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# An Analysis of Customary Law Inhibitions to the Right of Women to Choice of Marriage in Nigeria

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## Abstract

Marriage occupies an epochal position in Nigerian society and is governed by different legal systems comprising statutory, customary law or Islamic law. Customary law continues to exercise considerable influence over the formation, validity and dissolution of marriages, particularly in communities where customary marriage remains the predominant form of family formation. While customary law performs important social and cultural functions, certain customary practices tend to restrict women's autonomy in choosing marriage partners. These restrictions may arise from parental control, family and community expectations, lineage considerations, socio-economic status, religious or ethnic considerations, arranged marriages, bride-price practices and other patriarchal norms. This article examines the extent to which customary law may lawfully regulate or inhibit a woman's choice of marriage partners in Nigeria. It analyses the legal significance of consent to marriage, the constitutional prohibition of sex discrimination, the repugnancy doctrine, statutory regulation of customary law and Nigeria's obligations under applicable human rights instruments. Specific consideration is given to judicial pronouncements in *Osamwonyi v. Osamwonyi, Mojekwu v. Mojekwu, Mojekwu v. Iwuchukwu, Anekwe v. Nweke, Ukeje v. Ukeje and Okonkwo v. Okagbue*. The article argues that customary law is entitled to recognition within Nigeria's multi - legal system but that recognition is conditional. A custom that merely facilitates family participation in marriage is distinguishable from one that removes or substantially negates the woman's free and voluntary consent. The latter is vulnerable to invalidation where it conflicts with the Constitution, applicable legislation, public policy, natural justice, equity and good conscience. The article concludes by proposing a rights sensitive approach to customary law adjudication, legislative clarification, community engagement and improved access to justice for women.

**Keywords:** Customary Law, Marriage, Women, Consent, Gender Equality, Discrimination, Customary Marriage, Human Rights, Repugnancy Doctrine, Nigeria

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## 1. INTRODUCTION

Marriage is a universal institution. It is the voluntary union of a man and woman with full capacity to do so. In other words, the parties to marriage must be of full age or adults. As a result, the sanctity of marriage is a globally accepted norm. In fact, marriage is the root of family and the society.[1] In Nigeria, marriage must be between two people of opposite sex, that is, it must be between a male and a female.[2] Marriage is one of the most important social and legal institutions in Nigeria. It establishes a relationship between spouses and ordinarily creates reciprocal rights and obligations extending beyond the parties to their families and communities. In the Nigerian context, marriage is regulated through a multiple legal framework in which statutory marriage, customary marriage and Islamic marriage coexist. Customary marriage, in particular, remains deeply embedded in the social organisation of many Nigerian communities.[3]

The relevance and importance of customary law in Nigeria cannot be ignored. It reflects the history, norms, values, beliefs, traditions and social institutions of the communities in which it operates.[4] Nigerian courts have consequently recognised customary law as a legitimate source of law, subject to the requirements imposed by the legal system.[5] Custom, however, does not possess an unlimited capacity to regulate individual conduct. It operates within a legal order in which the Constitution is the *fons et origo* wherein fundamental rights are respected by governmental authorities and citizens.

One area in which this inhibition is particularly important is the right of women to choose their marriage partners. In many traditional settings, marriage has historically been regarded not simply as a union between two individuals but as an alliance between families and communities.[6] Consequently, the consent and preferences of the wider family may be considered relevant to the selection of a spouse for the female child. Parental consent, payment of bride-price, family negotiations and community participation constitute important aspects of customary marriage in Nigeria above the interest and choice of the wife – to - be.[7]

The problem arises where family or community participation ceases to be consultative and becomes coercive or forceful. There is an important distinction between a customary practice under which families participate in marriage negotiations and a custom that gives parents, guardians, family heads or community authorities the legal power to compel a woman to marry a person whom she does not freely choose or does not want to marry. The first may constitute a legitimate feature of customary marriage but the second raises serious legal questions concerning consent, dignity, personal autonomy, equality and freedom from discrimination of women in the exercise of their right to choice of partner in marriage. The Supreme Court recognised the fundamental element of consent in *Osamwonyi v. Osamwonyi*,[8] where the Supreme Court observed that consent is fundamental to both customary and statutory marriage. The decision is particularly important and essential because it demonstrates that customary marriage is not a purely

[1]Section 1 of the Same Sex Marriage (Prohibition) Act, 2013 makes any marriage or relationship between people of the Same Sex Marriage (Prohibition) Act, 2013 makes any marriage or relationship between people of the same sex an offence punishable with up to 14 years imprisonment in Nigeria. Not only that it prohibits such marriage but such marriage shall not be recognized as entitled to the benefits of a valid marriage.

