurisdiction that allows it to make laws that are supposed to be made by Parliament. The danger is that Ghana's democracy risks being subtly converted into a juristocracy – a government of unelected judges instead of elected representatives.

As Davis J., a South African High Court Judge, recently warned in *Mazibuko v Sisulu*,[22]

> Courts do not run the country, nor were they intended to govern the country…An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model.

Over the years, what the Supreme Court has sought to do is, in the words of Dotse JSC in *Mensah v Mensah*,[23] to implement the 'inkling' of a law that has not yet been made. According to Date-Bah

21 Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L R 19 at p 35.
22 Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly [2012] ZAWCHC 189 (22 November 2012)
23 [2012] 1 SCGLR 391

JSC, it is "the absence of Parliament's implementation of the principles embodied in Article 22(3) that this Court has sought to implement them through constitutional interpretation…"[24] Indeed, if Parliament had enacted an imperfect or restricted legislation to implement the property rights of spouses, the Supreme Court would be justified to make perfect or enlarge those rights through constitutional interpretation. But the situation is different. There is no statutory framework on property rights of spouses; and in the absence of any statute, what is there to be interpreted by the Supreme Court? It is easy to realise that the Supreme Court's interpretation and implementation of Article 22(3) is premised on the power conferred on Parliament under clause (2) of that Article, which power is clearly not judicial in character. Indeed, the decisions rendered under that Article have no constitutional foundation and are clearly built on nothing. As Lord Denning said in *MACFOY v. U.A.C.*,[25]"You cannot put something on nothing and expect it to stay there. It will collapse." Indeed, without a legislation made pursuant to Article 22(2) and (3) of the Constitution, any decision of the Supreme Court rendered under that provision may be likened to the proverbial house which is built in sand; it will fall.

Indeed, starting from the early case of *Mensah v. Mensah,*[26] the Supreme Court has made unwarranted incursions into the legislative arena reserved for Parliament. The danger of this judicial lawmaking lies in creating uncertainty in the law depending on which judge or court deals with the matter. Judges and lawyers acknowledge that the equitable principles evolved by the Supreme Court in their bid to judicially implement Article 22(3) of the Constitution are in complete disarray. What have been foisted on the courts in Ghana by the Supreme Court as guiding principles for determining spousal rights to property are inelegant judicial rules which are lacking in precision.

It is submitted that, the jurisprudence of equality judicially instituted by the Supreme Court under Article 22(2) and (3) of the Constitution is a naked usurpation of the legislative function under the thin disguise of constitutional interpretation. Concededly, modern judicial interpretation permits the courts to modify the text of a statute in order to make meaning out of the text. As Atuguba JSC clearly observed in *Appiah Ofori v Attorney General,*[27] "the view today is that in interpreting a statutory provision the court may, in a fit case, read words into the provision." This modern view is the golden child of purposive interpretation. But no modern concept of purposive interpretation can justify the Supreme Court's exercise of legislative function under Article 22(2) and (3) of the Constitution. Indeed, a close reading of the decisions of the Supreme Court does not suggest that the Justices understand that they have the power to implement the provisions of Article 22(2) and (3). Their only justification seems to be that once Parliament has failed to enact a legislation, the court must implement the provisions judicially. This is a wild notion of judicial power. The Supreme Court has taken purposive interpretation to limits impermissible under a democracy that thrives on the twin pillars of separation of powers and the rule of law. Purposive interpretation, in the final analysis, is not for the Supreme Court to override the legislature or tread on legislative grounds; rather, purposive interpretation, according to Aharon Barak, is intended to protect the status of the legislature as the law-making organ in a democracy.[28] As noted earlier, the Supreme Court has never sought to interpret any law made pursuant to Article 22(2) of the Constitution. That law has not yet

24 Arthur (No. 1) v Arthur (No. 1) [2013-201] SCGLR 543
25 (1962) A.C. 152 at 160; Republic v. Asogli Traditional Council And Others; Ex Parte Togbe Amorni VII (No. 2) [1992] 2 GLR 367, at p. 375
26 [1998-99] SCGLR 350
27 (2010) SCGLR 48
28 Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L R 19 at p 136

been made. And it is clear that only Parliament has the power to enact the law envisaged under that provision. Indeed, the so-called equitable principles judicially formulated under Article 22(3) of the Constitution is a façade of judicial legislation, which is wholly unacceptable in a democracy.

