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THE IMPACT OF MODERN LAWS ON SAME SEX MARRIAGE IN NIGERIA:  
A LEGAL HISTORY PERSPECTIVE

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ABSTRACT

The goal of this paper is to critically assess the impact of the modern laws on same sex marriage with focus on female husband rights. Some African countries have enacted laws to either legalise or ban same-sex marriages. Same-sex law has generated controversy in any country that legalises it or bans the practice. In Nigeria, since the same-sex law came into effect in January 2014, there has been rising fear among many Nigerians who practice female husband or woman-to woman marriages for purpose of producing children and not for sexual intercourse. The affected people are worried and confused as they are not sure of what will happen to the customary law marriage and the rights of the women and the children they owned through such marriages. A comparative approach is adopted such that the various forms of female husband marriage are explained and these are compared with other types of marriage that are universally known. While many lower Courts seem to be in sympathy the custom, the superior Courts have been consistently holding that female husband marriages offend public policy. Female husband marriages have been popular means that some women who could not bear children on their own have adopted to help them produce offspring for themselves or for their families, as such these form of relationship should not be categorized legally and judicially as gay marriages, which offend the law and public policy.

*Keywords:* Homosexuality, Public Policy, Human Rights, Civil Partnership.

1. INTRODUCTION

The customary laws of various communities do recognise the age-long traditional marriage practices. It is against this background that this study is undertaken to assess, *inter alia*, the impact of modern laws on female husband marriage in Nigeria. In order to achieve these aims, historical method of analytical inquiry is adopted to investigate the relevant sources of information concerning female husband marriage. Written in a legal history perspective, the primary sources consulted included decided court cases, law reports, statutes, and oral information obtained from relevant people through interviews, while history textbooks, journals, newspapers and magazines provided secondary sources of information.

Like communities in Europe, Americas 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-woman marriage has been

documented in more than 30 African ethnic groups<sup>1</sup>. These include Zulu, Lovedu, Sotho in Southern Africa; Kukuyu, Nandi, Nuer in East Africa; Yoruba in the Western Nigeria, and the Eastern Nigerian nations of Igbo, Ibibio, Annang, Oron, Efik, Ejaghan, Etung and Ogoja.

Recently, some African countries have enacted laws that either legalise or ban same-sex marriages. Clare Nullis of the *Associated Press* (December 1, 2006) reported that Denmark in 1989 became the first country in Europe to legislate same-sex partnerships, and several other European Union members, including Belgium, the Netherlands and Spain, have followed suit; likewise Canada. In the United States, the issue of same-sex marriage has continued to generate controversy. Only very few states, such as Massachusetts, allow gay marriage. Vermont and Connecticut permit civil unions, California grants similar status through a domestic-partner registration law. Over twelve states give gay couples some legal rights in America. On November 30 2006, South Africa became the first country in Africa, and the fifth in the world, to legalise same-sex marriages. The Roman Catholic Church and Muslim groups have denounced the South African same-sex marriages law as violating the sanctity of marriage. Uganda is one of the African countries that prohibit same-sex marriage. However, by the end of July 2014, the Ugandan Supreme Court annulled the anti-gay law, holding that it was unconstitutional<sup>2</sup>. However, on August 7 2014, it was reported<sup>3</sup> that the Ugandan lawmakers were planning to reintroduce the anti-gay bill.

On January 7, 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<sup>4</sup>. The Act outlaws same-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. It further stipulates a person who enters into a same sex-marriage contract or civil union is liable on conviction to a term of 14 years imprisonment. 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 law.<sup>5</sup> 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 communities. 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. 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

<sup>1</sup> Joseph M. Carrier and Stephen O. Murray, "Woman-woman marriage in Africa", *Boy-wives and Female Husbands: Studies of African Homosexualities*, Stephen O. Murray and Will Roscoe, (eds.) p.255 <http://www.colorq.org/Articles/article.aspx?d=2004&x=ssmarriage>; Kenneth Chukuemeka Nwoko, "Female Husband in Igboland" in Eno Blankson Ikpe (ed.) *Women & Power in Africa in the Twentieth and Twenty first Centuries* (Lagos: University of Lagos,2005), p.87.

<sup>2</sup> *TVC News* 30 July 2014; 31 July 2014; 1 August 2014.

<sup>3</sup> *TVC News*, August 7, 2014.

<sup>4</sup> 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 OKEY NDIRIBE, Sam Eyoboka & Victoria Ojeme, "Gay-Marriage Law: US threatens to Sanction Nigeria" *Vanguard*, January 21, 2014

<sup>5</sup> *Same -Sex Marriage(Prohibition) Law*, 20014

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 Law 2014. Female husband marriage or woman-to woman marriage has been in existence since the pre-history 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 practise 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 assess critically the legal and social implications of the same-sex law on female husband marriage or woman-to-woman marriage. In order to achieve these aims, historical method of analytical inquiry is adopted to interrogate relevant sources of information concerning female husband marriage or woman-to-woman marriage. The source consulted included decided court cases, law reports, statues, history textbooks, journals, newspapers and magazines. Relevant people were interviewed and oral information obtained from the interviews has been very useful. A comparative approach is adopted such that the various forms of female husband marriage are explained and these are compared with other types of marriage that are universally known. It is revealed that female husband or woman-to-woman marriage has been in existence since the pre-colonial period. It is concluded that female husband or woman-to-woman marriage is different in practice and purpose from gay marriage.