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[3]FR Adegbite, 'Legal Pluralism and Marriage in Nigeria: A Structure for Denying Rights to Women<https://www.researchgate.net> accessed 4 October, 2026.

[4]*Anla v. Ayanbola & Ors* (1977) LPELR – 24887 (SC) 1 at 3 – 6, per Sowemimo, J.S.C. (as he then was); *Pam v. Gwom* (2000) LPELR – 2896 (SC) 1 at 23.

[5]*Ibid.*

[6]This is very common in Nigerian indigenous and traditional societies.

[7]Adegbite, n. 3 above.

[8] (1972) LPELR – 2786 (SC) 1 at 9 10 paragraphs F – A, per Fatayi – Williams, J.S.C. (as he then was).

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communal institution in which the individual parties have no independent legal significance or that the individual parties are mere participants.

The problem is complicated by the fact that discriminatory customary norms do not always concern the formation of marriage directly. Norms and practices concerning inheritance, widowhood, matrimonial property and the status of women within the family may indirectly affect a woman's ability to exercise meaningful marital choice. Where marriage determines access to property, social status, security and family membership, customs or customary practices that place women in a legally inferior position may create substantial social pressure in the exercise of marital choice.

The Constitution of the Federal Republic of Nigeria 1999 (as amended)[9] prohibits discrimination on the ground of sex under section 42. It also protects dignity and personal liberty under sections 34 and 35 respectively. Section 17(3) (e) of the CFRN, although contained in the Fundamental Objectives and Directive Principles of State Policy, expresses the constitutional commitment to equality by requiring the State to ensure equal pay for equal work without discrimination on account of sex. The Evidence Act 2011 also imposes an important limitation or test of validity on customary law. Section 18(3) of the Evidence Act provides that a custom that is contrary to public policy or inconsistent with natural justice, equity and good conscience shall not be enforced as law.[10]

The central argument of this article is therefore not that customary law is inherently incompatible with women's rights. Rather, it is that customary law must be distinguished from customary practices and norms that are coercive, discriminatory or inconsistent with superior norms of Nigerian law. The legal question is not whether a practice is traditional but whether the particular rule, norm or practice can legitimately operate within Nigeria's constitutional and statutory framework with respect to women without any discrimination or oppression.

## 2. CONCEPTUAL CLARIFICATION

### 2.1 Customary Law in Nigeria

Customary law may broadly be understood as the body of rules and practices which, having acquired acceptance within a particular indigenous community, are regarded as binding by members of that community. It grows from the customs and norms of the people over a period of time.[11] There is no uniformity in Nigerian customary law as a result of the diversity of ethnic groups in the country. There are numerous customary law systems corresponding to the diversity of Nigerian ethnic and cultural communities.

Customary law is therefore local rather than universal. A norm which is applicable in one community may have no application in another community. The existence of a custom may be proved by evidence where it is not judicially noticed.[12] Section 16 of the Evidence Act 2011 permits custom or customary practice to be adopted as part of the law governing particular circumstances where it is judicially noticed or proved to exist, while section 18 of the Act regulates the proof and enforcement of custom.[13]

This evidential framework is relevant to the subject matter of this article. A party cannot simply assert that a particular practice is customary and thereby establish its legal validity. Two distinct questions arise in this discourse. One, whether the alleged custom exists; and two whether the court can lawfully enforce it. The second question is especially important where women's rights are concerned.

[9] Hereinafter referred to as CFRN.
[10] Section 18(3), Evidence Act, 2011, as amended.
[11] A Emiola, *The Principles of African Customary Law* (Emiola Publishers, 1997) 8.
[12] Section 18(1), Evidence Act, as amended.
[13] Sections 16, 17, 18 and 19 of the Evidence Act; Osamwonyi v. Osamwonyi (Supra) at n. 8 above.

