

Legal Implications of Same-Sex Marriage (Prohibition) Act, 2013 on Customary “Female Husband Marriage” or “Woman-to-Woman Marriage” in Nigeria

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ABSTRACT

Female husband marriage has been an age-long customary practice in many parts of Nigeria. The practice embedded in the customary law of the people. This study critically examines of legal implications of same-sex marriage (Prohibition) Act, 2013 on customary “female husband marriage” or “woman-to-woman marriage” in Nigeria. It is therefore necessary to give the statutory and judicial considerations of custom and customary law as these terms are relevant to this study. The statutory and judicial considerations together with the provisions of same-sex law form the legal framework of this work. The study observes that customary female husband or woman-to-woman marriage has been documented in many African cultures. The position of this study is that African female-husband and male-daughter practices are different from the woman-to-woman marriages or lesbianism practiced in the Western world. Whereas the African practices are to enable the people who face challenges in child bearing, the lesbianism practiced in the Western world and elsewhere is mainly for sexual satisfaction.

Keywords: *Female husband marriage, woman-to-woman marriage, same-sex marriage, customary law, lesbianism, homosexual*

INTRODUCTION

Like communities in Europe, America and Asia, some ethnic groups in Africa have been practicing female husband marriage otherwise known as woman-to-woman marriage from time immemorial. Customary female husband or woman-to-woman marriage has been documented in more than 30 African ethnic groups.¹ These include Zulu, Lovedu, sotho in Southern Africa; Kukuyu, Nandi, Nuer in East Africa; Yoruba in the Western Nigeria, Igbo in the South East Nigeria, and Ibibio, Annang, Oron, Efik, Ejaghan, Etung and Ogoja in the South-South Nigeria. Recently, some African countries have enacted laws that either legalise or ban same-sex marriages. In 1989, Denmark became the first country in Europe to legislate same-sex partnerships², and

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¹Ojubuonu O., “Women and Power in Africa in the Twentieth and Twenty-First Centuries” (2009) Fragrance Publications: Lagos, 87. See also: Same Sex Marriage in the Non-European world; Available at www.politicsforum.org/forum/viewtopic.php?f=10&t=25591 (accessed on 27/01/2015).

²See: Gay Marriage Around the World; Available at: www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/ (accessed on 27/02/2015).

several other European Union members, including Netherlands in 2000, Belgium in 2003, and Spain in 2005 have followed suit³; likewise Canada (2005) and Argentina (2010)⁴. In the United States, the issue of same-sex marriage has continued to generate controversy. Only very few states, such as Massachusetts in 2003, allow gay marriage.⁵ Vermont and Connecticut permit civil unions, California grants similar status through a domestic-partner registration law.⁶ Now, laws legalizing same-sex marriage are in effect in 37 States and the Districts of Columbia, with Court decisions, legislative actions or statewide referendums prompting the changes. Court rulings striking out same-sex marriage bans in several other States are currently being appealed.⁷ On the 30th of November, 2006, South Africa became the first country in Africa, and the fifth in the world, to legalise same-sex marriages.⁸ The Roman Catholic Church and Muslim groups have denounced the South African same-sex marriages law as violating the sanctity of marriage.⁹ Uganda is one of the African countries that prohibit same-sex marriage.¹⁰ However, by the end of July 2014, the Ugandan Supreme Court annulled the anti-gay law, holding that it was unconstitutional.¹¹ However, on the 6th day of August 2014, it was reported that the Ugandan lawmakers were planning to reintroduce the anti-gay bill¹². On 7th January, 2014, the Nigerian President, Goodluck Jonathan signed the Same Sex- Marriage (Prohibition) Bill into law amidst protests from some countries, groups and activists within and outside Nigeria.¹³ The Act outlaws same-

³ *Ibid*

⁴ *Ibid*

⁵ *Ibid*

⁶ See: www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (accessed on 27/02/2015).

⁷ See: www.features.pewforum.org/same-sex-marriage-state-by-state (accessed on 27/02/2015).

⁸ See: www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html accessed on 27/02/2015

⁹ *Ibid*

¹⁰ See: Uganda Anti-Homosexuality Act, 2014. Available at: www.refworld.org/pdfid/530c4bc64.pdf (accessed on 27/02/2015)

¹¹ See: www.bbc.co.uk/news/world-africa-28605400 & www.voanews.com/content/uganda-court-annuls-anti-gay-laws/1969580.html (accessed on 27/02/2015)

¹² Ojambo F., "Ugandan Lawmakers Plan to Reintroduce Court-Quashed Anti-Gay Law". Available at: www.bloomberg.com/news/articles/2014-08-06/ugandan-lawmakers-plan-to-reintroduce-court-quashed-anti-law (accessed on 27/02/2015).

¹³ It has been reported that leading western countries piled pressure on the Federal Government of Nigeria following President Goodluck Jonathan's signing of the Same-Sex Prohibition Act 2014. The latest country was the United States of America, whose Ambassador to Nigeria, Mr James Entwistle threatened that the United States would scale down its support for HIV/AIDS and anti-malaria programmes in response to the Federal Government's position on the gay rights issue. The United States Ambassador to Nigeria said he was worried about "the implications of the anti-same sex marriage law, which according to him, "seems to restrict the fundamental rights of a section of the Nigerian population." Member countries of the European Union and Canada expressed their objection to the law. However, a former Nigerian Ambassador to US, Dahiru Suleiman, has described homosexuality and lesbianism as "animalistic and degrading to humanity. See: Ndiribe O., Eyoboka S. & Ojeme V., "Gay- Marriage Law: US threatens to Sanction Nigeria" *Vanguard Newspaper of 21st* January, 2014. Available at: www.vanguardngr.com/2014/01/gay-marriage-law-us-threatens-saction-nigeria/ (accessed on 27/02/2015)

sex marriage in the country. The law stipulates that those who administer witness, abet or aid the solemnisation of a same-sex marriage are going to bag 10-year jail term.¹⁴ It further stipulates that a person who enters into a same sex-marriage contract or civil union is liable on conviction to a term of 14 years imprisonment.¹⁵ The law stipulates that the High Court of a State or of the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of Same-Sex Marriage (Prohibition) Act.¹⁶ Thus, Nigeria recognizes neither same-sex marriages nor civil unions for same-sex couples. Since January 2014 when the same-sex law came into effect, fears have been rising among most Nigerians who practice female husband or woman-to-woman marriages in their respective communities in Nigeria.¹⁷ The growing apprehension is because they are not sure of what will happen to the age-long customary law marriage practices and the rights of the women and the children they owned through such marriages.¹⁸ Female husband marriage or woman-to-woman marriage is a practice where a woman marries a woman and gives to a man for the purpose of procreating children, especially male children. The need to have male children led to the invention of the practice of female husband.

In other words, female husband or woman-to-woman marriage is an improvisation to sustain patriarchy in societies where emphasis is placed on male children. In many African countries including Nigeria, there are various kinds of customary law marriages that may superficially look like same sex-marriages and may therefore be said to have offended the Same-Sex Marriage (Prohibition) Act, 2014. Female husband marriage or woman-to woman marriage has been in existence since the pre-colonial period. It is against this background that this study is undertaken. The aims of the study are: (i) to examine whether in reality female husband marriage or woman-to-woman marriage as practiced in certain Nigeria communities is similar to same sex-marriage just prohibited by law; (ii) to find out reasons some people practice female husband or woman-to-woman marriage; (iii) to find out what has been the position of the Court of law on cases concerning female husband or woman-to-woman marriage since the colonial times; and (iv) to examine critically the legal implications of the Same-Sex Marriage (Prohibition) Act on female husband marriage or woman-to-woman marriage. In order to achieve these aims, historical method of analytical inquiry is adopted to investigate the concept of customary female husband marriage in Nigeria. Female husband marriage has been an age-long customary practice in many parts of Nigeria. The practice embedded in the customary law of the people¹⁹. It is therefore necessary to give the statutory and judicial considerations of custom and customary law as these

¹⁴ See: Section 5(3) of the Same-sex Marriage (Prohibition) Act, 2013

¹⁵ See. Section 5(1) of the Same-sex Marriage (Prohibition) Act, 2013

¹⁶ See: Section 6 of the Same-sex Marriage (Prohibition) Act, 2013

¹⁷ Odiase-Alegimenlen O. A. and Garuba J. O., "Same Sex Marriage: Nigeria at the Middle of Western Politics" (2014) Oromia Law Journal, Vol.3, No. 1, p. 284 - 289

¹⁸ Odiase-Alegimenlen O. A. and Garuba J. O., *Ibid*, 289

¹⁹ Ojubuonu O., *Ibid*

terms are relevant to this work. The statutory and judicial considerations together with the provisions of same-sex law form the legal framework of the study.

