


THE IMPACT OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) ON THE LAW OF ADVANCEMENT.

Muiz Banire Esq. LLB (Hons), BL, LLM.

Lecturer - University of Lagos.

ince 1945, several efforts at matching the status of women with that of their male counterparts, has culminated in the release of several legal instruments at the global level. While it can be categorically stated that between that period and now, there exists six (6) of such international instruments specifically on the status of women, there are simultaneously in existence not less than fifteen other corollary instruments relating, affecting, concerning and/or pertaining to the same status of women.

The specific conventions ranges from convention on the political rights of women, convention on the nationality of married women; the convention on consent to marriage, minimum age for marriage and registration of marriages through the convention (no 100) concerning equal remuneration for men and women workers for work of equal value, convention (no. 4) concerning employment of women during the night, to the ultimate convention on the elimination of all forms of discrimination against women. It is noteworthy that all the conventions preach the same gospel of equality of all sexes. However, for the singular fact that the CEDAW convention appears to a large extent to have consumed and accommodated all the messages inherent in the other

conventions, we shall in this exercise substantially rely on it for our analysis. Moreover, we wish to state that to the extent that the convention protects and promotes the equal status of both sexes, it is welcome. However, if in the course of implementation, it subjugates the other, sex, it becomes worrisome.

Put differently, the scheme of the convention is to place both sexes on equal pedestal without relegating, or acting detrimentally to the interest of the other. The import of this, unlike as in the United Kingdom, Sex Discrimination Act 1975, is to render the convention applicable at all times and in all facets. For the avoidance of doubt, the preambles of the said Act and that of the convention are herein reproduced respectively.

“An Act to render unlawful certain kinds of sex discrimination on the ground of marriage, and establish a commission with the function of working and promoting equality of opportunity between men and women generally; and for related purposes”

While that of the convention stipulates inter-alia that:
The state parties to the present convention:

“Bearing in mind the great contribution of women to the welfare of the family and to the development of the society, so far not fully recognized, the social significance of the maternity and the role of both parents in the family and in the up-bringing of children and aware that the role of women in procreation should not be a basis for discrimination but that the up bringing of children requires a sharing of responsibility between men and women and society as a whole. Aware that a change in the

traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women”.

From the above, it is obvious that the aim of the CEDAW convention is to rectify and balance the alleged iniquities of the past between both sexes, without correspondingly destabilising the scale. Consequently, it is in this context that we intend to appraise the concept of advancement against the tenor of the CEDAW convention. Our curiosity is the determination of the extent of conformity of the concept with the principle of equality of both sexes inherent in the convention. To this end, the central theme of our thesis is simply burden and benefit goes together, implying equality of both sexes in totality. At this junction, it may be worth entering a caveat that this effort should not be misconstrued as being borne out of any chauvinistic tendency, but rather as an exercise directed towards putting the convention on course. In this connection, and in order to achieve our aim, the paper shall be divided into three (3) part, viz.:

- (i) The concept of advancement in a family circle.
- (ii) The import and impact of the CEDAW convention on the said concept of advancement in a family circle, and
- (iii) Conclusion and suggestion.

CONCEPT OF ADVANCEMENT IN A FAMILY CIRCLE

Prior to our voyage into the substance of this aspect, we wish to state that the term 'family' as used in this context connotes the nuclear family made up of the husband, wife and the offspring, and not the extended family system prevalent in Africa.

Having made this clarification, the general rule in this area of the law of trust is that if a person buys, or conveys title in property in the name of another other than him who provided the purchase money or the transferrer, and there is no explanation for such to be, the law will presume such other person to be resulting trustee for the person who advanced the purchase money or the transferrer. In other words, in so far as such person remains a volunteer, he would be treated as a nominal owner of the property. To this rule however exists the exception that where such transferee is a close relation of the transferrer, or he is such a person who the transferrer is morally bound to provide for, the presumption of the resulting trust earlier entered under the general rule will be replaced by the presumption of advancement, signifying the intention of the transferrer to constitute the transferee the real owner, except again, if sufficient explanation necessitating viewing it otherwise can be furnished. Lord Eldon succinctly captures this scenarios when he said:

"The general rule that on purchase by one man in the name of another, the nominee is a trustee for the purchaser is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee."

The categories of relationship that will warrant the application of this presumption are however never close. And for the purpose of this discussion, we shall be restricting ourselves to the cases of parents and their offspring. To this end, where a father purchases, or makes an investment in the name of his child, such shall, in the absence of contrary intention be regarded as advancement. In other words, the

father would be taken to intend passing the beneficial interest to the child. It is to be noted that the affluence of the child or the fact of his maintaining the father is inconsequential. Similarly, the fact that the father continues to have dealings with the property after the initial transfer to the child does not derogate from the application of the principle. But where the converse is the position, that is, the child making the purchases in the name of the father, the law remains that the father will be treated as a nominal purchaser.