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### 2.2 Customary Marriage

Customary marriage is generally a marriage celebrated in accordance with the native law and custom of the parties or the relevant community. Its requirements vary from community to community. They may include consent of the parties, consent and participation of parents, payment of bride-price or dowry, presentation of gifts, performance of traditional ceremonies and formal handing over of the bride.[14]

The plural nature of customary marriage means that no single set of requirements can automatically be applied throughout Nigeria. Nevertheless, consent remains a fundamental element. The fact that families participate in the marriage does not necessarily mean that the woman's personal consent is irrelevant. Family consent and spousal consent are conceptually distinct.[15]

### 2.3 The Meaning of Choice in Marriage

The right to choice in marriage may be described as the individual's freedom or free – will to decide whether to marry, and subject to lawful restrictions such as age and prohibited degrees of relationship, whom to marry. Choice necessarily presupposes voluntariness. A person cannot meaningfully exercise a right of choice if refusal is accompanied by physical force, duress, threats, detention, severe social coercion or legally enforceable penalties imposed solely because of the refusal.

The right should therefore be understood in two dimensions: the negative right not to be forced into marriage; and the positive freedom to select or choose a spouse voluntarily. This distinction is important because a family may legitimately advise, counsel or express disapproval without necessarily violating the woman's legal rights. The legal difficulty arises when the advice becomes compulsion or duress on the woman to accept the marriage at all cost.

## 3.CONSENT AS A FUNDAMENTAL REQUIREMENT OF MARRIAGE

Consent occupies a central position in the law of marriage. In *Osamwonyi v Osariere Osamwonyi*,[16] the Supreme Court considered the validity of a marriage under Benin native law and custom and recognised consent as fundamental to customary marriage. The significance of this case extends beyond its particular facts. It demonstrates that customary marriage cannot be reduced to an arrangement exclusively controlled by parents or family heads. In other words, the spousal consent is very important especially the consent of the woman or the female.

The recognition of consent is also consistent with the broader conception of marriage under international human rights law. Article 16(1) of the Universal Declaration of Human Rights[17] recognises the right of men and women of full age to marry and found a family and requires free and full consent to marriage. Article 16(1)(b) of CEDAW[18] similarly recognises women's equal right freely to choose a spouse and to enter into marriage only with their free and full consent.

Although CEDAW has been ratified by Nigeria, it has not been domesticated as a law having direct domestic force in the same manner as the African Charter on Human and Peoples' Rights. The UN Committee on the Elimination of Discrimination Against Women has repeatedly expressed concern regarding the absence of full domestication of CEDAW in Nigeria.[19] Its provisions nevertheless provide an

[14]Adegbite, n. 3 above.
[15]Emiola, n. 11 above at 69 – 70.
[16]*Supra* at n. 8.
[17]Hereinafter referred to as UDHR.
[18]Convention on the Elimination of All Forms of Discrimination Against Women which was adopted by the United Nations General Assembly in 1979 but officially came into force on September 3, 1981. It sets a universal standand for gender equality and the protection of women's rights.
[19]FIDH, 'United Nations Calls on Nigeria to Urgently Adopt Laws Protecting Women's Rights: Bills Are Not Enough'<https://www.fidh.org> accessed 8 October, 2026.

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important international standard against which Nigerian law and customary practices may be evaluated, particularly where domestic constitutional rights are being interpreted.

The African Charter on Human and Peoples' Rights occupies a different position. Nigeria enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[20] thereby giving the Charter domestic legal effect. Section 1 of the Act provides that the Charter provisions contained in the Schedule have force of law in Nigeria. Article 18(3) of the African Charter requires the State Parties to ensure the elimination of every discrimination against women and the protection of the rights of women and children. Article 2 prohibits discrimination on grounds including sex. Accordingly, consent in marriage is not merely a matter of social etiquette. It is connected with autonomy, dignity and equality.

## 4. CUSTOMARY LAW INHIBITIONS TO WOMEN'S CHOICE OF MARRIAGE

### 4.1 Parental and Family Control

One of the most important features of traditional marriage systems is the participation of parents and extended family members. This may involve introduction of prospective spouses, negotiations between families and the performance of marriage rites.[21] Family involvement is not, in itself, unlawful. Nigerian society recognises marriage as having social and familial consequences, and it is understandable that families may participate in the process. The difficulty arises when family participation becomes determinative of the woman's decision.

