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# 'Marry In Haste…': The (Partial) Abolition Of Same-Sex Marriage In Bermuda

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**ABSTRACT**

In 2018, the British Overseas Territory of Bermuda revoked the right to marry for same-sex couples. In a judgment that reconceives the relationship between sexual orientation and religious freedoms, the Bermuda Supreme Court and Court of Appeal found this revocation to be unconstitutional. I explore the political and legal context in which same-sex marriage was granted and then revoked in Bermuda. I also consider the Bermuda Courts' judgments in light of the subsequent decision of the UK Supreme Court in *Steinfeld*, amongst others. While there was an assumption from both the Bermuda and UK governments that the revocation provision was compatible with the European Convention on Human Rights, I argue that this underestimates the significance of the distinction between declining to recognise a right to same-sex marriage and revoking a right that has already been exercised. While the European Court of Human Rights has not yet found the absence of same-sex marriage to be a violation of Article 12, I argue that the revocation of a right to marry between same-sex couples that had been recognised in accordance with national law changes the terrain on which the Convention arguments would be made.

**KEYWORDS:** same-sex marriage, Articles 12 and 14 European Convention on Human Rights, British Overseas Territories, Bermuda

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## 1. Introduction

Bermuda's Domestic Partnership Act 2018 (DPA) creates a comprehensive marriage-like provision for same-sex couples. It is broadly similar to the United Kingdom's Civil Partnership Act 2004 and is open to different-sex couples as well. As Mr Walton Brown, the Minister who introduced the legislation, noted: the Act means that Bermuda 'will be amongst the first English-speaking Caribbean islands to introduce and pass a law that provides legal recognition to same-sex couples'.[1] However, this rather positive characterisation of the Act omits the fact that same-sex marriages had already been taking place in Bermuda for six months when this legislation was introduced and for a year by the time it came into force.[2] Rather than creating a new right for previously unrecognised same-sex relationships, the DPA revoked a right to same-sex marriage and replaced it with what is commonly regarded as a second-tier status, though any existing same-sex marriages continue to be recognised as such.[3] This meant that same-sex couples with a strong preference for marriage over domestic partnership had to ensure that they married before the Act's commencement in June 2018.[4] As such, same-sex marriages would in fact continue to exist in Bermuda for the foreseeable future, though no new marriages could be established following the DPA. In this sense, it was only a partial rather than full abolition of same-sex marriage.

Had this legislation been enacted a year earlier it may well have been cause for celebration by the LGBT+ communities, but instead of becoming a leader in LGBT+ rights in the Caribbean region,[5] Bermuda became the second jurisdiction in the world to abolish same-sex marriage after marriages had already taken place. The first jurisdiction to do so was California in 2008, after a ballot initiative had amended the California Constitution to provide that: 'Only marriage between a man and a woman is valid or recognized in California'.[6] This was subsequently reversed by the US Supreme Court on the basis that it violated the Equal Protection Clause of the 14th amendment of the US Constitution.[7]

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[1] Ed., 'Governor Gives Assent: Domestic Partnerships', *Bernews,* 7 February 2018.
[2] Strangeways, 'Bermuda has first gay marriage', *The Royal Gazette*, 2 June 2017.
[3] Section 54 Domestic Partnership Act 2018.
[4] By 31 December 2017, ten same-sex marriages had been contracted in Bermuda with a further two occurring on Bermuda registered ships and in 2018 there were six same-sex marriages in Bermuda and a further four on Bermuda registered ships: see Ministerial Statement by the Minister of Home Affairs, The Hon. C. Walton D. Brown, Jr., JP, MP., *The Annual Report of the Registry General 2017*, available at: www.gov.bm/articles/annual-report-registry-general-2017 [last accessed 16 January 2020]; Anon., 'Minister: Annual Report of the Registry General 2018' *Bernews,* 28 September 2019.
[5] Bermuda is located in the North Atlantic but is an Associate Member of CARICOM and tends to be grouped together with Caribbean British Overseas Territories.
[6] *Perry v Schwarzenegger* 704 F.Supp.2d 921, 928 (2010).
[7] *Hollingsworth v Perry* 133 S. Ct. 2652 (2013). For the District Court decision, see *Perry v Schwarzenegger*, ibid. For the Ninth Circuit Court of Appeal's decision, see *Perry v Brown* 628 F.3d 1191 (9th Cir. 2011).

Similarly, the courts in Bermuda have determined that the revocation of marriage for same-sex couples is unconstitutional, though for very different reasons to those found in California.

Bermuda is not a sovereign nation. It is a British Overseas Territory and, as such, although it has been internally self-governing for over 400 years, the UK remains responsible for Bermuda's compliance with international human rights law, including the European Convention on Human Rights (ECHR).[8] Although the influence of the ECHR is apparent in the drafting of the fundamental rights chapter of Bermuda's Constitution, it has not been replicated in its entirety. Articles 8, 12 and 14 (the rights to private and family life, right to marry and prohibition of discrimination in relation to Convention rights) are not replicated in Bermuda's Constitution. Therefore, unlike those in California, Bermuda's LGBT+ community do not have recourse to a Constitution that includes sexual orientation as a protected characteristic, or even a broad equal protection or anti-discrimination clause. The anti-discrimination provisions in Bermuda's Constitution refer only to race, religion and associated characteristics.[9] As such, at first glance it seemed that a constitutional challenge to Bermuda's DPA would be difficult, if not impossible. However, in June 2018, the Bermuda Supreme Court held that the revocation provisions of the DPA were unconstitutional because 'depriving the applicants of the opportunity to participate in legally recognised same-sex marriages' violated the applicants' freedom of conscience protected by section 8(1) of the Constitution and constituted discrimination on the grounds of creed, contrary to section 12 of the Constitution.[10] The Bermuda Court of Appeal upheld this judgment, though they disagreed with the Supreme Court on the section 12 grounds.[11] They additionally struck down the revocation provision on the basis that it was enacted for a religious purpose contrary to the Constitution, an argument that the Supreme Court had rejected. The Bermuda government have announced their intention to appeal to the Judicial Committee of the Privy Council (JCPC) in London.[12]

The judgments of Bermuda's Supreme Court and Court of Appeal are significant as they represent the first time that courts anywhere have recognised that same-sex marriage is not only about equal protection for LGBT+ people, but also about protecting a diversity of religious beliefs.[13] As the Chief Justice noted, his decision 'vindicates the principle that Parliament cannot impose the religious preferences of any one group on the society as a whole'.[14] This innovative

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[8] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

[9] Section 12 Bermuda Constitution Order 1968.

[10] *Ferguson v Attorney General; OUTBermuda et al. v Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018), at paras 95 and 106 ('*Ferguson; OUTBermuda*').

[11] *Attorney General v Ferguson; Attorney General v OUTBermuda et al* [2018] CA (Bda) 32 Civ, 23 November 2018. They did not, though, agree that there had been discrimination based on creed. See the more detailed discussion of the cases below.

[12] McWhirter, 'Government set for run at Privy Council', *The Royal Gazette*, 14 December 2018.

[13] Cf: *Halpern et al. v Canada (Attorney General)* 65 O.R. (3d) 161 (2003).

[14] *Ferguson; OUTBermuda*, supra n 10 at para 108.

framing of access to same-sex marriage in terms of (religious) belief and conscience will no doubt be of interest to same-sex marriage advocates in similarly reticent jurisdictions that have constitutional protections for freedom of religion but not sexual orientation. Moreover, I argue that the events in Bermuda could have significant implications for both the UK's compliance with the ECHR and for the security of unpopular minorities who have gained rights via litigation under provisions such as Bermuda's (and the UK's) Human Rights Act, which are not constitutionally entrenched. In disregarding the maxim that 'freedom once given cannot be taken away'[15] the Bermuda Parliament, with the complicity of the UK (in giving Royal Assent to the DPA), set a dangerous precedent.