Statutory Definition of Custom: The current Evidence Act²⁰ offers statutory definition of the term “custom”. The Act defines custom as “a rule in which, in a particular district, has, from long usage, obtained the force of law”²¹. *Ekiti State High Court Law, 2010* defines custom to include “a rule which in a particular district or among the members of a tribe or clan or class of persons, has, from long usage, obtained the force of law and also local customary law”²². The expression “general custom or right” includes customs or rights common to any considerable class of persons²³. A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence²⁴. The burden of proving a custom shall be upon the person alleging its existence²⁵. A custom may be judicially noticed when it has been adjudicated upon by a superior court of record²⁶. Where a custom cannot be established as one judicially noticed, it shall be proved as a fact²⁷. Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of person who would be likely to know of its existence in accordance with section 73 of Evidence Act²⁸. Section 18 (3) of the *Evidence Act* warns: “In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience”²⁹.

Judicial Definition of Custom: In *Kharie Zaidan v. Fatima Khalil Mohssen*³⁰, the Supreme Court defined customary law as “a rule or a body of rules regulating and imposing correlative duties being a rule or the body of rules not enacted by the legislature but fortified by established usage and which are appropriate and applicable to any particular cause, action, suit, matter or dispute. This customary law is the system of law, not being the common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway”³¹. In *Princess Bilewu*

²⁰ Cap, E14, LFN, 2011

²¹ See: Section 2(1) of Evidence Act, Cap, E14, LFN, 2011

²² See: Section 42 of the Ekiti State High Court Law, 2010

²³ See: Section 73(2) of Evidence Act, Cap, E14, LFN, 2011

²⁴ See: Section 16(1) of Evidence Act, Cap, E14, LFN, 2011

²⁵ See: Section 16(2) of Evidence Act, Cap, E14, LFN, 2011

²⁶ See: Section 17 of Evidence Act, Cap, E14, LFN, 2011

²⁷ See: Section 18(1) of Evidence Act, Cap, E14, LFN, 2011

²⁸ See: Section 18 (2) of Evidence Act, Cap, E14, LFN, 2011. Section 73(1) of the Act states that “When it has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right, of persons who would be likely to know of its existence if its existence are admissible.

²⁹ See: Section 18(3) of Evidence Act, Cap, E14, LFN, 2011

³⁰ (1973) LPELR-SC.52/1973 or (1973) 11 S.C. 1

³¹ See: Ratio 5

*Oyewunmi v. Amos Owoade Ogunesan*³², the Supreme Court held that, “Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transaction. It is organic in that it is not static”³³. The Court has been consistent in holding that “customary law is a mirror of accepted usage” and that a particular customary law must be recognized and adhered to by the community³⁴. Since the colonial era, the Courts have been holding that, “it is the assent of the native community that gives a custom its validity. Therefore, a valid custom, whether barbarous or mild, must be shown to be recognized by the native community whose conduct it is supposed to regulate”³⁵. It is also necessary to emphasize, as the Court has done in the cases of *Giwa v. Erinmilkun*³⁶ and *Osolu v. Osulu*³⁷, that customary law is initially a question of fact and it remains so until the rule in question is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it³⁸.

The Court of Appeal in *Ojukwu v. Agupusi*³⁹ followed the Supreme Court decision in *Peanok Investments Ltd. v. Hotel Presidential Ltd*⁴⁰. and held that the issue of repugnancy of a custom needs not be pleaded but could be raised in the course of address by counsel, as it is a matter of law. The court can also raise it *suo motu* since it is enjoined to take same into consideration and apply it in determining whether a particular custom is applicable. In the *Okonkwo v. Okagbue*⁴¹ case, the Supreme Court *per* Mohammed Uwais, JSC posits that once a custom has been challenged in a court of law by anyone who is interested or adversely affected by its application and a call has been made to examine whether it offends natural justice, the Courts would pursue such complaint in order to establish whether the custom is inconsistent with sound reason and good conscience. Justice Uwais said, “Occasions have however arisen where the courts had found it necessary to declare certain customs repugnant to natural justice, equity and good conscience or against public policy and morality.” The Justice of Supreme Court went on to cite the *dictum* of Osborne, CJ in *Lewis v. Bankole*⁴² and *Meribe v. Egwu*⁴³ where Madarikan, JSC had held, *inter alia*, “the law governing any decent society should abhor and express its indignation of a ‘woman to woman’ marriage”. In view of the recently enacted

³² (1990) LPELR-2880 (SC)

³³ See: Ratio 2

³⁴ See generally the cases of *Owoniye v. Omotosho* (1961) 1 All NLR 304 at 309; *Bello v. Gov; Kogi State* (1997) 9 NWLR (Pt. 521), 496 CA; *Osulu v. Osolu* (1998) 1 NWLR (Pt. 535) 532 CA; *Okene v. Orianwo* (1998) 9 NWLR (Pt. 566) 408 CA.

³⁵ *Eghugbaji Eleko v. Government of Nigeria* (1931) A.C 662 at 673; *Bellow v. Gov. Kogi State* (1997) 9 NWLR (Pt. 521) 496 CA.

³⁶ (1961) NSCC 157 @ 159

³⁷ (1998) 1 NWLR (Pt. 535) 532 CA.

³⁸ See: Ratio 1 of Supreme Court judgment in *Oyewunmi v. Ogunesan supra*

³⁹ (2014) LPELR-22683(CA). See: Ratios 5, 7 and 8 Per Agube JCA

⁴⁰ (1982) LPELR-SC.79/1981

⁴¹ *Infra* (see footnote 109 on page 18)

⁴² (1908) 1 NLR 81

⁴³ (1976) 1 All NLR 266 or (1979) 3S.C. 23

Same-Sex Marriage (Prohibition) Act, 2013, the discussion of legal implications of the Act on the age-long practice of female husband or woman-to-woman marriages is very necessary.

Unlawful Marriages: The position of this study is that African female-husband and male-daughter practices are different from the woman-to-woman marriages or lesbianism practiced in the Western world. Whereas the African practices are to enable the people who face challenges in child bearing, the lesbianism practiced in the Western world and elsewhere is mainly for sexual satisfaction. This point will become clearer if the different types of marriage are comparatively defined. There are about twenty types of marriage⁴⁴, some of which are briefly discussed below. Definition of some types of marriage as practiced universally will help one to appreciate how marriage institution, the foundation of the world family, has been abused, and hence, government intervention through appropriate legislations.

Same-sex marriage is between two people who are of the same sex. Same-sex marriage refers to willful human sexual intercourse relations. Civil union otherwise known as civil partnership or registered partnership is a legally recognized form of partnership similar to marriage in some countries of the world⁴⁵. Historically, in several societies, the unions between people assigned the same sex at birth of whatever sexual orientation have been considered taboo⁴⁶. This has been so particularly among those of strongly religious taboo-derived patriarchal social mores in both the Western world and African and Asian societies. However, in some countries same sex marriage is not a crime as it is now in Nigeria. Some Western countries allow same-sex couples to adopt, while others forbid them to do so, or allow adoption only in specified circumstances. In the United States, the term civil union is used to connote a status equivalent to marriage for same-sex couples. Beginning with Denmark in 1989, civil unions under one name or another have been established by law in several countries, mostly developed countries in order to provide legal recognition of relationships formed by unmarried same-sex couples and to afford them rights, benefits, and responsibilities similar to those of legally married couples⁴⁷. There is a literary piece that shows that female husband or woman -to- woman marriage has been practiced in Europe even before the nineteenth century⁴⁸. Henry Fielding who published the biography of one Mary Hamilton has given an example of the practice of female husband in Europe. Mary Hamilton's biography was published in November 1746 under the title *The*

⁴⁴ See: www.libertinethought.blogspot.com/2008/01/20-types-of-marriage.html accessed on 26/02/2015

⁴⁵ See: www.freedomtomarry.org/pages/marriage-versus-civil-unions-domestic-partnership-etc (accessed on 26/02/2015).