A custom which requires a woman to marry a man selected by her parents, regardless of her objection, would be fundamentally different from a custom requiring parental consultation or family approval. The former substitute family decision for individual consent. The decision in *Osamwonyi v. Osamwonyi*[22] strongly suggests that family participation cannot completely displace the consent of the parties.

### 4.2 Arranged Marriage and Forced Marriage

Arranged marriage must be distinguished from forced marriage. In an arranged marriage, families may introduce the parties or facilitate negotiations, while the prospective spouses remain free to accept or reject the arrangement. Forced marriage, by contrast, occurs where real consent is absent because of force, threats, duress, coercion or comparable pressure.[23]

The distinction is particularly important in customary law. The existence of an arranged marriage does not necessarily establish a violation of rights. The decisive consideration is whether the parties, particularly the woman whose choice is under examination, had a genuine opportunity to refuse. Where refusal is legally or socially rendered impossible, the practice becomes inconsistent with the principle of voluntary or real consent.[24]

### 4.3 Ethnic and Community Restrictions

Marriage across ethnic, clan or community boundaries may historically have attracted disapproval in some Nigerian communities. Such restrictions may be justified by consideration of preserving lineage, culture, family identity or community solidarity. Nevertheless, a customary practice that prohibits a woman from marrying a person solely because of his ethnic origin raises serious legal questions under section 42 of the Constitution, which expressly prohibits discrimination based on community, ethnic group, place of origin and sex.

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[20]Cap A9, Laws of the Federation of Nigeria, 2004.
[21]Emiola, n. 11 above at 70 – 72.
[22]*Supra* n. 8 above.
[23]Life without Barriers, Understanding the Difference Between Forced Marriage and Arranged Marriage<https://www.Iwb.org.au> accessed 4, October, 2026.
[24] *Ibid.*

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There is an important distinction between social preference and legal disability. A family may express a preference that its daughter marry within the community which is a social preference. It is more difficult to sustain a legal norm under which the woman's choice is invalid solely because the prospective husband belongs to another ethnic group. No legal norm will sustain such legal disability.

### 4.4 Religion and Marriage Choice

Religious considerations may also influence customary marriage. Religious freedom is constitutionally protected and individuals may make decisions concerning their religious identity.[25] However, where religious considerations are incorporated into customary practice in a manner that coercively removes the woman's freedom of choice to marriage, the practice may become susceptible to constitutional and human rights concerns. The issue should therefore not be approached by asking whether religion or culture is good or bad. The legally relevant question is whether a particular customary norm or practice or religious practice or rule can deprive an individual of a right protected by superior law or the *grundnorm*.

### 4.5 Socio-Economic Status

In some communities, marriage choices may be influenced by family expectations concerning education, occupation, wealth, social standing or family background. These considerations may be socially significant, but their legal status must be distinguished from their social significance.[26] A family may advise a woman against marrying a person whom it considers unsuitable. It does not necessarily follow that the family possesses legal authority to compel her to marry another person.[27] The essential consideration is whether the woman's right to choice of partner to marry has been violated.

### 4.6 Bride-Price and Marital Autonomy

Bride-price is an important aspect in many customary marriages. It may serve cultural, symbolic and social purposes and should not automatically be equated with the purchase of a woman.[28] The legal difficulty arises where payment of bride-price is interpreted as giving the husband's family ownership or control over the woman. A woman is not a chattel and payment made as part of customary marriage cannot lawfully transform her into property.[29]

This distinction is especially significant when a woman seeks to terminate an abusive or unwanted customary marriage. The legal system must be cautious of practices that make the exercise of marital choice practically impossible by treating the woman's departure as requiring the repayment of a debt or purchase price. The contemporary relevance of public policy was emphasised by the Supreme Court in *Okonkwo v. Okagbue*[30] where the Supreme Court observed that custom is not static and that public policy must take account of contemporary social conditions and values. In this case, the Supreme Court also held that the consent of each party to the marriage is an essential element of marriage contract. There are instances where the parent of the woman or bride may refuse consent to the marriage because they did want the supposed groom or man for their daughter as husband in marriage but the daughter insists on marrying the man. In such a situation, the parent will also refuse to receive the bride - price, which is an essential element of a customary law marriage. Where the bride-price is not paid or received by the bride's parents, then there is no marriage under customary law marriage. Thus, the refusal to accept bride – price by the bride's parent is also a serious inhibition to the right to choose a marriage partner by the woman or the bride.