I begin with an in-depth analysis of the political and legal context of LGBT+ rights in Bermuda in order to understand how and why this action to remove the right to same-sex marriage was taken, including the UK's decision to give Royal Assent to the revocation legislation. Revealing a complex set of circumstances in which LGBT+ rights intersect with colonialism, race, religion and contested ideas of Bermudian identity, this analysis is based on published primary and secondary sources as well as interviews that I conducted in Bermuda in 2014 and 2018.[16]

Turning then to the litigation in the cases of *Ferguson v Attorney General; OUTBermuda et al. v Attorney General* (*Ferguson; OUTBermuda)*, I analyse the ground-breaking judgments of the Bermuda Courts. I argue that one issue that was not considered in detail in the Bermuda Courts' judgments but may be important on appeal to the JCPC is the potential significance of the distinction between *declining to enact* a same-sex marriage provision and *abolishing* a same-sex marriage provision that already exists. This could be significant both in terms of a potential attempt to justify the interference with a fundamental right under the Bermuda Constitution and in terms of whether Article 12 is engaged. In relation to the former, I argue that in a context where existing same-sex marriages continue to be recognised as marriages following the DPA, it may be difficult for the JCPC to accept an argument that a prohibition on future marriages was reasonably required. In relation to the latter, there was an assumption within Bermuda and the UK that the DPA would be compatible with the ECHR because while some form of relationship recognition appears to be necessary following *Oliari v Italy*, the European Court of Human Rights held in that case that Article 12 does not oblige states to 'grant' same-sex marriage.[17] However, I argue that this difference between declining to enact on the one hand and revoking on the other could be crucial, as once same-sex marriage has been recognised in accordance with national law Article 12 would be engaged. If the courts are not satisfied that the decision to abolish marriage for one group of people was proportionate, this could well constitute a breach of Article 12

[15] *Blackburn v Attorney-General* [1971] 1 W.L.R. 1037 at 1040 *per* Lord Denning.
[16] The empirical research was conducted in accordance with the SLSA's Statement of Principles of Ethical Research Practice (January 2009). Ethics approval for both sets of interviews was obtained from Kent Law School Ethics Committee.
[17] *Oliari and others* v *Italy* Applications Nos 18766/11 and 36030/11, Admissibility and Merits, 21 July 2015, at para 192.

and/or Article 14 taken together with Article 12. This could be significant because while Articles 12 and 14 are not replicated in the Bermuda Constitution, Bermudians are able to take cases to the European Court of Human Rights in Strasbourg.[18] As the UK is responsible for Bermuda's external affairs, including compliance with the ECHR, the UK (and not Bermuda) would be the respondent in such a case.

## 2. LGBT+ Rights in Bermuda: The Political and Legal Context

### A. 'Two Words And A Comma': A Brief History from Decriminalisation to Anti-Discrimination

The Bermuda legislature decriminalised sex between two men in 1994 via a statute that became known as the 'Stubbs Bill'.[19] Initially, it was intended that the Criminal Code Amendment Act 1994 would introduce the same age of consent as that between men and women: sixteen. However, in the face of strong opposition and an attempt to derail the Bill through a motion to delay debate,[20] the Bill was amended to make the age of consent eighteen, which it remains now. When I interviewed him in 2014, Mr Trevor Moniz MP, who had proposed that amendment in 1994, described it as a strategic compromise:

> Now sometimes we reach a juncture as we did with the Stubbs Bill where you can find a way to move forward without unduly upsetting society as a whole without there being a backlash that negates all the good work that you've done and I guess that's what I did with respect to the Stubbs Bill because without the amendment that I put forward the Stubbs Bill never would have passed and in the end it passed.[21]

The next attempt at advancing LGBT+ rights in Bermuda was made by Renee Webb MP, who introduced a Private Members' Bill in 2006 that would have amended the Human Rights Act 1981 to include sexual orientation, but this failed when all but two MPs refused to speak to it during the debate.[22] The failure of this Bill did, however, prompt 'one of the biggest demonstrations in recent

[18] The UK has, with the consent of the Bermuda government, formally accepted the competence of the European Court of Human Rights to hear individual applications from Bermuda under Article 56.
[19] Section 3(b), amending Section 177 Criminal Code 1907. The men must be over the age of 18 years and the sex must be 'in private'. See, for example, Ed., 'Stubbs' gay sex bill wins MP's support', *The Royal Gazette,* 14 May 1994.
[20] Northcott, *Stuck in the Middle of Nowhere: Queer Equality in Bermuda* (Unpublished LLM thesis, University of Keele, 2014) at 28.
[21] Mr Trevor Moniz MP interview with the author, July 2014.
[22] Northcott, supra n 20 at 29-30. According to Northcott, this meant that the motion was therefore unable to proceed according to the rules of the House of Assembly.

years'[23] outside the House of Assembly the following week and led to the creation of a campaign group 'Two Words and a Comma' (TWC).[24] TWC campaigned for seven years, involving 'provocative' press adverts, meetings with church leaders, public forums, lobbying and working with allies such as the Human Rights Commission, a statutory body who were also calling for the Human Rights Act to be amended to include sexual orientation.[25] They were eventually successful in persuading the government to introduce an amendment to add the two words and a comma, 'sexual orientation,' to the Human Rights Act in 2013.

During the Parliamentary debates on the amendment to the Human Rights Act, the (then) government minister, Mr Wayne Scott, directly addressed the concern that protecting against sexual orientation discrimination would be a 'slippery slope' leading to same-sex marriage, emphasising that 'the changes to the Act being debated today have nothing to do with same-sex marriage…. To be clear, this Government considers marriage to be between a man and a woman only.'[26]

The amendment to the Human Rights Act in 2013 was hugely important in the advancement of LGBT+ rights in Bermuda. Despite its name, the Act is not a broad human rights provision along the lines of the European Convention on Human Rights or the United Kingdoms's Human Rights Act 1998 but it does provide strong protection against discrimination in certain areas including employment, housing and provision of goods, facilities and services.[27] Although it is limited to these areas rather than a general prohibition against discrimination, the courts have deemed it to be quasi-constitutional legislation and given it a 'generous and purposive' interpretation.[28] Furthermore, unlike the UK's Human Rights Act 1998, the Act empowers the Court to hold discriminatory provisions inoperative.[29] It also does not permit any justifications for direct discrimination, even in cases where it may be a proportionate means of achieving a legitimate aim: direct discrimination is *always* unlawful, regardless of the circumstances or reasons for the different treatment.

The strength of this provision resulted in two significant advancements for LGBT+ rights in 2015. In the case of *A and B v Director of Child and Family Services*, a same-sex couple challenged the refusal of the Department of Child and Family Services (DCFS) to allow them to make a joint application for adoption.[30] The Supreme Court found that this constituted direct discrimination against unmarried couples and indirect discrimination against same-sex couples who were unable to marry. Hellman J declared 'the word "married" in subsections

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[23] Ed., 'Hundreds demonstrate against MPs' gay rights "silence"', *Bermuda Sun,* 2 June 2006, cited in Northcott, ibid. at 30.
[24] Northcott, supra n 20 at 30.
[25] Ibid. at 30-1.
[26] Bermuda Official Hansard. 14 June 2013 at 1352-3.
[27] Sections 6, 4, and 5, respectively.
[28] *Marshall v Deputy Governor* [2011] 1 LRC [Privy Council].
[29] Section 29 Human Rights Act 1981.
[30] *A and B v Director of Child and Family Services and Attorney General* [2014] SC (Bda) 11 Civ (3 February 2015).

28(1) and 28(3) of the Adoption Act 2006 to be inoperative'[31] so that a joint adoption application could be 'made by an unmarried couple, whether same-sex or different-sex, provided that they have been living together for a continuous period of not less than one year immediately before their application'.[32] The second case to be heard in 2015 was *Bermuda Bred Company v Minister for Home Affairs and the Attorney-General*.[33] The Bermuda Bred Company was established by LGBT+ Bermudians in order to 'promote social justice and non-discrimination'.[34] They sought a declaration that same-sex partners were entitled to be treated in the same way as spouses for immigration purposes, including work permits. They argued that failure to do so constituted discrimination on the basis of marital status and sexual orientation contrary to the Human Rights Act 1981. The Supreme Court held that the direct discrimination against unmarried partners was 'self-evident and quite obvious'[35] and that the issue of indirect discrimination 'requires only marginally more analysis':[36] because Bermuda law did not recognise same-sex marriages, it was impossible for same-sex couples to obtain the spousal immigration rights. The government did not attempt to justify the differential treatment of same-sex couples in relationships analogous to marriage and the relevant provisions were declared inoperative to the extent that they contravened the Human Rights Act 1981.