⁴⁶ Pomeroy S. B., *Spartan Woman*, (2002) Oxford University Press: Oxford, 46

⁴⁷ *Ibid*

⁴⁸ Henry Fielding, *The Female Husband*, (published anonymously in 1746). The literature is available at; www.ebooks.adelaide.edu.au/f/fielding/henry/female-husband/ (accessed on 28/06/2015).

Female Husband. *The Female Husband* contains the facts about Mary Hamilton and Mary Price.⁴⁹ It is to be shown that certain types of customary marriage practiced in the Western and non-African countries are similar to those practiced in Africa. These are *Levirate Marriage (Su'po)*, *Sororate Marriage*, *Traditional Marriage*, *Marriage of Convenience*, *Sexless Marriage*, *Boston Marriage*, *Male Daughter Marriage* and *Female Husband Marriage* or *Woman-to-woman marriage*. The main purpose of these forms of marriage has been to procreate children. Many people who could not produce children on their own therefore adopt these forms of marriages in order to preserve their family lines. These types of marriage may not be against the public policy. They may not offend the Same-Sex Marriage (Prohibition) Act, 2013. These forms of marriages are different from others, such as *Love Marriage*, *Hollywood Marriage*, *Lavender Marriage*, *Mixed Orientation Marriage*, and *Same-Sex Marriage*.

African female husband is also different from *mixed-orientation marriage*, which is heterosexual marriage where one spouse is gay, lesbian or bisexual. Furthermore, African woman-to-woman marriage is different from *Lavender Marriage*, which is a marriage between a man and a woman in which one, or both, parties are, or are assumed to be homosexual. It is also different from *Human-Animal Marriage*, which is a marriage between a human and a non-human animal. These types of marriage are against the public policy. The practices will definitely offend the Same-Sex Marriage (Prohibition) Act, 2013. A more detailed discussion of African customary law marriages is necessary in order to further distinguish the child-bearing purpose marriages from the non-child-bearing or love-making purpose marriages.

⁴⁹ Mary Hamilton married Mary Price “fraudulently, disguised as a man”. According to Henry Fielding, Mary Hamilton was born somewhere in Somerset; she was daughter of Mary and William Hamilton. She moved to Angus country, Scotland, and at the age of fourteen she left home in her brother’s clothes. She entered a three or four-year apprenticeship as a quack doctor before starting business for herself. In May 1746, she entered Somersetshire from Devonshire. She took quarters in Wells as Dr. Charles Hamilton at the house of Mary Creed, where Mary Price, Mrs. Creed’s niece lived also. On 16 July 1746, she was married to Mary Price by the Reverend Mr. Kingston, Curate of St. Cuthbert’s in Wells, who had published the banns. The couple then traveled around Somersetshire for two months until Mary Hamilton’s arrest at Glastnbury, 13 September 1746, Mary Price of course having discovered the deception. One Anne Johnson said to have been corrupted through Methodism, in turn corrupted Mary Hamilton. The two went to Bristol. Miss Johnson ran off with and married a man named Rogers, also a Methodist. Mary Hamilton then dressed herself as a male Methodist teacher. Mary Hamilton was tried for fraud at Taunton, Somerset, on 7 October 1746. She was convicted of having married a young woman of Wells and lived with her as her Husband. See: Sheridan Baker, *Henry Fielding’s The Female Husband; Fact and Fiction*. Available at: www.jstor.org/discovery/10.2307/460583?sid=21105974501123&uid=3738720&uid=4&uid=2 (accessed on 28/2015). See also: *The Female Husband or the Surprising History of Mrs. Mary alias Mr. George Hamilton*. The preview of the book is available at: www.amazon.com/The-female-husband-suprising-confinement/dp/1140791761 accessed on 28/02/2015 (accessed on 28/2015).

The Legal Effects of Customary Law Marriages

Customary marriage is a marriage contracted under the indigenous laws and customs of a particular community. There are many forms of customary marriage. These include man to woman marriage, female-husband or woman-to-woman marriage, male-daughter marriage, big dowry marriage, small dowry marriage, sororate marriage, wife inheritance or levirate marriage. As said earlier, the main purpose of all these types of marriage is to procreate children, especially male children. The necessary requirements to make a valid marriage are consent, bride price, capacity, celebration, and taking home of the bride to the bridegroom's house. These are condition precedents, which must be fulfilled.

Man-to-woman Marriage⁵⁰

In most cases, African man-to-woman marriage is polygamous. Few marriages are monogamous as practiced in the Western world that has come under the influence of Christianity. However, one of the essential requirements for a valid man-to-woman marriage is that it must be a union of a man and a woman to create the status of husband and wife or husband and wives⁵¹. Like statutory marriage, consent of the parties to be married and parental consent is paramount to ground a valid customary marriage. In *Dr. Osadiaye Osamawonyi v. Itohan Osariere Osamawonyi*⁵² the respondent averred that she never gave her consent to or entered into a marriage with the purported husband Patrick Goubadia, the Supreme Court held that consent of the bride-to-be was a condition precedent to marriage under Benin native law and custom. The apex Court also held that as no such consent was given, there was in fact no subsisting customary-law marriage at the time the respondent purportedly married the petitioner. In that case, the petitioner went through a marriage under the Marriage Act with the Respondent in Lagos on 21st June 1967.

On 6th July 1968, the Petitioner filled a divorce petition on the ground, *Inter alia*, that in 1964 the Respondent was lawfully married to one Patrick Goubadia according to Benin native law and custom. He averred that the said marriage was not dissolved until 14th August 1967 by a Benin customary court, which ordered the refund of ₦60 bride price to the said Patrick Goubadia. It was established in evidence that some time before 1966, the said Patrick Guobadia in contemplation of a proposed statutory marriage and unknown to the Respondent at the time, paid the Respondent's father the sum of sixty pounds as bride price. On learning about the payment, the Respondent in September 1966 rejected any proposal of marriage by Patrick Goubadia and the whole idea of marriage between them was abandoned. In this case, the Respondent's father is to blame for collecting money from Guobadia without letting his

⁵⁰ This term is coined to distinguish the formal marriage between a man and woman from the woman-to-woman marriage or female husband institution, which is the main focus of this study.

⁵¹ See: *Meribe v. Egwu, infra* (see footnote 106 on page 16)

⁵² (1972) LPELR-SC.295/1969

daughter to know about it. Such marriage falls within the definition of “arranged marriage” because one of the parties, in this case the wife-to-be, was not allowed to know what was going on concerning her intended marriage. Another condition precedent for a valid customary marriage is payment of bride price. It is a well established principle of customary law in Nigeria that payment of bride price is one of the essential ingredients of a valid customary law marriage⁵³. It has been observed that scholars, writers and indigenous people discussing customary law marriage often use the term “bride price” interchangeably with “dowry”. This usually leads to confusion because, *strict sensu*, “dowry” (*Eru Iyawo*) means the property, which a woman brings to her husband⁵⁴.

