Customary Law, Gender Equality and Sustainable Development

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Abstract

Gender equality, as a constitutional and customary law issue, is a recurring subject in academic debate. The relationship between law and development is also gaining recognition. However, insufficient attention has been given to the place of customary law in the latter discourse despite its role in the former. This paper established a nexus between customary law and development, particularly the sustainable development goal of gender equality and related goals adopted by the United Nations. The study utilised the doctrinal method of research by examining customary law to expose the practices which hinder development. It was found that customs which exclude women from land ownership or subject them to early marriage and other unfair treatment contribute to poverty, inequalities and inability to access basic needs which are indicators of development. The study showed that in spite of judicial pronouncements on the equal rights of women to property, as well as constitutional and legislative prohibitions on gender discrimination, many prejudicial customary practices persist in Nigeria, with far-reaching implications on the achievement of the United Nations Sustainable Development Goals. The paper proposed, amongst other recommendations, conscious reforms and the codification of customary law to meet society's developmental needs.

Keywords: Customary Law, Development, Sustainable Development Goals, Gender Equality

1. Introduction

While the maintenance of order is the main function of law in society, law is also a tool for effecting social change. Ibe-Ojiludu,[1]in his analysis of Nigeria's developmental challenge, stated that 'since law is conceived as an instrument of social control, it is capable of evolving development…Law has a developmental role.' Therefore, law and development is becoming a major aspect in legal and policy discussions. However, there is a concentration on statutes and international law, neglecting the implications of customary laws on development.

Development has been described as enlarging people's choices[2], achieving a high quality of life for all people,[3] reaching a state of low poverty, unemployment and inequalities,[4] etc. Yet, customary practices, such as inheritance of land by men to the exclusion of women and early marriage of the girl child, affect the quality of life and acts as a hindrance to the attainment of development. Thus, customary law should be evaluated inlaw and development discussions.

This paper exposes customary law practices that have an impact on the quality of life of women and the implications of gender inequality on the development of Nigeria as a nation, especially in light of the United Nations Sustainable Development Goals. This is a significant discussion since no society can achieve sustainable development when a large group within it is unable to access the same resources needed to be productive, and the conditions for a quality life. The essential question this paper answers is whether customary law as currently applied in Nigeria is being employed positively towards development and, consequently, promoting high quality living for

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[1] Somadina Ibe-Ojiludu, 'Nigeria's Developmental Challenge: Conceptualising Law and Development in the Nigerian Context' Beijing Law Review (2022) 13 1-22 at 4 <https://doi.org/10.4236/blr.2022.131001> accessed 24 November 2024.

[2] United Nations Development Programme (UNDP) (1990). Human Development Report 1990 (p.10). Oxford University Press/ Oxford.

[3] United Nations General Assembly (UNGA) (1997). Agenda for Development, Resolution 51/240, UN Doc A/RES/51/240. Par21.

[4] D. Seers, 'The Meaning of Development' *Institute of Development Communication* (1969) 44, Institute of Development Studies (pp. 2-3).. <https://www.ids.ac.uk/publications/the-meaning-of-development-2/#:~:text=Published%20on%201%20January%201969,and%20not%20development%20of%20things> accessed 21 November 2024.

all. If answered in the negative, what can be done to ensure that customary law plays a positive developmental role? As posited by Ibe-Ojiludu,[5]customary law is equally as important as other dimensions of law —legislations/statutory laws, common law, and international law — in the mission of law and development. Thus, customary law should be consciously deployed towards development.

2. Clarification of Key Concepts

2.1. Development

Development was traditionally understood purely in economic terms as an increase in the production capacity of a nation which would automatically improve the quality of life of the people through the trickle-down effect.[6]Since the late 1960s, however, the consensus in scholarship and in the practice of states in international law is that development accommodates not only economic development, but also matters bordering on improvement in the human and socio-political conditions of the human person.[7] A major supporter of this argument, Dudley Seers commented that 'we have all been aware that development consists of much else besides economic growth…in fact it looks as if economic growth may not only fail to solve social and political difficulties; certain types of growth may actually cause them.'[8]Thus, Seers remarked that a country cannot claim to be developed when factors such as poverty, unemployment, and inequality are worsening, even if per capita income doubles.[9]Amartya Sen[10] defined development as a process of expanding freedoms equally for all people. Similarly, the United Nations Development Programme (UNDP), adopting the term 'human development', emphasised that human development is a process of enlarging people's choices, the most critical of which are to live a long and healthy life, to be educated and to have access to resources needed for a decent standard of living.[11]