### B. From The Court Room To The Ballot Box (And Back Again): The Road To Same-Sex Marriage In Bermuda

In the same year as the two historic judgments in *A and B* and *Bermuda Bred*, Bermudian activist Tony Brannon began a petition for same-sex marriage that was presented to the government on 21 May 2015 with almost 2500 signatures.[37] It also, however, marked the beginning of an organised backlash against relationship recognition for same-sex couples. A group called 'Preserve Marriage' (PM) launched a petition against same-sex marriage that gathered over 9000 signatures.[38] They opposed not only same-sex marriage but also civil unions on the basis that the latter 'inevitably' lead to same-sex marriage.[39] PM also called for a referendum on the issue. There was an aborted attempt to

[31] Ibid. at para 42.
[32] Ibid. at para 43.
[33] [2015] SC (Bda) 82 Civ (27 November 2015).
[34] Ibid. at para 1.
[35] *Bermuda Bred*, supra n 33 at para 71.
[36] Ibid. at para 72.
[37] Strangeways, 'OBA accused of trying to evade 'controversy', *The Royal Gazette,* 2 March 2016.
[38] Preserve Marriage, see: www.preservemarriage.bm/who-we-are/petition.html [last accessed 24 January 2020].
[39] Preserve Marriage Bermuda, *What You Need to Know About Marriage: Questions and Answers Driving the Debate in Bermuda* (2016), available at: www.preservemarriage.bm [last accessed 24 January 2020].

introduce a civil union provision followed by political stalemate and the first litigation on same-sex marriage in Bermuda.

*(i) The Civil Union Bill 2016 and Referendum*

Initially rejecting the idea of a referendum, in February 2016 the One Bermuda Alliance (OBA) government introduced two consultative bills that would have provided for civil unions for same-sex couples and restricted the definition of marriage to a man and a woman.[40] The provisions of the Civil Union Act 2016 would have provided for 'the formalisation and registration of a relationship between same-sex couples', while the Matrimonial Causes Amendment Act 2016 would have provided that 'notwithstanding the Human Rights Act 1981, marriage remains exclusively a relationship between a man and a woman'.[41] The debate in Bermuda's House of Assembly reveals that the government's decision to table these Bills was influenced by the case of *Oliari v Italy*[42] in the European Court of Human Rights, as well as the *Bermuda Bred* decision, described above. However, instead of proceeding with these Bills, the government subsequently announced their intention to seek Parliamentary approval for a referendum to take place in June 2016.[43] This decision was criticised by both Bermuda's Human Rights Commission, who released a statement saying: 'We specifically reject the notion that the opinion of the majority should impinge on the right of equal treatment for minorities,'[44] and the Centre for Justice, who unsuccessfully sought an injunction and declaration that holding a referendum on fundamental rights was unconstitutional.[45] The Chief Justice held in that case that the principle that referendums ought not to be used to obtain mandates in cases of fundamental rights was a constitutional convention rather than a legally enforceable principle.[46]

Before the idea of the referendum could be put to the House of Assembly for legislative approval, Mr Wayne L. Furbert, introduced a Private Members' Bill, the Human Rights Amendment Act 2016, which sought to define marriage as being between a man and a woman, without providing for any form of relationship recognition at all for same-sex couples. This served the same function as one of the government's Bills, the Matrimonial Causes Act 2016, which had not been put to a vote when it was introduced in the preceding month. Mr Furbert was (unnecessarily) concerned that an amendment to the Matrimonial Causes Act would not be sufficient to overcome the supremacy

[40] Bermuda Official Hansard Report, 29 February 2016, at 850.
[41] Ibid. at 849.
[42] *Oliari*, supra n 17.
[43] Lagan, 'OBA to call referendum on same-sex marriage', *The Royal Gazette,* 1 March 2016. The Referendum (Same-Sex Relationships) Act 2016 was introduced to the House of Assembly on 2 March 2016 and the second reading took place on 11 March 2016.
[44] Lagan, ibid.
[45] *Centre for Justice v the Attorney General and Minister of Legal Affairs* [2016] SC (Bda) 64 Civ (10 June 2016).
[46] Ibid. at para 16.

clause in the Human Rights Act.[47] Mr Furbert's speech introducing his Bill replicates the hyperbolic claims produced by PM in their pamphlets, including claims that same-sex marriage in the United States has led to School Education Boards being 'pressured to include [LGBT] sex education in the curriculum', Christian charities being 'forced to stop providing adoption and foster care service because they want to place children with married moms' and a father being arrested after objecting to 'a homosexual curriculum' in his six-year-olds' class.[48]

The month after the second reading of Mr Furbert's Bill, and before it had passed the House, the House of Assembly debated the government's Referendum (Same-Sex Relationships) Act 2016. This debate again illustrates the influence of the European Court of Human Rights' judgment in *Oliari v Italy*:

> Let me just say that we determined that we would go this route [have a referendum on marriage and civil union] because it was the one method by which the Government could respond to the responsibility outlined in the *Oliari v Italy* case, to which much reference has been made in terms of a necessity to determine the populace's margin of appreciation.[49]

The term 'margin of appreciation' was used several times during the debate by those on both sides, though the term does not appear to be being used in its Convention sense but rather as a synonym for 'public opinion'. The Minister emphasised that while holding a referendum would not have been her preferred way to determine a human rights issue she felt bound to do so, being stuck 'between a rock and a hard place'.[50] While the government had previously assured the House that adding sexual orientation to the Human Rights Act would not lead to same-sex marriage, subsequent developments in the European Court of Human Rights and domestic case law, described above, created a real probability that if they did not provide some sort of recognition for same-sex relationships the Court will eventually require same-sex marriage. If that happens, 'the floodgates open, and we find ourselves in a situation of being forced to accept that which we say we do not want.'[51] The Minister describes her own conflicted feelings, on the one hand trying to fulfil the commitment made by her predecessor that there would not be same-sex marriage and on the other trying to 'fulfil commitments on an equal basis, as far as possible, to all members

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[47] Section 30B(1) Human Rights Act 1981 provides: 'Where a statutory provision purports to require or authorize conduct that is a contravention of [this Act], this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.' See also Section 29.

[48] See Hon. Wayne L. Furbert, Bermuda Official Hansard, 2 March 2016, at 1027; and Preserve Marriage, supra n 38 at 4.

[49] Hon. Patricia J. Gordon-Pamplin, Bermuda Official Hansard Report, 11 March 2016, at 1513.

[50] Ibid. at 1516. See also Sam Strangeways, 'OBA accused of trying to evade "controversy"', *The Royal Gazette,* 2 March 2016.

[51] Gordon-Pamplin, supra n 49 at 1516.

of our community'.[52] The referendum, therefore, was a way to try to find a route out of this conflict but as the then Shadow Minister for Home Affairs, Mr Walton Brown, noted this route could prove even more problematic for the government: if the referendum were to reject any form of relationship recognition the government would then be unable to pass such legislation,[53] but this would not negate the legal requirement to provide it under the Human Rights Act 1981 or the European Convention on Human Rights, if the courts were to so rule.[54] The result of the referendum, which took place in June 2016, bears out this concern, with 69% of those voting opposing same-sex marriage and 63% opposing civil unions. However, as the turnout was less than the 50% required to make the referendum result valid the questions were officially deemed 'unanswered'.[55] Nevertheless, the referendum result has been frequently referred to in Parliament and in public discourse as representing the public's opposition to same-sex marriage.[56]

Following the referendum result, the government did not press ahead with their Bills. Mr Furbert's Bill passed the House comfortably by a margin of 20 votes to 10 on 8 July 2016, but was defeated by one vote in the Senate.

*(ii) Godwin and Deroche: The First Marriage Judgment*

The Bermuda Supreme Court handed down its judgment in *Godwin and Deroche v Registrar General and Others*, on 5 May 2017.[57] Charles-Etta Simmons, PJ, held that the exclusion of same-sex couples from marriage amounted to unlawful direct discrimination on the basis of sexual orientation due to the different treatment of same-sex and different-sex couples. As there is no permitted justification for this differential treatment in Bermuda's Human Rights Act, this constituted discrimination. The potentially more difficult issue was whether the discrimination fits within the relatively narrow remit of the Act. In other words, could the issuing of a marriage licence be described as supplying 'goods, facilities or services' under section 5 of the Act? The respondents argued that 'acts in pursuit of government policy or distinctively governmental functions do not fall within the ambit of "services".'[58] However, Simmons PJ followed the JCPC in *Minister of Home Affairs v Fisher*[59] in giving the Human Rights Act a 'generous interpretation'. She used her powers under section 29 of the Human Rights Act 1981 to declare the 'definition of marriage to be inoperative to the extent that it contains the term "one man and one woman" and reformulated it to read "the

[52] Ibid.
[53] The referendum was non-binding, so presumably Mr Brown is referring to politically unable, rather than legally unable to pass such legislation.
[54] Mr. Walton Brown, Bermuda Official Hansard Report, 11 March 2016, at 1519.
[55] Section 6(6)(a) Referendum Act 2012.
[56] For example, Preserve Marriage, intervening in the *Godwin* case in opposition to same-sex marriage, claimed to represent the majority of the population in Bermuda: *Godwin and Deroche v the Registrar General et al* [2017] SC (Bda) 36 Civ (5 May 2017), at para 10.
[57] Ibid.
[58] *Godwin*, supra n 56, at para 102.
[59] [1980] AC 319, at 338.

