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Obergefell v. Hodges and the Judicialization of Same-Sex Marriage in America: Legalizing the Impossible.

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Abstract

In *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al* (*Obergefell*), 2015, the US Supreme Court supposedly legalized same-sex marriage across America, thus, resting the "right to marry" advocacy in America post-*United States v. Windsor*. The Court premised its decision *inter alia*, on the quest for expansive protection of the rights to marriage and equality under the Fourteenth Amendment to the US Constitution. Nonetheless, *Obergefell* still generates mixed pro-love discussion in legal, academic, sematic, socio-cultural, religious, and political circles inside and outside America. This paper distinguishes "civil union" from "marriage" and argues that logically, socio-religiously, scientifically, grammatically or otherwise, "same-sex marriage" is a mere jargon because *marriage* is naturally and practically *impossible* between persons of the same biological sex. The paper concludes that *Obergefell* is a judicial endorsement of an impossibility, and a somersault of human dignity. It may seem afro-centric, but it certainly furthers scholarship on marriage and "the other side" of *Obergefell.*

Keywords: Obergefell v. Hodges, judicialization, Same-sex marriage, America, The Impossible.

Introduction

In *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al*, 576 U. S. (2015)[1], the US Supreme Court held that a lawful valid marriage can be legally licenced and celebrated between men and women of the same sex. This paper disagrees with this decision. It argues instead that for all intents and purposes, same-sex *marriage* is a misconception of the obvious, an impossible cliché and a mere jargon which, at best, describes an *imaginary* marriage. Simply put, marriage is not possible between persons of the same biological sex. This paper corroborates the recent conclusion that judicial decisions which legalize same-sex marriage or otherwise place them at par with heterosexual marriage. Because this will create inequality rather than solving it, with a strong possibility that social forces will operate to restore equity in ways that may increase social dysfunction(Schumm 2015).

[1] *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al*. Certiorari to the United States Court of Appeals for the Sixth Circuit No. 14–556. Argued April 28, 2015—Decided 26 June 2015. (Consolidated together with the following three cases: Tanco et al. v. Haslam, Governor of Tennessee, et al., No. 14–562; DeBoer et al. v. Snyder, Governor of Michigan, et al., No. 14–571; and Bourke et al. v. Beshear, Governor of Kentucky, No. 14–574, also on certiorari to the same court. http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (29/6/2015). For precision, this paper also refers to the case as *Obergefell v. Hodges.*

This paper is as much pro-human cum marriage rights as it is pro-nature, that is, *legal* as well as *human,* and it tries to strike a balance between *the legal* and *the natural* of marriage.
The plague of *impossibility* of same-sex *marriage* is also amplified by the lacuna in the Marriage (Same Sex Couples) Act 2013 applicable in England and Wales which makes no provision for consummation or desisting from adultery as integral obligation and incidence of marriage especially in lesbian *marriages* (Beresford 2015). Nonetheless, adultery and the *inability to consummate* are valid grounds for voiding a marriage. Certainly, this lacuna is beyond any logical or legal remedy. Suffice to say, that equality and intimacy rights in marriage properly so-called, goes far beyond legislative or judicial declarations, otherwise, such marriage law will continually perpetuate both formal and substantive inequality resulting in irredeemable repression for women who marry women (Beresford 2015).

Truly, the *Obergefell* decision illustrates the power of the judiciary in influencing legal and constitutional process in America. (Frost 2015). This does not detract from the final conclusion of this paper that the legalization of same-sex *marriage* in the America or elsewhere, is a strange new dimension of "respectability politics" (Matsick and Conley 2015).This will distort both the marriage institution and the right to marry, and therefore, will be incapable of realistically securing the rights to marriage equality, life, or human dignity. Precisely

Crux of the *Obergefell* Decision

The *Obergefell* decision legalized same-sex *marriage* in the whole of the United States of America. Indeed, this case is a date with history. It marks the end of several years of agitations of pro-love "spouses", activists and groups in the United States with its ripples felt around the world, even though historically, Netherlands was the first country to legalize same-sex *marriage* (Karsten 2014)[2]. It equally marks the reawakening of serious academic, legal, socio-political and religious discuss for and against same-sex *marriage* in and out of

[2]Same-sex marriage had earlier been legalized in the following countries pre-2015, that is, The Netherlands (2000); Belgium (2003); Canada and Spain (2005); South Africa (2006); Sweden and Norway (2009); Portugal, Iceland and Argentina (2010); Denmark (2012); Uruguay, New Zealand, France, England / Wales and Brazil (2013) and Luxembourg and Scotland (2014). (See CNN World Report of February 10, 2015, "Same-sex marriage: Where in the world is it legal?" by Monica Sarkar and Inez Torre. http://edition.cnn.com/2015/02/10/world/gay-marriage-world/index.html (8/11/2015), citing *Pew Research Center, January, 2015* as their source of information.