Ibe-Ojiludu agreed with these definitions, noting that development is 'equally locatable in non-economic spheres since people can experience higher qualitative life in their socio-political and human conditions.'[12]Analysing Sen's definition, Ibe-Ojiludu explained that 'development is a term for describing the expansion and the removal of barriers to freedom which people enjoy. The freedom could be political freedom. It could be freedom to make social choices. It could be freedom to make economic choices.'[13]

Thus, modern definitions of development take a multidimensional approach as represented in the Agenda for Development adopted by the United Nations (UN) General Assembly that 'Development is a multidimensional undertaking to achieve a higher quality of life for all people.'[14] Currently, the multidimensional approach to development is being explored through the implementation of sustainable development goals globally.[15]Sustainable development bases true

[5] (n1)
[6]Wanninayaka M. Semasinghe, 'Development, what does it really mean?' *Acta Politica Polonica* (2020) 49(1) 51–59 <http://dx.doi.org/10.18276/ap.2020.49-05> accessed 21 November 2024.
[7] (n1)
[8] (n4)
[9] (n 4)
[10] Amartya Sen, Development as Freedom (Oxford University Press 2001) 3.
[11] (n2)
[12] (n1)
[13] ibid
[14] (n3)
[15] Brundtland, G.H. (1987) Our Common Future: Report of the World Commission on Environment and Development. Geneva, UN-Document A/42/427. < http://www.un-documents.net/ocf-ov.htm > accessed 28 December. The term

development on a balance of economic, social and environmental factors. In 2015, the nations of the world under the UN adopted 17 Sustainable Development Goals (SDGs), a set of integrated goals with targets to ensure eradication of poverty, hunger and inequalities, protect the climate and environment, ensure gender equality, and also ensure the provision of basic needs such as health care, clean water, education, affordable energy etc.[16]

2.2. Gender Equality

Gender equality isa term often defined in the context of the equal treatment of women; but it more correctly refers to the need to treat both men and women equally. Black's law dictionary describes gender inequality, also referred to as gender discrimination, as any circumstance where certain rights and privileges are accorded a person or denied a person on the basis of sex which may have as a binding force of law or be a practice judicially noticed.[17]In essence, gender inequality is the practice of making use of the gender of a person as a determinant factor before conferring a benefit.[18]To apply gender equality is to create and provide opportunities for both genders to objectively aspire to the best without socio-cultural and systemic issues debarring one as against the other.[19]

While it is true that gender equality refers to both genders, the discussions in most research and policy documents, including this paper, revolve around discrimination against women and girls as this is the prominent form of gender inequality. Gender inequality against women manifests in several ways. It includes lower school enrolment rates for the girl child, early marriage of the girl child, discrimination in women's access to land and other property, discrimination against women in contracting and access to credit facilities, female genital mutilation, unfair widowhood practices, barriers against women in the labour market at entry and promotion levels, and limitations for women in politics.[20]

2.3. Customary Law

Before the British colonised Nigeria and introduce a formal legal system, there were many communities existing separately with rules guiding their relationships and activities, and the members of the community accepted the rules as binding on them. The rules were unwritten and distinct from one community to the other. These rules are what we refer to today as customary law. The Black's Law Dictionary defines custom as a practice that by its common adoption and long, unvarying habit has come to have the force of law.[21] Many of the customs of the different tribes in Nigeria have so become law that the 1999 Constitution of the Federal Republic of Nigeria (as

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'sustainable development' was initially used at the World Commission on Environment and Development (Brundtland Commission) in 1987 while addressing concerns about the impact of economic development through industrialisation on the environment. The Commission defined sustainable development as 'attending to present needs without compromising the possibility of future generations attending their own needs'.

[16]UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015, <https://www.refworld.org/legal/resolution/unga/2015/en/111816>accessed 05 December 2024.

[17]B.A. Garner, *Black's Law Dictionary* (9th Edition, West Publishing Co: Minesota, 2009).

[18] Oluwakemi Odeyinde, 'Gender Equality and Sustainable Development: Evaluating the Effectiveness of Nigerian Laws and Practices to Guarantee the Woman's Human Right' *The Journal of Sustainable Development Law and Policy* (2021)(12)(2) 398-420.

[19] Olayinka Akanle, 'The Sociology of Gender Equality and Development in Democratizing Nigeria'. *The Nigerian Journal of Sociology and Anthropology* (2011) (9) (1) 21-36 <DOI: 10.36108/NJSA/1102/90(0110)> accessed 23 December 2024.