voluntary union for life of two persons to the exclusion of all others"'[60] and issued an Order of Mandamus compelling the Registrar to issue marriage licences to same-sex couples.[61] The OBA government declined to appeal, despite political pressure to do so. As the Attorney General, Mr Trevor Moniz, subsequently explained to the House of Assembly, he considered that as there was 'no reasonable chance of a different decision on appeal' there was no point in appealing just to 'buy time' or 'play politics'.[62]

It might be said that the decision not to appeal *Godwin*, which had proven so contentious, began the chain of events that led to the passage of the Domestic Partnership Act. However, it is unlikely that an appellate decision in favour of same-sex marriage based on the Human Rights Act would have forestalled the determination of its opponents to legislatively overturn it through amending the Act. Mr Furbert had already signalled his intention to reintroduce his Bill in the following legislative session, at which point (similar to the procedure under the UK's Parliament Acts 1911 and 1949) it would not require the Senate's approval before going to the Governor for Assent.[63] Therefore while the government's unwillingness to appeal undoubtedly irritated the opponents of same-sex marriage, even an appellate decision that was based on the Human Rights Act rather than the Constitution would have been vulnerable to legislative over-ride.

The first same-sex marriage took place less than a month after the *Godwin* judgment was handed down.[64] However, less than two months later Parliament was dissolved and the Progressive Labour Party (PLP) were elected by a landslide[65] on a platform that included a pledge to repeal same-sex marriage and replace it with a separate provision for same-sex relationship recognition.[66] Shortly after the election Mr Furbert, a PLP member of the House of Assembly, pledged to bring his Bill back to Parliament, claiming that this time he expected that it would become law.[67] However, instead, on 24 November 2017, Mr Walton Brown introduced the Domestic Partnership Act on behalf of the new PLP government.[68]

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[60] *Godwin*, supra n 56, at para 136.
[61] Ibid. at para 135.
[62] Mr Trevor Moniz, Bermuda Official Hansard, 8 December 2017, at 912.
[63] Bermuda Constitution Order 1968, s38(2). See Bell, 'Year before Furbert Bill returns to House', *The Royal Gazette,* 16 July 2018.
[64] Ironically, it was not between the applicants, Winston Godwin and Greg DeRoche, who decided instead to marry in Greg's home country of Canada following a delay publishing their banns: see Ed., 'Gay couple tie knot in Canada after Bermuda court victory', *The Jamaica Observer,* 23 May 2017.
[65] Smith, 'PLP storms to election victory', *The Royal Gazette,* 18 July 2017.
[66] Progressive Labour Party, *Putting Bermudians First: An Agenda for a Better and Fairer Bermuda,* 2017, available at: www.royalgazette.com/assets/pdf/RG36980777.pdf [last accessed 24 January 2020] at 14.
[67] Strangeways, 'Furbert: Same sex bill looks hopeful', *The Royal Gazette,* 28 July 2017. See Section 38(2) Bermuda Constitution Order 1968.
[68] Bermuda Official Hansard Report, 24 November 2017, at 647.

## C. The Domestic Partnership Act 2018

### *(i) A 'Retrograde Step' or a Necessary Compromise? The Debate in the Bermuda Parliament*

Now Minister for Home Affairs, Mr Brown had been a long time friend of the LGBT+ community in Bermuda. When I interviewed him in 2014, he spoke of having been the first Bermudian politician to attend London Pride after a member of Bermuda's LGBT+ community had invited him:

> He said it would be nice to have some political presence and I said "of course I'll go" so I went. And I got a lot of comments from people, half of them were negative. But if you believe that people should be treated equally you carry on and do what you have to do. At some point people will come to realise that rights for people who are gay or lesbian are fundamental rights and they should be granted those rights. And the Churches who oppose, they're on the wrong side of history and they'll be seen as such. The challenge of leadership is to help steer the country in the way you think it should go on all issues so those of us who support LGBT rights have a responsibility to speak out and to act and do so consistently, despite what some in the Church would say….[69]

Mr Brown's political record reflects this statement of support for the LGBT+ community, having previously spoken in favour of the amendment to the Human Rights Act in 2013 to include sexual orientation[70] and against Mr Furbert's proposed Bill to define marriage as being between one man and one woman.[71] In relation to the latter, he said: 'I cannot support any legislation which acts as an inhibitor to the further progression of rights.'[72]

It is an unhappy irony, then, that it was Mr Brown who was to introduce the DPA on behalf of the government. He was, perhaps even more than his OBA predecessor, between a rock and a hard place. It is clear from his statement introducing the Bill that Mr Brown is pre-empting the reintroduction of the Furbert Bill, which would 'have the effect of outlawing same-sex marriage without any rights being given to same-sex couples'.[73] He refers to both the 'fundamental divide in our community' between those who support and those who oppose same-sex marriage,[74] and the commitment made in the PLP election manifesto to 'ensure that same-sex couples would have a wide raft of legal benefits.'[75] Echoing the reasoning of Mr Trevor Moniz (above) during the debate in relation to the age of consent, he defends his position as one of necessary political compromise:

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[69] Interview with author, July 2014, Hamilton, Bermuda.
[70] Bermuda Official Hansard Report, 15 February 2013, at 49.
[71] Bermuda Official Hansard Report, 2 March 2016, at 1032.
[72] Bermuda Official Hansard Report, 8 July 2016, at 2440.
[73] Bermuda Official Hansard Report, 8 December 2017, at 881.
[74] Ibid.
[75] Supra n 73 at 882.

> The Bill today, of course, is not ideal, but we all know that. But it is the result of the political circumstances that we have to confront. This Government will provide leadership. There are some who will view it as a step backwards…. Some will see this as a retrograde step, others will see it as a modicum of salvation, but it is a compromised [sic] legislation designed to put us in a space where we can accommodate a variety of interests. And it is my hope, Mr Speaker, that we can make progress as time unfolds so that the space we are in today is not the space we are going to be in five years from now.[76]

Both compromise and the difficult position that Mr Brown found himself in personally were recurring themes in the Parliamentary debates.[77] Although when examining the Bill without context one might be persuaded that a reasonable compromise between those who seek same-sex marriage and those who oppose it would be a comprehensive domestic partnership provision (and indeed this is a compromise that has been made in many jurisdictions), the context here is vital. This Bill was not extending rights to same-sex couples in an incremental manner as had been the case with other domestic partnership provisions but rather reducing them, 'downgrading' from access to marriage to domestic partnerships. It is also worth noting that another form of compromise that could have protected the beliefs of both those who seek and those who oppose same-sex marriage would be the one adopted in England and Wales, where religious bodies (other than the Church of England)[78] must 'opt in' according to a statutory procedure before they are permitted to perform same-sex marriages.[79] This prevents those who oppose same-sex marriage from being required to perform them while at the same time allowing those who support it to do so.

Some supporters of the Bill suggested that it might be a temporary solution, that Bermuda would continue to evolve on human rights issues but is not ready for same-sex marriage yet. For example, Mr Sylvan D. Richards Jr., described the Bill as 'a halfway house', which gives same-sex couples access to rights while keeping marriage heterosexual. It would be, according to Mr Richards, his daughter's generation who would 'take it to the next step' as Bermudian society evolves and takes Parliament with it.[80] However, this idea that Bermuda is *not yet ready* for same-sex marriage overlooks the fact that at the time of this statement same-sex marriages already existed and had done so for six months: it was too late to *keep* marriage heterosexual. In contrast, several speakers did highlight the fact that same-sex marriages had already taken place and opposed the removal of rights that had already been granted and exercised. For example Mrs Patricia Gordon-Pamplin, whose own compromise Civil Union Bill had not

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[76] Ibid. at 883.
[77] See for example, the remarks of Mr Walter H. Roban, ibid. at 906; Mrs Patricia Gordon-Pamplin, at 890; and Mr Trevor Moniz, at 912.
[78] Section 4(5) Marriage (Same-Sex Couples) Act 2013.
[79] Sections 2 and 4 Marriage (Same-Sex Couples) Act 2013.
[80] Supra n 73 at 916. See also Mrs Gordon-Pamplin at 891; Mr Roban at 906; Mr Simmons at 915; and Mr Brown at 921.

