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Women at the bench: Does it make a difference? Assessing the impact of women judges in addressing gender-based issues in Ghana

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Abstract

The impact of women judges in addressing gender-based issues, particularly in Africa, is largely under-researched both at the regional and country-specific levels. This paper researches on the impact of women judges in selected gender-based cases in Ghana – that is spousal property rights cases. The paper seeks to answer the primary question: in addressing spousal property rights in Ghana, have women at the bench made a difference? In answering this question, a doctrinal analysis of purposively selected cases was conducted which led to a finding that women judges did not make a difference in the development of the law on spousal property rights in Ghana. The findings and recommendations made in this paper are expected to contribute to the understanding of how female participation in judging gender-based cases have influenced and could potentially influence the interests and rights of women as well as to inform the policy choice of women judges.

Key words

Gender; Ghana; judging; spousal property; women judges

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Resumen

Se ha investigado demasiado poco, tanto a nivel regional como nacional, sobre el efecto de que haya juezas que se ocupen de temas de género, sobre todo en África. Este artículo investiga el impacto de juezas en casos seleccionados, basados en género, de Ghana –es decir, casos de derecho de propiedad conyugal. El artículo busca responder a esta pregunta: ¿han marcado la diferencia las mujeres de la judicatura en cuanto a derechos de propiedad conyugal en Ghana? Se realizó un análisis doctrinal de casos seleccionados intencionalmente, y ello llevó a descubrir que no hubo tal diferencia. Esperamos que los hallazgos y recomendaciones recogidos en este artículo ayuden a comprender mejor cómo la participación de las mujeres en el enjuiciamiento de casos basados en género ha podido influir y puede influir potencialmente en los intereses y derechos de las mujeres; y, por otro lado, a informar la elección de políticas de las juezas.

Palabras clave

Género; Ghana; enjuiciamiento; propiedad conyugal; juezas

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1. Introduction

The participation of women in the judiciary across Africa has been on the rise since the year 2000. Women have been appointed as chief justices of Supreme Courts, presidents of Constitutional Courts, justices and magistrates. One of the reasons assigned to the campaign for gender equality at the bench is that, judicial decisions on gender-based issues will reflect the input of women judges as they will show a strong allegiance towards promoting the rights and equality of women. However, the impact of women judges in addressing gender-based issues, particularly in Africa, is largely under-researched both at the regional and country-specific levels.

This paper researches on the impact of women judges in influencing the judicial decisions on spousal property rights in Ghana. Ghana's legal system is a common law system. The judiciary structure is in two levels: superior courts and lower courts. The Supreme Court, Court of Appeal and the High Court make up the superior courts while the lower courts comprise the district and circuit courts. Details of the structure, powers and functions of the judiciary are provided in the 1992 Constitution, the Courts Act of 1993 (Act 459 as amended) and other legislative instruments. The legal landscape of spousal property rights in Ghana has been demarcated mostly by case law until 1992 when the statutory footing of spousal property rights was introduced by article 22 of the 1992 Constitution. However, a comprehensive legislation is yet to be actualized – the details are discussed at a later section of the paper. Hence, in the absence of comprehensive legislation, the courts have actively continued to define the scope and nature of spousal property. Consequently, the stockpile of cases on spousal property in Ghana is hefty. The case laws have evolved over time, changing with the changing society, with judges being at the helm of the changing affairs. The judicial decisions that are assessed in this paper are decisions by the superior courts of Ghana.

Matters relating to spousal property rights of women in Ghana could arise under three main circumstances, that is property possessed by a woman (a) prior to marriage; (b) during the subsistence of a marriage; or (c) at the end of a marriage due to the dissolution of the marriage or the death of a spouse. The primary focus of this paper is on spousal property rights of women to jointly acquired property when a marriage ends as a result of divorce or death of a spouse. The reason for our focus is that property rights of women at the dissolution of marriage or upon the death of a spouse in Ghana had been an issue that the law grappled with for a long time.

Overall, there have been three major developmental milestones in relation to the spousal property rights of women at the end of a marriage. Each phase brought to the table better bargaining powers for women. In the early years after Ghana's independence in 1957, the law was that property acquired during the subsistence of a marriage with the assistance of the wife was deemed as belonging only to the husband to the exclusion of the wife (*Quartey v Martey*, 1959). Historically, women by law were to provide support to their husbands to carry out the duties of their station in life. The proceeds from the joint efforts were solely for the man. The wife and children were only entitled to maintenance. Subsequently, the position of the law changed to recognize the assistance offered by women in the acquisition of joint property such that women were declared joint beneficial owners with their husbands. The recognition of women's assistance in the law was contingent on the woman showing evidence of substantial contribution to

the acquisition of the property in question (*Abebreseh v Kaah*, 1976). In the late 1990s, the substantial contribution position gave way to the current position of the law which is equal and joint ownership of jointly acquired property during the subsistence of a marriage (*Mensah v Mensah,* 1998–99).

The paper answers the primary question: in addressing women's interest in relation to family law matters in Ghana, have women at the bench made a difference? To answer this question purposively selected cases are critically analysed. The cases selected are of two categories: the first category are the revolutionary cases that pioneered particular phases of the development of spousal property rights in Ghana and the second category of cases are those other than pioneering cases that are significant for their added contribution to the development of the law. These cases constitute the bulk of the sources of data used for this paper. Other sources of data were relevant constitutional and statutory provisions, scholarly writings, monographs and research reports.

The outcome of this paper is expected to contribute to the understanding of how female participation in judging gender-based cases have influenced and could potentially influence the interests and rights of women as well as to inform the policy choices of women judges.

The paper progresses in this manner: part two discusses the concept of women and judging by reviewing existing literature to ascertain the framework for which a case may be made for introducing more women on the bench. The third part focuses on the Ghanaian context of spousal property in Ghana by tracing the development of the law since independence till now. This part sets the scene for part four which constitutes the analyses of the case law on spousal property rights in Ghana since independence till date. The analysis is to determine whether the presence or absence of women at the bench in the selected cases made any difference in the law's development. The final part concludes on the subject matter of this paper.