### *1.1 Definition of Terms*

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. It is therefore necessary to give the statutory and judicial definitions of custom and customary law as these terms are relevant to the present study. The statutory and judicial definitions together with the same-sex law highlighted above form the legal framework of the paper.

#### *(a) Statutory Definition of Custom*

The current Evidence Act<sup>6</sup> offers statutory definition of the term “custom”. By section 2(1) of the Evidence Act “custom” “is a rule in which, in a particular district, has, from long usage, obtained the force of law.”<sup>7</sup> *High Court Rules* state that “Local custom includes 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.”<sup>8</sup>

The expression “general custom or right” includes customs or rights common to any considerable class of persons.<sup>9</sup> 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 evidence<sup>10</sup>. The burden of proving a custom shall be upon the person alleging its existence<sup>11</sup>.

A custom may be judicially noticed when it has been adjudicated upon by a superior court of record.<sup>12</sup> Where a custom cannot be established as one judicially noticed, it shall be proved as a

<sup>6</sup>*Evidence Act, Customs Cap, E14 Laws of the Federation of Nigeria, 2011.*

<sup>7</sup>Section 2(1) of the *Evidence Act*.

<sup>8</sup> *Akwa Ibom State High Court (Civil Procedure) Rules, 2009, section 79, p328.*

<sup>9</sup> Section 73 (2) of the *Evidence Act*.

<sup>10</sup> Section 16(1) of the *Evidence Act*.

<sup>11</sup>Section 16 (2) of the *Evidence Act*.

<sup>12</sup> Section 17 of the *Evidence Act*.

fact<sup>13</sup>. 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<sup>14</sup>. 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”<sup>15</sup>.

(b) *Customary Law*

In *Kharie Zaidan v. Fatima Khalil Moshssen*<sup>16</sup>, 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.” In *Oyewunmi v. Ogunesan*<sup>17</sup>, the Supreme Court said, “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.”<sup>18</sup> 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 community.<sup>19</sup> 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.”<sup>20</sup> It is also necessary to emphasize, as the Court has done in the cases of *Giwa v. Erinmilokun*<sup>21</sup> and *Osolu v. Osolu*<sup>22</sup>, 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 it.

The Court of Appeal in *Ojukwu v. Agupusi*<sup>23</sup> followed the Supreme Court decision in *Peanok Ltd. v. Hotel Presidential Ltd.*<sup>24</sup> 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 *Okagbue* case, the Supreme Court *per* Mohammed Uwais, JSC posited 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

<sup>13</sup> Section 18(1) of the *Evidence Act*.

<sup>14</sup>Section 18 (2) of the *Evidence Act*. Section 73(1) states “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.

<sup>15</sup> Section 18 (3) of the *Evidence Act*.

<sup>16</sup>*Kharie Zaidan v. Fatima Khalil Moshssen* (1973) I S.C per T. O. Elias, CJN.

<sup>17</sup>*Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt.137) 182 S.C .

<sup>18</sup>See also *Pam v. Gwon* (2001) 1 S.C 56; *Ogolo v. Ogolo* (2003) 18 NWLR (Pt. 852) 494 SC.

<sup>19</sup> See generally the cases of *Owonyin v. Omotosho* (1961) 1 All NLR 304 at 309; *Bello v. Gov; Kogi State* (1997) 9 NWLR (Pt. 521), 496 CA; *Osolu v. Osolu* (1998) 1 NWLR (Pt. 535) 532 CA; *Okene v. Orianwo* (1998) 9 NWLR (Pt. 566) 408 CA.

<sup>20</sup>*Eghugbaji Eleko v. Government of Nigeria* (1931) A.C 662 at 673; *Bellow v. Gov. Kogi State* (1997) 9 NWLR (Pt. 521) 496 CA.

<sup>21</sup> *Giwa v. Erinmilokun* (1961) 1 S.C NLR 337.

<sup>22</sup> *Osolu v. Osolu* (1998) 1 NWLR (Pt. 535) 532 CA.

<sup>23</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p. 130.

<sup>24</sup> *Peanok Ltd v. Hotel Presidential Ltd.* (1982) 12 S.C.1at 321 per Uwais JSC.

against public policy and morality.” The Justice of Supreme Court went on to cite the *dictum* of Osborne, CJ in *Lewis v. Bankole*<sup>25</sup> and *Meribe v. Egwu*<sup>26</sup> 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 Same-Sex Marriage Law 2014, enlightenment of the Nigerian people on the age-long practice of female husband or woman-to-woman marriages is very necessary, because as it is often said “enlightenment is superior to enforcement.”

