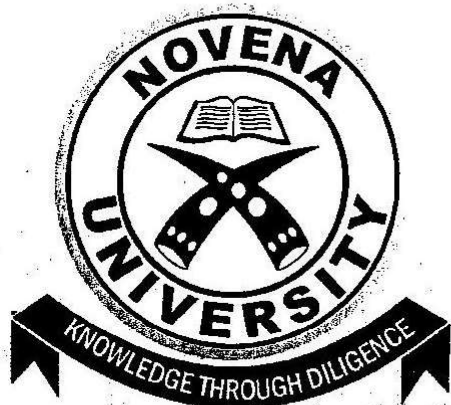




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ARTICLES

A Critical Analysis on the Characteristics, Relevance and Value of Humanitarian Intervention under the United Nations Charter: Some Current Jurisprudential Concerns in the Enforcement of International Human Right Law

Prof. Bibobra Bello Orubebe

X-Raying the Legal and Administrative Consequences of Divulging Confidential Information in Taxation

*Olokooba S. M
Awodun Muritala*

The Admissibility of a Child's Evidence

Dr. N.A.O. Ijaiya

Judicial Interpretation of the Constitution of India

Hakeem Ijaiya, Ph.D

Rights and Spouses in the Quest for Equality and Justice under the Islamic Family: the Muslim Feminist Perspective

*Grace Emmanuel Kaka
Adamu I. Tanimu*

Sustainable Development: A Recipe for Reconciling the Contradictions of Development in Africa

Dr. H. Bena Buku

Legal Issues in Organ Donation and Transplantation: Autonomy, Confidentiality, Consent and Capacity in Focus

*Bashir Adeniyi Omipidan, PhD
Omodoyin Taiye Joshua*

The Nature of Land Holding under the English Doctrine of Estate: Relevancy and Applicability to the Modern Nigerian Land Law

S.M. Abdulmalik

01 Exploring The implementation of ADR in the Nigerian Construction Industry

*Barakat A.Raji
Ashgar Ali Ibn Ali Mohamed*

14

A Geo-legal Survey of the Laws on The Subject of Fire In Nigeria

*Muhtar Adeiza Etudaiye, Ph.D
Abdulazeer Hamza Okene*

16

31

Towards Regulation of Aviation Emission in Nigeria: A Study on the Environmental Impact of Aviation Emissions and the Control Laws.

*Murtala Ganiyu A. Murgan
Maizatun Mustapha*

17

41

49

65 Comparative Analysis of the Nigerian and Malaysian Governments Implementation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) : Lessons to other Developing Countries.

Ganiat Mobolaji Olatokun PhD

190

CASE REVIEW

87 Provision of Security not a precondition for challenging the enforcement of an award under New York Convention: IPCO (Nigeria) Limited (Respondent) V Nigerian National Petroleum Corporation (Appellant) [2017] UKSC 16.

Philip Osarobo Odiase, PhD.

195

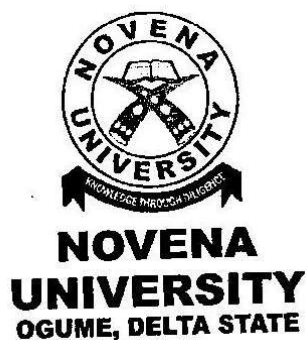
99

The Defence of Provocation in Homicide Cases in Nigeria: The 'Novelty' in the Case of Shande V State [2005]12 NWLR (PT. 939) 301

*Matthias Zechariah,
Jude Henry Ekwoma Okoro
Leah Mark Bulus*

200

119



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LAW JOURNAL

N.U.L.J. Vol. 2. No. 1, 2017

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Comparative Analysis of the Nigerian and Malaysian Governments Implementation of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) : Lessons to other Developing Countries.