[20] ibid

[21] (n17)

amended) recognises customary law as a body of law in Nigeria.[22] According to the Supreme Court in *Nwigwe* v *Okere*:[23]

> *Customary law emerges from the traditional usage and practice of a people in a given community which by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired, to some extent, element of compulsion, and force of law with reference to the community.*

3. Customary Law, Gender Equality and Sustainable Development: The Nexus

As earlier emphasised in this paper, to be sustainable, development must be multidimensional. Thus; the 17 SDGs of the UN are interconnected such that a failure to address one goal may lead to difficulty in achieving some other goals. There lies the nexus between gender equality and sustainable development. The goal of gender inequality is addressed by SDG Goal 5—to achieve gender equality and empower all women and girls.[24] The gender equality goal is concerned with issues such as child marriage, female genital mutilation, representation of women at the workplace and in politics, women's access to property, women's decision-making power, etc. Failure to address these issues inhibits development of the society. According to the UN in the preamble to its Agenda for Development in 1997, 'the empowerment of women and their full participation on a basis of equality in all spheres of society is fundamental for development.'[25]The World Bank, in its World Development Report,[26]gives reasons why the patterns of gender inequality—in human and physical capital endowments, in economic opportunities, and in the ability to make choices to achieve desired outcomes (agency)—matter, as follows:

> *First, gender equality matters intrinsically, because the ability to live the life of one's own choosing and be spared from absolute deprivation is a basic human right and should be equal for everyone, independent of whether one is male or female. Second, gender equality matters instrumentally, because greater gender equality contributes to economic efficiency and the achievement of other key development outcomes.*

Further analysing the implications of gender inequality on economic development, the World Bank asserts that misallocating women's skills and talent comes at a high economic cost as gender equality can have large impacts on productivity. It noted that women now represent more than 40 percent of the global labour force, 43 percent of the agricultural workforce, and more than half of the world's university students; thus, for an economy to be functioning at its potential, women's skills and talents should be engaged in activities that make the best use of those abilities.[27]Anne Mikkola, in describing the relationship between gender equality and the economy, stated that 'Casual observation indicates that countries in which women and men have more equal economic opportunities are also the more affluent countries.'[28]She also found that the preference not to

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[22]Section 315, Constitution of the Federal Republic of Nigeria 1999 (as amended).

[23]*Nwigwe* v *Okere* (2008) 34 NSCOR 1325

[24] Sustainable Development Goals <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 20 December 2024. See also Sustainable Development Goal 5 https://sdgs.un.org/goals/goal5 accessed 20 December 2024.

[25] (n3)

[26] World Bank (2012), World Development Report 2012*:* Gender Equality and Development. Washington, DC: World Bank Group. http://documents.worldbank.org/curated/en/492221468136792185/Main-report accessed 18 December 2024.

[27]ibid

[28] Anna Mikkola, 'Role of Gender Equality in Development - a Literature Review' *ERN: Economic Growth & Aggregate Productivity in Developing Economies* (2005) (84)1-45 at 3.

educate girls leads to a distortion that prevents the efficient accumulation of human capital.[29]Making a similar observation, Chen explained that if more boys get the opportunity to go to school, this means that the number of people who get educated is lower than it potentially would have been if boys and girls received equal educational opportunities, and this results in a labour force productivity lower than the labour force productivity that would have been achieved if there were no gender gap in educational enrolment. This also applies to gender gaps in employment, and the resulting lower labour productivity would in turn result in a lower rate of economic growth.[30]

The implications of gender inequality are however, not limited to economic development alone. Equal opportunity for women also improves other development outcomes. For instance, in the area of policy formulation, where women and men have equal chances to become socially and politically active, make decisions, and shape policies, it leads over time to more representative and more inclusive institutions and policy choices.[31]

The consideration of customary law in the law and development discourse, especially as it relates to gender equality and its impacts on sustainable development, is necessary as the customary laws of many ethnic groups in Nigeria, and Africa as a whole, include many practices which are discriminatory against women and which have various implications for development of women and a nation generally. The most notable form of discrimination against women is in the area of acquisition and inheritance of property. In the Igbo custom, for example, the practice of primogeniture prevails such that on the demise of a man, the first male child, called the 'Di-okpala', inherits his deceased father's dwelling house known as 'obi' and one distinct piece of land known as 'aniisi obi', while the daughters and widows have no right of inheritance or succession.[32]Other landed properties of the deceased are held in trust for the male off-spring of the deceased by the eldest son, and all the sons have a right to farm on the lands or share in the rents where they are leased.[33]Where the deceased dies without a male child, the widow and any daughters cannot inherit his property; rather, it reverts to his family.[34] The widow is only allowed to live in the deceased's house and use his farmlands for as long as she remains unmarried her interest is merely possessory, and this right is subject to her good conduct. She will be allowed to use his farmland and be maintained by whoever inherits the estate unless she has a grown son in which case it will be his responsibility to maintain her. A widow without a son has no rights to remain a member of her husband's family and may in fact be expelled from her husband's compound by his heir.[35]The exception for a female child to inherit the father's property is for her to have a male child while unmarried that will answer her father's name.[36]