## 2. UNLAWFUL MARRIAGES

The position of this article 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 sixty<sup>27</sup> types of marriage, 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 and the social license related to those relationships, e.g. mores, law, stigma, or the social legitimacy of the relationship as perceived by those with social power. Civil union otherwise known as civil partnership or registered partnership, is a legally recognized form of partnership similar to marriage<sup>28</sup>. Historically, in several societies, the unions between people assigned the same sex at birth of whatever sexual orientation have been considered taboo.<sup>29</sup> 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 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 (in some countries, identical) to those of legally married couples.<sup>30</sup>

There is an evidence to show that female husband or woman -to- woman marriage has been practiced in Europe even before the eighteenth century. Sheridan Baker 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 Female Husband* said to be the original work of Henry Fielding. *The Female Husband* contains the facts about Mary Hamilton and Mary Price. Mary Hamilton married Mary Price “fraudulently, disguised as a man”. According to Henry Fielding and Sheridan Baker 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

<sup>25</sup> *Lewis v. Bankole* (1908) 1 NLR 81

<sup>26</sup> *Meribe v. Egwu* (1976) 1 All NLR 266; (1979) 3 S.C 23.

<sup>27</sup> [http://en.wikipedia.org/w/index.php?title=Types\\_of\\_marriages](http://en.wikipedia.org/w/index.php?title=Types_of_marriages). Retrieved 20/7/14.

<sup>28</sup> Civil union [http://en.wikipedia.org/wiki/Civil\\_union](http://en.wikipedia.org/wiki/Civil_union). Retrieved 20/7/14.

<sup>29</sup> Sarah B. Pomeroy, *Spartan Women*, page 46. Oxford University Press"; Civil union [http://en.wikipedia.org/wiki/Civil\\_union](http://en.wikipedia.org/wiki/Civil_union). Retrieved 20/7/14.

<sup>30</sup> " Sarah B. Pomeroy, *Spartan Women*, page 46. Oxford University Press"; Civil union [http://en.wikipedia.org/wiki/Civil\\_union](http://en.wikipedia.org/wiki/Civil_union). Retrieved 20/7/14.

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<sup>31</sup>.

It is to be shown that certain types of customary marriage practised in the Western and non-African countries are similar to those practised in Africa. These are *Levirate Marriage*, *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 prohibition law, 2014. 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 offend the same-sex prohibition law, 2014. 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.

### 3. 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, cerebation, and taking home of the bride to the bridegroom's house. These are condition precedents, which must be fulfilled.

#### 3.1 Man- to-Woman Marriage<sup>32</sup>

In most cases, African man-to-woman marriage is polygamous. Few marriages are monogamous as practised in the modern Western world that has come under the influence of

<sup>31</sup>Sheridan Baker, *Henry Fielding's The Female Husband; Fact and Fiction* <http://www.jstor.org/discovery>.; also, *The Female Husband or the Surprising History of Mrs. Mary alias M<sup>r</sup>. George Hamilton* London: M. Cooper, 1746.

<sup>32</sup>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.

Christianity. However, one of the essential requirements for a valid man-to-woman marriage or man-to-women 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 wives.

Like statutory marriage, consent of the parties to be married and parental consent is paramount to ground a valid marriage. In *Osamawonyi v. Osamawonyi*<sup>33</sup> 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 customary law. 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 21 June 1967. On 6 July 1968, the Petitioner filled a divorce petition on the ground, *inter alia*, that in 1964 the Respondent was lawfully married to Patrick Goubadia according to Benin native law and custom. He averred that the said marriage was not dissolved until 14 August 1967 by a Benin customary court, which ordered the refund of €60 (₦120) bride price to the said Goubadia. It was established in evidence that some time before 1966, the said 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 (₦120.00) 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 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. As Professor Nwogugu has rightly noted, "it is a well established principle of customary law in Nigeria that payment of bride price is an essential ingredient of a valid customary law marriage."<sup>34</sup> It has been observed that scholars, writers and indigenes people discussing customary law marriage often use the term "bride price" interchangeably with "dowry". This usually leads to confusion because, *strict sensu*, "dowry" means the property, which a woman brings to her husband. On the contrary, the statutory definition of "bride price" is "...any gift or payment, in money, natural produce, brace rod, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place"<sup>35</sup>. 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*<sup>36</sup> the Court held that payment of bride price or part of thereof does not *per se* constitute a valid marriage under customary law. 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*<sup>37</sup>.

Celebration of the marriage is another customary law requirement, which follows other requirements (i.e. capacity and bride price). Celebration of marriage includes the act of taking the bride to the groom's house. As succinctly put by one expert on Family law, "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 (sic) and formerly handed over by parent or guardian to a

<sup>33</sup> *Osamawonyi v. Osamawonyi* (1972) 10 SC 1. (1973) 1 NMLR 25, (1972) 1 All NLR 356.

<sup>34</sup> Nwogugu, *Family Law in Nigeria*, p.51.

<sup>35</sup> Section 2 of *Limitation of Dowry Law 1957, Cap.76 Laws of Eastern Nigeria 1963*. Similarly, section 2 of the *Marriage, Divorce and Custody of Children Adoptive By-Laws Order, 1958*. defined bride price as "a customary gift made by a husband to or in respect of a woman at or before marriage".

<sup>36</sup> *Ogunremi v. Ogunremi* (1972) 2 UILR 466.