been taken to a vote the previous year, could not support the Bill on the basis that the law had already given same-sex couples 'something that does not impact anybody else – *does not impact anybody else* – and now to take it away.'[81] Similarly, Mr Jeff Baron noted that: 'We are removing… we are *removing* equality; we are removing the rights of people like Ms Saltus and Ms Aidoo who married in July … to marry again.'[82] Notably, such sentiments were not limited to those who had previously supported or been lukewarm towards the idea of same-sex marriage: Ms Leah Scott said during the debate that she does not support same-sex marriage, yet she opposed the taking away of a right that had already been granted.[83]

It is, therefore, important to examine why and how this 'compromise' was reached. The opposition to same-sex marriage in Bermuda was led by Preserve Marriage (PM). It has close links with the Christian right in America[84] and some local conservative Churches. For example, the majority of the group's funding reportedly came from unnamed Churches,[85] and the group's spokespersons were named in the media as: Dr Melvyn Basset, a chairman of Child Evangelism Fellowship Bermuda and a Deacon in his Church;[86] Pastor Gary Simons, Senior Pastor at Cornerstone Bible Fellowship; and Mark Hall, who is the Regional Director of Word of Life Caribbean and Bermuda.[87] Despite these clear links to conservative Christian Churches and its aim to uphold marriage 'as a special union ordained by God between a man and a woman',[88] PM appears to downplay its religious influences by presenting itself as 'concerned citizens' rather than an explicitly Christian organisation. A strategy of downplaying biblical arguments in favour of apparently secular ones is one that Preserve Marriage has in common with similar anti-gay-marriage organisations in the United States (the National Organization for Marriage) and the United Kingdom (the Coalition for Marriage).[89] However, there is little doubt that these are organisations that seek to promote a particular, conservative, version of Christianity. The move away from 'biblical injunction and a rhetoric of disease and seduction'[90] is neither new nor limited to the issue of same-sex marriage: over two decades ago Professor Didi Herman identified a pragmatic move by the Christian Right in the United

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[81] Ibid. at 891 (her emphasis).
[82] Ibid. at 898 (his emphasis).
[83] Ibid. at 904.
[84] The National Organization for Marriage reportedly advised PM: Ed., 'NOM Played "Significant Behind Scenes Role"', *Bernews*, 12 February 2018.
[85] This was acknowledged by one of its spokespersons, Dr Basset: Strangeways, 'Preserve Marriage ends plea for funds', *The Royal Gazette,* 22 February 2016.
[86] Ed., 'College honours Dr Bassett, Arlene Brock', *The Royal Gazette,* 7 February 2015.
[87] Ed., 'Preserve Marriage Increases "Action Team"', *Bernews,* 22 December 2015.
[88] Preserve Marriage Bermuda, *Who We Are and Why We Exist: A Snap Shot Overview* (2016), available at: www.preservemarriage.bm [last accessed 24 January 2020].
[89] See: nationformarriage.org/main/resources/family_structure; and www.c4m.org.uk [both last accessed 24 January 2020].
[90] Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (University of Chicago Press, 1997), at 113.

States away from the older discourses on the basis that 'they were no longer useful and, indeed, were mobilizing support for, rather than opposition to, gay rights'.[91] Furthermore, despite the apparently secular arguments presented by PM on its website, the Christian basis of the opposition to same-sex marriage in Bermuda was acknowledged by many of those who spoke during the Parliamentary debates.[92] It was addressed most directly and most effectively by Mr Brown, in a speech that largely prophesised (and was influential in) the eventual Court of Appeal judgment on this issue:

> Now, we also have an evangelical segment within the fundamentalist movement, embraced in part by groups like the Preserve Marriage [sic]. [But] you cannot base sound policy on a particular interpretation of religion. Yes, we may be largely a Christian society, but we are not only Christians here…. [And] if you say you should adopt a Christian interpretation, well, which version of Christianity should you embrace? It is Catholicism, it is AME, is it Seventh-day Adventist, which one? They all have nuances, they all have different views….[93]

The reason why the 'compromise' was necessary, therefore, was a continuing opposition to same-sex marriage, after its introduction, led by a conservative Christian organisation. There were no calls for a domestic partnership provision from the LGBT+ community, who appeared to be satisfied with having access to the institution of marriage. The 'compromise' only became necessary because Mr Furbert threatened to reintroduce his private members' bill, which had, in turn, originated with PM's campaign against same-sex marriage in 2016. Had this bill passed, same-sex marriage would have been abolished with no provision for a domestic partnership in its place.

The process by which the 'compromise' was reached was explained by PLP members of the House during the debate, who told of how the Premier had instructed 'the four combatants'[94] within the party (Mr Brown, Mr Furbert, and two others) to sit in a room and not come out 'until you have come to some position that we, the party, can support'.[95] As Mr Furbert explained:

> The Honourable Walton Brown is not happy with the total Bill. I am not happy with the total Bill. But we sat in the room for . . . as a matter

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[91] Ibid.

[92] See also Chief Justice Kawaley's comment in the Supreme Court judgment that both Preserve Marriage and Mr Furbert had campaigned for the revocation of same-sex marriage on 'explicitly religious grounds': Supra n 10 at para 63. This different perception may be attributable to a different style of campaigning during public meetings and door-to-door canvassing that I have had not access to. My conclusions are based only on reading Hansard, the Preserve Marriage website, and local newspapers, where the opposition to same-sex marriage has been presented in more secular terms.

[93] Supra n 73 at 883.

[94] Mr Neville S. Tyrell, ibid. at 914.

[95] Ibid.

> of fact, one time we told the Premier, No, we're not coming to any conclusions. The Premier said, Go back, make a decision. You have to go back.[96]

Based on his public remarks as well as comments made when I interviewed him in 2014 and 2018, I have no doubt that Mr Brown's support for the DPA was rooted in a desire to find a way to protect access to at least the substantive legal consequences of marriage, if not access to the designation marriage, in the face of determination by PM and Mr Furbert to remove legal recognition for same-sex relationships. However, I would argue that this does not necessarily mean that the Act is a *constitutionally* acceptable compromise. If, as I suggest above, the revocation provision was included in order to satisfy a conservative Christian vision of marriage this would likely violate Bermuda's Constitution, which prohibits legislation created for a religious purpose. Though the DPA when considered as a whole does not initially appear to have a religious purpose, upon closer examination of the history and context it almost certainly does. I would argue that the revocation provision is the *raison d'être* for the whole Act: but for the revocation provision, the Act would not have been introduced. Had PM not been so successful in campaigning against same-sex marriage and then subsequently for its revocation, there would have been no reason to introduce a domestic partnership provision at all: the LGBT+ community were certainly not advocating for such a provision, nor were heterosexual couples seeking an alternative to marriage. The Supreme Court and Court of Appeal judgments on this point are discussed below.

Another broad theme of the same-sex marriage debates, which included but was not limited to the Parliamentary debates on the DPA, was the issue of Bermudian culture, identity, and values, which are closely connected to both race and colonialism. Opponents of same-sex marriage argued that it goes against the cultural values of Bermuda. In doing so, they juxtaposed 'European' values with 'Caribbean' and 'African' values that they say oppose homosexuality,[97] implying that the former are not Bermudian. For example, in oral arguments in *Godwin*[98] Preserve Marriage cited Bermuda's 'Caribbean roots', stating: 'This court is facing a cultural challenge of monumental proportions'.[99] Similarly, during the Parliamentary debates Mr Furbert noted that support or opposition to same-sex marriage was 'almost broken down by race' due to cultural differences: 'the African countries are against same-sex marriage and the Western countries are for it.'[100] Mr Burgess put it in more emphatic terms:

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[96] Ibid. at 894.

[97] This is of course contested, see further: Ekine, 'Beyond Anti-LGBTI Legislation: Criminalization and the Denial of Citizenship' in Bakshi et al. (eds), *Decolonizing Sexualities: Transnational Perspectives, Critical Interventions* (CounterPress, 2016); Campbell, *The Queer Caribbean Speaks: Interviews with Writers, Artists and Activists* (Palgrave, 2014).

[98] Supra n 56.

[99] Strangeways, 'Same-sex: Fear over multiple partner marriages', *The Royal Gazette,* 2 February 2017.

[100] Lagan, 'Furbert defiant in defeat', *The Royal Gazette,* 15 July 2016.