On the contrary, the “bride price” (*Owo Ori Iyawo*) is a specific price (property, money, etc) paid by the bridegroom (or his family) to the bride’s parents or guardians⁵⁵. The legal effect of bride price is that it creates the status of betrothal and therefore a special relationship between the parties to the intended marriage. In *Ogunremi v. Ogunremi*⁵⁶ the Court held that payment of bride price or part of thereof does not *per se* constitute a valid marriage under customary law⁵⁷. Thus, in some communities, if a girl in respect of whose intended marriage bride price has been paid becomes pregnant by another man before the proposed marriage takes place, the suitor is by custom entitled to claim the child. However, such custom, as will be shown presently, has been condemned by the superior Courts of records in many cases including *Edet v. Essien*⁵⁹. Celebration of the marriage is another customary law requirement, which follow other requirements (i.e. capacity). Celebration of marriage includes the act of taking the bride to the groom’s house. In most systems of customary law in Nigeria, there is no marriage until the bride is led to the house of the bridegroom or his parents and formerly handed her over by parents or guardian to a representative of the bridegroom’s family⁶⁰. Thus, in *Beckley v. Abiodun*⁶¹, it has been judicially decided that a valid Yoruba or Ibo marriage was not contracted until the formal handover of the bride had taken place⁶². Similarly, in *Osamwonyi v. Osamwonyi*⁶³ the Supreme Court held that according to Benin customary law, payment of dowry alone without cohabitation as well did not constitute a valid customary marriage. In *Ogunremi v. ogunremi*,⁶⁴ the Court held that customary law marriage might be contracted by proxy. The pertinent questions at this juncture are: if a woman who is seeking to marry a woman for herself

⁵³ Uwogugu E. I., *Family Law in Nigeria*, (3rd Edition), (1990), Heinemann: Ibadan, 67

⁵⁴ Staples J. A., “Dowry and Bride Price are not the same thing”. Available at: www.jasonstaples.com/sociology/dowry-and-bride-price-are-not-the-same-thing/ (accessed on 26/02/2015)

⁵⁵ *Ibid*. See also: Deuteronomy 22: 28-29. I take the view expressed in this article.

⁵⁶ (1972) 2 UILR 466

⁵⁷ Nwogugu E. I., *ibid*, 73

⁵⁸ Nwogugu E. I., *ibid*, 71

⁵⁹ (1932) 1 NLR 47

⁶⁰ Uwogugu E. I., *Ibid*, 58

⁶¹ (1943) 17 NLR 59; also *Ikedionwu v. Okafor* (1966-67) 10 ENLR 178.

⁶² Yeboa K. Y., “Formal and Essential Validity of Akan and Ghanaian Customary Marriages” (1993-1995) University of Ghana Law Journal, Vol. XIX, 140

⁶³ *Supra*

⁶⁴ *Supra*

or for her husband or brother for the purpose of producing children fulfills all these conditions, can such a marriage be valid? Can children begat from woman-to-woman or female husband be given all their legal rights as would be given to children produced from man-to-woman marriage?

African Female Husband or Woman to-woman Marriages

The practice of female husband in Africa is different from that practiced in the Western world as exemplified by the Mary Hamilton's case quoted above and other homosexual cases. A typical female husband arrangement involves two women undergoing formal marriage rites; the requisite bride price is paid by one party as in a heterosexual marriage⁶⁵. The woman who pays the bride price for the other woman becomes the sociological 'husband'⁶⁶. The couple may have children with the help of a 'sperm donor', who is a male kinsman or friend of the female husband, or a man of the wife's own choosing, depending on the customs of the community⁶⁷. The female husband is the sociological father of any resulting offspring.

The children belong to her lineage, not to their biological father's. As will be shown later, in some Nigerian communities where female husband marriage is practiced, resulting offspring do not belong to the lineage of the female husband, though she is recognized as the sociological father. Even in Old Europe, marriages were contracted mainly for purposes of inheritance and sustenance of dynasties. In African culture, production of heirs was and still is the overriding interests in most marriages, hence the age long preference for sons as opposed to daughters from the marital union⁶⁸. Marriages were and still are contracted for purposes of forming alliances between families or groups and for love making. Particularly, in Africa, these purposes led to woman-to-woman marriages, under-age marriages and polygamous marriages. The aim of under-age marriages was also to cement friendship relations between the families of the bride and the groom. It has been asserted that child marriage was the most common way of acquiring rights in women in Igbo land⁶⁹. Marriages contracted between two females were and still are referred to as female husband or woman-to-woman marriage⁷⁰. It is a form of customary law marriages. The name attached to this type of marriage often creates confusion leading some people who are not familiar with the practice to link it

⁶⁵ Carrier J. M. and Murray S. O., "Woman-Woman Marriage in Africa," in Murray S.O and Roscoe W. (eds.) *Boy-wives and Female Husbands: Studies of African Homosexualities*, (1998) St. Martin's Press: New York, p.255.

⁶⁶ *Ibid.*

⁶⁷ *Ibid*

⁶⁸ Nwoko K. C., "Female Husband in Igbo Land: Southeast Nigeria", (2012) *Journal of Pan Africa Studies*, Vol. 5, No. 1, 72

⁶⁹ Nwoko K. C., *ibid*, 73

⁷⁰ Nwoko K. C., *ibid*, 73 ("Marriages in Igbo land were not restricted to adult males and females alone. To large extent, marriages were contracted between two females and between underage children until they grow up. For the latter, it was for various reasons, to ensure the continued friendship ties of their families, and to protect especially the girl bride from any future suitor. Child marriage was "the most common way of acquiring rights in women.")

to lesbianism as practiced in the “civilized” world. African practice of female husband is not the practice of lesbianism and has nothing to do with woman-to-woman sexual intercourse⁷¹. Rather, African practice of female husband is adopted by barren women to produce children when all other options had failed. Usually, although the female husband is the one that pays the bride price of the girl, she has a man who would be performing duty of a husband, especially the sexual function to make the girl bear children for the female husband. In fact the man comes in strictly for this function. The female husband to the woman carries out the other functions of the father before and after the child is born. Under some customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman. However, there is much in these cases than meets the eye. The true position in each case is that there is at the background a man in whose name or behalf the marriage is contracted⁷². African female husband is similar to the *sexless marriage* practiced in some countries of the Western world. Sexless marriage is a marriage in which there is no sex between the two partners. The aim of woman-to-woman marriage in Africa is never for anything concerning sexual intercourse between the female husband and the girl/woman she marries. There are many kinds of female husband marriage as practiced in Nigeria. These include rich but unmarried female husband marriage; male daughter marriage; female children marrying for their father; barren wife marrying for her husband.

Rich But Unmarried Female Husband Marriage

A typical example of a female husband is a wealthy woman who is not married and has no children to inherit her property and preserve her family line. Experience has shown that in some parts of Nigeria, an unmarried but prosperous woman who desires to have a family of her own, may, if she cannot bear children, ‘marry’ another woman to do so on her behalf. She attains this objective by providing the bride-price for a new wife who while living with her bears children⁷³. Usually, internal family arrangements are made whereby the new wife bears children by specially chosen male members of the family or by a paramour. The marriage is in fact contracted in the name of a male member of the family of the financier wealthier woman. This may be regarded as a type of “ghost marriage”⁷⁴. The practice of female husband is not novel to Igbo land. However, the practice of female husband in Igbo land is different from lesbianism practiced in America and European countries⁷⁵. The practice of female husband has been seen as a way out for a barren couple. It was a customary way for unmarried but mature wealthy women who could not have their own children use the female husband system to procreate. The most significant reason for the practice of female husband

⁷¹ Nwoko K. C., *ibid*, 74

⁷² Nwogugu E. I., *ibid*, 79

⁷³ Nwogugu E. I., *ibid*, 79

⁷⁴ Nwogugu E. I., *ibid*, 79 -80

⁷⁵ Nwoko K. C., *ibid*, 74

was the production of the male child personality with capacity to inherit family property. Thus, even a married woman that could not procreate male or female children could “marry” a wife for her husband. Apart from Igbo land, the practice is also common among the Ibibio, Annang, Oron and Efik communities of South-South Nigeria. In Nkwa Ibiono in Ibiono Ibom Local Government Area of Akwa Ibom State, one Prophetess Ikwo Idio was said to have married many wives and took them to her house. She brought young men to work for her as palm fruit harvesters and to service those women to procreate children for her. Prophetess Ikwo Idio was a rich woman. Before she died in 2003, she had through the practice of female husband owned many children who now inherit her property and keep her name alive⁷⁶.