<sup>37</sup> *Edet v. Essien* (1932) 1 NLR 47.

representative of the bridegroom's family"<sup>38</sup>. Thus, in *Beckley v. Abiodun*<sup>39</sup>, it was judicially decided that a valid marriage was not contracted until the formal handover of the bride had taken place. Similarly, in *Osamwonyi v. Osamwonyi*<sup>40</sup>, the Supreme Court held that according to Bini customary law, payment of dowry alone without cohabitation as well did not constitute a valid customary marriage. In *Ogunremi v. Ogunremi*<sup>41</sup>, the Court held that customary law marriage might be contracted by proxy.

Pertinent questions at this juncture are: if a woman who is seeking to marry a woman for herself or for her husband or brother for the purpose of producing children fulfill 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?

### 3.2 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 cases of homosexual. As Carrier and Murray have noted in their article titled "Woman-woman marriage in Africa", a typical female husband arrangements involves two women undergoing formal marriage rites; the requisite bride price is paid by one party as in a heterosexual marriage. The woman who pays the bride price for the other woman becomes the sociological 'husband'. 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 community. 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 union. Marriages were and still are contracted for purposes of forming alliances between families or groups and for lovemaking. 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 land<sup>42</sup>. As Nwoko has noted recently,

...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."<sup>43</sup>

Marriages contracted between two females were and still are referred to as female husband or woman-to-woman marriage. It is a form of customary law marriages. The name

<sup>38</sup>Nwogugu, *Family Law in Nigeria*, p.58.

<sup>39</sup>*Beckley v. Abiodun* (1943) 17 NLR 59; also *Ikedionwu v. Okafor* (1966-67) 10 ENLR 178.

<sup>40</sup>*Osamwonyi v. Osamwonyi* (1972) 10 SC.

<sup>41</sup>*Ogunremi v. Ogunremi* (1972) 2 UILR 466.

<sup>42</sup>See "Igbo Beliefs and Religious Thought" in Columbia Encyclopedia: at <http://www.answers.com/topic/ibo>.

<sup>43</sup>Nwoko, "*Female Husband in Igboland*", p.91.



attached to this type of marriage often creates confusion leading some people who are not familiar with the practice to link it 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 intercourse. 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 on the girl’s head, she (i.e. the female husband) has a man who would be performing duty of a husband, especially sexual function to make the girl bear children for the female husband. E. I. Nwogugu, a Professor of law, in his *Family Law in Nigeria* has thrown more light on the African institution of female husband when he writes:

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 contracted<sup>44</sup>.

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.

### 3.2.1 Rich but Unmarried Female Husband Marriage

A typical example of a female husband is 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 desire 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 children.<sup>45</sup> 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.”<sup>46</sup>

Nwoko has further explained the concept and of reasons for female husband. According to him, the practice of female husband is not novel to Igbo land. As practised in Igbo land, female husband was different from lesbianism practised in America and European countries. 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 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.

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<sup>44</sup>Nwogugu, *Family Law in Nigeria*, p.63.

<sup>45</sup>Nwogugu, *Family Law in Nigeria*, p.63-4.

<sup>46</sup> This custom obtains in Asaba, Bendel State *Iweze v. Okocha* (1967/68) M.S.N.L.R.64; Esenwa, F.E. ‘Marriage Custom in Asaba Division’, *The Nigerian Field* (1948) vol.XIII No.2 Talbot, P.A. *Tribes of the Niger Delta: Their Religions and Customs*, (London: Frank Cass, 1967), pp.195-6.

Apart from Igbo land, the practice was also common in Ibibio, Annang, Oron and Efik communities of Eastern Nigeria. In Mbiaobong Ikot Uofio in Ini Local Government of Akwa Ibom state, Mba Akpa Use was a popularly known female husband. Since she had no child, she married many women so that they would produce children for her. She was highly respected by the people of her community and beyond as she used to barb her hair and dyed it like a man. She did not have a child<sup>47</sup>. Elders interviewed in Ibiono, Ikono, Itak and Ediene admitted its existence in their areas. In Nkwa Ibiono in Ibiono Ibom Local Government Area, 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 women to procreate children for her.<sup>48</sup> 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 alive.<sup>49</sup> However, it appears the real blood relation of Ikwo do not allow the children she got through this practice to inherit all her properties as they are claiming that her property should revert to her family.<sup>50</sup>

### 3.2.2 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" marriages. The existence of this practice in parts of Southeastern and South-South Nigeria has been confirmed through interviews<sup>51</sup>. 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 title.<sup>52</sup> 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". These women said they would not accept to stay as *Adiaha Ufok* to give birth to children for the family. Some women view the practice of *Adiaha Ufok* as an abomination<sup>53</sup>. They argued that such practice was contrary to their Christian belief, particularly Ephesians 5:31 that says, "A man leaves his father and mother and is joint to his wife, and the two are united into one."

Amadiume's recent 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 female hood to male hood and the rights of "sons" could

<sup>47</sup>Interviews with Bar. Ernest Usa at Ezra Chamber, Esune Street, Uyo, 18/7/14. Chief Okposong at Mbiabong Ikot Udofia, Ini. L.G.A., 18/7/14; Mr. Okon Udo Usoro at Mbiabong Ikot Udofia, 18/7/14.

<sup>48</sup> Interview with Adiaha Dan Nsi (65 years), Nkwa Ibiono. 27/4/14.