2. Women and judging: Theory and concept

That a judge must be impartial and independent is fundamental to the administration of justice at the bench and essential to the effective execution of his or her judicial role. Socrates explains the fundamental qualities of a judge as follows: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially". These qualities have made an appearance in almost all if not all literature related to the judiciary and its work globally (Wilson 1990).

In the Bangalore Principles of Judicial Conduct (2002), independence and impartiality are listed as part of the values requisite for effective discharge of the judicial office. It explains the principle of independence as a pre-requisite to the rule of law and a fundamental guarantee of fair trial. A judge must therefore exercise his or her judicial role independently based on the facts and evidence before him or her free from any direct or indirect extraneous influences, inducements, pressure, threats or interference. With regard to impartiality the Bangalore Principles directs a judge to discharge his or her judicial duties without favour, bias or prejudice.

Similarly, the Code of Conduct for judges and magistrates in Ghana mentions independence and impartiality as essential for the discharge of judicial functions. The

Code explains an independent judiciary as indispensable to justice. It further requires judges to remain impartial and not to be swayed by partisan interests, public clamor or fear of criticism. Judges are not to manifest bias or prejudice (Judicial Service of Ghana 2011). In the same way, the judicial oath of office outlined in the 1992 Constitution of Ghana also obligates judges to execute the functions of the judicial office without fear or favour, affection or ill-will (1992 Constitution).

Although these qualities of independence and impartiality are necessary and ideal for the proper discharge of justice in our society, manifesting these virtues is not an easy task. A judge when sworn into office does not lose his or her humanity. The judge continues to embody the aggregate of inherited and acquired predispositions which may be known or unknown to him or her. The reality of an absolute neutral mind is almost non-existent, and where such a mind exists it may actually miscarry in the administration of justice, "for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done" (Shientag 1975, cited in Shery 1986).

Having in mind the foregoing, one's response to the question, will women judges make a difference at the bench? will depend on which view of judicial impartiality and independence a person holds. A person on the side of pure, unadulterated judicial impartiality and independence is more likely to answer in the negative because the bench, regardless of its gender composition follows the law to the letter without any trace of extraneous and personal influences. Consequently, women judges will exercise the same level of impartiality and independence as their male counterparts leading to no difference at all (Shientag 1975, cited in Wilson 1990).

On the other hand, a person who is of the opinion that not all areas of law are subject to the same level of judicial impartiality *stricto sensu* is likely to answer in the affirmative (Wilson 1990). For example, in the area of family law there are arguments that gender differences do influence judicial decisions (Shientag 1975, cited in Wilson 1990). For this reason, increasing the representation of women at the bench will bring on board a feminine perspective of the law that will balance out the predominantly masculine views – what is referred to as the difference theory. The existence of such state of affairs, according to this school of thought will truly reflect judicial impartiality and parity of perspectives. It will build public trust since the bench will then reflect the gender diversity of the society. Having in mind the duality of human perspectives to issues, increasing the representation of women at the bench will make judicial decisions resonate with the totality of human perspectives of things (Wilson 1990).

Malleson (2003) shoots down the difference theory as being "theoretically weak, empirically questionable and strategically dangerous". She makes a case for women on the bench not as a result of the different experiences and attitudes they will bring to the bench but on the basis of equity and legitimacy. Malleson (2003) is of the view that equal participation of men and women at the bench is inherent in democracy without which the general public will lose trust in the judiciary. Similarly, Grossman argues for sex/gender representation at the bench because it "matters to legitimacy" (both normative and social legitimacy) when the different sexes have different approaches to law, facts or the process of judicial decisions making or when the differences in sexes flow from biological makeup or experiences in life. According to Grossman, impartiality

is fundamental to normative legitimacy and judging. To be impartial, both male and female judges are required. Therefore, where is this an acute over-or-underrepresentation of one sex, it undermines the normative legitimacy of the courts. Regarding why sex representation matters to social legitimacy, Grossman explains that representation shapes perceptions of impartiality and fairness such as where a group of a particular sex has experienced discrimination in the past, a court that lacks representation of the discriminated group is likely to have its authority and legitimacy questioned (Grossman 2012).

Other scholars have argued that the mere presence of women at the bench makes a lot difference as it breaks the stereotypes associated with the role of women in society (Shery 1986). The presence of women at the bench renews the mind of men in society and empowers women. In Ghana for example, research has shown that the symbolic representation of women at the bench, especially when a female chief justice was appointed, led to increased women joining the bench and changing the patriarchal face of law practice (Dawuni 2016).

There are arguments that also proffer that, women judges will influence not only the substantive law but the entire judicial process as well. This stems from the belief that men view the world differently from women and also think differently from women especially in matters that border on morality. Men view moral issues through the lens of competing rights and as such more easily resort to the adversarial process. Women on the other hand, view moral issues from the angle of competing obligations of the parties involved and therefore lean towards amicable settlement in the interest of all parties (Gilligan 1982).

Dawuni (2016) posits that that while having women judges at the bench contributes to promoting women's rights, women representation in and of itself is not sufficient to cause a complete turnaround. Additional factors such as laws that guarantee women's rights, an enabling socio-cultural environment and partnerships with civil society organisations are also necessary to promote the rights of women.

The above literature review shows that theoretically, arguments in favour of the fact that women judges make a difference outweigh the arguments that are not. It is also apparent that even for those arguments in favour of women judges making a difference, the rationales differ. In the African context, Dawuni (2020) who has conducted a number of research on women at the bench points out that while there is some progress in the feminization of the bench, there remains quite a number of areas on women's participation in the judiciaries that needs further research such as assessing how gender-based cases are handled by women judges compared to men, and the impact of women at the bench in transforming court decisions if any. The analysis conducted in this paper which assesses the impact of women judges in shaping the Ghanaian law on spousal property rights therefore adds to the limited research and literature on the role and impact of women at the bench especially in Africa.