America(Beresford 2015, Christiansen 2015, Deboyser 2015, Garrett 2015, Igić 2015, Meyers 2015, Pollack 2015, Sáez 2015, Strauss 2015, Yilmaz 2015). This includes the suggestion to adopt new religious right paradigm to respect and protect deep commitment to religious freedom. It therefore provides appropriate exemptions for religious objectors and removes fundamental legal barriers that would require them to respect or otherwise facilitate a same-sex-marriage (Knauer 2015).

Obergefell v. Hodges is a consolidation with three other cases on writs of certiorari to the United States Court of Appeals for the Sixth Circuit. It arose from same-sex petitioners seeking to marry or to have their marriage recognized by the States of Tennessee, Michigan and Kentucky respectively.[3] In those states, and in Ohio (from where the *Obergefell* case ensued), marriage is defined per *Hyde v. Hyde*, that is, a voluntary union of one man and one woman to the exclusion of all others.

The petitioners were 14 same-sex couples and two male same-sex "widows". They filed writs in the Federal District Courts in their respective States alleging that relevant State authorities denied them the right to marry or give legal recognition to their marriages lawfully performed in other States within the United States. This according to them, violated the Fourteenth Amendment of the US Constitution.

In each of the three cases, the District Court ruled in favour of the petitioners. On appeal to the Sixth Circuit, the cases were consolidated[4] and certiorari was narrowed to two major issues, namely, whether the Fourteenth Amendment obliges a State to license a marriage between two people of the same sex, and whether the Fourteenth Amendment requires a second State to recognize a same-sex marriage performed and licensed in a first State where the practice is lawful. The Court of Appeals reversed and set aside the decisions of the three District Courts and held that a State is not obliged by the constitution to license same-sex marriages or to recognize same-sex marriages in any other State.

On further appeal, the US Supreme Court ruled for the petitioners and held that the Fourteenth Amendment protects the right of same-sex couples to *marry* and that the State is obligated to

[3]*Valeria Tanco, et al., Petitioners 14–562 v. Bill Haslam, Governor of Tennessee, et al*;*DeBoer et al. Petitioners 14–571 v. Snyder, Governor of Michigan, et al*. and *Bourke et al. Petitioners 14–574 v. Beshear, Governor of Kentucky*.

[4]*DeBoer* v. *Snyder*, 772 F. 3d 388 (2014).

license their *marriage* and to recognize any such *marriage* already *lawfully* licensed outside the US. This judicial endorsement of same-sex marriage has consequently been described as a legal innovation(Karsten 2014)which ends all previous agitations for marriage equality in America. It also highlights the power and influence of the American judiciary to in making such critical decision on really sensitive issues. (Frost 2015).

Earlier in the June 2013 case of *United States v. Windsor*, [570, U.S. 2013][5] the US Supreme Court had struck down the Defense of Marriage Act (DOMA) 1996,[6]which defined marriage simply as *a legal union between one man and one woman as husband and wife* thereby preventing recognition of same-sex marriages. Although *Windsor* marked the initial dramatic change in judicial and political attitude towards LGBT rights in America, *Obergefell* finally made possible what was once thought to be impossible (Encarnación 2014).

Premises of *Obergefell v. Hodges*

The judgement is premised on the supposed quest for compound, latitudinal and expanded protection of human rights, especially the rights to marriage; equal protection and equality before the law; non-discrimination and human dignity in America Nonetheless, *Obergefell v. Hodges* still leaves some thoughts which the US Supreme Court, in its wisdom, probably did not foresee or rather, saw differently.