Male Daughter Marriage

Another practice devised by the people to have sons in their families was the use of first daughters. As noted earlier, in most pre-colonial patriarchal societies in Southern Nigeria, a man’s generation and lineage were preserved in the personalities of his sons. Thus, in such communities, when a man was unable to have a male child, he appointed one of his daughters, in most cases the first daughter, to stay back in the family and procreate for the family. This practice is known as “male daughter” marriage. The existence of this practice in parts of Southeastern and South-South Nigeria has been confirmed through interviews available on the internet⁷⁷. A man who has no male child may persuade one of his daughters to stay behind and not to marry. The purpose of such an arrangement is for her to produce a male successor for her father, and thereby save the line from threatened extinction. Thus, any child she bears while remaining with her parents is considered the legitimate child of her father right from birth. Any male child so produced has full rights of succession to the grandfather’s land and title⁷⁸. Among the communities in Akwa Ibom and Cross River States in South-South Nigeria the custom is known as *Adiaha Ufok* meaning “daughter of the house” or “daughter of the family”. Recently, some women view the practice of *Adiaha Ufok* as an abomination⁷⁹. They argue that such practice was contrary to their Christian belief⁸⁰.

⁷⁶ Okon B. A., Ekpe E. L. and Ansa S. A., “*Documenting the Significance of Ibibio Traditional Marriage Gift Items: A Comparative Approach*”, (2014) International Journal of Language and Linguistics, Vol. 2, No. 3, 182.

⁷⁷ Tradition of Same Gender Marriage in Igboland, Nigeria; (this Article is available at: www.blackagendarreport.com/?q=content/tradition-same-gender-marriage-igboland-nigeria) (accessed on 26/02/2015)

⁷⁸ The custom is known as *Arewa or Arhewa* in Ishan custom and in Ibo custom. See: Bradbury R. E. and Lloyd P. C., “*The Benin Kingdom and the Edo-Speaking peoples of South-Western Nigeria and Itsekiri*” (1957) International African Institute: London, Ethnographic Survey of Africa, Western Africa, Part XIII, 80. See also: Thomas N. W., “*The Edo-Speaking Peoples of Southern Nigeria*” (1970) Journal of the Royal African Society, Vol. 10, 7-8; Rowling C. W., “*Notes on Land Tenure in Benin, Kukuruku, Ishan and Asaba Divisions of Benin Province*” (1948) Government Printer: Lagos, 99.

⁷⁹ Visit: www.scribd.com/doc/164393675/unpf0063 (accessed on 26/02/2015).

⁸⁰ See: Ephesians 5:31 that says, “A man leaves his father and mother and is joint to his wife, and the two shall be one flesh”.

The study on female husbands has shown that in Igbo land, a man who did not have a son could pass land and economic trees to his daughters if the daughters were recognized to play the role of procreating children for the family. In this way, the daughter passed from female hood to male hood for the purpose of procreation and inheritance. It has been observed that the passage from femalehood to malehood and the rights of “sons” could only be accomplished and recognized through rituals⁸¹. *Adiaha Ufok* could not be married out; if married, such marriage might not be blissful and as such might not last⁸².

The practice of *Adiaha Ufok* is more prevalent among the Efik and the riverine Ibibio communities. Among the Efik, the *Adiaha* has full right over her father’s property and it is not surprising that she could act as male daughter in the family⁸³. However, amongst the Ibibio and Annang, the male daughter or *Adiaha Ufok* would not be allowed to inherit property even the property personally owned by her father. The *Adiaha Ufok* would be challenged by members of the lineage to stop devolution of such property to her. Members of the extended family usually claimed such property to be the property of the extended family. Such property owned by a man who died without a male child is known as *Ikot Ufok* or *Ikot Ekpuk* or *Mkpo Ekpuk/Mkpo Ufok* in Ibibio and Annang land⁸⁴. Unlike the practice of male daughters, which is recognized through rituals, the practice of female husbands does not need rituals for them to inherit the property rights. The practice of *Adiaha Ufok* among some communities in Ibibio, Annang and Efik does not need any rituals. Among the Igbo, the male daughter or “successor-apparent either procreates directly by going for a sex mate known as *Ikonwanna* or look for a younger female who she took in as a wife after the necessary bride-price and other traditional rites had been performed”⁸⁵. In this way, the male daughter assumes the traditional status of a man and a husband in the society and before the gods. It is significant to note that during the traditional marriage rite, the female husband would still need her real male relation to front her or act as her spokesperson before her in-laws⁸⁶.

Female Children Marrying for their Sonless Father

It was and is still common to see some female children of a family collectively pay bride price of a younger girl after the death of their sonless father in the name of their eldest sister so that the new bride would give birth to male children to preserve their father’s lineage and for inheritance purposes. The bride would choose a bedmate from the family of the female husbands so that she would procreate male children. The choice of bedmate was critically determined and the female husband had, as a matter

⁸¹ Amadiume I., *Male Daughters, Female Husbands: Gender and Sex in an African Society*, (1987) Atlantic Highlands: London, 188-189

⁸² Okon B. A., Ekpe E. L. and Ansa S. A, *Ibid*

⁸³ Okon B. A., Ekpe E. L. and Ansa S. A, *Ibid*

⁸⁴ Okon B. A., Ekpe E. L. and Ansa S. A, *Ibid*

⁸⁵ Nwoko K. C., *ibid*, 75

⁸⁶ Nwoko K. C., *ibid*, 75

of compulsion, to assist the bride in choosing her sex partner. There are reasons for the involvement of the female husband in choosing a bedmate for the girl. The reasons are: (i) to ensure that the bedmate was a blood relation of the female husband; (ii) to preserve the blood tie of the family; (iii) to ensure that the bride would not pollute the family by raising children fathered by miscreants, thieves or persons with ailment; (iv) to prevent the introduction of undesirable traits into the family; and (v) to prevent marrying an Osu (the outcast)⁸⁷. The female children can also marry for their father while alive but have no children or sons.

The society did not look down on the practice of female marriage, especially when the actual essence of the marriages was fulfilled, that is, procreation of male children. The role of the female husband as man was also recognized and respected by the people of the area, including traditional rulers. To actualize the essence of the marriage, the female husband remained the sociological father of any resulting offspring. The children belonged to the lineage of her father, not to their biological father (bedmate). Consequently, she played the role of the father, provider, protector and indeed all the functions and responsibilities enshrined in the patriarchal concept which included physical protection of the family and its territory, the male economic sphere, the spiritual sphere, the social sphere, etc⁸⁸.

At this level, the female husband in theory enjoyed equal status with her male kit and kin though this was not the general practice in Igbo land. Among her female mates, the *Umuada*, she was regarded as a man and first among equals, *Okenwanyi*. She was treated like a man and her opinion was first sought in the gathering of opinions. In any ceremony, she enjoyed equal privilege with her male counterparts and in some Igbo communities like Uguta, could break kola nut,⁸⁹ but only among her female folks. She combined both secular and spiritual functions and obligations. She participated in secret rituals and sometimes associated with the male elders in communal rituals⁹⁰.

Married Barren Woman Marrying For Husband

This is another form of female husband though slightly different from the one just discussed above. In some communities, it is not strange to see some barren married women marry young girls for their husbands as a means of securing her position in the family. The barren wife provides her husband with funds for the bride-price in respect of a new wife who is expected to bear children in her place⁹¹. Apart from barren wives, some married women who are not fortunate to bear sons may also marry wives

⁸⁷ Nwoko K. C., *ibid*, 76. See also: Emefiene I. R., “*The History of Ubulu People with Special Searchlight on Ubulu-Uno* (2006) Floreat Systems: Benin City, 218

⁸⁸ Nwoko K. C., *ibid*, 76

⁸⁹ This is a cultural practice in Igbo land reserved only for men

⁹⁰ Nwoko K. C., *ibid*, 76

⁹¹ This is not peculiar to Africa alone; the practice was also recognized in the ancient Israel communities. In ancient Israel, a childless woman could call herself a mother by giving her maid-servant to her husband as a second wife (assuming, of course, the maid-servant did indeed produce a child).

for their husband in order to procreate male children for the family. Some married women prefer marrying new wives to their husbands to leaving their matrimonial home or allowing their husbands to die without children. Some legal authorities argue that since such marriage is in fact contracted in the name of the husband, there is no question of one woman being married to another⁹². Though that may be rightly so, the financial support and moral concern of the barren or sonless wife should not be ignored especially where the woman is the bread-winner of the family and the husband cannot afford the resources needed to afford a second wife by himself. This means that without the agreement and financial support of the old wife, it would not have been possible for the poor and sonless or childless husband to marry another wife to have children.