3. The Ghanaian context of spousal property rights

Issues pertaining to spousal property rights of women in Ghana could arise in terms of property possessed by a woman before marriage, during the subsistence of a marriage, at the dissolution of a marriage or upon the death of a spouse. As indicated earlier, the

focus of this paper is on spousal property rights of women to jointly acquired property when a marriage ends as a result of divorce or death of a spouse.

This part of the paper traces the milestones in the development of spousal property rights of women in Ghana since independence. It lays out the organic process by which the Ghanaian common law, that is customary law and case law, on spousal property rights of women has evolved over time. It is generally observed that, concerning property acquired by the joint efforts of both spouses in a marriage, the law during the early years after independence did not recognize the spousal property rights of women whatsoever. With time however, women's spousal property rights of women began to be acknowledged to the extent that they made substantial contribution towards the acquisition of such property. The law further developed in a way that was more supportive of women's spousal property rights such that substantial contribution was no longer the requisite standard, rather, mere contribution was a good enough grounds to establish a woman's entitlement to part of the spousal property. The current state of the law as determined by the courts is based on the broad constitutional provision which requires equitable distribution of spousal property. Equitable distribution has often been construed to mean equal distribution.

Generally, under Ghanaian customary law, a woman has the right to own property in her own name. Marriage has little to no effect on this proprietary right. A woman can acquire property in her name before and after marriage because the notion of community property in marriage is alien to Ghanaian customary law. Each spouse retains all property acquired through their individual efforts in his or her name (Kuenyehia and Ofei-Aboagye 1998). On this matter, Mensah Sarbah (1968, p. 39) writes:

> While a husband is living with his wife, or is providing for and maintaining her, he is not liable for her contract debts, or liabilities, except for maintenance and any medical expenses she may be put to for herself or child by him. For the wife, if free-born or domestic of a different family, can acquire and hold property apart from the husband, and her own family to fall back on.

The right of a woman in marriage to own self-acquired property in her name absolutely under customary law is only encumbered to the extent that the woman and her husband jointly contribute for the maintenance of their household. A husband's interest in his wife's property or earnings, under customary law is limited only to what is needed for the joint maintenance of their household. The self-acquired property continues to remain the absolute property of the woman when the marriage ends either through divorce or death of a spouse (*Reindorf v Reindorf*, 1974).

3.1. No spousal property rights of women: Nothing at all

Under customary law, the husband is regarded as the head of the family and bread winner while the wife is duty bound to assist the husband in all his ventures. Thus, where the husband during the subsistence of the marriage acquires property with the assistance of the wife, the property is deemed as belonging to the husband exclusively. Such property is not considered under customary law to be a joint property unless there is evidence strongly leading to the contrary. This position was first endorsed by the courts in *Quartey v Martey & Another*, 1959.

In *Quartey v Martey & Another* (1959) a widow claimed a third share in the property of her late husband on the grounds *inter alia* that she financially assisted her late husband during his lifetime and had given active assistance to him in all the jobs he did. She further added that her late husband had acquired the property – of which she was claiming her share – partly through her assistance rendered him. The court found that the assistance she gave to her late husband was an allowance of £5 a month, later increased to £10 a month. She also used her husband's credit customer's passbook to trade on his behalf. These were found by the court to be insufficient towards assisting the husband in building a house then valued at £6,000.

Dismissing her claim, the high court per Ollenu J (as he then was) stated:

> … by customary law it is the domestic responsibility of a man's wife and children to assist him in carrying out the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father. (*Quartey v Martey & Another*, 1959, p. 380)

Thus, in the absence of strong evidence to the contrary, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband, and not a joint property of the husband and the wife (*Quartey v Martey*, 1959, p. 380).

Similarly, the high court in *Adom and Another v Kwarley* (1962) held that a wife who assists her husband in his trade does not become a joint-owner of the husband's earnings or of any property he acquires with his earnings. In this case, the wife had assisted her late husband to build a house by selling the produce of their vegetable farm to help raise the necessary funds. Her active assistance to her husband's business was considered by the court as falling within her domestic responsibility.

Also, in *Gyamaah v Buor* (1962), a widow claimed for a specific share of eleven cocoa farms which she claimed she assisted her late husband to cultivate during his lifetime. The widow's claim was upheld by the trial court but overturned by the appeal court based on the customary law rule that it was the customary duty of the wife to assist her husband in his daily tasks and acquisition of property, but that assistance did not entitle the wife to become a joint owner of such property acquired through her assistance.[1]

3.1.1. The bench and the nothing at all principle

As far as one can tell, the cases that pronounced the nothing at all principle were simply a restatement of the customary law position which deemed assistance given to a husband by his wife as constituting her domestic and customary responsibility. The Ghanaian society at the time endorsed this view, the judges being an integral part of the society only gave judicial backing to it. Ollenu's disposition in *Quartey v Martey & Another* (1959) enforced the prevailing customary law at that time regardless of its manifest injustice. Considering that, the judges could enforce the customary law position by restating it, could they have gone the other way? Could they have engineered a

[1] As an obiter, the court added that, where the assistance was substantial and financial in nature the widow would have been entitled as of right to a share in the properties acquired by her husband.

change? If the concept of judicial activism is anything to go by, then the answer would be, yes, they could have after all, the law is in the bosom of the judge.

In the cases cited above, all the judges were male. The cases were decided at a time where the number of female judges in Ghana was diminutive if not zilch. Even the legal scholars who wrote on customary law were all male. Is there a possibility that the decisions of the court came out the way they did because the judges were all males? Would female judges have made a difference? To answer in the affirmative will be to give credence to the arguments by the scholars who argue that women on the bench will make a difference. Perhaps had there been women judges, their different perspectives and experiences could have led to a different end (Shery 1986, Wilson 1990). On the flip side, to answer in the negative will mean an affirmation of scholars such as Shientag (1975, cited in Shery 1986) that, judges make decisions independent of their gender disposition.