Ganiat Mobolaji Olatokun PhD*

KEYWORDS: Women, Human Rights, Domestication, Reservation, Implementation

ABSTRACT

Nigeria and Malaysia are both signatories to The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and by virtue of the convention voluntarily agreed to be bound by the terms of CEDAW. Furthermore, such ratifications imply that both the Nigerian and Malaysian Governments are obliged to ensure that its domestic legislations comply with the Treaty's provisions. The two countries periodic reports, as well as the mode of implementation, actually shows the treaty has mix impacts on women's well-being.

This paper, therefore, examines implementation made by the Nigerian and Malaysia governments with the aim of advancing critical recommendations that can benefit other developing countries.

1.0 Introduction

Nigeria is one of the largest countries in Africa covering an area of 923,768 square kilometres and Africa's most populous country. It lies between latitudes 4° and 15° east of the Meridian. It is geographically situate North of the Bight of Bonny. Nigeria ratified, without any reservation whatsoever, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on the 13th of June, 1985. On its part, Malaysia, a country in South East Asia ratified and acceded to the CEDAW Treaty on the 5th of July 1995. By ratifying and acceding to the Convention both the Nigerian and Malaysian governments are obliged to ensure that their domestic legislations comply with the treaty provisions amidst all difficulties. This is international legal status of both countries in relation to the CEDAW, and is the basis this paper addresses the issues.

Equality of rights for women is a basic principle of the United Nations. The preamble to the Charter of the UN sets as one of the organisation's central

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consideration for the plight of women was given high priority,⁶ and by a resolution of the United Nations General Assembly, The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted on the 18th December, 1979.⁷ The Convention is a human rights document which promotes the principle of non-discrimination and equality. The Convention focuses on three key issues of which reproductive rights is one. The right to choose is one aspect of reproductive rights.⁸

Other aspects of reproductive rights include fully shared responsibility for child rearing between both sexes, right to maternity and family planning. Reproductive rights under CEDAW are contained in Article 12 which deals with health and Article 16 which deals with marriage and family.

2.0 Nigeria's CEDAW Implementation

Nigeria's implementation of CEDAW started with its combined 4th and 5th reports (1994-2002) and after that it has been filing its subsequent reports to the various sessions. For the purpose of easy analysis all the reports will be discussed together. The reports by the Nigerian government read together portends that "the country has done much" in the words of the Nigerian reports stated in parts that:-

..Nigerian government positively note with satisfaction the progress made by the Government's establishment of the Ministry of Women Affairs, the advancement of women, increase in school attendance rates for girls and literacy rates for women, as well as the increase in the number of women in decision-making positions.... The Nigerian Government has given rural women access to drinking water, electricity and shelter as well as qualitative improvements in their living conditions....⁹

The above facts are themselves are curiously explicit and tend to give the impression that the Nigerian government has accomplished much in the implementation of CEDAW. The reality is by every dent of imagination different in several respects.

One, Nigeria as a state party of CEDAW is yet to be implemented in Nigeria as a legally binding or better still, enforceable international treaty. Because section 12 of the Nigeria Constitution,¹⁰ does not give automatic enforceability to CEDAW and other international instruments. In fact, the constitution requires legislative domestication of international conventions

⁶ See Article 2 of the Universal Declaration of Human Rights 1948.

⁷ GA res. 34/180, 34 UN GAOR Supp. (No 46) at 193, UNDOC. A/34/46, entered into force Sept 3, 1981.

⁹ Nigerian Government CEDAW Report 4th and 5th combined (4th and 5th Periodic Report (1994-2002).

¹⁰ CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, Section 12 [1999], (as amended).

before they can be enforced. The needs be made that if CEDAW had been domesticated the lacunas in the current Nigerian constitution may have been 'taken care off'.

Two, the preceding paragraph in which Nigeria claims to have done much is a fallacy. What is more the provision of basic amenities is contained in chapter II fundamental objectives of directive state principle are non justiciable and any claim of voluntary compliance is a statement that 'wash decency over board'.