<sup>49</sup>Interview with Chief Linus Udo Iba, (70 years) Village Uyo-Obio/ Farmer. 8/7/14.

<sup>50</sup>Christogonus Udo Ekpo, Village Council Member/ Farmer, Uyo-Obio. 8/7/14.

<sup>51</sup>Interview with Chief Udo Umo Nnanga Inyang, Famer, Family Head, Iko Oku Idio, Uyo, 07/7/14.

<sup>52</sup>The custom is known as *Arewa* or *Arhewa* in Ishan custom and *Idegbe* in Western Ibo custom; see R. E. Bradbury and P. C. Lloyd, *The Benin Kingdom and the Edo-Speaking peoples of South-Western Nigeria, West Africa, part XIII* (International African Institute, London 1957), 80; N. W. Thomas, "The Edo-Speaking Peoples of Southern Nigeria" *Journal of the Royal African Society* (Vol. 10, 1970), pp. 7-8; C. W. Rowling, *Notes on Land Tenure in Benin, Kukuruku, Ishan and Asaba Divisions of Benin Province* (Lagos, Government Printer 1948) p. 99.

<sup>53</sup> Interview with Madam Cecilia Saba Eyoh (70) Women Leader, Ediene, Ikono L.G.A. 8/7/14.

only be accomplished and recognized through rituals.<sup>54</sup> *Adiaha Ufok* could not be married out; if married, such marriage might not be blissful and as such might not last.<sup>55</sup> 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 family<sup>56</sup>. It appears that this particular practice of *Adiaha Ufok* was not common in many communities of hinterland Ibibio. However, the rarity of the practice could not deny its existence.

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 Ekpok/Mkpo Ufok* in Ibibio and Annang land.<sup>57</sup>

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."<sup>58</sup> In this way, the male daughter assumed 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-laws.

### 3.2.3 Female Children Marrying for their Sonless Father

It was and still is 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 family of female husbands so that she would procreate male children. The choice of bedmate was critically determined and the female husband had, as a matter 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*<sup>59</sup>. 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. Nwoko has noted this much when he wrote:

<sup>54</sup> Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society*. (London: Zed Books Ltd., 1987), pp.188-9.

<sup>55</sup> Interview with Chief Edwin Bassey, (53) Itam, Itu L.G.A. 6/11/11.

<sup>56</sup> Interview with Mrs. Mary Ekanem (45) Teacher, Calabar, Cross River State. 6/11/11.

<sup>57</sup> Interview with Reverend Udo Johnson Essien, Uyo-Obio, 20/5/13

<sup>58</sup> Nwoko, "*Female Husband in Igboland*" p.93.

<sup>59</sup> *Ibid.*; see also I. R. Emefiene, *The History of Ubulu People with Special Searchlight on Ubulu-Uno* (2006), p.218; cited in *Ibid.*

To actualize the essence of marriage, the female husband remained the sociological father of any resulting offspring. The children belonged to the lineage of her father, not to that of their biological father. 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, etc. At this level, the female husband in theory enjoyed equal status with her male kith and kin... Among her female mate, 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...<sup>60</sup>

### 3.2.4 Married Barren Woman Marrying for Husband

This is another form of female husband though slightly different from the one just discussed above. More illustrations are necessary to help explain further both the practice of and reason for female husband clearer. In some communities, it is not strange to see some barren married woman 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 place<sup>61</sup>. Apart from barren wives, some married women who are not fortunate to bear sons may also marry wives 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<sup>62</sup>. 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 another<sup>63</sup>. 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.

### 3.2.5 Sororate Marriage, Wife Inheritance or Levirate, 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 procedure. *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 deceased<sup>64</sup>. In some Nsit communities of Akwa

<sup>60</sup>Nwoko, "Female Husband in Igboland" p.94.

<sup>61</sup> See, for instance, S.N.C. Obi, *The Customary Law Manual*, (Enugu: Government Press, 1977)

<sup>62</sup> Interview with Promise Ime Asuquo, fish trader, Ibiaku Uruan, 25/7/14.

<sup>63</sup> Nwogugu, *Family Law*, p.65.

<sup>64</sup> See generally Nwogugu *Family Law*, p.65; K. Williamson, "Changes in the Marriage System of Okrika Ijo" in *Africa* Vol. xxxII 1962, p.53, 58-60, the *Eastern Region Limitation of Dowry Law*, 1956 which

Ibom state widows prefer marrying within their late husband's family, including their late husband's brother<sup>65</sup>.

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 practised in Rivers and Bayelsa States of Nigeria, for example in the riverine areas of Ijaw and Okrika. "Big Dowry" a 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 parents. 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 parents.

#### 4. REASONS FOR DESIRING CHILDREN, ESPECIALLY MALE CHILDREN

As mentioned earlier, one of the reasons for female husband marriage is to bear children particularly male children. The reasons for being anxious to get children, particularly male, appear to be universal. Some of the reasons are captured by Patterson who wrote "one single-born son would be right to support his father's house, for that is the way substance pile up in the household; if you have more than one, you had better live to an old age; yet Zeus can easily provide abundance for greater number, and the more there are, the more work is done and increase increases."<sup>66</sup> One could glean a number of facts from the above quoted passage. First, children are given to couples by God, in the case of the Ancient Greeks, by the goddess Zeus, that could also provide food to feed the children. Second, economic situation and one's profession might determine the number of children couples intend to produce. Economic activities such as farming, shepherding, fishing, long distance trading and craftsmanship would certainly demand more hands and therefore many wives to produce many children to assist in carrying on these activities. People need children so that they could maintain their family line such that it will not disappear. In certain cultures, sons are preferred to daughters because of the belief that male children would maintain the dynasty and the family cults. People regard children as dependable source of care for their aged.