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[25]Section 38, CFRN, 1999, as amended.
[26]O Olanipekun, 'Do Nigerian Parents Really Influence Nigerian Marriages?' <https://www.pulse.ng> accessed 8 October, 2026.
[27]V Bamas and L Opoola, 'Should Family Background Influence Choice of Spouse?' <https://www.dailytrust.com> accessed 8 October, 2026.
[28]Emiola, n. 11 above at 71 - 72.
[29]*Ibid.*
[30][1994] 12 SCNJ 89.

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### 4.7 Widowhood and Remarriage

Certain customary practices may also constrain widows' freedom to choose whether and whom to marry after the death of their husbands. Historically, practices such as levirate marriages have existed in some communities, under which a widow would be expected to marry a relative of her deceased husband. Whatever historical or social purpose such arrangement may have served, a compulsory requirement that a widow should marry a particular person raises serious legal questions concerning autonomy and consent. A widow does not cease to be an autonomous person by reason of the death of her husband. Any customary practice that treats a widow as transferable from one male relative of her husband to another is therefore difficult to reconcile with contemporary constitutional provisions on the right to human dignity and personal liberty.[31]

## 5. CONSTITUTIONAL PROTECTION OF WOMEN'S MARITAL AUTONOMY

### 5.1 Constitutional Supremacy

Section 1(1) of the Constitution establishes the Constitution as the supreme law in Nigeria while section 1(3) renders inconsistent laws void to the extent of their inconsistency. Customary law which is also law in Nigeria is therefore subject to the Constitution. This principle is particularly significant where a customary norm discriminates between men and women.[32] The fact that a practice is ancient does not make it immune from constitutional scrutiny.

### 5.2 Right to Dignity

Section 34 of the Constitution protects the dignity of the human person. Forced marriage has the tendency to defeat the dignity of the human person because it treats the individual as an object of family or community decision rather than as an autonomous person capable of making fundamental personal choices. The precise constitutional analysis will depend upon the facts. Nevertheless, coercive practices that involve physical force, degrading treatment, detention or serious threats must be mirrored through the provisions of section 34 in addition to other constitutional protections.

### 5.3 Personal Liberty

Section 35 protects personal liberty. Although not every disagreement concerning marriage constitutes a deprivation of liberty, physical detention or coercive confinement to compel a woman to submit to a marriage may raise a direct constitutional issue. The principle is therefore particularly relevant where customary practice is accompanied by physical restraint, duress, coercion or subjugation to marriage against the choice of the woman.

### 5.4 Freedom from Discrimination

Section 42 is perhaps the most directly relevant constitutional provision. It prohibits discrimination and restrictions, privileges or disadvantages imposed by law or governmental action on specified grounds, including sex, community, ethnic group and place of origin. The constitutional provision should be read alongside the judicial development of customary law principles in cases concerning women. In *Ukeje v Ukeje*,[33] the Supreme Court held that an Igbo customary norm excluding female children from inheritance violated section 42 of the Constitution. The decision concerned inheritance rather than marriage, but its broader significance lies in the recognition that customary law cannot be enforced where its operation results in unconstitutional discrimination against women.

[31]Sections 34 and 35, CFRN, as amended.
[32]*Ibid.* Section 42.
[33](2014) LPELR – 22724 (SC) 1 at 32 – 33 paragraphs E – F, per Rhodes Vivour, J.S.C.

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Similarly, in *Anekwe v Nweke*,[34] the Supreme Court rejected a customary law under which a widow without a male child could be deprived of rights in her deceased husband's property, describing the custom as repugnant to natural justice, equity and good conscience. These decisions are not direct authorities on a woman's right to choose her husband. They are nonetheless highly relevant because they establish a judicial willingness to subject discriminatory customary practices to constitutional and repugnancy scrutiny.