The case laws show that modifications to the age-old customary law principle of exclusive ownership of spousal property by the husband began when married women started to be gainfully employed and provide ample financial support to maintain the home (Kuenyehia and Ofei-Aboagye 1998, p. 33). As a result, the rights and interests that accrued to married women for joint efforts in acquiring property during the subsistence of marriage significantly improved. One cannot therefore tie the wave of change in Ghana's spousal property legal regime to the gender composition of the judiciary per se.

Due to the lack of specific legislative directive on spousal property in the midst of the changing society, the courts became the principal vehicle for moving away from the erstwhile patriarchal position to a more inclusive one which will now be discussed.

3.2. Entitlement based on substantial contribution

A shadow of the emerging wave of reformist spousal property rights was cast in *Gyamaah v Buor* (1962) where the court in an obiter indicated that, the widow would have been entitled as of right to a share in the properties acquired by her husband had her assistance been substantial and financial in nature. Subsequently, the courts incorporated the principle of substantial contribution in its *ratio decidendi*. Wives who provided compelling evidence to support a claim of substantial contribution were declared by the court as being entitled as of right to share in the property acquired by their husbands.

In *Abebreseh v Kaah* (1976), a customary law wife upon the death of her husband instituted an action in court seeking for a declaration that the sale of her matrimonial home by her late husband's customary successor was void. Her grounds were that the property in dispute was a jointly acquired property by herself and her late husband since she contributed to building the property. The issue before the court was whether the wife's contribution to building the property was mere assistance to the husband in discharge of her customary duties or her contribution was so large as to entitle her to be declared joint owner.

The court entered judgment in favour of the wife on the basis that her contribution was substantial[2] even though she could not quantify it in monetary terms. The court further added that, contrary to the customary law understanding that the wife and children were dependent on the husband, this was not the case in this matter. Thus, the customary law rule that that the property acquired by a husband with the assistance of his wife and children became the exclusive property of the husband was not applicable. The court proceeded to distinguish the instant case from *Quartey v Martey*[3] and concluded that it will be contrary to natural justice and good conscience to regard the wife's contribution as mere assistance at customary law.

In *Yeboah v Yeboah* (1974), a wife married under ordinance claimed that she was a joint owner of their matrimonial home. According to her, she acquired the land on which the house was built prior to the marriage. Her husband funded the building of the house on the said land using a loan he had obtained from his employers. The wife stated that during the construction of the house in Ghana, she self-sponsored her air ticket from London, where the couple the lived then, to Ghana at the request of her husband to supervise the construction. She also indicated that she paid for other alterations to the building. The trial judge found as a fact that the wife made contributions in cash and kind. The issue before the High Court was to determine whether those findings of fact by the trial judge could on their own support a declaration in favour of the wife that she was a joint owner of the house with the husband.

The court held that the wife was a joint owner of the house with her late husband based on two reasons: first, the marriage being one under ordinance was not to be governed exclusively by customary law.[4] The court added that even under customary law there was no positive rule prohibiting joint ownership between persons not connected by blood although it was not encouraged. The second reason was founded on the intention of the parties who by their conduct and other surrounding factors had clearly demonstrated that they intended to jointly own the matrimonial home.

It is also clear from the case law that substantial contribution towards the acquisition of spousal property was not limited only to financial contribution but also included non-financial contribution. These may take the form of payment of the children's schools fees so as to free the man to focus on acquiring the matrimonial property (*Achiampong v Achiampong*, 1982–83); being a housekeeper (*Bentsi-Enchill v Bentsi-Enchill*, 1976) or offering assistance in kind towards the husband's business (such as keeping the stores

[2] The wife was a wealthy and successful trader in textiles, meat and general goods while the husband was a tally clerk who was later promoted to a bookkeeper. The wife contributed half of the purchase price of the plot of land on which the disputed house was built. Due to her late husband's financial inability to commence the building, the couple decided that, the husband will pay the school fees for their ten children which he could afford with his meagre salary while the wife bore the housekeeping expenses of the entire family. The wife also bought the timber and contributed to the cost of other building materials. She also supervised the labourers who built the house and helped carry water to the building site.

[3] The court indicated that in the instant case, the wife made direct contributions to the husband intended solely for the construction of the disputed property and also took up the cost for housekeeping as her husband's wages could not support the family. On the contrary, in *Quartey v Martey*, the wife admitted to the court her husband could have financed the house from the proceeds of a cocoa farm which his deceased father left for him and which will make the house a family property.

[4] English legal concepts could not be excluded. Thus, the court in its obiter considered the application of the doctrine of survivorship.

running) so that the husband can acquire property from the proceeds of the business (*Mary Oparebea v S.A. Mensah*, 1933–94).

The liberality of entitlement based on substantial contribution even extended to cohabiting partners. Thus, in *Owusu v Nyarko* (1980) where there was no valid customary law marriage between the parties, the court held that the woman was entitled to one-third share of the cocoa farm of the man because she helped him cultivate it.

In determining whether or not there was substantial contribution, the court established that the level of scrutiny required was less than that associated with commercial transactions between business persons (*Anang v Tagoe*, 1989–90). Consequently, in a case where a wife's claim of substantial contribution – purchasing building materials – was not supported by receipts, it did not preclude her from obtaining a declaration that she was a joint owner of the property (*Anang v Tagoe*, 1989–90). The cut back on scrutiny was no leeway for women to rest on their oars in proving substantial contribution. The court refused to transfer a house to a wife after her divorce because she provided no evidence of her substantial contribution to the cost of the house (*Odoteye v Odoteye*, 1984–86).

The courts also exercised caution so as to prevent the unjust enrichment of husbands who sought to rely on the customary law principle of exclusivity of spousal property to men (*Mensah v Bekoe*, 1975). In *Reindorf alias Sacker v Reindorf* (1974), the court declared property acquired from the proceeds of the trade of a wife to be her separate property which vests in her alone and not in both spouses as joint property. The court considered the wife's trade to be independent of her husband regardless of the fact that her husband provided the initial working capital. The court further stated that there will still be guarantee of joint ownership even where the husband runs sporadic errands at the request of his wife during the course of her business or supervises the construction of a building from the proceeds of her trade.