The uncertainties of survival in infancy and childlessness might lead to marrying many wives. As Martha Ablibah has observed, the benefits derived from bringing forth many children were applicable to both Africans and Ancient European nations including Ghana and Greek societies.<sup>67</sup> Certain taboos associated with birth can also induce couples to desire many children, practically male children. For instance, giving birth to twins in Eastern and Western part of Nigeria was a taboo, which was later abolished by Mary Slessor in Old Calabar and elsewhere in Nigeria<sup>68</sup>. Martha Alibah reported that in certain parts of Ghana, there was a taboo associated with the birth of a specific number of children<sup>69</sup>.

It needs to be stressed that historically marriages whether same-sex or otherwise, were undertaken for very different reasons in different times and within different cultures. In Old

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limited bride price in respect of customary law marriage to not more than sixty naira; *Solomon v. Gbobo* (1974) 4 ECSR 457; SN.C. Obi, *The Customary Law Manual*, Government Press, Enugu, 1977, p.258; P.A. Talbot, *Tribes of the Niger Delta: Their Religions and Customs*, London: Frank Cass, 1967), pp.195-6

<sup>65</sup> Interview with Mrs Uwem Bassey, Trader, Obotim Nsit Village, 10/9/13.

<sup>66</sup> Cynthia Patterson, "Not Worth the Rearing: The Causes of Infant Exposure in Ancient Greece", *Transaction of the American Philological Association* (Vol. 115, 1985), p117.

<sup>67</sup> Martha Ablibah, "Not Worth the Rearing: The Nzema (Ghanaian) and Greek Experiences" *Abibisem Journal of African Culture and Civilisation* (Vol. 3, 2010), p104.

<sup>68</sup> See W. P. Livingstone, *Mary Slessor of Old Calabar: Pioneer Missionary*. London: Hodder and Stoughton N.D.; J. Buchan, *The Expendable Mary Slessor*. Edunburgh: The Saint Andrew Press, 1980.

<sup>69</sup> Alibah, "Not Worth the Rearing ...pp.105-6.

Europe, for example, marriages were contracted for three basic reasons. The reasons included preservation of dynastic lines, formation of alliances between families, and production of heirs. While these reasons still hold sway in Africa, in modern Europe, the reasons have changed. As Carrier and Murray have rightly observed, today Europeans think differently. They prefer marrying for 'love' while some decide to forgo marriage altogether. Similarly, in some pre-colonial and post-colonial Africa, marriages including opposite-sex marriages and female husband marriage were and are often contracted for reasons similar to the Europeans', particularly for continuance of lineage and for purposes of inheritance and not so much motivated by 'love', or 'sexual orientation'. Carrier and Murray have also recalled that "loveless" marriages were the norm most of the world through most of history, and are still popular today.

##### 5. THE POSITION OF LAW ON PRACTICES OF FEMALE HUSBAND MARRIAGES

Customary Court recognizes female husband or woman-to woman marriages as valid marriages. Similarly, as will be shown later, some High Courts recognise female husband or woman-to woman marriages as valid marriages. However, the superior Court of record, to wit: Court of Appeal and the Supreme Court never hold this brand of marriage to be valid. In other words, the lower Courts seem to have recognized some of the customary law marriages in some respects. Professor Nwogugu writes that customary law recognized the practice of female husband marriage in that "a barren wife may, in an effort to fulfill her obligation to bear children for her husband, "marry" another wife for her husband – that is, provides the bride price for the marriage. Children born of the other wife are regarded as the legitimate children of the husband"<sup>70</sup>.

Certain customs accept as legitimate children born by male daughters and children born by women married by barren wives for their husband. Also regarded as legitimate are children born by widows while they are still living in their late husband's house and while the dowry has not been returned to the former husband. As rightly observed, "there are also instances of a child being regarded as the legitimate child of a man who is not its natural father. If, for instance, a widow remains in her late husband's family without re-marrying and her marriage with her late husband is not formally dissolved, any child she bears post-humously is regarded as the legitimate child of the late husband at birth."<sup>71</sup>

This custom was judicially approved in the case of *Nwaribe v. President Oru District Court & Anor*<sup>72</sup> as not being contrary to natural justice, equity and good conscience. In that case, after Oyibo's husband named Obiora had died in 1952 she continued to live in the matrimonial home, within the family of the deceased. Oyibo became pregnant by the applicant, Nwaribe, while she was still living there. However, before delivery, she left to stay with her people. Subsequently, she took action in the customary court for a formal divorce. The court held that her marriage to the deceased, Obiora, was not dissolved by death in 1952, and awarded Oyibo's child to the brother of the deceased. Throughout the duration of the case, Nwaribe did not participate in the customary court proceedings. After the case had come to an end, he challenged the decision of that court as being contrary to natural justice, equity and good conscience. Egbuna J. distinguished the case before him from *Edet v. Essien*<sup>73</sup> and *Mariyama v Sodiku Ejo*<sup>74</sup> on three grounds. First, in Nwaribe's case, Oyibo continued to reside in her late husband's house after his death and became pregnant while staying there. Second, there was no question of a claim to the child on the basis that the late husband was not refunded the dowry, as was the case in *Edet v. Essien*. Third, as the learned judge argued, the applicant

<sup>70</sup> E. I. Nwogugu, *Family Law in Nigeria* (Ibadan: Heineman Educational Books, 2001), pp.287-8.