> We know the majority of Europeans support this type of action. I am not from Europe. I am not European. And this country is predominantly black.[101]

However, this narrative was contested. For example, Mr Brown addressed this point directly in his speech, arguing that that the issue is not as racially divided as some contend:

> [During canvassing] at one household, which happened to be a parsonage – and for those who would like to look at it as if the black community is fundamentally against same-sex rights, it happened to be a black household, because there are people who keep count of that – the family said to me, *Mr. Brown, this household supports same-sex marriage*… in a parsonage. So let us not paint everybody with a broad brush.[102]

Similarly, Ms Zakiya Johnson Lord, co-director of OUTBermuda, said that it is 'just not true' that black Bermudians are more opposed to same-sex marriage than whites, noting that there were 'many beautiful allies of all ages, both black and white Bermudians, who have gone out of their way to openly support their LGBT friends and relatives.'[103] Furthermore, it is worth noting that while opponents were portraying same-sex marriage as being primarily supported by white 'Europeans', it is also the case that the American Christian right, to whom PM reportedly looked for advice and support,[104] is 'a *white* movement' with 'few persons of color, and no nonwhite organizations' at its forefront.[105]

Significantly, a number of Caribbean countries that are signatories to the American Convention on Human Rights will be bound by the Inter-American Court of Human Rights' recent Advisory Opinion, which requires same-sex marriage to be recognised.[106] It specifically noted that:

> There would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal", while another institution with identical effects

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[101] Supra n 73 at 918.
[102] Ibid. at 883.
[103] Quoted in Marusic, 'Even Without Gay Marriage, Queer Rights in Bermuda Are Stronger Than the US: And after calls for protests from the likes of Ellen DeGeneres, Bermudians aren't here for it', *them.*, 13 March 2018.
[104] Ed., 'NOM Played "Significant Behind Scenes Role"', *Bernews,* 12 February 2018.
[105] Herman, supra n 90 at 11.
[106] The countries bound by this Convention include: Barbados; Grenada; Jamaica; and the Dominican Republic.

> but with another name would exist for those considered "abnormal" according to this stereotype.[107]

Such a separate institution would be considered discriminatory and would not be permitted in those Caribbean jurisdictions that are signatories to the Convention, other than as 'a transitional situation' for those states encountering 'institutional difficulties' in implementing same-sex marriage and taking into account the time necessary for legislative reform.[108] It is, therefore, likely that 'Caribbean law', if not 'Caribbean values', will shift quite quickly on this in the near future.

Nevertheless, those opposed to same-sex marriage in Bermuda linked it with broader contestations around Bermudian identity and colonialism. This is something that the LGBT+ community had worked hard to avoid during their earlier campaign to include sexual orientation in the Human Rights Act, seeking 'cultural change' alongside legal change rather than appealing to London to intervene. As Mr David Northcott explained when I interviewed him in 2014:

> … we as a group were very conscious of not going down the route of having Britain impose something on us…. [Having sexual orientation protection] doesn't come in a social vacuum and we didn't want it to be in a social vacuum…. Part of our mission statement was that we would achieve this through education, lobbying, and so on and so forth…. We felt that for a more sustainable, accepted, cultural change to take place it had to be contextualised in Bermuda by Bermuda residents…. And not from outside, in terms of the colonial master.[109]

The colonial relationship with the UK would, though, inevitably be invoked through the DPA because it could not become law until the Governor gave Royal Assent. The Governor's decision on whether to grant or refuse Royal Assent was a complicated one, particularly given that Bermuda has been internally self-governing for over 400 years with very little interference from the UK since the Constitution was enacted in 1968. To refuse Assent for a domestic piece of legislation, particularly one as contentious and emotive as this one, would be an act of colonialism, and one that could undermine the work that the Bermudian LGBT+ community had done in terms of building coalitions towards a sustainable cultural change since the Two Words and a Comma campaign. Nevertheless, there were some calls for the Governor to do so.

### *(ii) Royal Assent: The Constitution, the Convention, and the Spectre of Colonialism*

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[107] OC-24/17, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* IACtHR 24 November 2017, at para 224.
[108] Ibid. at para 227.
[109] Mr David Northcott, co-founder Two Words and a Comma, interview with author, 2014.

Although Bermuda is internally self-governing, the Governor is empowered by the Bermuda Constitution Order 1968 to give Royal Assent on behalf of the Crown. The Constitution provides that the Governor may assent, withhold assent, or 'reserve the bill for the signification of Her Majesty's pleasure'.[110] The latter is required in certain circumstances unless the Secretary of State authorises assent, including where legislation appears to the Governor to be either inconsistent with the UK's international obligations or 'in any way repugnant to or inconsistent with the provisions of this Constitution'.[111]

The UK was pressured to refuse Royal Assent from within Bermuda as well as from within the UK, and from international organisations such the Human Rights Campaign. For example, Bermudian litigant Mr Winston Godwin was quoted as telling the Governor that refusing Assent would send 'a message that you not only believe in equality of all people but that you disagree with the stripping of rights'.[112] In the UK Parliament, Mr Chris Bryant led an adjournment debate on 29th January 2018, arguing that while he has 'no desire to upset the delicate balance' between on the one hand the independence of the self-governing Territories in terms of their own law-making, and on the other, the UK's responsibilities, this is 'a deeply unpleasant and very cynical piece of legislation'.[113] The Governor could, Mr Bryant argued, refuse Royal Assent on the basis that it contravened the Bermuda Constitution, section 12 (freedom from discrimination). He additionally refers to the revocation of rights:

> It would have been one thing if the Bermudian Government had introduced civil partnerships as a forward step when there was no such provision in law in Bermuda, but this is a retrograde step – it is taking a step backwards – that deliberately limits the rights currently enjoyed by many Bermudians.[114]

While I would share Mr Bryant's concern about the revocation of rights, the way in which the UK has sought to encourage or cajole other jurisdictions to recognise LGBT+ rights has been criticised as a form of neo-colonialism.[115] In the case of Bermuda and the other British Overseas Territories, it is of course colonialism rather than *neo*-colonialism. The constitutional relationship makes the UK's involvement necessary though no less problematic. During the debate, concerns for LGBT+ rights in Bermuda were linked to the broader neo-colonial project of the UK seeking to influence the expansion of LGBT+ rights elsewhere:

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[110] Section 35(2) Bermuda Constitution Order 1968.
[111] Section 35(2)(a) and (c) Bermuda Constitution Order 1968.
[112] Johnston and Johnston-Barnes, 'Gay Marriage Pioneer's Plea to Governor', *The Royal Gazette,* 14 December 2017. See also Chris Bryant, HC Deb, Vol 635, col 648 (29 January 2018); and Strangeways, 'Same-Sex: US Group Pressures Rankin', *The Royal Gazette,* 14 December 2017.
[113] HC Deb, Vol 635, col 647 (29 January 2018).
[114] Ibid.
[115] For a recent reflection on this, see Lalor and Browne, 'Here Versus There: Creating British Sexual Politics Elsewhere' (2018) 26 *Feminist Legal Studies* 205.

> I take just as active an interest in the human rights of LGBT people in Moscow, Tehran and Beijing as I do in the human rights of those in Hamilton, because the thing is that human rights are… a seamless garment. We cannot divide them up.[116]

However, the relationship with Bermuda is obviously not the same as that with Russia, Iran, or China. It is one thing to express a view to a fellow sovereign nation; it is another to refuse Assent to democratically enacted legislation from an overseas territory. Yet, the UK is responsible for ensuring Bermuda's compliance with international human rights law, including the European Convention on Human Rights. This is the paradox of modern colonialism: the UK seeks a 'partnership'[117] with the British Overseas Territories, yet retains the ability to exercise control over them and, with it, responsibility to do so in certain circumstances. Colonialism remains a spectre in the shadows of the relationship between Bermuda and the UK; Bermudians are aware that it is there, and may or may not wish to exorcise it, but they would definitely rather not see or hear it. A refusal of Royal Assent would bring it forcefully into the light in a context where there are already calls for independence from a nationalist government.[118]

Those speaking during the UK Parliamentary debate did on the whole acknowledge the complexities of the modern (colonial) relationship between Bermuda and the UK. They acknowledged that Bermuda is self-governing, but they also correctly note the UK's responsibilities for human rights in the British Overseas Territories, and the difficult position that the UK found itself in. Mr Bryant acknowledges that some people had told him 'in very robust terms to butt out' as this issue should be left to Bermuda to resolve.[119] However, in the opinion of Mr Bryant and other speakers the events in Bermuda would impact on Britain's reputation around the world.[120]

Speaking on behalf of the UK government, Sir Alan Duncan expressed his disappointment in the removal of rights, but emphasised the government's belief that the 'best approach is to encourage, persuade and, if necessary, cajole' and that the relationships with the Territories are best served if they are based on 'partnership and consensus'.[121] Any intervention from the UK in legislation from an Overseas Territory without its consent would be 'an exceptional step' and, as such, 'the Secretary of State is considering the implications of the Bill very