Three, the general tenure and language of the Nigerian ground norm particularly section 26 of the constitution appear to discriminate against women because whereas Nigerian men can legally acquire citizenship for their foreign wives by registration, Nigerian women cannot legally extend the same right to their foreign husbands.

Four, the Nigerian situation particularly as it affects rural women is pathetic. The situation is worst in the remote oil and gas bearing Niger Delta and other minority communities. According Professor Orubebe Bello:-

...the youths are poorly educated; women generally suffer all forms of discrimination in all socio – cultural activities. Maternal Mortality Rate is (608) per 100,000 live births (almost ten percent higher than the national average); several women die of HIV/AIDS and other preventable diseases; infant mortality rate is also far higher than the national average; the environment is degraded as a result of oil pollution. The people have lost their primary occupation of fishing..etc...Most educational and health care facilities are desolate without requisite equipments and personnel;....In fact, fifty percent of the women and indeed people live under one dollar per day and are hopelessly destitute;..while the oil and gas resources obtained from their ancestral homelands is stolen under all guises ie corruption by all shades of leaders at all levels.....¹¹

Although it is the practice of Nigerian governments to orchestrate success, the reality on the in and around the country speak of dire circumstances. It's against this backdrop some scholars insist its rather seeking to read of Nigerian government making progress on implementation of CEDAW to say the least.

3.0 Malaysia's CEDAW Implementation

On the 5th of July 1985, Malaysia ratified and acceded to the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW). To date, the Malaysian Government has not passed any Act in

¹⁰ CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, Section 12 [1999], (as amended).

¹¹ ORUBEBE BIBOBRA BELLO, ENVIRONMENTAL LEGAL IMPLICATIONS OF OIL AND GAS EXPLORATION IN THE NIGER DELTA OF NIGERIA, at PP. 91-92 (Pro Quest USA, UMI, 2009).

Parliament to make CEDAW wholly applicable to Malaysians.¹² By ratifying and acceding to the Convention, the Malaysian Government has voluntarily undertaken to be bound by the terms of the Convention. Furthermore, by choosing to ratify and become a party to the Convention, the Malaysian Government has an obligation to ensure that its domestic legislation complies with the Treaty's provisions. In fact, the Malaysian Government is obliged to give regular reports on the performance of the Convention to an appointed Committee of CEDAW. Failure to comply with the terms of the Treaty will mean that the Malaysian Government is in breach of International Law. However, evidence has shown that, the Government of Malaysia has over the years given piecemeal effect to some of the provisions under CEDAW, by incorporating these provisions into different domestic legislations, for example, the Constitution.¹³

The reluctance of the Malaysian Government to carry out a holistic implementation of the Convention has been demonstrated in the piecemeal domestication of CEDAW provisions, as well as the specific reservations expressed by the Government to its accession and ratification of the Convention.¹⁴ In 1995, Malaysia ratified CEDAW with the following original reservations:

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah Law and Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2(f), 5(a), 7(b), 9 & 16 of the aforesaid Convention. In relation to Article 11, Malaysia interprets the provision of this Article as reference to the prohibition of discrimination on the basis of equality between men and women only.

A reservation is a unilateral statement or phrase, made by a state when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or modify the legal effects of certain provisions of the Treaty in their

¹⁰ CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, Section 12 [1999], (as amended).

¹¹ ORUBE BE BIBOBA BELLO, ENVIRONMENTAL LEGAL IMPLICATIONS OF OIL AND GAS EXPLORATION IN THE NIGER DELTA OF NIGERIA, at PP. 91-92 (Pro Quest USA, UMI, 2009).

¹² See "Measuring Up to CEDAW: How far short are Malaysian Laws and Policies?", Malaysian Perspective, Pacifica Publications (1996), p.35. Suhakam Round table Discussion: Rights and Obligations Under CEDAW, 17th March, 2003.