To the contrary however, will appear to be purchases, or investment made by the mother in the name of the child. In this respect, such transfer shall be deemed to impose resulting trust on the child. Put differently, the child will be regarded simply as a nominal purchaser except contrary intention can be established. The rationale behind the principle being that the mother owes no moral duty of maintaining the child. The above rationale has been severely criticised rightly in our view, this cases mirror the modern perception of the issue. But even if those are insufficient to tilt the scale, the statutory trend currently existing in some legal system demonstrate the imposition of parental obligation of maintenance equally on the mother. This therefore necessitate the need to confer the status of advancement on such purchases or investments made by the mothers in their children's names. In this regard, we are alluding to the Married Women Property Act and the CEDAW convention that will be exhaustively discussed later in this paper. But suffice to conclude this segment by stating that as far as case law still stands, such purchases will remain in the purview of resulting trust in the absence of contraindication.

The other aspect of this section of our discussion is that involving purchases or investments between husbands and wives, vice versa. The rule is that where the husband invents, or purchases property in the name of the wife, such shall attract the presumption of advancement in the absence of contrary intention, and/or special legislation on the subject. The presumption is even said to be much stronger when the parties are about getting married. However, if the marriage event did not come to pass, the presumption will be reversed to that of resulting trust.

Astonishingly however, where it is the wife that invents, or make purchases in the name of her husband, the presumption will not be that of advancement in her own case, but rather, that of resulting trust. The justification, understandably then, lies in the historical economic subjugation of women. However, in view of the modern status of women, politically, culturally and economically, there have been uproar, criticisms of the rule, though yet to no avail generally. Appreciable progress has however been made in cases involving matrimonial properties. Remarking on this issue, Lord Denning, M.R has this to say:

"If this case has come up for decision twenty years ago, there would undoubtedly have been a presumption of advancement; because at that time whenever a husband made financial contributions towards a house in his wife's name, there was presumption that he was making a gift to her. That presumption found its place in the law in Victorian days when a wife was utterly subordinate to her husband. It has no place, or, at any rate, very little place, in our law today. Pettitt V. Pettitt (1970)

A.C. 777, per Lord Reid at p. 793, per Lord Hudson at p. 811 and per Lord Diplock at p. 824. We have decided these cases now for some years without much regards to a presumption of advancement, and I think we should continue so to do”.

As indicated earlier, this changing judicial attitude is limited to matrimonial property disputes. Hence, as far as other aspects of the relationship are concerned, the law regrettably remains the same. This undoubtedly is highly prejudicial to the interest of the man believed or reputed to be enjoying equality of status with his marital partner. Whether or not this position is justifiable, especially within the context of the CEDAW convention, shall pre-occupy our attention in the next ensuing discussion.

THE IMPORT AND IMPACT OF THE CEDAW CONVENTION ON THE CONCEPT OF ADVANCEMENT IN A FAMILY CIRCLE

In this area of our discussion, we intend to set out the relevant provisions of the CEDAW convention with a view to analysing and sifting out their connotations. Thereafter, a critical look at its impact on the principles enshrined in the concept of advancement shall be undertaken. To this end, the foremost provision of the convention that is of interest to one with regard to the subject under discussion, is contained in Article 16 and it provide that:

“State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a)

(b)

(c) *The same rights and responsibilities during marriage and at its dissolution;*

(d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

(e)

(f)

(g)

(h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration"*

In considering the above provision, it is our fervent belief that one needs no canon of interpretation to ascertain the import, which without mincing words, is to treat both sexes equally in all matters arising, relating and/or occurring during the subsistence of the marriage without favour. Therefore, in the determination of their rights and privileges, the principle must be recurring. The further implication of the above is that any concept or principle of law found to be promoting inequality between the partners will violate the convention. In other words, there must be no retention or

perpetration of detriment on any of the marital partner in the process of remedying the erstwhile inequality. This duty of ensuring equality in the family set up is imposed on the states parties to the convention which they must discharge by translating it into their national laws, whilst simultaneously purging the existing laws of the iniquities.

And in a language justify the conclusion, Article 15 of the same convention states:

1. *States parties shall accord to women equality with men before the law.*
2. *State parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal right to conclude contract and administer property and shall treat them equally in all stages of procedures in courts and Tribunals.*
3. *State parties shall agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void."*

Again, this provision is unreservedly requiring state parties that all campaigns of equality of material partners required under the various provisions of the convention must be brought to bear on the law. This means that all acts, omissions and commissions, of both sexes must be viewed from the same perspective. Implicit in the provision therefore,

is that any principle of law, statutory or otherwise, which infringes the concept of equality of both sexes must be repealed or modified to conform with the philosophy. And in a pre-emptory manner, deliberate and unintentional failure to review any such law will render same null and void to the extent of its inconsistency with the philosophy of equality of both sexes before the law. It is in the context of the above discussion that the principles of advancement that we have discovered to confer undue advantage on the other marital partner deserve immediate reform, and/or treatment as void principles.