Undoubtedly, property purchased by one spouse during the marriage with his or her own earning belongs exclusively to that spouse and the whole beneficial interest vests only in that spouse. Also, if both spouses set up their home in a house already owned by either spouse, the other spouse will have no interest in it except otherwise stated in an express agreement (*Bentsi-Enchill v Bentsi-Enchill*, 1976).

The Supreme court in *Ribeiro v Ribeiro* (1989–90) gave a lucid explanation as to when proof of substantial contribution was necessary and when it was not during property settlement upon divorce under s. 20(1) of the Matrimonial Causes Act, 1971 (Act 367). Section 20(1) of the Act provides, "[t]he court may order either party to the marriage to pay to the other party such movable or immovable property as *settlement of property rights* or in lieu thereof or as part of *financial provision* as the court thinks just and equitable". The court was of the view that, where an order to vest immovable property under s. 20(1) is in connection with settlement of property rights (which on the face of it belongs to only one spouse), then proof that the recipient is either the owner of the property or made substantial contribution towards its acquisition is essential. On the other hand, where an order to vest immovable property under s. 20(1) relates to application for financial provision, proof of substantial contribution is not necessary.[5]

[5] The reason for the court's position is that the property to be conveyed forms part of the just and equitable financial provision by the court which the court considers the wife to be entitled to. Not because the court

In the *Ribeiro* case, the wife applied for financial provision and accommodation after the dissolution of a 34-year marriage. The trial High Court awarded a lump sum payment to the divorced wife and ordered the conveyance of a Haulage house (one of the ten houses of the husband) as financial provision under s. 20(1) of Act 367. The husband's appeal was dismissed by the Court of Appeal which upheld the trial court's decision explaining that since the wife had not expressed any preference for any particular house of the husband's ten houses, the trial court had the discretion to order the conveyance of any of the houses without any interference by the husband.[6] On a further appeal, counsel for the husband argued that the power of the court to vest immovable property under s. 20(1) of Act 367 was contingent upon proof (which was lacking in this case) that the recipient was either the owner or made substantial contribution towards its acquisition. It was based on this contention that the Supreme court painstakingly distinguished between the two boughs of s. 20(1) of Act 367.[7]

In determining what amounts to or does not amount to substantial contribution, the courts have alluded to principles of equity. Brobbey J in *Anang v Tagoe* (1980–90 at page 11) stated:

> … where a wife made contributions towards the requirements of a matrimonial home in the belief that the contribution was to assist in the joint acquisition of property, *the court of equity would take steps to ensure that belief materialised*. That would prevent husbands from unjustly enriching themselves at the expense of innocent wives, particularly where there was evidence of some agreement for joint acquisition of property.

The steps taken by the courts of equity to ensure that reasonable belief by a spouse of acquiring beneficial interest in a property hinted at equality is demonstrated in the cases below. Although it would later take a Supreme Court judgment in the late 1990s to expressly demarcate the confines of these equitable principles.

The Court of Appeal in *Achiampong v Achiampong* (1982–83), also applied the principle of equitable sharing of joint property after divorce. The husband in this case had bought a house on hire-purchase in his name and induced the wife, who reasonably believed that she was acquiring joint beneficial interest, to make substantial contribution towards improvement of the house. The court holding that the wife indeed had beneficial interest in the property stated that,

> [W]hichever way one may view the facts and the circumstances of the present case, the wife was entitled, both in law and in equity, to some beneficial interest in all the properties in dispute, absence of agreement notwithstanding. Having regard to the extent of the wife's contribution, *that beneficial interest should be nothing less than a half-share*. The High Court could not therefore have come to any better conclusion than it did.

finds that it belongs to the wife, or that the wife was part-owner, or that she contributed in any way whatsoever to its acquisition.

[6] Prior to the trial court's decision, the husband had transferred the Haulage house to his new wife in addition to another house he had already given to her. The trial court found the transfer to be in bad faith intended to defeat the financial provision that might be made for the divorced wife. For that reason, the trial court rescinded the disposition.

[7] The Supreme court distinguished the Ribeiro case from *Achiampong v Achiampong*. The former bordered on financial provision while the later bordered on settlement of property rights.

In *Quartey v Amar* (1971) where upon the dissolution of a 16-year marriage, the divorced wife claimed ownership of two houses which she claimed were purchased with her own money. The court found no substantial contribution in respect of the first house but did so in respect of the second. The purchase price of the second house was jointly paid for by the couple, although the greater contribution was made by the husband. The court in declaring the wife a joint owner of the second house explained that where two persons contributed in unequal shares towards the purchase of a property, the law presumed the purchasers to take as tenants in common and share proportionate to the sums advanced. However, where the persons involved were husband and wife, then "unless there is evidence to the contrary, it is presumed that they intended to own the property jointly and the equity maxim – 'equality is equity' prevails" (*Quartey v Amar*, 1971, p. 240).

3.2.1. The bench and the substantial contribution principle

One can observe that the substantial contribution principle is a recognition of the fact that certain forms of assistance offered by wives to their husbands exceeded the customary law expectation of the domestic role of a wife. Thus, if the assistance or contribution of a wife was commensurate with what was expected of her as a wife at customary law, then the courts will apply the nothing at all principle rather than the substantial contribution principle.

Once again, the judges were all male judges who recognized the changing role of women in society and gave effect to the changes through their decisions. This avows the position of the school of thought that women judges will not make a difference because judges exhibit a pure, unadulterated judicial impartiality rather than a gendered outlook on issues ((Shery 1986 citing Shientag 1975). The male judges advanced the cause of women even in the absence of women judges.

Despite the commendable advancement of women's spousal property rights by the courts, the reality was that women were still at the mercy of the courts. A woman's entitlement to spousal property remained case-specific and was largely subject to the prejudices, understanding and application of equitable principles of the judge. Consequently, there was the need to for another shift, this time more precise in form and with cross-cultural application for all cases nationwide – the 1992 Constitution of Ghana.