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[29] ibid

[30] Derek Chen, 'Gender Equality and Economic Development: The Role for Information and Communication Technologies' (The Knowledge for Development Program of the World Bank Institute, World Bank Policy Research Working Paper April 2004) 1-34 <https://documents1.worldbank.org/curated/en/288621468778204692/pdf/WPS3285.pdf> accessed 22 December 2024.

[31] (n26)

[32]E.I. Nwogugu, *Family Law in Nigeria*, (3rd Edition, HEBN Publishers Plc Ibadan, 2014).

[33]Itse Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries* (Malthouse Press Limited Lagos 2006) p.265.

[34] ibid

[35](n 32) See *Nezianya* v *Okagbue* [1963] 1 All N.L.R 352

[36] Michael Takim Otu, Miebaka Nabiebu, 'Succession to, and Inheritance of Property under Nigerian Laws: A Comparative Analysis' *European Journal of Social Sciences* (2021)(62)(2) .

Under Yoruba customary law, the position is slightly better as the children of the deceased are the exclusive beneficiaries and within the group, there is no distinction between male and female in the distribution of their father's estate, with the children receiving equal shares.[37]However, though the Yoruba custom allows female children equal rights to property as male children, a widow cannot inherit her deceased husband's property.[38]

Like the Igbo custom, the Bini custom in Edo State of Nigeria practices primogeniture; thus, the first son inherits the principal house in which the deceased lived in his lifetime and died (known as 'Igiogbe') upon fulfilment of the condition that he performs the second burial rites of his father.[39]The Esan people within the same Edo State also follow the rule that the first male son inherits all the property of his late father to the exclusion of all other children after the performance of the final burial ceremony.[40]

There are several implications of entitling only men to inheritance of land. First, the possibility of a man losing his property to his male relatives and the financial dependence of a woman on her son after the demise of her husband creates a preference for male children. Therefore, there may be negative attitudes to girl children at birth. The World Bank reports that this may be contributing to the instances of missing girls during infancy and early childhood.[41]

A major implication of male domination in land inheritance is that of economic deprivation of women. The UN acknowledges that 'Land is key to a life with dignity and a basis for entitlements which can ensure an adequate standard of living and economic independence and, therefore, personal empowerment.'[42]As adults, owning land can help take a woman out of poverty, thereby giving her capacity to provide for her needs and face the challenges of life. Land ownership also promotes the achievement of other development needs as a financially empowered woman is able to access better healthcare, nutrition, modern energy services, quality education, clean water and surroundings, and also provide these for her children. According to Justice Mujibat Oshodi, excluding women from inheritance hinders their economic independence, impacting investments in education, healthcare, and family well-being; it perpetuates a cycle of poverty, leaving women without resources to improve living conditions, educate their children, or start businesses.[43]Reporting on the impacts of land ownership by women on agriculture, the World Bank, referencing the Food and Agriculture Organization (FAO), noted that 'equalising access to productive resources between female and male farmers could increase agricultural output in developing countries by as much as 2.5 to 4 percent.'[44]Reflecting on why gender equality must include customary laws, the World Economic Forum observed as follows:

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[37] (n33). Also see *Lewis & Ors* v *Bankole & Ors* (1901) 1 NLR 82 at 262

[38] (n32). *Suberu* v *Sunmonu* (1957)12 FSC 33

[39](n32)

[40]P.O. Itua, 'Disinheritance of Women under Esan Customary law in Nigeria: The Need for a Paradigm Shift Towards Gender Equality'*Advances in Social Sciences Research Journal*, (2021) (8)(2) 668-723.

[41] (n26)

[42]UN Entity for Gender Equality and the Empowerment of Women (UN Women) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), Realizing Women's Rights To Land And Other Productive Resources. New York And Geneva, 2013.