## 6. THE REPUGNANCY DOCTRINE

The repugnancy doctrine remains one of the essential mechanisms through which Nigerian courts determine whether a customary law can be enforced or not. Section 18(3) of the Evidence Act, 2011 provides that a custom shall not be enforced where it is contrary to public policy or inconsistent with natural justice, equity and good conscience. The doctrine has attracted criticism because of its colonial origins and the uncertainty inherent in concepts such as "natural justice" and "good conscience". Nevertheless, it continues to have statutory recognition.

The modern approach should not be based on whether a customary law resembles English law. Instead, the test should be informed by the Constitution, Nigerian public policy, contemporary social conditions and fundamental rights. This approach is consistent with *Okonkwo v. Okagbue*,[35] where the Supreme Court stressed the changing nature of custom and the relevance of contemporary values. The doctrine should therefore be applied in a structured manner to meet the following: (i) Existence: is the alleged custom established? (ii) Scope: what exactly does the custom require? (iii) Effect: what practical consequences does the norm have for the woman? (iv) Constitutional compatibility: does the custom conflict with a constitutional right? (v) Statutory compatibility: does it conflict with legislation? (vi) Public policy: is enforcement consistent with contemporary Nigerian public policy? (vii) Repugnancy: is enforcement contrary to natural justice, equity and good conscience? This approach is preferable to simply describing a custom as repugnant without examining how it operates.

## 7. JUDICIAL DEVELOPMENT OF WOMEN'S RIGHTS UNDER CUSTOMARY LAW

### 7.1 *Mojekwu v. Mojekwu*[36]

In this case, the Court of Appeal considered the discriminatory effects of the Oli-ekpe custom relating to inheritance. The Court of Appeal criticised the customary law that excluded women from inheritance. The case became an important authority in discussions concerning gender discrimination under customary law. On appeal, however, the Supreme Court cautioned against the Court of Appeal's procedure in raising and determining the repugnancy issue without giving the parties an opportunity to address it. The Supreme Court's decision demonstrates an important procedural point, that is, judicial concern for women's rights must operate within established principles of adjudication. The case is therefore best understood not as establishing an unrestricted judicial power to abolish every discriminatory custom, but as illustrating the tension between customary law, constitutional values and procedural fairness.

### 7.2 *Ukeje v. Ukeje*[37]

The subsequent decision in in this case represents a significant constitutional development. The Supreme Court held that an Igbo customary law that disentitled a female child from inheriting her deceased father's estate was inconsistent with section 42 of the Constitution. The significance of the case is that the

[34](2014) LPELR – 22697 (SC) 1; [2014] 9 NWLR (Pt. 1412) 393 SC.
[35]*Supra* at n. 30 above.
[36](1997) LPELR – 13777 (CA) 1 28 – 35 paragraphs D – B, per Tobi, J.C.A. (as then was).
[37]*Supra*, n. 33 above.

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Constitution is not subordinate to customary law. A customary law or norm may therefore lose legal force when its application constitutes constitutionally prohibited discrimination.

### 7.3 *Anekwe v. Nweke*[38]

In this case, the Supreme Court confronted another customary law which was disadvantageous to women. In other words, that customary practice or custom was discriminatory against women. The custom denied a widow without a male child the ability to inherit landed property from her deceased husband. The Supreme Court rejected the custom as repugnant and discriminatory. The case is significant because the discriminatory practice was defended as customary law. The Supreme Court's position demonstrates that customary status alone cannot provide an answer to constitutional and public policy objections.

### 7.4 *Okonkwo v. Okagbue*[39]

This case is important for another reason. The case concerned an unusual customary practice involving the marriage of a woman to a deceased man for purposes associated with lineage and procreation. The Supreme Court rejected the custom and in doing so emphasised that the content of public policy changes with social conditions. The Court stated in substance that conduct acceptable in the past may not remain acceptable in contemporary society and that custom is not static. The Supreme Court went on to emphasised that custom is not static and that public policy must reflect contemporary social conditions and values. The principle is particularly relevant to customary practices affecting women's autonomy. A practice cannot be preserved merely because it has historical roots if its present operation is incompatible with contemporary constitutional values.