Firstly, the court described marriage as a dynamic institution which is subject to "continuity and change" which invariable altered "aspects of marriage once viewed as essential" and that these changes "have strengthened, not weakened, the institution". The court noted that these "new insights" and "changed understandings" of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.[7]This has ensued public discussion of LGBT issues as well as open agitations and litigations for the protection of equal constitutional *rights to marry*. However, from a religious point of view, this so-called dynamism of the marriage institution does not in any way justify the judicialization of a manifest impossibility, that is, legalization of marriage between persons of the same biological

[5] Docket No. 12-307.
[6]110 Stat. 2419
[7]These phrases are contained in and culled from Page 2 of the Syllabus of the judgement in *Obergefell v. Hodges*.

sex. Nonetheless, being a secular country of people of different religions including atheists some of whom may be opposed to same-sex relationships, the US is not bound to take religious objections to homosexuality into consideration.

Obergefell creates the fear that in future, the law may be further stretched to protect the intimate choices or right to marry between a son or daughter and their biological mother or father (or a boy/girl with his biological brother/sister, or even twin brothers/sisters) under the Fourteenth Amendment.[8] It is equally socially feared by many religious and non-religious groups and individuals that in future, the US may even witness the licencing of polygamy and polyandry in consequence of protecting right of marriage, individual choices, equality and non-discrimination, thereby moving marriage, as jokingly and wryly put, from square one to square two (Igić 2015). The future possibility of such social dysfunction justifies the view that the judicialization of same-sex marriage institutionalizes inequality in marriage rather than equality, and that over time, the inherent mechanism of a realistic society will itself resolve this inequality (Schumm 2015).

The *Obergefell* decision is also premised on a misconception which equates 'union' to 'marriage' without distinction. It therefore emphasises a new concept of marriage as a union formally recognised by the State, whether or not it is sanctioned by religion. On the contrary, this paper contends that a homosexual "marriage" *should* only be a 'union'. Even in India where the Special Marriages Act, 1954 recognises inter-caste and inter-religious marriages which are not accorded sanction by religions, such special marriages are usually between opposite sexes and not same-sex couples. It can thus be rightly argued that the misconception that every union may be legalized as marriage must have beclouded the Court's vision from realizing the natural impossibility of *marriage* between persons of the same biological sex, or that marriage is

[8]The reality of this kind of scenario was reported on November 3, 2015 under the caption: "Couple seeks right to marry. The hitch? They're legally father and son", when Evan Perez and Ariane de Vogue of CNN Politics wrote thus: "The legalization of same-sex marriage has given way to a new problem for a Pennsylvania couple, who technically are father and son… Nino Esposito, a retired teacher, adopted his partner Roland "Drew" Bosee, a former freelance and technical writer, in 2012, after more than 40 years of being a couple. Now, they're trying to undo the adoption to get married… But Judge Lawrence J. O'Toole, of the Court of Common Pleas of Allegheny County, ruled against the couple. ..He was "sensitive to the situation" but noted that despite the fact Esposito and Bosee desire to marry, "they cannot do so because they are legally father and son."" (See CNN Politics, http://edition.cnn.com/2015/11/03/politics/same-sex-marriage-adoption-father-son-pennsylvania/index.html?sr=fbCNN110715same-sex-marriage-adoption-father-son-pennsylvania0300AMStoryGalLink&linkId=18575030 (8/11/2015).

possible only between opposite sexes (Abe 2014).No known Holy Book contemplates or otherwise recognizes marriage between persons of the same sex, even though recent studies show subjectivity and attitudinal differences among various spiritual and religious adherents (Jones, Cox et al. 2014, Shipley 2014, Gay, Lynxwiler et al. 2015, Harrison and Michelson 2015).

Obergefell is further premised on the denial or query, albeit erroneously, of the unchangeable and undeniable historical fact that *man* and *woman* are the principal partners in every marriage. This is the truism affirmed by Lord Penzance in the old English case of *Hyde v Hyde*(1866)which rightly defined marriage as the voluntary union of one man and one woman to the exclusion of all others. Incidentally, the so-called legal dynamism inherent in the *Obergefell* decision seem to have redefined marriage and raised it beyond the 1866 imagination of Lord Penzance.

Heterosexual or opposite sex marriage (as distinct from same-sex marriage) is therefore to be construed without prejudice to, different from, and not be confused with, but rather distinguished from other types of unions or relationships (Weller 2015).This includes bonding between close friends(Ikpe 2004) or woman to woman marriage[9] which is valid under certain Nigerian and African customs(Oboler 1980, Cadigan 1998, Tamale 2011).But which definitely is not a homosexual relationship (Krige 1974, Achebe 2011, Nwoko 2012), or relate to the concept of "male daughters" or "female husbands" recognized in traditional Nigerian Ibo (Amadiume 1987) and Yoruba (Osiki and Nwoko 2014) societies.