Another pertinent provision of the convention justifying the equal right of both sexes in both economic and social life in a family circle is that which provides that:

“State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same right, in particular,

- (a) The right to family benefits*
- (b) The right to bank loans, mortgages and other forms of financial credits*
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.”*

The inference to be drawn from the provision is that, all states parties are expected to create and facilitate access for both parties in terms of obtaining credit facilities as well as material acquisition without either suffering from any form of disability due to his or her sex. Now, if the above three (3)

analysis above frowns at this, it will require urgent modification in compliance with its dictates. Submissively therefore, the convention's attitude towards a principle of law as this is to harbour its continuous application. The reason therefore is that if both parties are to be treated equally on the strength of the convention, any purchase and/or investment in the name of the husband by the wife must from the inception of the convention be treated as advancement, in the absence of contra-indication. This, in our view, is the only means of sustaining the soul of the convention.

Having thus so far revealed the inherent discrimination the principles of advancement in a family circle, and the impact of the convention on same, our adventure shall now lead us towards reaching a conclusion and rendering suggestions as to ways of retaining the principle of advancement without doing violence to purport of the CEDAW convention. This of course, shall constitute our next focal point.

CONCLUSION AND SUGGESTIONS

As indicated earlier, the efforts at entrenching equal treatment of both sexes must not be restricted to the surface or made to look artificial. It must be made to extend to all facets of human endeavours since they are both participants in the areas. In this connection, we have revealed in the body of this paper that the CEDAW convention denounces discrimination of any form as far as marital partners are concerned. Along the line of making this discovery, especially in the analysis of impact of the convention on the concept of advancement, we succeeded in unveiling some discriminatory

tendencies inherent in the principles. In this regard, we did not mince words in condemning this discriminatory disposition. Further emerging facts from the discussion is that the basis which erstwhile informed the discriminatory nature of the concept of advancement equally form the gravamen of the CEDAW convention. Thus, in view of this and coupled with the economic liberation of women and equal opportunity women now enjoys, we did not find it difficult to assert that the foundation of the concept has been knocked off. Consequently, once such impediments, which hitherto formed the bedrock of the discrimination, are extinct, we can but only strongly advocate equal treatment of both sexes.

Therefore, the continuous application of the concept of advancement as it presently stands is offensive to the convention. For it to be defensible in the face of the convention therefore, an overhaul of some of the tainted principles need be done to bring it in conformity with the intendment of the convention. Now doing away with this exposition, the question is, what should be embarked upon in order to purge the concept of the defects, and thereby align its operation with the scheme of the convention. The CEDAW convention commands that:

"States parties shall take appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either sexes or on stereotyped roles for men and women".

In response to this, our first suggestion is that the rules that purchases and/or investments made by mothers in the names of their children will attract presumption of resulting trust, must now be correctly stated and modified to command presumption of advancement instead. The Beijing declaration and programs of action lends credence to this proposition. The implication of this is that all pronouncements existing to the contrary must at the earliest opportunity be reversed and/or set aside.

Secondly, all purchases and/or investments in the name of the child by the mother must henceforth, in the absence of contrary evidence, be treated as advancement as opposed to resulting trust. This undoubtedly would be more in accord with the tenor of the convention. That this must be so is buttressed by the declaration of the women themselves at the said Beijing conference and platform for action. Again, the further implication of this is that any judicial pronouncement to the contrary must now be treated with suspect, and any statute of diverse nature must be treated with disdain. Needless to remind ourselves that the wind in this direction is blown to matrimonial property disputes as shown earlier.

Whilst seriously speaking, one would want to think that the womenfolk in their struggle for the equality would have taken cognizance, or envisaged the associated hazards, it may be safer to address the unlikely event of their unpreparedness to shoulder this burden. In that event, we recommend that the principle be re-modified to read that any purchases and/or investments by the husband in the name of the wife should invite the application of resulting

trust rather than advancement in the absence of evidence to the contrary.

Again, to cover all eventualities, if this approach is still uncomfortable to the womenfolk, we offer in the alternative to the foregoing that, a total abandonment of the concept of advancement as it relates to husband and wife. The import of which is that the ordinary rules premised on equality of both sexes will then apply. From the totality of all the above it is submitted that since the concept of advancement originated and developed from the principles of equity, which in its liberal meaning connotes equality, fairness and justice it stands to reason that if the concept of equality of both sexes as contained in all the conventions, especially the CEDAW convention is to be meaningful, then burden and benefit must be allowed to move together in the implementation of the principles of law and the convention particularly if one bears in mind that a party cannot approbate and reprobate at the same time.

Conclusively therefore, having claimed, secured and enjoyed the benefits of the convention, the seemingly distasteful sides engraved in the convention must be embraced. Hence, all necessary adjustments must be embarked upon to render the operation of the convention meaningful. At this juncture, and in the interim, we rest our oars.