¹³ See Article 8(2) of the Malaysian Constitution as amended 2001.

¹⁴ The Government of Malaysia has expressed reservation with regards to Articles 2(f), 5(a), 7(b), 9 and 17 of CEDAW. Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah Law and the Federal Constitution of Malaysia. Malaysian Government withdraws its reservation in respect of Articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h). See www.un.org/womenwatch/daw/cedaw/reservations-country.htm for more information.

application to that State.¹⁵ It can thus be argued that a Country like Malaysia that has made reservations to CEDAW is less committed to the human rights treaty in question¹⁶ (CEDAW). According to Goldsmith and Posner (2005),¹⁷ reservations are predominantly used by liberal democracies to circumvent any treaty provision they do not want to comply with. A reservation is permissible unless a treaty itself prohibits it, or permits only certain reservations excluding the one in question, or the reservation is incompatible with the object and purposes of the treaty.¹⁸

The power to make reservations to international treaties grows out of the principle of 'sovereignty of states', by which states can claim that they are not bound by some particular provisions of an international treaty which they do not consent to.¹⁹ Reservations to human rights treaties, like CEDAW will have peculiar influences on the nationals of the reserving States,²⁰ just as Human Rights Treaties are likely to lead to certain patterns in the behaviour of citizens of the ratifying or acceding State.²¹

Aside from the expression of reservation, and the piecemeal effect given to the provisions under CEDAW by the Malaysian Government, another angle from which the method adopted by the Malaysian Government in its implementation of CEDAW provisions could be understood is the issue of domestication.

States may domesticate multilateral treaties to which they are parties, so that the rights contained in such Treaties may become applicable and

¹⁵ See Article 2(1) Vienna Convention in International Law Treaties, (1969). Web.me.com/waltergehr/The-International-Law-of-Treaties/Reservations.html. See also, Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaty", *Journal of Legal Studies* 36(2), (2007), pp 397-430. See <http://eprints.lse.ac.uk/305/>. Available in LSE Research online: June 2008. Visited 24/4/11.

¹⁶ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?", *Journal of Conflict Resolution*, Vol. 49, No. 6, (2005) pp 925-953. (published by Sage Publication Inc). <http://www.jstor.org/stable/30045143>. visited 11/03/11.

¹⁷ Goldsmith, Jack L, and Eric Posner, "The Limits of International Law", Oxford University Press, New York, (2005).

¹⁸ Article 28(2) CEDAW. See also, Frederic L. Kirgis, "Reservations to Treaties and United States Practice", *American Society of International Law*, (2003). See also, www.asil.org/insigh105.cfm.

¹⁹ M. N. Shaw, "International Law", 6th ed. Cambridge University Press, Cambridge. (2008) p914.

²⁰ K. Korkelia, "New Challenges to the Regime of Reservations Under the International Convention on Civil and Political Rights", *European Journal of International Law*, (2003), p3.

²¹ Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?", *The Journal of Conflict Resolution*, Vol. 15, No. 4, (2007), pp588-621, (published by Sage Publication Inc). <http://www.jstor.org/stable/27638567> visited 11/02/11. See also, Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law", copyright © 2005, University of Chicago Law Review, 72 *U. Chi. L. Rev.* 469. See also, <http://litigation-essentials.lexisnexis.com/webcd/app?action>. See also, William Bradford, "In the Minds of Men: A Theory of Compliance With Laws of War", Copyright © 2004, *Arizona State Law Journal*, 36 *Ariz. St. L. J.* 1243. See also, <http://litigation-essentials.lexisnexis.com/webcd/app?ac>.

enforceable domestically in the State concerned²². It can, therefore, be said that domestication of treaties is a matter of national or municipal law, and is not governed by international law.²³ In order to domesticate a particular international treaty, the dualist approach (transformation), or the monist approach (incorporation) may be used. Under the dualist approach, treaties belong to a separate legal system from that of domestic law. They do not form part of domestic law directly until an appropriate national legislation has been enacted to give the treaty the force of law domestically²⁴. It involves a direct incorporation of treaty provisions through enactment, which gives the force of law to specified provisions of a treaty or indeed, the whole treaty.