3.3. Equality is equity principle

The 1992 Constitution of Ghana laid the foundation for the current state of the law on spousal property rights in Ghana. Article 22(3) provides,

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 the dissolution of the marriage.

Accordingly, the current position of the law on spousal property rights in Ghana does not require proof of substantial or financial contribution to the acquisition of joint property in order for a party to enjoy beneficial interest (Constitutional Review Commission 2011).

The 1992 Constitution under article 22(2) further required Parliament to "as soon as practicable after the coming into force" of the Constitution, enact legislation regulating

the property rights of spouses. However, it would take Parliament about two decades for a bill to see the light of day and another couple of years for the bill to be passed into law.[8] In the interim, the legislative gap was once again filled by case law. The Supreme Court of Ghana has interpreted "distributed equitably" in the 1992 Constitution to mean "distributed equally".

In *Mensah v Mensah* (1998–99), a husband and wife both claimed ownership to the same residential estate house after their divorce and the high court gave judgment in favour of the wife, declaring her as the sole owner of the disputed house. The husband appealed to the Court of Appeal. The Court of Appeal granted the appeal in part and set it aside in part, that even though the house was rightly declared as jointly owned by the husband and wife, the extensions to the house were solely funded by the wife. Thus, the wife was declared to be the sole owner of the extensions. The husband appealed to the Supreme Court against the specific finding of the Court of Appeal that declared the wife as the sole owner of the extensions.

The Supreme made findings of contributions by the husband[9] and intention of the parties which demonstrated that the construction of the extension was to create more space in the house and for their joint benefit and that of their children – a joint intention which was the same for which the main house had been acquired. Based on the court's findings, it unanimously allowed the husband's appeal by declaring both the husband and wife as joint and equal beneficial owners of both the main house and its extensions.

The landmark decision in *Mensah v Mensah* (1998–99) set the foundation for the prevailing law that equality is equity in determining the proportions in which joint spousal property should be shared. The celebrated declaration of the principle by Bamford – Addo JSC who read the judgment of the Supreme Court were as follows:

> … the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage. (*Mensah v Mensah*, 1998–99, p. 335)

The Supreme Court further cemented the equality is equity principle established in *Mensah v Mensah* (1998–99) in *Boafo v Boafo* (2005–06). The *Boafo* court gave a panoramic view of the principle by providing the rationale behind the principle as can be ascertained from the drafters' intention under article 22(3) of the 1992 Constitution.

In the *Boafo* case, the wife appealed to the Court of Appeal on the grounds that upon the distribution of properties after the dissolution of her marriage, the trial judge made distribution orders not on a half and half basis in contravention of article 22(3) of the 1992 Constitution. The Court of Appeal granted the appeal holding that the properties

[8] The Property of Spouses Bill was approved by cabinet in 2013 but is yet to be approved by parliament.

[9] The Supreme court found that: (a) the house was acquired in 1973, extension works were done between 1978 and 1979 when the parties were still married and cohabiting; (b) the husband had applied to the State Housing Corporation for permission to build the extensions to the house and had also procured someone to make the drawings of the proposed extensions; (c) the husband had provided the room divider in 1983 and had also paid for the paneling of the ceiling; and (d) he had during the period of the construction of the extension works made contributions to the household expenses

should be distributed equally. The husband then appealed against that decision to the Supreme Court.

The Supreme Court unanimously dismissing the appeal by the husband and affirming the holding of the Court of Appeal on equal distribution held that there was no inflexible rule stipulating that a spouse's inability to clearly identify a contribution (as in the instant case) would automatically disentitle him or her from a half share. The court explained that article 22(3)(b) of the 1992 Constitution and s. 20(1) of Act 367 only provided for equitable distribution of jointly acquired property without specific proportions. This was because the question of what is equitable, in essence what was just, reasonable and fair, was purely a question of fact to be determined by the peculiarities and equities of each case. The court then went on to explain why in the general scheme of things, the equitable distribution that satisfies the underlying purpose of the constitutional provision is equal distribution. Date-Bah JSC, who read the judgment of the court made reference to the report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution (1991). The committee in their report indicated the desire to expand the scope of classical human rights, particularly economic, social and cultural rights, in the previous constitutions before the 1992 Constitution (Committee of Experts 1991, pp. 74–75). Against this background, the Committee, identified the continued discrimination against women despite legislation to enhance women's status and concluded that the Constitution being the supreme law of the land ought to prohibit actions that infringe on women's rights. For this reason, the Committee proposed what is now article 22(3) of the 1992 Constitution using the word "women" instead of "spouse". However, in the interest of gender equality, "spouse" was eventually used to replace "women" in the final draft which is what currently appears in the 1992 Constitution. Based on these findings, Date-Bah arrived at the logical inference that equality is equity. He said:

> Article 22 firmly places within the domain of social human rights the distribution of the property of spouses on divorce. The history of the proposal, now embodied in article 22, shows why a wide range of circumstances, the equitable sharing that will satisfy its underlying purpose is an equal sharing. The Constitution is giving impetus to a movement away from the approach manifested in Ollennu J's formulation of the customary law … to a position more in tune with women's equal status with men in the Ghana of today. It was meant to right the imbalance that women have historically suffered in the distribution of assets jointly acquired during marriage. An equal division will often, though not invariably, be a solution to this imbalance. The logic underlying this solution is that equal partners should share equally. However, the particularities of an individual case may make this general approach unsound in specific instances. (*Boafo v Boafo*, 2005–06, p. 713)

3.3.1 The bench and the equality is equity principle

Throughout the developmental milestones, there had been no female judges making pronouncements until the equality is equity principle. However, although there were two female judges out of five judges in *Mensah v Mensah* (1998–99), the panel gave their judgment unanimously and there is no evidence lending itself to the fact that the women on the *Mensah v Mensah* bench exhibited any form of gender sensitivity. Again, the situation in *Mensah v Mensah* leans towards the argument that women on the bench will

not make much of a difference on the bench because they will adhere to the judicial principles of neutrality and impartiality just like their male counterparts.