<sup>71</sup> Nwogugu, *Family Law*... pp.287-8.

<sup>72</sup> *Nwaribe v. President Oru District Court & Anor.* (1964) 8 ENLR 24.

<sup>73</sup> *Edet v. Essien* (1932) 11 NLR.p. 47.

<sup>74</sup> *Mariyama v Sodiku Ejo* (1961) NRNLR. p. 81.

did not appear to contest the issue of the custody of the child in the customary court proceedings, and he was aware and admitted in his affidavit that by the custom of his locality the child was that of Oyibo's late husband. The Judge seemed to have raised the issue of acquiescence against Nwaribe. Learned Judge said, "If the applicant knew that this is the custom of Otulu and conceived the woman whilst she was staying in the deceased husband's place as a member of that household, he cannot be heard to complain to his Court that the decision of the native court was against natural justice."<sup>75</sup> The learned Judge therefore held that the custom was not contrary to natural justice, equity and good conscience.

In *Meribe v. Egwu*<sup>76</sup> the Supreme Court was called upon to pronounce on the validity of woman -to- woman marriage in which a married but barren woman married a wife for her husband. The facts of the case were as follows. The land in dispute belonged to one Nwanyiakoli, who died without issue in 1937. She was one of the wives of Chief Egwu who pre-deceased her in 1935. The plaintiff who contended that the land devolved on him under customary law, claimed that because Nwanyiakoli was barren she married one Nwanyiocha (the plaintiff's mother) for her husband as a wife. Under the applicable customary law, the children of such a marriage are regarded as the children of the barren woman. The defendant who also relied on customary law, contended that on the death of his grandfather, Chief Egwu, his own father, Meribe, being the eldest surviving son, inherited Nwanyiakoli, she being one of the deceased's wives. On her death, Meribe inherited her properties, which later devolved on the plaintiff and other sons of Meribe. He also submitted that woman-to-woman marriage was contrary to public policy and good conscience. The trial Court found for the plaintiff. On appeal, the Supreme Court dismissed the appeal. Madarikan, JSC who delivered the unanimous opinion of the Court dealt specifically with validity of the alleged woman-to-woman marriage thus:

"In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a 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 proviso 14(3) of the Evidence Act and ought not to be upheld by the court."<sup>77</sup>

Section 14(3) the Evidence Act cited above is 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."<sup>78</sup> Thus, on the status of the barren woman marrying a wife for her husband, the court observed that: "we however do not think that on a close examination of the facts of this case, there was a 'woman to woman' marriage between Nwanyiakoli and Nwanyiocha. The Court further observed that the true nature of the arrangement was appreciated by the learned trial judge when he rightly held that:

"... the facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself, a fact naturally impossible – but that she 'married' in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwu to marry her.

<sup>75</sup> *Nwaribe v. President Oru District Court & Anor.* (1964) 8 ENLR, pp.24, 26.

<sup>76</sup> *Meribe v. Egwu* (1976) 1 All NLR 266.

<sup>77</sup> Per Madarikan, J SC in *Meribe v. Egwu* (supra) *Enwezor v. Akaya* (1977) 1 ANSLR 100 at p.275.

<sup>78</sup> Evidence Act, Customs Cap, E14 Laws of the Federation of Nigeria, 2011.

There was no suggestion in evidence that there was anything immoral in the transaction”<sup>79</sup>.

It could be gleaned from the *Meribe's* case are that: (i) Court did not recognise woman-to-woman marriage as a valid marriage because it failed to meet one of the essential requirements of a valid marriage, which is that it must be a union of a man and a woman to create the status of husband and wife. (ii) The Court recognized the children born by the woman married by a barren woman for her husband as children of the husband. (iii) Such children have the right to inherit the man's property as his legitimate children. (iv) Although the Court regarded such marriage as invalid, it did not see “anything immoral in the transaction.” However, in the *Okonkwo v. Okagbu*<sup>80</sup>, the Supreme Court refused to follow the custom, which permitted sisters to “marry” a wife for a deceased brother to raise up children in his stead on grounds of repugnancy. In this case, the High Court held that it was moral and proper for a widow to raise children in the matrimonial home of her deceased husband and such children be credited to the late husband. The Supreme Court rejected this and decided that it is settled principle of our customary jurisprudence that any custom which is repugnant to natural justice equity and good conscience or contrary to public policy or any law in force should be struck down.

In spite of the Supreme Court's warning in the *Meribe's* case that “where there is proof that a custom permits such an association ( of ‘woman to woman’ marriage), the custom must be regarded as repugnant” and that “society should abhor and express its indignation of a ‘woman to woman’ marriage”, many Nigerian communities appear not to heed the clarion call. Decided cases in recent times abound to support this assertion.