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[116] Mr Chris Bryant, HC Deb, Vol 635, col 649 (29 January 2018).
[117] See for example: Foreign and Commonwealth Office, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (Cm 4264) (1999); and Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (Cm 8374) (2012).
[118] Minister for Home Affairs, Walton Brown, interview with the author, 2018. See also Jonathan Bell, 'Burt: Our Next Chapter is Independence', *The Royal Gazette,* 23 May 2018.
[119] Supra n 116.
[120] See also Mr Sandy Martin, HC Deb, Vol 635, col 653 (29 January 2018).
[121] HC Deb, Vol 635, col 652 (29 January 2018).

carefully.'[122] The UK's colonial cajoling should, it seems, remain in the shadows.[123]

The Governor gave Royal Assent to the legislation on 7 February 2018 and in her explanation given to the UK Parliament the following day the Minister, Mrs Harriett Baldwin, reiterated the assertion that the UK should only intervene in exceptional circumstances.[124] There have been examples of the UK intervening in the past where domestic legislatures have declined to make their laws compatible with the ECHR. For example, the UK required the Caribbean Overseas Territories to decriminalise sex between men and to abolish the death penalty.[125] However, same-sex marriage is not in the same category as these issues because there is not yet clear jurisprudence from Strasbourg requiring same-sex marriage. The UK government, like Bermuda's (see above), appeared to be under the impression that the Domestic Partnership Act is compatible with the ECHR:

> It is important to recognise that the regime for domestic partnerships implemented by Bermuda in its Domestic Partnership Act can also meet the European Court of Human Rights requirement for legal recognition of same-sex relationships.[126]

I return to this question below, arguing that this issue is far less clear than this statement implies. Nevertheless, given the circumstances in which the Domestic Partnership Act was passed, it would have been both difficult and unwise for the UK to refuse Assent. While the revocation of the right to marry itself is problematic and legally dubious (as I argue below), it should be the courts rather than the UK government that decides that point and, if necessary, overturns the DPA. In addition to being an act of colonialism rather than partnership, refusing Assent would have risked both a backlash against LGBT+ rights as a 'European' import and a constitutional crisis.

## 3. The Constitutional Challenge: The Litigation in *Ferguson; OUTBermuda*

### A. Same-Sex Marriage and Religion

In the absence of a constitutional anti-discrimination provision protecting against sexual orientation discrimination, and in the absence of a right to marry or protection for private and family life in Bermuda's Constitution, a constitutional challenge to the Domestic Partnership Act appeared at first glance to be a lost cause. In fact, the Chief Justice quickly dismissed most of the arguments made by the applicants in *Ferguson; OUTBermuda*, but OUTBermuda

[122] Ibid.
[123] Cf: Section 51(2) Sanctions and Anti-Money Laundering Act 2018.
[124] HC Deb, Vol 635, col 1651 (8 February 2018).
[125] Caribbean Territories (Abolition of the Death Penalty for Murder) Order 1991; and the Caribbean Territories (Criminal Law) Order 2000.
[126] Mrs Harriett Baldwin, HC Deb Vol 635, col 1649 (8 February 2018).

had built coalitions with religious groups and individuals who supported their application and became co-applicants, which proved crucial. In this way, the litigation in this case became not about 'sexual orientation versus religion', in the way that it has generally been framed elsewhere,[127] but rather about whether the state can prioritise one set of (religious or non-religious) beliefs over another. In this respect, the litigation in Bermuda changes the terrain on which same-sex marriage cases have generally been fought.

The first strand of Ferguson and OUTBermuda's case was that the DPA was enacted for an impermissible religious purpose, contrary to section 8 of the Constitution.[128] Chief Justice Kawaley accepted that the revocation provision 'clearly reflected the beliefs of [Preserve Marriage] which had canvassed for their adoption on explicitly religious grounds' and that they were 'substantially the same' as those contained in Mr Furbert's private members bill, which had been introduced on 'explicitly religious grounds'.[129] However, he concluded that the DPA must be considered as a whole, rather than taking the revocation provision in isolation. The Act as a whole had been introduced as part of a political compromise and had 'a predominantly secular purpose'.[130] The revocation provisions, according to the Chief Justice were also not enacted 'solely or substantially for religious purposes',[131] but rather had a 'mixed religious and secular purpose.'[132] He accepted the government's evidence that the DPA was 'a realistic compromise' between those who opposed any form of recognition for same-sex couples and those who wanted to retain same-sex marriage.[133]

In contrast, the Bermuda Court of Appeal took the view that if the *primary* purpose of the Act were religious, it would fall foul of section 8 of the Constitution, 'even if that was not the only purpose'.[134] Summarizing the events that led up to the enactment of the DPA, beginning with the addition of sexual orientation to the Human Rights Act in 2013, the Court determined that the purpose of the revocation provision was to reverse the decision in Godwin.[135] They recognised its origin in the Furbert Bill, which in turn had been heavily influenced by and 'aligned closely with the promotional material' of Preserve Marriage, 'a religious lobby created to oppose same-sex marriage'.[136] The Court accepted that 'the Act as a whole was a political compromise introducing a comprehensive scheme for same-sex relationships and fulfilled an election promise'.[137] However, by examining the underlying reason for the revocation provision, they concluded that it was introduced primarily for a religious purpose. It is the purpose of that particular provision that is critical, not the

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[127] See for example Samuels, 'Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights' (2015) 8 *Ecclesiastical Law Journal* 74.
[128] Supra n 10 at para 5.
[129] Ibid. at para 63.
[130] Ibid.
[131] Ibid. at para 70.
[132] Ibid. at para 63.
[133] Ibid. at para 68.
[134] Supra n 11 at para 20.
[135] Ibid. at para 27.
[136] Ibid. at para 34.
[137] Ibid. at para 40.

purpose of the Act as a whole.[138] On that basis, the Court of Appeal held that the DPA violates the Constitution.

In the second, and potentially far-reaching, strand of their case, the LGBT+ applicants were supported by Dr Gordon Campbell on behalf of the Wesley Methodist Church, Ms Sylvia Hayward-Harris (a minister), and the Parlor Tabernacle of the Vision Church of Bermuda. They complained of a violation of the constitutional rights to freedom of conscience and the right not to be discriminated against.[139] Ms Hayward-Harris told the court that the DPA 'prevents me from conducting same-sex marriages, something which is an important part of my religious beliefs.'[140] Moreover, on behalf of the Wesley Methodist Church, Dr Gordon Campbell noted that while post-*Godwin* religious organisations were able to choose whether or not to perform same-sex marriages, the DPA was the result of 'several churches and individuals' having persuaded the government to enact their religious belief into law:

> When that law… [the DPA] comes into effect on 1 June 2018, *everyone whether they hold that belief or not will be bound by those churches' and individuals' belief*. On that date, our congregation will lose the right to choose for itself whether or not to perform legally-recognized same-sex marriages.[141]

This was a key argument in persuading the Chief Justice to find the DPA unconstitutional. Section 8(1) of the Bermuda Constitution provides that: 'Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience'. This includes freedom of thought and religion (including non-religious beliefs), freedom to change such beliefs, and freedom to 'manifest and propagate' these beliefs in 'worship, teaching, practice and observance'. It replicates section 22 of the Bahamas Constitution, which was considered by the Privy Council in *Royal Bahamas Defence Force and others v Laramore*.[142] The Chief Justice quotes extensively from Lord Mance's opinion in *Laramore*, in which he states that: 'It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance'. The 'objective element' arises only after 'the nature of the individual's particular beliefs has been identified.'[143] The Chief Justice also cites the Privy Council's view in both *Laramore* and their previous opinion in *Olivier v Buttigieg*[144] that courts should be slow to conclude that an interference with freedom of conscience is 'too trivial to qualify for protection'.[145] He concludes that:

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[138] Ibid. at para 42.
[139] Supra n 10 at para 11.
[140] Ibid. at para 18(c).
[141] Ibid. at para 9 (my emphasis).
[142] [2017] UKPC 13. This was outlined by the Chief Justice in *Ferguson; OUTBermuda*, ibid. at para 73.
[143] *Laramore*, ibid. at para 14.
[144] [1967] A.C. 115, at 136-137.
[145] Supra n 10 at para 76.