[43]Mujibat Oshodi, *The Inheritance Rights of Women in Nigeria*, International Association of Women Judges (Washington DC, 7 November 2023) The inheritance rights of women in Nigeria - International Association of Women Judges (iawj.org) accessed 20 December 2024.

[44] (n26)

> *There is much more at stake in inheritance rights than who gets the house, the car, and the sewing machine…a study in Nepal found that children whose mothers owned land were 33% less likely to be malnourished. The benefits are much more than economic: In India, women with secure rights to land were found to be eight times less likely to suffer domestic abuse.*[45]

Discrimination in land inheritance rights under customary law is therefore not only a hindrance to gender equality as a sustainable development goal, but also, a hindrance to other connected SDGs.

Another major form of inequality perpetuated against the female gender is underage marriage of the girl child. Girls are given away in marriage at an early age, and the married girl child is seen as part of her husband's family. The result is that parents are wary of investing their resources in the education of their girl child. This accounts for the preference to send the boy child to school over the girl child as many cultures in Nigeria consider money spent on female education as a waste.[46]The implication of early marriage and the consequent poor education results in lack of skills to take up economic opportunities and low intellectual development to make quality life choices. It also limits women's abilities to contribute significantly to their families, especially children, and denies a nation of human capital and better policy choices from a balanced perspective of men and women. To illustrate, the World Bank reports:

> *The level of the parent's schooling including the mother has been positively linked to children's educational attainment across a broad set of countries; in Pakistan, children whose mothers have even a single year of education spend one extra hour studying at home every day and report higher test scores.*[47]

Women's education is also linked to a range of health benefits for children, such as higher immunisation rates, better nutrition and lower child mortality.[48] The unmarried girl child is also exposed to health challenges like obstetrics fistula (VVF), a serious health condition resulting from having children at too early an age. These are all related to the actualisation of goal 3 of the SDGs—good health and wellbeing.[49]Early marriage also interferes with the freedom to choose when to marry, who to marry, how many children to have, and other life choices. A preference for female education over early marriage also has economic implications for a nation; educated women tend to marry at a later age and increase the time intervals between pregnancies, consequently giving birth to fewer babies. This reduces the birth rate in a country, lowers the number of dependents in a society, and over time results in increase of the productive group in an economy, which will eventually boost economic growth.[50]

Another circumstance that reflects the gender bias against women under customary law arises in matters relating to divorce such as maintenance, settlement of property and custody of children. Customary law, in many customs, gives the father exclusive custodial rights over the children of the marriage, a right extending beyond custody to ownership as even where the father is incapable

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[45]Tzili Mhor, 'Why gender equality must include customary laws', *World Economic Forum*(Geneva, 13August 2015**)** <https://www.weforum.org/stories/2015/08/why-gender-equality-must-include-customary-laws/> accessed 29 November 2024.
[46] (n19)
[47] (n26)
[48] ibid
[49] (n24)
[50] (n30)

of caring for the children, the right is extended to his family members rather than the mother.[51] Even in the case of young children, especially babies, the custody is only granted to the woman on the condition that the child is to be returned to the father when it is weaned or of age. This practice has implications on children's wellbeing as it is only the interest of the child that should be the determining factor in the granting of custody.[52]For the woman who has been deprived of the choice to be with her children, it is an infringement on her social freedom and may impact her mental health. In the area of maintenance, first, during the subsistence of a customary marriage, a husband has a duty to maintain the wife while she focuses on raising children and running the home. Unfortunately, where the husband persistently fails to play this role despite intervention of both families, the woman's options are limited to enduring or dissolving the marriage as customary law has no judicial machinery for the enforcement of this duty.[53] In the event of separation, there is no provision for maintenance of the woman after the marriage, nor is there any provision for her to be settled with property.[54] This raises serious concerns in light of the fact that a married woman would have spent years dedicated to the family and giving up opportunities for her own financial growth or, in some cases, may have engaged in some work on the family farmlands or other petty businesses by which she contributed to the finances of the home. Consequently, she is faced with leaving without any skills or capital to navigate the world economically. Also, during the marriage, while the married man can acquire and dispose of property as he wishes, the married woman's right to acquire and dispose of property is subject to her husband's prior consent.[55] These conditions keep a woman in perpetual poverty and dependence on others for her sustenance, thereby causing economic stagnation and poor outcomes in other development indicators such as education, health, access to justice, etc.