In a very recent case of *Ojukwu v. Agupusi*<sup>81</sup>, decided by the Court of Appeal in 2014, the appellant is the head of the Ojukwu Family of Okpuno, Ebenator, Uruagu Nnewi, Anambra State. The 1<sup>st</sup> respondent is also of Okpuno Ebenator, Uruagu, Nnewi extraction and from the same larger Dunuka Family with the appellant. The 2<sup>nd</sup> 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 2<sup>nd</sup> respondent had three surviving daughters for the deceased at the time of the demise. After the death of her husband, the 2<sup>nd</sup> respondent begat four children (two males and two females). It was the case of the appellant that the 1<sup>st</sup> respondent impregnated the 2<sup>nd</sup> respondents which resulted in the birth of the four children. However, the respondents while acknowledging the fact of the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 (issues) 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 respondent and that the 2<sup>nd</sup> 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

<sup>79</sup> *Meribe v. Egwu* (supra).

<sup>80</sup> *Okonkwo v. Okagbue* (1994) 12 SCNJ 89, (1994) 9NWLR (Part 308) p.301.

<sup>81</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p. 126.



Court over rules itself in a judgment given *per incuriam*.” 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 Courts.<sup>82</sup> *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* 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 3<sup>rd</sup> defendant to him. To claim further that the children the 3<sup>rd</sup> defendant had by other man or men are the children of Okonkwo 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 1<sup>st</sup> and 2<sup>nd</sup> 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.<sup>83</sup>

This decision accorded with the one earlier made in *Meribe v. Egwu*<sup>84</sup> where Supreme Court declared that a custom which permitted marriage of one woman to another (in which the children of such marriage would not be sure of their natural father) to be repugnant to natural justice equity and good conscience. Following this decision in *Meribe v. Egwu* made 1976, the Court of Appeal said in the instant case of *Ojukwu v. Agupusi*: (Supra):

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 birth. 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 2<sup>nd</sup> respondent. The custom which permits the bearing of children by widows for their late husband is repugnant to natural justice, equity and good

<sup>82</sup>On essence of principle of judicial precedent, the Court said *Ojukwu v. Agupusi*(*supra*)“Standing by the previous decisions of the Supreme Court which have not been proved to the perverse or to have been decided *per incuriam*, obviates stability and enhances consistency and coherent *corpus Juris* and presents continuity and manifest respect for the past decisions in our legal order. Apart from ensuring equality of treatment of litigants before the courts, it spares the Judges the stress and drudgery of re-examining rules and principles of law thereby affording the law some degree of predictability and stability of the existing legal order.”

<sup>83</sup> Per Ignatius Igwe Agube, JCA in *Ojukwu v. Agupusi* (2014) 21 WRN pp. 127-8.

<sup>84</sup> *Meribe v. Egwu* (1979) 3 S.C 23; see also *Helen Odigie v. Iyere Aika* (1985) NBCL 51.

conscience and contrary to public policy and morality. Such custom ought not to be enforced.<sup>85</sup>

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."<sup>86</sup> Female husband or woman to woman marriage or male daughter marriage may be consider "mores", meaning customs and behaviour that are considered typical of a particular social group or community. Such customary marriages are gone through by the people who cannot on their own bear children to meet the "aspirations", "expectations" and "sensitivity" of the people. Usually, the society is sensitive to bareness or having only female children. Husbands give love and respect to wives that bear children and more love, respect and care given to those that bear male children for them. Lack of children, especially male children, has been a source of problem in most marriages. Sometimes it leads to broken homes or divorce. To solve the problem of owning children and save their marriages, some women devised the practice of woman-to-woman marriages which have now formed part of their traditions and customs.

## 6. CONCLUSION

The Court's pronouncement on same sex marriages in the *Ojukwu v. Agupusi* shows that judicially, African female husband or woman-to-woman marriage is equated to same-sex-marriage or homosexual practised 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.<sup>87</sup>

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.<sup>88</sup> Definitely, such marriages will offend the Same-

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<sup>85</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p. 128.

<sup>86</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p.130.

<sup>87</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p.130.

<sup>88</sup> *Ojukwu v. Agupusi* (2014) 21 WRN p. 128.

sex Marriage Law 2014, 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 to 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 Law 2014 will give the Courts more powers to illegalise female husband marriages in Nigeria. The Courts may not enforce their continuance of these customary law marriages. In *Omaye v. Omagu*<sup>89</sup> 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.”<sup>90</sup> 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 relatives. 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 her.

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 problems 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-sections 4.2.1, 4.2.2 and 4.2.3 of this paper 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. In most communities, such children may not be allowed to contest for any elective political position when they grow up. 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. The question as to whether the constitutional rights may avail them is examined in another article by the present author. 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.

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<sup>89</sup> *Omaye v. Omagu* [2008] 7 NWLR. See also section 2(1) of the *Evidence Act*, 1990 for the meaning of custom.

<sup>90</sup> *Omaye v. Omagu* (supra), p. 507, para. D. See also section 14 of the *Evidence Act*, 1990.