It is clear from the above cases that even though it has been held that the ordinary incidents of commerce do not apply in marital relations and that the courts will not employ mathematical division to determine each spouse's share in the property, the courts currently apply the equality is equity principle. The equality is equity principle has tolled the death knell of the substantial contribution principle. Yet, the equality is equity principle is not absolute but amenable to the equities of each case.

The extent of the role of women judges throughout the developmental phases of the law on spousal property will now be discussed in the next section.

4. Women judging and spousal property rights in Ghana: A difference made?

Having laid out the roadmap leading to the current position of the law, this section now looks as the gender make-up of the bench that informed the various milestones identified and determine how it may have influenced the decisions.

Regarding the early years after independence when the customary law principle of exclusive spousal property of husbands prevailed, it was observed in the cases analysed that all the judges sitting in those cases were male. Arguably, these decisions were made at a time when female judges were scarce.

FIGURE 1

Figure 1. A visual representation of the gender of judges at the bench during the era of no spousal property rights of women.

It was also observed that male judges were the vanguard of the shift from the customary law position to the substantial contribution principle. In the cases analysed in this paper, all the judges were male.

FIGURE 2

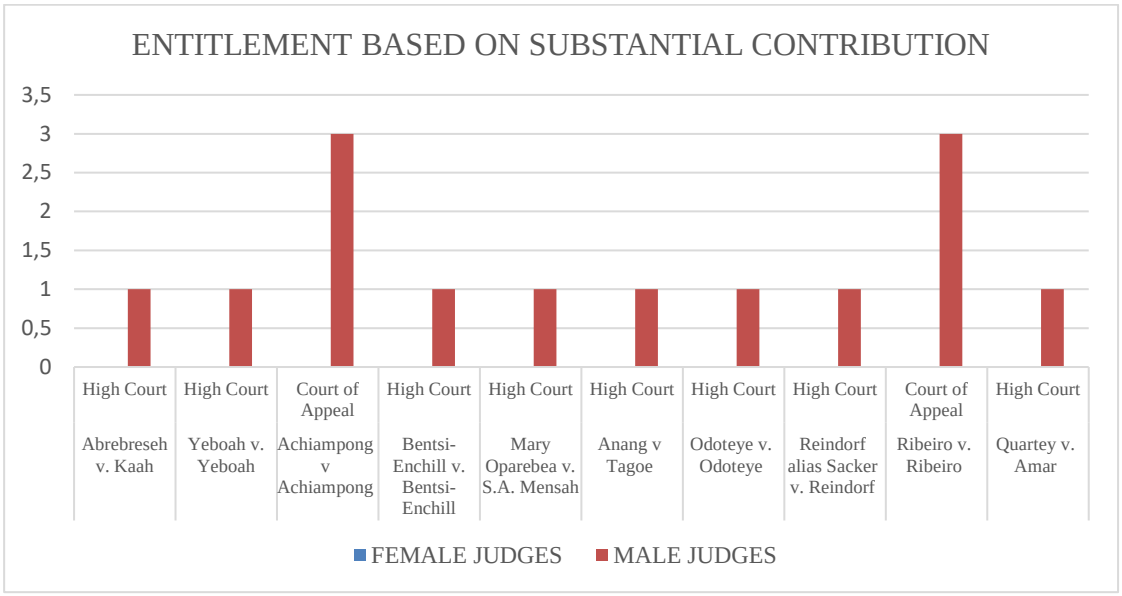

Figure 2. A visual representation of the gender of judges at the bench during the era of entitlement based substantial contribution by women.

During the period when the substantial contribution principle was being developed, the male judges outnumbered the females, which gives rise to the question: if there had been more female judges sitting on such cases, would they have made a difference? Based our examination of the case law, the answer is more likely to be negative. The reason being that the prevailing social norms influenced the judges (largely male) in their interpretation of the law. With changing times came changing roles of women, that is women were no longer limited to solely keeping the home but also became wage earners who could make substantial financial contribution to acquiring property. Thus, once society acknowledged the changing roles of women, the law had to necessarily respond to it. It was not surprising therefore that the courts took notice of societal changes in order to depart from the customary law position. In *Bentsi Enchill v Bentsi Enchill* (1976) Sarkodee J at page 306 stated: "In recent years the wife is very often a wage earner and makes contribution towards the common expenses by buying for and running the home. Judicial opinion today shows that the trend is to give credit to the wife for her services in kind as a housekeeper or for the use of her own income or savings in such a way as to enable her husband to use his for the purchase of a house. The beneficial ownership has been held to be in both husband and wife jointly". Sarkodee J's statement is a clear indication that the law will not stand still while the rest of the world goes on.

Similarly, the shift from the substantial contribution principle to equality is equity principle was also premised on social change. Date-Bah JSC in the *Boafo* case took notice of the need for the law to change to reflect changing trends of women in society when he referred to the report of the Committee of Experts which conceded same. Indeed, law is a tool for social engineering, but the lurking question is: a tool which causes what? Is the law the initiator of social change or social change drives a change in the law? In

relation to the subject matter of this paper, the latter applies. It is not the case law that steered society in a new direction, rather, it only validated social change.

By the time the equality is equity principle was established, the number of women judges at the bench in Ghana had considerably increased. Accordingly, the gender frame of the bench for *Mensah v Mensah* was fairly balanced with three male judges (Hayfron Benjamnin JSC, Acquah JSC and Atuguba JSC) and two female judges (Bamford Addo JSC and Akuffo JSC). The decision of the court was read by a female judge, Bamford Addo JSC, although this state of affairs barely had any impact on the gender dynamics of the decision because the judgment was a unanimous one.