The uniqueness of these so called forms of African same-sex marriages is that unlike the American or western-style same-sex marriage, they are unlicensed, unknown to law and does not permit of physical sexual relationships. It is immaterial that reports claim that women in same-sex relationships enjoy as much affection (Borneskog, Lampic et al. 2014, Frost and Gola

[9]"Woman to woman marriage" in African societies, including Nigeria, is *considered as* marriage for the primary purpose of furthering procreation and begetting a *heir* for a man who is either impotent and incapable of having children by himself, or whose wife could not bear children, or where a man is deceased and his widow being unable to bear children from the "outside", decides to "marry" another woman "in the name of her late husband and who will thus be *considered as wife* (or second wife of the deceased, bearing in mind that polygamy is an acceptable form of African native customary marriage) for the deceased husband" for the primary purpose of bearing children who would be heir to the deceased man. These heir can also validly inherit the "private and personal" estate of the deceased under native customary law but they cannot assume communal public throne as "*Eze*" (traditional kings) or "*Nze*" (traditional kindred representatives), even if their deceased "father" earlier held such positions. Such marriage is NOT registerable under the Marriage Act and CANNOT be formalized in church because it is simply an "improvisation to sustain patriarchy."

2015) or even greater relationship satisfaction than married women in heterosexual relationships (Meuwly, Feinstein et al. 2013).

A "union" or "relationship" or "fraternity" or "friendship" or "affair", even between *extremely close* friends or neighbours of the same biological sex, may be common, possible, rightly permissible, respected and accepted as part of ancient, modern or emerging human society. However, it cannot in any correct way amount to, translate into, or be judicialized into a proper legal marriage for purpose of securing legal protection or other benefits or obligations inherent in legislation and consequent upon a lawfully licenced marriage. Otherwise, we would as well be bound to accept that everything that glitters is gold!

The Problems with *Obergefell v. Hodges* and Matters Incidental Thereto

Obergefell is fraught with certain direct and remote, immediate and imminent problems and consequences. First, the premise of dynamism applied by the US Supreme Court is an unrealistic judicial over-stretch. It distorts the meaning, content and understanding of 'change' in marriage, even though one Indian scholar expressed an undeniably persuasive view that juristically, and even in Islam, marriage is a contract and not a sacrament (Devi 2015). Even so, the true character and essence of marriage still places pre-conditions on capacity to enter into a *valid* contract of marriage in law, namely, that parties thereto must not be of the same biological sex. Islamic jurisprudence also acknowledges the facts of *irregular* and *void* marriages and emphasises that *batil* (void) or *fasid* (irregular) marriage does not create the relationship of husband and wife(Niazi 2015).

Secondly, the judgement reaffirmed that *rights* are comprised of certain personal beliefs, as well as individual choices of intimate partnerships and interests "central to individual dignity and autonomy".[10]It also underlined the State's obligation under the Fourteenth Amendment's Due Process Clause to identify these interests and protect them constitutionally, and in this case, by recognizing marriage between two persons of the same sex and granting them marriage licence. Interestingly, the court did not say that the mere grant of marriage licence makes the couple "husband and wife" as this may have upset the common prefixes of "Mr and Mrs" used in relation to husband or wife in a proper legal marriage. The court did not also consider logical

[10]*Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486.

reasoning that "protecting personal choices of intimacy" may as well cover "intimate choices" of incestuous partnerships and relationships which are presently prohibited as criminal acts.

And by the way, *all* human or individual choices cannot be interpreted within the confines of the Fourteenth Amendment's Due Process Clause. For instance, the 'right of choice' of a pervert or extremist religious fanatic who feels "convinced" or "believes" that his act of terrorism is a personal "obligation", religious injunction or *just* individual "choice" can by no means be protected by law or the Fourteenth Amendment. In the *Obergefell* case, the US Supreme Court ought to have simply left the issue as open or closed as it has been without necessarily and positively *legalizing* it. The US is therefore faced with marriage prefixes such as "Mr and Mr" or "Mrs and Mrs" which cannot truly represent so-called "new insights" and "changed understanding" of marriage, but rather a clear distortion of common truisms of English clichés.