Finally, a major customary practice affecting women which has direct influence on health as an indicator of sustainable development is female genital mutilation (FGM). While FGM, in itself, is not a gender equality issue per se, as male children are also circumcised, the rationale offered by tradition practitioners for the circumcision of girls are often gender discriminatory in the sense that it is done to curb female sexual desires; this is not the case for male children who are not faced with the same control.[56] This practice results in pain, infections, sexual problems, increased risk of childbirth complications, and psychological problems like depression and low self-esteem for the woman.[57]This customary practice is contrary to the gender equality and health goals of the United Nations.

4. Attempts at Curbing Gender Inequality

Judicial pronouncements against discriminatory customary practices have been made based on rules guiding the application of customary laws in Nigeria. A customary law is only applicable in Nigeria where it is not repugnant to natural justice, equity and good conscience, is not contrary to public policy, and is not inconsistent with any law being in force in Nigeria.[58]The 1999

[51] Margaret Chinyere Onokah, *Family Law* (Spectrum Books Limited Ibadan, 2003) .
[52] (n18)
[53] (n51)
[54] ibid
[55] ibid
[56] Chinedu Anieke, *Legal Consequences of The Igbo Customary and Canonical Laws on Marriage and Family*, (Pontifical Urbanian University Roma, Italy 2013) at 166.
[57] WHO, 'Female Genital Mutilation'(5 February 2024)<Female genital mutilation (who.int)> accessed 30 November 2024.
[58] A.O. Sanni, *Introduction to Nigerian Legal Method*, (2nd Edition, Obafemi Awolowo University Press Limited, Ile-Ife 2006) 1-57.

Constitution, which determines the validity of all other laws in Nigeria, provides in section 42 that a Nigerian citizen of a particular community, ethnic group, religion or political opinion, place of origin, or sex shall not suffer any form of deprivation, disability or restrictions which others are not subjected to.[59]In *Mojekwu* v. *Mojekwu*,[60] the Nigerian Court of Appeal reached a landmark decision on the equal status of women to inherit property. In this celebrated case, the appellant sought a declaration from the Court of Appeal that as the only surviving male relative of his late uncle, he was entitled to inherit his uncle's property under the custom of the people of Nnewi called 'Oli-ekpe' whereby the closest male relative of a man is to inherit his property where he does not have a surviving male child. Under the custom, the two wives and two daughters of the deceased could not inherit his property. The Court of Appeal, per Niki Tobi, JCA (as he then was), holding in favour of the deceased's widow regarded the said Oli-ekpe custom as being discriminatory and repugnant to natural justice and good conscience. On appeal, the Supreme Court in *Mojekwu* v. *Iwuchukwu*[61]was however reluctant to out rightly condemn the tradition; instead, it condemned the lower court's criticism of the custom. The apex court eventually took a firm stand in the latter case of *Mrs Chituru and Enyinaya Ukeje* v *Mrs Gladys Ada Ukeje*.[62]In that case, the plaintiff, daughter to the deceased from another woman, sued his widow and son who had obtained letters of administration in respect of his property, seeking a declaration that she was entitled to a share of his estate. The Supreme Court upheld the decisions of the trial court and the Court of Appeal, noting that the Igbo customary law that disentitles a daughter from inheriting the property of her deceased father is void as it conflicts with section 42 of the 1999 Constitution. Again, in *Onyibor Anekwe* v *Mrs Maria Nweke*,[63] the appellant, the nephew of the deceased, acting on the Awka custom, had ordered the respondent, the wife of the deceased, to vacate her matrimonial home which she had shared with her husband during his lifetime on the ground that she had only daughters and no male child to survive her deceased husband. The Supreme Court frowned at this custom and condemned it in strong terms as being repugnant to natural justice, equity and good conscience.

Beyond domestic law and judicial pronouncements, Nigeria, as a member of the international community, is guided by principles and rules of international law, and a fundamental principle of international law is the equality of both men and women as outlined in the Universal Declaration of Human Rights (UDHR), 1948*viz*.: 'All human beings are born free and equal in dignity and rights.'[64]Nigeria is a party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[65] which prohibits all forms of discriminatory practices against women and enjoins state parties to enact laws abolishing all existing discriminations against women.[66]At the regional level, Nigeria is a party to the African Charter on Human and

[59] S.44, CFRN 1999 (as amended)
[60] (1997) 7 NWLR 283
[61] [2004] 4 SC (Pt. II)
[62] (2014) 11 NWLR (Part 1418) 384 619
[63] (2014) 9 NWLR (Part 1412) 393
[64] Universal Declaration of Human Rights, UNGA Res 2200A (XXI) (1948); Art.1.
[65]UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, Treaty Series, vol. 1249, p. 13, 18 December 1979.
[66] D.T Eyongndi, F.N Opara, O.O Oladele, D.A Agbu, M.O Ajayi, 'Realising Female Inheritance Rights in South Eastern Nigeria: The Imperativeness of Going Beyond Legal Rhetoric' The Age of Human Rights Journal (2024) 22 DOI: 10.17561/tahrj.v22.7972 accessed 2 December 2024.