Under the monist approach²⁵, the legal system of a State is usually considered to include treaties which the State has ratified. Thus, treaties may become directly applicable in that state domestically (self-executing) and do not rely on subsequent national legislation to give them the force of law once they have been ratified by the State.

The dualist regime is operated in Malaysia. The provisions of CEDAW do not automatically become applicable until incorporated into the Constitution.²⁶ This accounts for the piecemeal domestication of some provisions of CEDAW in Malaysia. Those provisions of CEDAW that now form part of the Constitution of Malaysia are those that have been domesticated. All other provisions, which have not found their way, through

²² A. O. Adede, "Domestication of International Obligations", A Foundation for law and policy for contemporary problems, (2001). See also, <http://www.commonlii.org/ke/other/KECKRC/2001/14.html> See also, the Asia Pacific Pacific Islands Treaty Series. References on the complex issue of domestication of international laws and treaties (such as CEDAW), after ratification on the international level by countries. See also, <http://www.wunm.com> and <http://www.pacii.org/oldpits/english/domestication.html> The act of transformation was also dealt with at the Suhakam Roundtable discussion. *Op. cit.*

²³ A. O. Adede, *Ibid.* The international UN system cannot compel changes in ratifying states. Treaty compliance is essentially a domestic process. See Mwanza, Iris, "How Nations Misbehave: Compliance With Human Rights Treaties in Commonwealth Africa", Paper presented at the annual meeting of the American Political Science Association, Philadelphia, Aug 2003. See, <http://www.allacademic.com/meta/p62693-index.html>

²⁴ See the outcome of the Bangkok Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangkok, Thailand, 23rd-25th March 2009, p5. See also, Abdul Ghafur Hamid @ Khin Maung Sein, "Judicial Application of International Law in Malaysia: A Critical Analysis", Asia-Pacific Yearbook of International Humanitarian Law, Vol.1 (2005), (published in 2006), pp196-214, Institute of International Legal Studies, University of Philippines. For further readings on dualism and monism, see, Oppenheim's International Law, Lauterpacht (ed), Vol.1, Peace, (18th ed, 1955), 37; See also, Brownlie Ian, "Principles of Public International Law", 5th ed., (1998) pp 42-43. See also, The Suhakam Roundtable Discussion. *Op. cit.*

²⁵ Melissa A. Walters, "Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Right Treaties", Columbia Law Review, (2007), Vol. 107: 628 pp 630-704. See also, www.columbialawreview.org/assets/pdf/107/3/walters.pdf See also, D. P. O'Connell, "International Law", Steven and sons, London (1970) p 39. See also, H. Kelsen, "Principles of International Law", Rinehart and Winston (1966), pp 533-584. See also, D.V.C. Okene and B. C. Eddie-Amadi, "Bringing Rights Home: The Status of International Instruments in Nigeria Domestic Law", lawlib.wlu.edu/lexopus/works/560-1.pdf.

²⁶ *Op. cit.* Malaysian Constitution.

parliament, into the body of domestic laws, are yet to be domesticated²⁷, and therefore not binding on the citizens of Malaysia.

3.0 Evidence of Gradual Implementation of CEDAW by the Malaysian Government

On the 6th of February 1998, the Government of Malaysia withdrew its reservation in respect of Articles 2(f), 9(1), 16(b), 16(d), 16(e), and 16(h). Also, in July 2010, the Malaysian Government equally removed its reservations to CEDAW Articles 5(a), 7(b) and 16(2).