Obergefell rightly restated the general truth endorsed earlier in *Lawrence* v. *Texas*[11] that decisions about marriage are among the most intimate that an individual can make. Nonetheless, it is unacceptable, and therefore unreasonable to apply this truth to all persons, and in all cases, whatever their sexual orientation.[12]

Same-sex *marriage* therefore represents a deinstitutionalization of marriage and a weakening of the social norms that define partners' behaviour(Treas, Lui et al. 2014). It erodes the age-long natural content, concept and contextual dynamics of marriage, albeit some American conservatives claim that it rather resolves the differences between broad libertarianism and core religious traditionalism (Keckler and Rozell 2015).

Understandably, most discourse on same-sex marriage are usually based on law proper, and hardly on morality, moral evaluation or any Moral Foundations Theory (MFT) (Graham, Haidt et al. 2012, Wojcik, Ditto et al. 2013, Graham, Meindl et al. 2015, Schumm 2015).

The foregoing arguments may seem Afrocentric but they are really not addressing same-sex marriage as un-African, immoral, reprehensible or criminal act, albeit this is the common notion in most African countries including Nigeria, Kenya, Zimbabwe, Malawi, Namibia and Uganda (Smith, Tapsoba et al. 2009). In these countries, same-sex relationships are generally

[11] 539 U. S. 558, 574.
[12]See Page 3 of the Syllabus of the judgement in *Obergefell v. Hodges*

viewed as manifestation of western decadence or Euro-American perversion(Bleys 1995) seeking to contradict the sanity of African morality (Mugabe 2015).[13]. And in about 38 African countries, same-sex relationships are criminalised, with punishments ranging from extortion, blackmail and imprisonment to death penalty (Thoreson and Cook 2011, Finerty 2013, Schwartz, Nowak et al. 2015).

In *Obergefell*, the US Supreme Court narrowly missed the golden opportunity to properly distinguish the meaning and character, albeit relatedness, of "civil union" and "marriage". This paper concedes that a "civil union" is a permissible relationship of consenting adult males or females who may even live together or *relate* to one another as best friends or couples (Powell, Quadlin et al. 2015). It further conceded that even though same-sex marriage is *marriage-like* (Strasser 2001),it certainly lacks legal imprimatur of a proper marriage because both concepts are at best, separate but unequal (Cox 2000).

Obergefell also failed to distinguish between "best friend" and "spouse" in relation to marriage, as well as inheritance by a *friend or other beneficiaries* under a will and inheritance as *spouse of a marriage* with the testator.

The Cambridge Advanced Learner's Dictionary and Thesaurus defines *spouse* in both British and American English simply as "a person's husband or wife".[14]It also defines *wife* as "the woman that you are married to"[15] and *husband* as "the man that you are married to".[16]

More elaborately, the Oxford Advanced Learner's Dictionary of British and World English defines *wife* as "a married woman considered in relation to her spouse"[17] and *husband* as "a married man considered in relation to his spouse".[18] It also defines *spouse* as "a husband or wife, considered in relation to their partner".[19]

[13] President Robert Mugabe of Zimbabwe showed open rejection and abhorrence to same-sex relationships when, at the UN General Assembly in New York on 28 September 2015, he referred to "same-sex marriage" as "'new rights' that are contrary to our values, norms, traditions, and beliefs" and exclaimed, "We are not gays!" http://www.slate.com/blogs/the_slatest/2015/09/28/zimbabwe_s_mugabe_u_n_speech_on_gay_human_rights.html (20/8/2015).
[14]http://dictionary.cambridge.org/dictionary/english/spouse (28/10/2015).
[15]http://dictionary.cambridge.org/dictionary/english/wife (28/10/2015).
[16]http://dictionary.cambridge.org/dictionary/english/husband (28/10/2015).
[17]http://www.oxforddictionaries.com/definition/english/wife (28/10/2015).
[18]http://www.oxforddictionaries.com/definition/english/husband (28/10/2015).
[19]http://www.oxforddictionaries.com/definition/english/spouse (28/10/2015).

Consequently, with respect to the right of inheritance, best friends or partners in a civil union may validly and legally inherit each other's estate as appointed next-of-kin or by virtue of the express provisions of a valid *will* or codicil. Such inheritance is also possible under a nuncupative will (that is, a will that is delivered orally to witnesses rather than written), but certainly not in consequence of marriage, or as *spouse*, that is, husband or wife. Above all, recent changes in social and family ideologies in the past half century make it clear that "the domination of the nuclear family consisting of a married heterosexual couple and their children is over" (Harrington 2015). It is therefore unrealistic to even suggest that legalizing same-sex marriage guarantees non-discrimination, and equal protection of the rights of marriage and inheritance for same-sex lovers, because marriage is not the only basis for inheritance, even upon intestacy.