Peoples' Rights which it domesticated to be enforceable as an Act of the National Assembly.[67]The Charter provides for equality between men and women as well as the prohibition of discrimination based on sex, religion, or status.[68]The African Charter specifically protects women from discrimination pursuant to one of its protocols—Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Protocol imposes obligation on States in the Africa Union (AU), to take consequential steps and provide statutory and regulatory framework to ensure equality of the sexes, and elimination of all forms of discrimination to which the African woman is subjected to in all parts of the Continent.[69]Article 21 particularly deals with the inheritance rights of widows in Africa, and also the rights of children to inherit the estate of the deceased parent irrespective of their gender.[70]

While many of the efforts to combat customary law-induced gender inequality is in the area of land ownership, there have been some efforts in other instances. In the case of female genital mutilation, some states have enacted laws to combat the problem, for example, the Girl-Child Marriages and Female Circumcision (Prohibition) Law 2000 of Cross-River State.[71]The Federal Act, the Violence Against Persons (Prohibition) Act2015 criminalises and punishes anyone who performs, or engages another to perform, or who incites, aids, abets or counsels another to perform or attempt female circumcision.[72] For the issues pertaining to custody of a child, a woman married strictly under customary law can apply for custody of her children under the Child Rights Act 2003which presupposes that both parents are equal and what matters in the grant of custody is 'the best interest of the child'.[73]For child marriage, the Child's Right Act prohibits the marriage of a girl child below 18years and criminalises the act of marrying or promoting the marriage of an underaged person.[74]Supporting these domestic statutes, international and regional laws such as the African Charter on the Rights and Welfare of the Child, the CEDAW and the UN Convention on the Rights of a Child (CRC) all abhor child marriages.[75]Inspite of all these efforts, the discriminatory customary law practices prevail.

5. Adapting Customary Law Towards Its Development Role

It is important to understand why customary law should be considered in a development process rather than being isolated from it, and then identify how it can be employed in this process so as to adapt it towards a positive development outcome. According to Savigny, the foundations of a legal system are to be found in the national spirit of the people—the volksgeist—which can be discovered through the history of the people. Thus, law is born with the nation, grows and dies with it. Therefore, custom, which is the volksgeist, predates and precedes legislation, and legislation must conform to the popular consciousness.[76]Thus, where a law is not derived from the

[67]African Charter on Human and Peoples' Rights(Entry into Force in 1986) domesticated as African Charter on Human and Peoples' Rights (Ratification Enforcement) Act, Cap.10 Laws of the Federation of Nigeria, 2004.
[68]Ibid, Arts. 2, 3, 18(3) and 19. See also (n40).
[69]Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Entry into Force in 2005), art. II.
[70] Ibid
[71] Cap G1 Laws of Cross River State. Also see Rivers State Abolition of Female Circumcision Law 2001, Edo State Female Circumcision and Genital Mutilation Law No4 of 1999, Enugu State – FGM (Prohibition) Law (2004)
[72]S.6, Violence Against Persons (Prohibition) Act (2015)
[73]Ss. 1 &2, Child's Right Act (2003)
[74]Ss. 21 & 23, Child's Right Act
[75]African Charter on the Rights and Welfare of the Child (Entry into Force in 1999); CEDAW (n65); UN Convention on the Rights of a Child (CRC)(Entry into Force in 1990). See also (n40).
[76]Funso Adaramola, *Jurisprudence* (2nd Edition, LexisNexis Durban, 2008)

people's custom, it will face resistance compared to rules developed from their common consciousness. A practical reflection of this theory is obvious in the Nigerian legal system where there is difficulty in separating the people from their customary approaches despite the several rules against discrimination based on gender, especially the 1999 Constitution which is supreme. The difficulties presented by this situation can be seen in the conflicting decisions reached by judges in cases where customs were in issue. For instance, in *Mojekwu* v *Iwuchukwu*, the Supreme Court took the side of the custom over the provisions of the Constitution on discrimination, a stance which has been regarded as a reflection of the extreme chauvinist posture of the society as at the time the cases were litigated before the court.[77]Ibe-Ojilude opined that one of the reasons why laws fail in Africa is because drafters of legislation have failed to ask, 'Why do people behave as they do in the face of a rule of law?'[78]To effectively play its developmental role, it is clear that first, customary law must be acknowledged as important and not inferior to legislations, treaties and inherited English laws. Rather than try to subjugate customary law, the better approach is to establish dialogue between local culture and constitutional/international standards.