CONCLUSION

It is regrettable that Parliament has failed to enact any law to implement the policies and principles outlined in Article 22(3) of the Constitution. But this is not one of 'casus omissus' to be filled by judicial interpretation. The fatal failure by Parliament to enact a law on spousal rights to property is not a gap in the law to be remedied through interpretation. The remedy obviously lies in prevailing upon Parliament to enact a statute to provide for the property rights of spouses. If the Supreme Court had been faithful in their supposed interpretation of Article 22 (2) and (3) of the Constitution, they would discover that there is nothing in that article to be interpreted. The basis of any proper interpretive jurisdiction under that article would be an enactment made to regulate the property rights of spouses. It is submitted that in the absence of any enactment, the Supreme Court has no business implementing the ideals in that provision under the guise of constitutional interpretation.

It needs to be stressed that the obligation of Courts to develop legal principles to bridge the gap between the law and society is not a carte blanche for the judiciary to veer into legislative province to make laws. It is submitted that the presumptive ownership doctrine and the jurisprudence of equality principle are judicial creations that cannot be justified within the context of Article 22(3) of the Constitution. It is significant to note that Pwamang JSC in *Adjei v Adjei,*[29] has authoritatively reduced the presumptive ownership principle to a mere *"judicially created presumption", "mantra"* or *"evidential presumption"* which does not confer substantive rights on spouses. It is submitted that the presumption of joint ownership of property acquired in marriage lacks constitutional basis. It is a product of untrammeled judicial activism inconsistently forged on the anvil of judicial lawmaking. As Pwamang JSC noted at p. 62 of his judgment in *Adjei v Adjei:*

> It is imperative to understand that the commendable and progressive presumption that property acquired during a marriage is jointly acquired ***is not stated by the constitutional provisions in Article 22 which is abundantly clear*** [emphasis supplied].

It is easy to observe that Article 22(2) and (3) of the Constitution does not create any substantive property rights in spouses. These constitutional provisions only cast a duty on Parliament to enact a legislation to provide for property rights of spouses. The fact that Parliament has not enacted any legislation to implement Article 22(2) and (3) is not in doubt. The Parliament of Ghana has remained in slumber for well over three decades without taking any legislative action to effectuate the property rights of spouses. What the Supreme Court has done over the years in evolving equitable principles for sharing matrimonial properties may be commendable but certainly not within its appropriate judicial functions. Taken this observation to be well-founded, it can be said that the Supreme Court is frolicking in the field of legislative functions on the seemingly uncontrollable wings of constitutional interpretation. Given the necessity of having a legal framework to regulate spousal rights to property in Ghana, it is suggested that Parliament of Ghana should take steps to enact a law to regulate the property rights of spouses. It is the firm view of the present author that Parliament's inertia to pass the *Spousal Rights to Property Bill* is a matter of national regret. Parliament has overslept on its mandate. But it is disquieting that when Parliament went to sleep,

29 [2021] 172 GMJ 1

the Supreme Court assumed legislative functions and purported to implement the provisions of Article 22(3) of the Constitution. The result is that the Supreme Court has failed to evolve any meaningful jurisprudence on the property rights of spouses in Ghana. It is submitted that as far as the provisions of Article 22(2) and (3) of the Constitution are concerned, it is only Parliament that has the power to enact a law to implement the policies espoused therein. The Supreme Court has committed inexcusable trespass into a domain constitutionally reserved for Parliament. This is an unwarranted violation of the doctrine of separation of powers which underpins the Constitution. In their commendable quest to do substantial justice to spouses, the Supreme Court judges should always observe the caution that the Supreme Court is a judicial body, not a legislative organ of government.