Sororate Marriage, Wife Inheritance or Levirate, Man-to-Man Marriage, Big and Small Dowry Marriage

Having dealt with the female husband extensively, other customary law marriages earlier mentioned can now be briefly discussed. These include *sororate marriage*, which is a marriage in which on the death of a wife; the widower (husband) is presented with a substitute by his deceased wife's family without a fresh marriage procedure⁹³. *Sororate marriage* is similar to *wife inheritance* or *levirate marriage* to some extent. *Wife inheritance* or *levirate marriage* is a marriage, which on the death of a man his widow may become a wife of his brother or other close relative without the need for a fresh bride price, or formal marriage. However, in some communities, the customary law recognizes the right of a widow to elect whether to remarry within her late husband's family or not. If she chooses to marry within her late husband's family, she is at liberty to choose which of her late husband's brothers or relatives to settle down with as a husband. Nevertheless, some communities allow sons to "inherit" their late father's wives other than their own mother, while other customs admit only the brothers and other close relatives to take the wives of the deceased⁹⁴. In some Nsit communities of Akwa Ibom State, widows prefer marrying within their late husband's family, including their late husband's brother⁹⁵.

There also exist formalized, socially recognized relations between two men in Africa. Among the Zande⁹⁶ a male warrior could marry a teenage boy by paying bride-wealth to the boy's parents. The man addresses the boy-wife's parents as in-laws, and

⁹² Williamson K., "Changes in the Marriage System of Okrika Ijo" (1962) Cambridge Journals (International African Institute) Vol. 32, Iss. 1, 53

⁹³ Nwogugu E. I., *ibid*, 79. See also: Aina O. I., Aransiola J. A., And Osezua C., "Sexual Health And Sexual Rights Within Marriage" (2006) Africa Regional Sexuality Resource Centre, 4. (The Article is available at: www.arsrc.org/downloads/uhss/aina.pdf [accessed on 28/02/2015])

⁹⁴ See: www.justice.gov%2Ffeoir%2Fvll%2Fcountry%2Fcanada_coi%2Fnigeria%2FNGA101045.E.pdf (accessed on 01/03/2015)

⁹⁵ See: www.justice.gov%2Ffeoir%2Fvll%2Fcountry%2Fcanada_coi%2Fnigeria%2FNGA101045.E.pdf (accessed on 01/03/2015)

⁹⁶ Zande people are located in Southwestern part of Sudan, Northeastern part of Congo and the Central African Republic.

render services to them as befitted a son-in-law. Unlike women-women marriages, man-boy marriages end when the boy comes of age. The former boy-wife can now take his own wife, and his former husband can marry another boy-wife⁹⁷. There are also customary law marriages whose statuses are determined by the quantum of the bride price paid to the family of the bride. These include “Big Dowry” marriage and “Small Dowry” marriage. These are commonly practiced in Rivers and Bayelsa States of Nigeria, for example in the riverine areas of Ijaw and Okrika⁹⁸. “Big Dowry” marriage is a marriage where the married woman becomes part of her husband’s family and her children belong to that family. This is so because the husband paid “big dowry”, (i.e. reasonable bride price) to his wife’s parents⁹⁹. On the other hand, “Small Dowry” marriage is a marriage where the married woman remains part of her original family and her children become members of their mother’s family. The children have the right to inherit property from their mother’s family. This is so because the husband paid “small dowry” to his wife’s parents¹⁰⁰.

The Position of Law on Practices of Female Husband Marriages in Nigeria

Legal opinion on this form of marriage from the customary courts to the Supreme Court appears contradictory. The contradiction is overly prominent because:¹⁰¹

- (a) the Nigerian Matrimonial Causes Act 1970 is extremely silent on woman-to-woman marriage¹⁰²;
- (b) the Customary Court Edict in some states of the federation, for example, the defunct Bendel State, seems to have declared it repugnant¹⁰³,
- (c) yet in the communities where it is practiced, it is still recognized and accepted as a way of life¹⁰⁴.

The following examples show the attitude of Nigerian courts towards woman-to-woman marriage. In *Helen Odigie v. Iyere Aika*¹⁰⁵, the court had to decide whether a child born of a woman married to another woman is the child of the woman husband. The facts were as follows: The plaintiff (a woman husband) sought the return of her child in the custody of the defendant. According to Esan custom a childless woman who desires to raise a family is permitted to marry a girl on the payment of dowry and to lay claim to any offspring of such a girl. The plaintiff being childless, following Esan custom,

⁹⁷Murray S. O. and Roscoe W. (ed), “*Boy-wives and Female Husbands*”: Studies of African Homosexualities, 27. (The book is available at: www.arcados.ch/wp-content/uploads/2012/06/MURRAY-ROSCO-BOY-WIVIES-FEMALE-HUSBANDS-98.pdf [Accessed on 01/03/2015])

⁹⁸Nwogugu E. I., *ibid*, 81

⁹⁹Nwogugu E. I., *ibid*, 81

¹⁰⁰Nwogugu E. I., *ibid*, 81

¹⁰¹Otepor N., “*A Woman who is Husband and Father: An Essay in Customary Law*” (2008) Review of Nigerian Law & Practice, Vol. 2, 72

¹⁰²Otepor N., *ibid*,

¹⁰³Otepor N., *ibid*, See also: Customary Court Edict 1978, Section 22(a)

¹⁰⁴Otepor N., *ibid*

¹⁰⁵Helen Odigie V. Iyere Aika (1985) NBCL 51.

married the defendant when she (defendant) was ten years old. At twenty the defendant fall in love with Ukiwe, a male teacher resident at Ewohimi, and became pregnant by him. This took place with the consent of the plaintiff, who paid the ante and post-natal maternity fees as was required by customary. When the baby boy was born she (the husband) named the child Aigbesole.

Problems subsequently arose when Ukiwe left Ewohimi on a transfer to Ekpoma eighteen months after the birth of Aigbesole. While moving to his new station, Ukiwe took the child and his mother along with him. Depressed by this act, the plaintiff brought an action in the customary court seeking the return of her child in the custody of the defendant. This action was in order because by Esan custom the plaintiff was culturally and legally entitled to the custody of the child. The lower court held in favour of the plaintiff's claim. It was against this decision that the defendant (now appellant) went to High Court. The counsel for the appellant argued that the decision of the lower court was wrong. The decision is repugnant to natural justice, equity and good conscience. Furthermore, he argued that a woman cannot marry a woman and it would be inconsistent with dictates of justice to declare otherwise. The trial judge agreed with the submissions of the counsel to the appellant. According to him:

"I agree entirely with counsel to the appellant. It is an odious custom to permit a woman to marry a woman. It is equally atrocious and against public policy to deprive unwilling natural biological parents, for any reasons, of their child and vest the same on childless parents or childless man or woman as if the child were a chattel. This ugly custom is distinguishable from the system of child adoption which primarily is for the welfare of the child".

The judge, therefore, held that woman-to-woman marriage is repugnant to natural justice, equity and good conscience. The decision of the lower court which was to the effect that the child belonged to the plaintiff was consequently set aside. In *Meribe v. Egwu*¹⁰⁶, the court had to decide whether a child born of a woman married to a childless woman, while the latter was also married to a man, is the child of the woman husband or the child of the "male husband" of the "woman husband". The facts were as follows: Nwanyiokoli, one of the wives of Chief Cheghekwa, because she was childless, married her niece, Nwanyiocha, and contracted her husband (Cheghekwa) for the purposes of raising heirs for her. The niece had children from the affairs between her and Chief Cheghekwa, one of whom was the plaintiff in this case. Nwanyiokoli had brought the plaintiff up as her own son; she played the role of the plaintiff's natural and biological father. Nwanyiocha, her niece and wife, lived with her and she played the role of a husband. This happened while Nwanyiokoli was living in Chief Cheghekwa's house as one of his wives. When Nwanyiokoli died, the plaintiff performed the burial ceremony as the son of the woman. He inherited her property including the land which was the subject of dispute. He had farmed on the disputed land from the time of Nwanyiokoli's death in 1937, until 1971 when the defendant trespassed on it. The

¹⁰⁶ (1976) LPELR-1861 (SC)

defendant was one of the children of Meribe, eldest son of Chief Cheghekwa, by another wife. When his father died, Meribe has inherited Nwanyiokoli under native law and custom (Levirate). The defendant claimed that when Nwanyiokoli died, it was his father, Meribe, who performed the burial rites and inherited her property including the disputed land, not the plaintiff. During the trial, evidence was given and accepted by the lower court to the effect that:

“It is the custom of our place that if a woman has no issue, she can marry another woman for her husband any issue from the said woman would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance”¹⁰⁷.