Suffice to say, that *Obergefell* indeed, over-stretches the rights of choice and marriage under the Fourteenth Amendment by judicializing and endorsing a manifest impossibility. It contradicts the age-long traditional definition of marriage which limits it between two persons of opposite gender in the gender binary (Abe 2014), and as common in most other jurisdictions (Matsick and Conley 2015).

The legalization of same-sex marriage also distorts grammar and lexicon. For instance, it changes the fact of "husband" as male and "wife" as female, ditto "widow" as *wife* of a deceased man and "widower" as *husband* of a deceased wife. It also alters the concept and context of common historical cliché in the prefixes, "Mr and Mrs". It also diminishes the seriousness with which widows are classified and treated as a special or vulnerable group, alongside women, children and the disabled. And quite interestingly and funny enough, *Obergefell* has moved society from the popular, "You may kiss the bride" to the new "You may kiss the groom" (Gwartney and Schwartz 2016).

The right to marry under the Fourteenth Amendment ought therefore, to have been protected within the confines of a proper marriage and not otherwise. This is to ensure that this "new learning" does not necessitate other distortions or future socio-grammatical and legal impossibilities such as "a tall short woman" or a small big man" or a white black woman" etc. In *Obergefell,* the US Supreme Court simply put a round peg in a square hole!

Obergefell further distorts or rewrites the previous basics of a valid civil law marriage, namely, monogamous union; heterosexual union; union for life; and voluntary, albeit some scholars

strongly disagree that these factors, especially monogamy, is synonymous with opposite-sex marriages only (Conley, Ziegler et al. 2012, Frost and Gola 2015, Frost 2015).

In spite of these arguments against *Obergefell*, some people still propagate the view that the legalization of same-sex marriage by the US Supreme Court is one of the most celebrated in the history of equal protection of rights in America (Fetner 2016). The controversies raised by *Obergefell* justify the doubt of some scholars on the propriety of placing same-sex marriage as a subject under the Fourteenth Amendment to the US Constitution (Soulby, Kennedy et al. Summer 2015).

Some have identified certain "robust stigma" associated with consensual non-monogamous relationships as well as a halo surrounding monogamous relationships (Conley, Moors et al. 2013). Others like Schmitt argued much earlier and quite logically too, that human beings are not even capable of consistent or strict long-term mating (Schmitt 2005) otherwise cases of divorce and infidelity, visiting prostitutes and keeping of mistresses and comfort women would not be common across cultures and jurisdictions (Schmitt 2005).

Nonetheless, it is the absence or non-conformity to fundamental legal requirements that actually sets "licenced" marriage apart from other forms of marriage including Asian and African polygamous marriage, child-marriage, forced involuntary marriage(Devi 2015, Saidon, Adil et al. 2015, Scolaro, Blagojevic et al. 2015). This also applies to woman to woman marriage in African customary law, and now, the "new changed understanding" which is, same-sex *marriage* a la *Obergefell v. Hodges*. Suffice to say that these forms of marriages are yet valid under native law and custom only. They are accepted or rather excused, and considered convenient and socially "permissible" within their existing peculiar socio-cultural cum religious order as well as in the emerging new socio-legal cum expansionist human rights order. However, it will not be strange if the legislature or the courts "licence" these native/customary marriages as *legal* marriages under the law. Simply and mildly put, *Obergefell* failed to realise that every marriage is a union but not every union is a marriage!

The so-called dynamism of marriage in *Obergefell* utterly distorts the notion of family, especially in relation to the status of children. It invariably creates "new forms of children" who would no longer have "father and mother" as parents but instead "father and father" or "mother and mother". And with respect to human dignity, these new class of children would

have been grossly dehumanised and demeaned and their rights to life and dignity severely violated, even out-rightly denied, by the sheer consequence of *Obergefell v. Hodges.*

A strict application of the *Obergefell* decision may equally invalidate or eliminate the existing legal requirements which prohibit marriage of persons within certain degrees of affinity and consanguinity, thereby promoting or permitting some degree of incestuous or interfamilial sexual activity or marriage which are prohibited in America and almost universally(Sackett 2015). And in the words of Bosnia and Herzegovina physician, Rajko Igic: "In contrast to the heterosexual marriage of man and a woman, same sex marriage does not produce children, thus eliminating the dangers of inbreeding. Same sex marriage could become legal among close cousins, brothers, sisters, uncle-nephew, and aunt-nice provided that the social, moral, and religious restraints would permit. If Marcus Tallius Cicero were alive, he would certainly shout: *O tempora! O mores!*"(Igić 2015)[20].