However, reservations are retained in relation to five (5) CEDAW articles. These include Article 9(2) which requires State parties to grant women equal rights with men with respect to the nationality of their children; Article 16(1)(a), pursuant to which states 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 the basis of equality of men and women, the same right to enter into marriage; Article 16(1)(c), on equality of rights and responsibilities during the contracting and dissolution of marriage; Article 16(1)(f), on equality of rights and responsibilities with regards to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; and lastly Article 16(1)(g), on the equality of personal rights as between husband and wife, including the right to choose a family name, a profession and an occupation.

Despite the reservations still maintained with respect to the five articles above, the Malaysian Government deserves to be commended on the laudable strides embarked upon in order to see that discrimination against women in Malaysia is reduced.

4. What Lessons for Developing Countries

The issue of CEDAW implementation is at the heart of good governance and constitutional democracy in the developing countries. Thus the need for its full implementation cannot be over stated. However, the required robust legal framework coupled with the appropriate political will to address the living conditions of women in both Nigeria and Malaysia are lacking in many respects. Although Malaysia appear to have made reservations it has fractured or segmented domestication of CEDAW, a fact that beclouded most of its efforts at CEDAW implementation. But beyond this reality lies the wide gap of positive or negative legal and policy approaches that other developing countries can draw lessons from. For example in Nigeria and Malaysia religion

²⁷ Jack Goldsmith, "The Unexceptional US Human Rights RUDs", University of St. Thomas Law Journal, (2005), 3. u. St Thomas L.J. 311. Vol. 3:2. See <http://litigation-essentials.lexisnexis.com> , See also, Louis Henkin, "US Ratification of Human Rights Treaties: The Ghost of Senator Bricker", 89 AM.J. Intl.L. 341, 341 (1995). See further, Ryan Goodman, "Human Right Treaty, Invalid Reservations and State Consent", American Journal of International Law, Vol. 96:531, (2002) pp 531-566.

and customary laws are still relied on to deny women their basic socio-cultural rights under obscure circumstances because CEDAW has not been fully implemented. Here other developing countries need to opt for full domestication to avoid the shadow of "primitive or unhealthy human right observance" which negatively impacts the two countries ability to attract Foreign Direct Investment (FDI) increasingly becoming dependent on adherence to human rights.

Also critical in this discourse is the fact that both countries periodic reports contain sweeping and indeed flowery language that tends to be misleading. Yet, widowhood practices, early marriage and Female Genital Mutilation (FMG) and forced marriages amongst other obnoxious practices against women are rampant. Other developing countries need to be more factual in their report writing and take urgent steps to ensure quality and equity on issues affecting rural women. Definite steps need to be taken to elevate fundamental objectives and directive principles that impact on women is made justiciable.

Further to the above, there is the need to enact national legislations that eliminate all forms of discrimination. Because of the peculiar vulnerabilities of women, governments should implement deliberate policies that address poverty and the advancement of women. It is also advised that countries embark on criminalisation of violence against women. While national judiciaries are encouraged to ensure that language in national legal and policy documents reflect gender neutrality.

Developing countries must not repeat the missteps of Nigeria and Malaysia by adopting affirmative policies that empower women and protect them in times of crisis. Adopt climate mitigation and adaptation strategies that address the challenges women face during national environmental emergencies.

Conclusion

Despite the reservations expressed by the Government of Malaysia on its accession and ratification of the CEDAW in 1985, the Convention has been made to have some impact in Malaysia through the domestication of certain CEDAW provisions and the withdrawal of some of the reservations earlier made. The Malaysian Government being fully aware of the implications of a holistic implementation of the provisions of CEDAW was cautious in giving force to its provisions. Hence it adopted a piecemeal approach to the implementation of the Convention. However, with the gradual implementation of CEDAW in Malaysia, Malaysian women have now begun to take their rightful place in the socio-political affairs of the state. Flowing from this, it is the contention of this paper that if the Nigerian government can also strive to implement most international treaties that enhance the status of women, Nigeria will make good progress in the actualisation of the human rights of women and will be highly regarded in the community of nations.