The trial judge accepted the evidence adduced before the court but held that while (a) the evidence was in accord with native law and custom, (b) Nwanyiokoli did not marry Nwanyiocha for herself but for her husband, a fact naturally impossible because Nwanyiokoli is a woman; (c) it was indisputable that Nwanyiokoli treated the plaintiff as her son. According to the judge *“the word marriage in the context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwa to marry”*. The court found for the plaintiff, on the grounds that the marriage was validly contracted. The defendant appealed to the Supreme Court of Nigeria which did not uphold the judgments of the lower courts.

According to Madarikan, J.S.C.: *“in every system of jurisprudence known to us one of the essential requirements for a valid marriage is that it must be the union of man and a woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage, and where there is proof that a custom permits such an association the custom must be regarded as repugnant by virtue of the provision of section 14(3) of the Evidence Act and ought not to be upheld by the court”¹⁰⁸*. The court, thus, set aside the decisions of the lower courts. It declared the system of woman-to-woman marriage repugnant to natural justice, equity and good conscience.

The third case, *Okonkwo v Okagbue*¹⁰⁹ is not logically different from the other two. It was decided in the Supreme Court of Nigeria in December 1994. The court dwells heavily on the lonely ratio established in 1976 by Madarikan J.S.C. in *Meribe V. Egwu*¹¹⁰. The facts were as follows: the appellant, Okonkwo, together with

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*. Section 14(3) the Evidence Act cited in the judgment is now section 18(3) in the current Evidence Act (2011) which states, *“In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience.”*

¹⁰⁹ (1994) 9 NWLR (PT. 368) 391. See also the decision of Court of Appeal, Enugu Division in the case of Emmanuel Ebele V. Augustine Ebele (2013) LPELR-21207(CA), is on all fours with *Meribe v. Egwu*

¹¹⁰ *Supra*

his four brothers on behalf of whom he instituted the action are the surviving children of late Nnanyelugo Okonkwo who died in 1931. Late Okonkwo had two sisters, Mrs. Lucy Okagbue and Mrs. Victoria Obiozo, who also survived him. Neither of these two women had any child by their late husbands or anyone else.

On the death of their husbands both of them returned to Okonkwo's household, the family of their birth. Sometime in 1968, thirty-two years after the death of their brother, both sisters married one Rose purportedly for and on behalf of their late brother, without the consent or knowledge of their late brother's five surviving male children. Six children were born of this marriage, all bearing Okonkwo, as surname. The six children claimed to be the children and heirs of late Nnanyelugo Okonkwo, and were thus entitled to inherit both real and personal property of Nnanyelugo Okonkwo. The children of late Nnanyelugo Okonkwo protested this development to no avail. Their insistence that the six children from Rose should, at best, be returned to the families of late Okagbue and Obiozo who indirectly, are the fathers of these children yielded no positive results. The two sisters claimed that the marriage was validly contracted because it was recognized by Onitsha native law and custom. They claimed further, that the six children are legitimate. It was against the background of these conflicting claims that the appellant went to court. Evidence was adduced as to the following:

- (a) Under Onitsha native law and custom a sister who is childless can marry another woman for her deceased brother even where such a deceased has issues surviving him,
- (b) Consent of the larger family of the deceased Nnanyelugo Okonkwo was obtained to the said marriage. The consent required was that of the general family, not that of the nuclear family of the deceased. The consent required was only and solely that prior to contracting of the marriage.
- (c) A reconciliatory meeting was held prior to the court action during which it was unanimously agreed that the marriage between the two sisters of late Okonkwo and Rose was validly contracted. Rose was a wife entitled to all rights and privileges like any other married woman in Okonkwo family; her children are legitimate like all others in Okonkwo family household.

Delivering judgment, Nwokedi J., held as follows:

*"I am satisfied that some members of Okonkwo family endorsed the action of Mrs. Okagbue and Mrs. Victoria Obiozo in marrying Rose as a wife for their late brother. I have no alternative but to declare that the marriage of Rose was valid under Onitsha native law and custom, the six children are perfectly legitimate and belong to Okonkwo family. This is more so as there is as of now no law in Nigeria on legitimacy or otherwise"*¹¹¹.

Dissatisfied with this judgment, the appellant went to the Court of Appeal. Dismissing the appeal Macaulay J.C.A in a unanimous judgment had this to say: "in view of the

¹¹¹ *Okonkwo v. Okagbue, supra*

evidence led that both before and after the marriage, the necessary consents were obtained, I am satisfied that the learned trial judge was correct in finding that marriage was the consent of the family in accordance with Onitsha native law and custom... this appeal is totally without merit and hereby dismissed. The custody of the children is granted to the family of the father into which their mother had been married”¹¹². Still dissatisfied with the judgment of the Appeal Court the appellant went to the Supreme Court of Nigeria. The appellant in his brief of argument raised the following issues for the court to determine:

- (a) At the court of first instance on who was the onus of proving Onitsha native law and custom as it relates to the marriage in issue? Whether the High Court and Appeal Court were right in placing the onus on the appellant?
- (b) Considering the evidence before the court of first instance, and the finding of the fact made by the trial judge, can it be said that conditions precedent to the contracting of such marriage as the one in issue was fulfilled in this case?
- (c) Did the Appeal Court consider properly the question as to whether or not the custom even if held established is repugnant to natural justice, equity and good conscience? And indeed is the custom, considering the entire circumstances of this case, not clearly repugnant to natural justice, equity and good conscience and contrary to public policy?¹¹³

Allowing the appeal, Uwais J.S.C in the lead judgment observed *inter alia*:

“In the present case when Mrs. Lucy Okagbue and Mrs. Victoria Obiozo purported to have married Rose for the deceased 32 years after his death, the marriage cannot rightly be said to be valid. It is a fiction and a fallacy, for there is no way in which a dead person can naturally get married to the living. It is utterly impossible. Therefore, what, at best, happened is a marriage between Rose and Mrs. Okagbue and Mrs. Obiozo, which is marriage between a woman and two women. This is what this court has held in Meribe v. Egwu¹¹⁴ that must be regarded repugnant to natural justice, equity and good conscience. I have no hesitation holding that this marriage for the deceased is invalid since the custom by which the marriage was contracted is repugnant to natural justice, equity and good conscience. What then is the status of the children of Rose? Are they the children of the deceased? It is obvious from my finding that if there was no marriage between the deceased and Rose; it is a fiction to talk of children of such a marriage. In reality a dead person cannot procreate 32 years after his death”.

In a very recent case of *Ojukwu v. Agupusi*¹¹⁵, decided by the Court of Appeal in 2014, the appellant is the head of the Ojukwu Family of Okpuno, Ebenator, Uruagu

¹¹² *Ibid*, p. 318 -319

¹¹³ *Ibid*, p. 305-306

¹¹⁴ *Supra*

¹¹⁵ *Supra* (see: foot note 39 on page 5)

Nnewi, Anambra State. The 1st respondent is also of Okpuno Ebenator, Uruagu, Nnewi extraction and from the same larger Dunuka Family with the appellant. The 2nd respondent was the wife of the late Christopher Ejimkonye Ojukwu the younger brother of full blood of the appellant. The said Christopher Ojukwu died in 1987, and the 2nd respondent had three surviving daughters for the deceased at the time of the demise. After the death of her husband, the 2nd respondent begat four children (two males and two females). It was the case of the appellant that the 1st respondent impregnated the 2nd respondents which resulted in the birth of the four children. However, the respondents while acknowledging the fact of the 2nd respondent giving birth to those four children post-humous of Christopher Ojukwu, nevertheless, denied knowledge of who their biological father is/was even though same is a fact peculiarly to the knowledge of the 2nd respondent and the burden of proof was on her.