A further reason why customary law should be actively engaged in the gender equality and development problem is posited by Susan Williams who observed that 'culture is constantly contested in a political struggle between those who wish to legitimise their power and privilege and those who need to challenge the status quo in order to redress grievances, realise human dignity, and protect well-being.'[79]She noted that customary law presents women with an untenable choice between enduring inequality in order to enjoy many vital benefits of membership in their own communities, or abandoning all that by opting-out of the community in order to enjoy equality.[80] Therefore, to make progress, there must be engagement with the community to create the opportunity for wilful change of the status quo so as to reduce pushback against those who want to change things. There is need to communicate to the people the impacts their customary practices have on their women, children and the community at large. They must be positioned to see reform not as an attempt to erase their history and value system but, rather, as an opportunity for the community to realign its values towards the society it would like to be. The influence and respect for traditional and religious leaders should be leveraged for this purpose.[81]

Again, a striking feature of customary law that makes it even more useful for development is its flexibility and adaptability to changing social trends.[82]Thus, when customary law fails to be dynamic and respond to a change in the needs of a section of its adherents, that is a poor reflection of the true nature of customs. It ought to be sensitive and responsive to the changes in community.[83]There should be opportunity for dialogue so as to evaluate whether the customs are still the general consensus or whether there is need to reevaluate some practices which are no longer acceptable. Then, the people should reach a consensus on reforming the customs towards the promotion of sustainable development.

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[77] (n66)
[78] (n1)
[79] S.H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption' *Indiana Journal of Global Legal Studies* (2011) (18) (4) 65-89. https://www.repository.law.indiana.edu/ijgls/vol18/iss1/4> accessed 2 December 2024.
[80] ibid
[81] (n66)
[82] (n588)
[83] (n79)

Finally, customary law should be engaged in ensuring gender equality as the options made available to people who want to prevent the application of customary law are inadequate. They require education, financial resources, and knowledge of the options, and these are not usually available to many women in the rural areas where the harmful customary practices are prevalent. Many women in the rural areas in Nigeria would not be aware of the judgments in *Ukeje* v *Ukeje* and the other landmark cases or have the economic capacity to access the courts. Also, customary law brings with it community justice structures which, in contrast to regular court system, emphasises amicable resolution and the restoration of harmony.[84] To illustrate, if a widow were to fight against discrimination in the regular courts and win, she may still be faced with the problem of coming back to continue to live amongst the same people she sued who may use traditional systems to punish her. A more diplomatic approach would be the settlement of the dispute by a group of community elders who are charged with applying customary law according to modern best practices which favour gender equality.

Justice Mokgoro, a South African judge, in discussing the influence of customs on compliance with other laws in a complex legal system, noted that 'the tension between customary law and the right to equality is eased by a harmonisation process that draws from our rich cultural values.'[85]Williams explains that this avoids the development of parallel legal systems—a formal legal system recognising women's equality but not applied in practice and an informal, discriminatory system which is actually applied.[86] Customary law should only be directly subject to constitutional scrutiny since it, in fact, derives official authority from a country's constitution. It should then be codified so as to present its core values together with adaptations that reflect modern realities with a provision for continuing reform and development.

6. Conclusion

If we agree that placing barriers to a person's freedom to make choices, whether political, social or economic, is denying them of development, then we can correctly conclude that gender inequality against women perpetuated by customs affects their freedom to exercise these choices and is a hindrance to the achievement of development.

Nonetheless, customary law should not be relegated to the background. Rather than have a separate system acknowledging women's equality which is not obeyed due to its detachment from the people's consciousness, it is recommended that the traditional society, especially its institutions and group representatives, be engaged and educated about the development benefits that would accrue if the customs are re-evaluated and improved to be more gender balanced. The revised customs accepted by majority should then be codified as law while leaving room for further reforms.

[84] Ibid

[85] Yvonne Mokgoro, 'The Impact of South Africa's Constitutional Court on Gender Equity: A Case Law Approach, Presentation at Congressional Breakfast on the Impact of South Africa's Constitutional Court on Gender Equity' (Apr. 13, 2005) at 16 in S.H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption' *Indiana Journal of Global Legal Studies* (2011) (18) (4).

[86] (n79)