## 8. CUSTOMARY LAW, CULTURE AND WOMEN'S RIGHTS: RECONCILING THE COMPETING INTERESTS

It would not be legally and sociologically correct to regard all customary law as oppressive or all traditional practices as incompatible with women's rights. Customary law serves legitimate functions. It can facilitate family relationships, preserve community identity and provide culturally appropriate mechanisms for marriage and dispute resolution. The appropriate objective is therefore not the elimination of customary law but its constitutionalism and rights - sensitive development.

Three principles are particularly important. First, cultural recognition does not mean constitutional immunity. The Constitution protects cultural identity in various contexts, but cultural practices operate within the constitutional order. A customary rule cannot override an applicable constitutional provision.

Second, family participation is different from family domination. The participation of parents and relatives may be legitimate. The legal problem arises where participation becomes a substitute for the woman's own decision or exercise of her right.

Third, customary law is dynamic. Custom develops as society changes. The Supreme Court's reasoning in *Okonkwo v. Okagbue*[40] supports the proposition that customary law should not be treated as frozen or rigid at a particular historical moment. This dynamic approach is preferable to an artificial opposition between culture and human rights. Nigeria communities themselves can participate in developing customary practices that preserve cultural identity while respecting individual autonomy.

[38] *Supra*, n. 34 above.
[39] *Supra*, n. 30 above.
[40] *Supra*, n. 30 above.

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## 9. THE AFRICAN CHARTER AND INTERNATIONAL HUMAN RIGHTS STANDARDS

The African Charter is especially significant because it has domestic force in Nigeria through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Article 2 guarantees enjoyment of Charter rights without discrimination, including discrimination based on sex. Article 3 guarantees equality before the law and equal protection of the law. Article 18 recognises the family as the natural unit and basis of society and requires protection of the rights of women and children.

The international framework is reinforced by CEDAW. Article 16 is particularly relevant because it addresses equality in marriage and family relations, including the equal right to freely choose a spouse and to enter into marriage only with free and full consent. The difficulty, as noted earlier, is that CEDAW has not been fully domesticated in Nigeria. The international obligation is therefore distinguishable from direct domestic enforceability. The distinction should be maintained in scholarly analysis to avoid overstating the domestic legal status of the Convention. Nevertheless, international instruments remain valuable interpretative materials, particularly where domestic constitutional principles such as dignity, equality and non-discrimination are being developed.

## 10. CHALLENGES IN PROTECTING WOMEN'S MARITAL CHOICE

### 10.1 Legal Pluralism

Nigeria's plural legal system presents a major challenge. The same social relationship may be viewed differently under statutory, customary and religious norms.

### 10.2 Unwritten Nature of Customary Law

Many customary rules are transmitted orally. This can create uncertainty about their content and scope. The Evidence Act therefore requires proof of custom where it has not been judicially noticed.[41]

### 10.3 Social Pressure

A woman may technically possess a right to refuse a proposed marriage but lack the social or economic capacity to exercise that right. This illustrates the distinction between formal rights and substantive autonomy.

### 10.4 Economic Dependence

Women who depend financially on parents or prospective spouses may face considerable pressure to accept family decisions.

### 10.5 Access to Justice

Legal remedies are of limited practical value if the affected woman cannot access lawyers, courts or legal aid services.

### 10.6 Fear of Social Consequences

In close-knit communities, rejection of a family-selected spouse may result in stigma, ostracism or loss of family support. Although such consequences may not themselves constitute a legally enforceable customary rule, they may substantially affect the practical exercise of choice.

## 11. TOWARD A RIGHTS - SENSITIVE APPROACH TO CUSTOMARY MARRIAGE

A more coherent legal framework should recognise that customary law and women's rights need not be treated as mutually exclusive. First, courts should distinguish carefully between customary regulation and

[41]Sections 16, 17 and 18, Evidence Act, 2011, as amended.

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customary coercion. Regulation of ceremonies, family participation and marriage rites does not necessarily violate individual rights. Coercion that removes free consent is fundamentally different and legally prohibited.

Second, courts should expressly consider constitutional rights when determining the enforceability of discriminatory customs. The constitutional analysis should not be left entirely to the uncertain language of repugnancy.