FIGURE 3

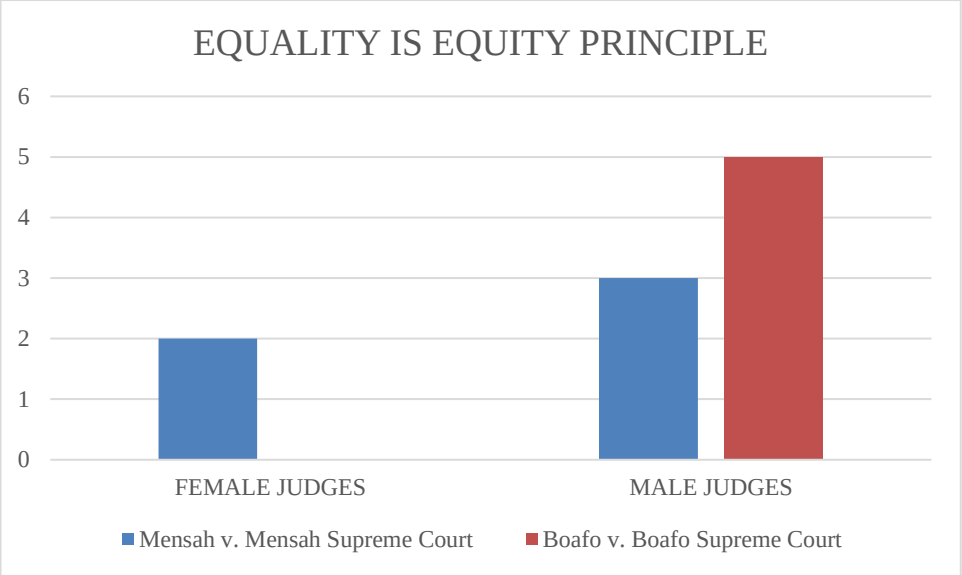

Figure 3. A visual representation of the gender of judges at the bench which established the Equality Is Equity principle.

Away from the gender composition of the bench, it is interesting to note that, the claim leading to the decision in the monumental *Mensah v Mensah* (1998–99), which has been heralded by many as changing the course of spousal property rights for women in particular, was initiated by a man and not a woman. The decision of the court, the first of its kind at the time, was given in favour of a husband who wanted to assert his property rights against his ex-wife. A good question for future reflection and research at this point is, would the decision in *Mensah v Mensah* have been different if the claimant was rather the woman and not the man?

Another striking observation is that, in *Boafo v Boafo* (2005–06) where the Supreme Court fortified the nature, rationale and scope of the equality is equity principle, the bench was an all-male one. The absence of female judges on the bench did not in any way water down the application of the principle. It could be argued that the *Boafo v Boafo* (2005–06) court did not really have much of a choice than to follow precedent. However, that may not be entirely true because under article 129(3) of the 1992 Constitution, while the previous decisions of the Supreme Court are normally binding, the Constitution permits the Supreme Court to depart from a previous decision when it appears right to do so. Consequently, there remains the possibility that the *Boafo* court could have departed from the decision in *Mensah v Mensah* (1998–99) even if slightly. The *Boafo* court could

have for example, reasoned that the equality is equality principle was too far-reaching, an unruly horse that should be tamed. Accordingly, the *Boafo* court could have held that equitable distribution would be interpreted to mean proportion based solely on substantial contribution rather than equal distribution. Despite this possibility, the *Boafo* court rather entrenched the decision in *Mensah v Mensah* (1998–99) which adds to the evidence that the change in the law on spousal property was not as a result of the exclusive initiative of judges but was influenced by the changing context of society in terms of the role of women and so women judges would have barely made a difference.

Having established that the presence or absence of women judges at the bench would not have made any difference in shaping the Ghanaian law on spousal property rights, what then could be the possible role of women judges going forward in ensuring continued justice for women's spousal property rights? Women judges, like their men counterparts, could go the extra mile by being more gender sensitive and gender responsive. The fact that a judge is of the female sex does not automatically make her gender sensitive and responsive, neither does the fact that a judge is male automatically make him insensitive and unresponsive to gender issues. Sex is different from gender. Sex is purely biological and centered on the physiological differences between men and women (Tamale 2018). Gender, on the other hand connotes the social and cultural construction of the different roles for women and men that create masculine and feminine identities (Tamale 2018). A person of the female sex may be detached from the realities of gender dynamics of society because of the environment she grew up in which may have been more supportive rather than unaccommodating. Hence, our recommendation is that judges, both male and female, should be made gender sensitive and responsive through training and education. Gender sensitivity and responsiveness on the bench will sustain the prevailing edict which gives women equal and equitable share in spousal property and also advance judicial activism in the area of spousal property and beyond especially for women.

5. Conclusion

In this paper we set out to answer one question: in addressing spousal property rights in Ghana, have women at the bench made a difference? The answer is, not quite. The findings and observations made indicate that the cases at each developmental stage of the law, reflected the reality and spirit of the society at that moment. The law which deemed property acquired during marriage with joint efforts as belonging exclusively to the husband, was a reflection of the patriarchal organization of society at the time, embodied in traditional law and norms. In the same way, the substantial contribution principle, was a reflection of the shifting roles of women in society at the time. Likewise, the equality is equity principle, is a reflection of the need to balance the equal rights of men and women in modern society which includes property rights. In addressing spousal property rights in Ghana, the shifting paradigms are attributable to the changing society coupled with the disposition of the judges but not their gender.

The cases examined shows that women have virtually been non-existent on the bench with regard to all the landmark cases except in *Mensah v Mensah* (1998–99). The evidence also shows that the judiciary was not gendered. Consequently, one can conjecture that it will take a lot more women at the bench and gender sensitization in order for women to make a marked difference.

This paper primarily focused on what the role of women judges was in the development of the law on spousal property rights in Ghana by examining the judgments of landmark cases on the matter. What is, what will be or should be the role of women judges could be the subject matter of a future research. The findings in this article contributes first to the limited studies on the role of women judges in African countries and secondly adds to advancing our understanding of the role of women judges within the African context.

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