Parties joined issues on whether it was abominable or repugnant to natural justice or good conscience for children to be credited to the deceased. The learned trial Judge held that the children born long after the death of their mother's late husband were children of the deceased and that same was not repugnant or abominable. He further held that from the totality of the facts before him, there was no marriage between the 1st respondent and that the 2nd respondent and the four children were still members of the Ojukwu Family by Nnewi Native Law and Custom, contrary to the claim of the appellant which was dismissed in its entirety.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal unanimously allowed the appeal and held *inter alia*: *On bindingness of Supreme Court decisions on all other courts*, the Court held, “*The Supreme Court is the ultimate or highest court in the land and all previous decisions of the court are absolutely binding upon all other courts whether the decision is correct or not until the apex Court over rules itself in a judgment given per incuriam*”¹¹⁶. Therefore, the Court, said it was improper for the learned trial Judge in the face of Supreme Court decisions whether arrived at *obiter* or *per ratio decidendi*, to rely on a High Court decision in the determination of the issue at the lower court. By virtue of the impregnable doctrine of *stare decisis* or judicial precedent the Supreme Court is superior and at the apex in the hierarchy of Courts¹¹⁷. *On status of a custom that allows a woman to marry another woman for purposes of raising children for her deceased brother*, the Court Appeal followed the Supreme decision in *Okonkwo v. Okagbue*¹¹⁸ reached 20 years ago and rejected the custom, holding:

“*The institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rd defendant to him. To claim further that the children the 3rd defendant had by other man or men are the children of Okonkwo*”

¹¹⁶ See: Ratio 10 of the judgment in *Ojukwu v. Agupusi supra*

¹¹⁷ See: Ratio 9, *ibid*

¹¹⁸ *Supra*

deceased is nothing but an encouragement to promiscuity. It cannot be contested that Okonkwo (deceased) could not be the natural father of these children. Yet 1st and 2nd defendants would want to integrate them into the family. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience. It is in the interest of the children to let them know who their true fathers are (were) and not to allow them live for the rest of their lives under the myth that they are children of a man who had died many decades before they were born. I hold the view that the observations of the learned Justice of the apex Court apply to the facts and circumstances of this case where a man who died in 1987 could still father four children long after his death and that the learned trial Judge had no rationale basis for distinguishing our present case from Okonkwo v. Okagbue”¹¹⁹.

Following this decision in *Meribe v. Egwu*¹²⁰ made 1976, the Court of Appeal held that: The custom of Nnewi people which allows wives of deceased husbands to have post-humous children for their late husband is not only repugnant to natural justice, equity and good conscience but contrary to public morality and policy in that it encourages prostitution and promiscuity apart from stigmatizing the children who shall be perpetually unsure of their biological fathers by the circumstances of their birth¹²¹. The custom in the instant case is not only primitive, moribund but repugnant to natural justice, equity and good conscience and also contrary to public policy and morality; and in accordance with the proviso to section 14(3) of the Evidence Act, ought not to be enforced to declare those four children, the children of Christopher Ojukwu who had died since 1987 before they were born by the 2nd respondent. The custom which permits the bearing of children by widows for their late husband is repugnant to natural justice, equity and good conscience and contrary to public policy and morality. Such custom ought not to be enforced¹²².

On determination of whether a custom is repugnant to natural justice, equity and good conscience or contrary to public morality, the Court held that it

“...involves the value judgment of the Judge/Court which should be objectively related to contemporary mores, aspirations, expectations and sensitivity of the people of this country and the consensus opinion of civilized international community which we share.”¹²³

¹¹⁹ See: Ratio 7 of the judgment in *Ojukwu v. Agupusi supra*

¹²⁰ *Supra*

¹²¹ *Ibid*

¹²² See: Ratio 5 of the judgment in *Ojukwu v. Agupusi supra*

¹²³ See: Ratio 8 of the judgment in *Ojukwu v. Agupusi supra*

CONCLUSION

The Court's pronouncement on same sex marriages in the *Ojukwu v. Agupusi*¹²⁴ shows that judicially, African female husband or woman-to-woman marriage is equated to same-sex marriage or homosexual practiced in the "so-called civilized world" or by so-civilized people in other parts of the world. The Court does not want people to import "same sex marriages and unnatural behaviours" from the "so-called civilized world" into Nigeria.

*There is no doubt that with improved technological developments, we are now in a global village and accordingly our culture must reflect these changing times yet without compromising our natural values and ethos. Talking of international community the so-called civilized world is now encouraging same sex marriages and unnatural behaviours but we need not copy them to our detriment, as it would appear that we are even now paying the bitter price of modernity and westernization*¹²⁵.

With greatest respect to the Court, one needs to input that although "*the so-called civilized world is now encouraging same sex marriages and unnatural behaviours*", such sexual behaviours are quite different from intents and purposes of African female husband or woman-to-woman marriages, which are to procreate children for those who could not bear children, especially male children. It is different from same-sex marriage between two people of the same sex whose willful intention is to have human sexual intercourse relations. These four types of marriage earlier discussed, namely, same-sex marriage as practiced in "*the so-called civilized world*", mixed-orientation marriage, Lavender marriage and human-animal marriage are marriages that constitute *unnatural behaviours*. These marriages are therefore repugnant to natural justice, equity and good conscience and contrary to public policy and morality. If these types of marriages are practiced in Nigeria as customs, the Court has enjoined in several cases that such customs ought not to be enforced. Definitely, such marriages will offend the Same-sex Marriage (Prohibition) Act, 2013, but the traditional female husband marriage that is exclusively for procreation, will not violate the new law.

Almost all the authorities cited indicate that the Courts, especially the superior Courts of records, do not approve of female husband or woman-to-woman marriage. In most cases, the superior Courts see all forms of female husband marriages not only being repugnant to equity, natural justice and good conscience but also contrary to public morality and public policy. The likely legal effect is that the traditional practices and their consequences may not be enforced by the Court of law in Nigeria. The reason is that the customary practices are held to be contrary to public policy. The Same-sex Marriage (Prohibition) Act, 2013 will give the Courts more powers to illegalise female husband marriages in Nigeria. The Courts may not enforce the

¹²⁴ *Supra*

¹²⁵ See: *Per* AGUBE, J.C.A. (P. 42, Paras. D-G) of the judgment in *Ojukwu v. Agupusi supra*

continuance of these customary law marriages. In *Omaye v. Omagu*¹²⁶ the Court of Appeal said “custom is a rule which, in a particular district has from long usage, obtained the force of law”. However, the Court went further to hold that “no custom relied upon in judicial proceeding shall be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience”¹²⁷. That Court appears to have sanctioned the customary practice where a married barren wife marries for her husband so that the new wife procreates children for the family.

Children born by the wife married by the barren woman belongs to her husband and not to the barren woman or her relatives¹²⁸. The Court has also held that a child born by a widow after the husband had died and she continued to live in his house does not belong to the dead man but to the man that conceived her¹²⁹. However, it must be admitted that woman-to-woman marriage has certain inherent legal and sociological problems that usually need court’s interpretation and determination. Such problem include validity of the marriage, determination of the real owner of the children of the marriage, children’s right to inheritance and right to occupy traditional stool in their respective communities. In truth, some forms of the woman-to-woman marriages appear to be sources of social, political and traditional problems in modern societies. The examples of female husband marriages given in sub-headings in this work may encourage promiscuity and prostitution and broken homes. Children born of such marriages may be wayward and constitute nuisance in the society because they lack full parental control and care. They might be discriminated against on the ground that they cannot trace their paternal roots. In addition, such persons may not be allowed by the elders to occupy traditional seat as traditional rulers. Female husband or woman-to-woman marriage has been serving very useful socio-economic and psychological purposes in various Nigerian communities. In spite of the problems, female husband marriages whose purposes are for child bearing should not be categorized legally and judicially among gay marriages whose purpose is only sexual and not for procreation.

¹²⁶ (2008) 7 NWLR (Pt. 1087)

¹²⁷ (2008) 7 NWLR (Pt. 1087) p. 107

¹²⁸ See: *Meribe v. Egwu, supra*

¹²⁹ See: *Ojukwu v. Agupusi, supra*