Third, the repugnancy doctrine should be understood as complementary to constitutional rights rather than as their substitute. Section 18(3) of the Evidence Act remains useful, but a modern analysis should ask whether the custom is consistent with constitutional equality, dignity and liberty.

Fourth, the courts should avoid generalising about Nigerian customary law. Custom varies substantially among communities. The precise customary norm, evidence establishing it and its practical effect should be examined by the courts.

Fifth, law reform should involve traditional rulers, community leaders, women's organisations, lawyers, academics and affected communities. Reform imposed without social participation may be difficult to implement.

## 12. RECOMMENDATIONS

**12.1 Legislative clarification:** Federal and State legislation should provide clearer protection for the requirement of free and voluntary consent in customary marriage, while respecting the constitutional allocation of legislative powers.

**12.2 Constitutional interpretation:** Courts should continue to interpret customary law consistently with sections 34, 35 and 42 of the Constitution where the facts properly raise those questions. This will enhance the right of women to marry.

**12.3 Development of customary law:** Traditional institutions and community leaders should be encouraged to review customs that subordinate women or remove their capacity to make independent decisions concerning marriage.

**12.4 Legal education:** Women in rural and urban communities should be educated about their rights concerning marriage, consent, divorce and access to justice.

**12.5 Legal aid:** Legal-aid mechanisms and services should be strengthened so that economically vulnerable women can challenge coercive customary practices in the society.

**12.6 Community-based reform:** Community education should emphasise that respect for culture is compatible with respect for the individual autonomy of women and avoidance of discriminatory practices against women.

**12.7 Domestication of CEDAW:** Nigeria should continue efforts toward full domestication and implementation of CEDAW, particularly its provisions concerning equality in marriage and family relations.

**12.8 Judicial intervention:** Judicial decisions concerning discriminatory customary practices should clearly distinguish between the existence of the custom, its historical rationale, its present operation, its impact on women, its compatibility with the Constitution, its compatibility with legislation and its consistency with public policy and natural justice. This would promote greater predictability and doctrinal coherence.

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## 13. CONCLUSION

Customary law remains an important component of the Nigerian legal system and continues to regulate marriage for a substantial part of the population. Its importance should not, however, obscure the constitutional status of the individual. A woman who enters into a customary marriage does not surrender her legal personality or fundamental rights. The involvement of parents and extended family in marriage negotiations may be culturally legitimate but it cannot automatically displace the woman's own consent. The crucial distinction is therefore between customary participation and customary coercion. A custom that facilitates family participation while preserving the free decision of the prospective spouses is materially different from one that compels a woman to marry a person selected for her by family or community.[42]

The Nigerian courts have progressively demonstrated that customary law is neither immutable nor superior to the Constitution. The cases of *Osamwonyi v. Osariere Osamwonyi* established the fundamental importance of consent in marriage; *Mojekwu v. Mojekwu, Ukeje v. Ukeje* and *Anekwe v. Nweke* demonstrate the judiciary's willingness to confront discriminatory customary practices, while *Okonkwo v Okagbue* emphasises the dynamic character of custom and the contemporary nature of public policy.

The better approach is not to reject customary law as inherently incompatible with women's rights. Rather, customary law should continue to develop within the constitutional framework. Customs that preserve cultural identity, facilitate family relationships and regulate ceremonial matters can coexist with women's fundamental rights. Customs that remove free consent, impose discriminatory disabilities or treat women as subordinate objects of family decision must, however, be subjected to constitutional, statutory and public policy scrutiny.[43]

Finally, the protection of women's right to choose marriage in Nigeria requires more than formal judicial declarations. It requires a combination of constitutional adjudication, legislative clarification, community engagement, legal education, economic empowerment and accessible remedies. The long-term objective should be a Nigerian legal order in which respect for customary law and respect for women's autonomy are not regarded as competing values, but are harmonised within a constitutional framework founded upon dignity, equality and justice.

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[42]NE Worugji and RO Ugbe, 'Customary Law, Women's Right and the Two Faces of Law in Nigeria' (2015) 21(1) East African Journal of Peace and Human Rights, 96.
[43]AC Diala, 'A Critique of the Judicial Attitude Towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States' (2018) 18(1) African Human Rights Law Journal.