A realistic and natural understanding of these salient distinctions would have certainly prevented the US Supreme Court from *legalizing* same-sex *marriage*, and yet securing the rights to life, equality or dignity of persons in same-sex relationships. This is without prejudice to certain Public health research which, though failing also to recognize the distinction between same-sex *relationship* and same-sex *marriage*, suggests certain advantages of legalizing same-sex relationships. For instance, that discriminatory environments and prohibition of same-sex *marriage* are detrimental to health, and that *legalizing* same-sex marriage contributes to better health for LGBT people. Furthermore, that it led to fewer mental health care visits and expenditures for gay men and reduced psychological distress among lesbian, gay, and bisexual adults in legally recognized same-sex relationships (Gonzales 2014).

One wonders if a further expansion of *Obergefell* may not someday define, expand and authorise legal marriage (by legislation, judicialization or *judislations*),[21] between a human and

[20] "**O tempora o mores**" is a sentence by Cicero in the fourth book of his second oration against Verres (chapter 25) and First Oration against Catiline. It translates as **Oh the times! Oh the customs!** (**Oh what times! Oh what customs!** or, alternatively, **Alas the times, and the manners**): See Ottenheimer, I. & M. *Latin-English Dictionary* 1955. This sentence is now used as an exclamation to criticize present-day attitudes and trends, often jokingly and wryly.

[21]This phrase refers to a 'law' made by the court. It was formulated and used to describe the uncommon *judislative* role of judicial creativity and activism of a court, especially the Supreme Court of India, in assuming and exercising (and without usurping, but rather complementing) the traditional law-making function of the legislature. (See Aloysius Ndubuisi Ojilere (2015). Quest for a Sustainable Legal Framework for the Protection of Women's Right to Dignity in Nigeria: Lessons from India and South Africa, PhD Thesis, Faculty of Law, University of Malaya, Malaysia.

animal "couple" under another possible interpretation of the Fourteenth Amendment, even though animals cannot volunteer requisite consent. At such repressible but irreversible point the truth may then become manifest that judicial decisions that make same-sex marriage legally or otherwise equivalent to heterosexual marriage will create inequality rather than solving it. This will underscore the strong possibility that social forces will, indeed, operate to restore equity in ways that may increase social dysfunction (Schumm 2015). Alternatively, while marriage will continue to be important to people of faith and in certain cultures, civil marriage will gradually become little more than a means of registration of intimate partnerships (Parkinson 2015).

Conclusion

This paper has argued to what extent it considers *Obergefell v. Hodges* as a judicialization of the impossible. Whatever plausible arguments supporting this view may only be relevant for their scholarship value with respect to the United States since judgement has already been pronounced by the highest court in the land, and must therefore be obeyed. Nonetheless, this paper remains severally significant having explored the proper meaning, true character and content of marriage, as well as the proper distinction between marriage and union. It further shows that the quest to secure marriage equality right, non-discrimination or human dignity under the Fourteenth Amendment of the US Constitution has been unnecessarily overstretched and misplaced. It therefore concludes that a same-sex *marriage* is naturally impossible despite its legalization by judicialization. Most of all, this paper provides alternative legal scholarship upon which the US Supreme Court may deem fit to reverse itself and set aside the *Obergefell* decision in future.

Addendum

True, *Obergefell v. Hodges* may have created an almost general presumption/belief that the US Supreme Court has legalized same-sex marriage across the United States. This seems untrue! In January 2016, Chief Justice Roy S. Moore of the Supreme Court of Alabama, issued an administrative order insisting that the ban on same-sex marriage in Alabama (earlier upheld by the Supreme Court of Alabama in March 2015) still stands.

The judge ingeniously argued, and this paper agrees with him, albeit technically, that *Obergefell v. Hodges* invalidates the marriage bans in Michigan, Kentucky, Ohio and Tennessee only — that is, the specific laws named in *Obergefell* — but not necessarily in Alabama.[22]This further confirms that both within and outside the judiciary, the last has not been heard of the legalization of same-sex marriage in the United States of America(Culhane 2016).

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