> Just as [Preserve Marriage] and its members genuinely believe that same-sex marriages should not be legally recognised, the Applicants and many others equally sincerely hold opposing beliefs. *It is not for secular institutions of Government, without constitutionally valid justification, to direct the way in which a citizen manifests their beliefs*…. Persons who passionately believe that same-sex marriages should not take place for religious or cultural reasons are entitled to have those beliefs respected and protected by law. But, in return for the law protecting their own beliefs, they cannot require the law to deprive persons who believe in same-sex marriage of respect and legal protection for their own beliefs.[146]

In making this finding, the Chief Justice distinguishes the Canadian case of *Halpern v Attorney-General of Canada and Others*, one of the earliest same-sex marriage cases.[147] In this case, the Ontario Court of Appeal rejected a complaint from the Metropolitan Community Church that its freedom of conscience rights were infringed because they were not able to perform same-sex marriages. The Chief Justice considered the freedom of conscience issue in *Halpern* to be peripheral to the Court's main decision, in which the applicants had succeeded on other grounds to establish discrimination, and also found the 'overly restrictive' approach to be inconsistent with the 'generous approach' to freedom of conscience taken by the Privy Council in the case of *Laramore*.[148] He was also able to distinguish *Halpern* for two other important reasons: first, in contrast to Ontario, legally recognised marriages had already taken place in Bermuda and that recognition is being removed; and second, in this case, the belief is not only in marriage as a religious ceremony, but as 'a legally recognised civil ceremony as well'.[149] The Court of Appeal upheld the Supreme Court's judgment and reasoning in relation to freedom of conscience, emphasising that belief in marriage, whether opposite- or same-sex, is a fundamental one and that 'following the decision in Godwin, Bermuda law drew no distinction between the two until the DPA became law'.[150]

In addition to contravening the Constitution's freedom of conscience provision in section 8, the Supreme Court also found discrimination on the grounds of creed under section 12 in relation to Ms Sylvia Hayward-Harris, the Parlor Tabernacle of the Vision Church of Bermuda, and Dr Gordon Campbell on behalf of the Wesley Methodist Church. They complain 'solely about the impairment of their ability to manifest their beliefs by celebrating same-sex marriages' and, as such, the discrimination against them is 'very clearly "wholly or mainly attributable to" their creed' as required by section 12(4) of the Constitution.[151] In contrast, the discrimination against the other applicants, Mr Ferguson, OUTBermuda and Ms Jackson, is mainly due to their sexual orientation, which is not protected in the Constitution. However, the Court of

[146] Supra n 10 at para 89-90 (my emphasis).
[147] Supra n 13.
[148] Supra n 10 at para 88.
[149] Ibid. at para 87 (emphasis in original).
[150] Supra n 11 at para 70.
[151] Supra n 10 at para 101.

Appeal overturned the Supreme Court's decision on this point, finding that while 'creed' should be given a broad meaning, all definitions of it 'refer to a *system or set of beliefs* rather than a single belief.'[152] As the respondents' case was based on a single belief, 'namely a belief in marriage recognised by law in which same-sex couples ought to be able to participate,'[153] this would not fall within the definition of 'creed' to be protected by the Constitution.

These judgments are striking in their re-conception of the relationship between religion and LGBT+ rights, deftly overcoming the oppositional way in which they are presented and in so doing reflect some of the criticisms of both sides made by Mr Brown in his Parliamentary speech introducing the DPA. The judgments recognise what Mr Brown had himself passionately articulated during the Parliamentary debates through his story of canvassing at the parsonage: some religious bodies support same-sex marriage. Their beliefs (as well as the beliefs of those who seek to marry for non-religious reasons) deserve to be protected just as much as those of the more dominant religious beliefs that oppose it. For the religious individuals and organisations seeking to perform same-sex marriages, the 'compromise' of the DPA is irrelevant: it is not a question of whether the legal rights of marriage have been (or can be) replicated for same-sex couples. It is about the meaning of, and access to, the institution of marriage itself. When the debate is framed in this way it becomes clear that it is not an acceptable compromise to impose the beliefs regarding marriage of one group on those holding contrary views.

This conclusion in some ways mirrors that of the UK courts in *Steinfeld and Keidan v Secretary of State for Education.*[154] Rebecca Steinfeld and Charles Keidan wanted legal recognition for their committed, long-term relationship, but had 'deep-rooted and genuine ideological objections to marriage based upon what they consider to be its historically patriarchal nature.'[155] They sought access to civil partnership, which, in their view, would better 'reflect their values and give due recognition to the equal nature of their relationship'.[156] Though their case was not based on freedom of conscience, their argument was, essentially, the other side of the coin to that made by the applicants in *Ferguson; OUTBermuda*. For the latter, their deep-rooted and genuine belief in the institution of marriage inspired their claim, while Steinfeld and Keidan's case was based on objections to the institution.

The applicants in *Steinfeld* relied on Article 14 ECHR, in conjunction with Article 8. In the Court of Appeal, Lady Justice Arden, whose judgment was recently endorsed by the UK Supreme Court,[157] found that allowing same-sex couples but not different-sex couples to access civil partnerships was discriminatory. Significantly for the Bermudian 'compromise', she found that

[152] Supra n 11 at para 75.
[153] Ibid.
[154] [2017] EWCA Civ 81.
[155] Ibid. at para 5.
[156] Ibid. at para 5.
[157] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

discrimination 'does not cease because an opposite-sex couple can marry and so avoid the need for a civil union'.[158]

> In my judgment, the Strasbourg Court would reject the "can-marry" submission too. The appellants have rejected marriage on the basis of opinions that they are entitled to hold. Marriage is not an effective option for them, and Convention rights have to be interpreted so as to be practical and effective and not theoretical and illusory.[159]

The existence of an alternative form of recognition for their relationship did not bar the applicants from 'showing that their complaint falls within the "ambit" of Article 8.'[160]

The Bermudian 'compromise' of the DPA extending marriage-like benefits to same-sex couples then, would also be unlikely to be considered by the Judicial Committee of the Privy Council to be a good answer to a discrimination claim regarding the revocation of same-sex marriage. Though they are not identical, Convention jurisprudence is regularly drawn upon by the Bermuda courts seeking to interpret the Constitution for two reasons: the fundamental rights chapter was 'greatly influenced' by the Convention;[161] and there is a presumption that the Bermuda Parliament would not intend to legislate in a way that is inconsistent with the UK's international obligations.[162] As such, the interpretation of the qualified rights of the Convention will influence the way in which the courts interpret the similarly qualified freedom of conscience provision in the Bermuda Constitution.

This does not, however, mean that the Bermuda government would necessarily be unable to justify the differential treatment. In the Bermuda Supreme Court and Court of Appeal, the government chose to 'fight mainly on the terrain which most favoured the applicants': the claim that there was no interference with fundamental rights.[163] As such, they did not offer any arguments that the interference could be justified. In the remainder of this section, I consider whether there could be a justification for the interference, given the context in which the DPA was enacted in Bermuda. I then explore the issue of Convention rights, which were raised several times during the parliamentary debates in both Bermuda and the UK (above). I argue that the assumption that the DPA is compatible with the Convention may well be misguided in failing to take account of the potentially significant distinction between a state declining to enact same-sex marriage, and a state revoking a previously-exercised right to same-sex marriage.

### B. Revocation of the Right to Marry: Is There a Justification?

[158] Supra n 154 at para 18.
[159] Ibid. at para 40.
[160] Ibid. at para 44.
[161] Supra n 59 at 328, per Lord Wilberforce.
[162] See: *Marshall v Wakefield and Accardo* [2009] SC (Bda) 22 Civ at 13.
[163] Supra n 10 at para 48.

In his judgment, Chief Justice Kawaley addresses the issue of whether Parliament had the power to revoke part of the Human Rights Act according to domestic constitutional law. He explains that in June 2016, following the *A and B* and *Bermuda Bred* cases, Parliament amended the supremacy provisions in the Human Rights Act, s30B, making it easier to opt out through delegated, rather than only through primary, legislation. This, he suggests, emphasises the point that the supremacy provisions in the Act 'have always been subject to Parliamentary dilution'.[164] As a result, he finds it unsurprising that the government decided to legislatively reverse *Godwin* rather than appeal.[165] While the fact that marriage was revoked after the right had already been exercised was, for the Chief Justice, an aggravating factor rather than one that was integral to the question of whether constitutional rights were breached,[166] I will argue that the distinction between revocation of a right and refusing to create a right becomes more significant in relation to whether the government can *justify* the interference.

The government would need to establish that the interference with freedom of conscience is justified according to the Bermuda Constitution, section 8(5). Using similar language to Article 9(2) ECHR, this provides that there will not be a violation of section 8 where the law:

> … makes provision which is reasonably required (a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited interference of persons professing any other religion or belief.

The appellate courts could therefore be asked to determine whether the revocation of marriage for same-sex couples was 'reasonably required'. Arguments based on defence, public safety, public order, public morality, or public health, would be undermined by the fact that same-sex relationships are legally recognised in the DPA, and the fact that existing same-sex marriages will continue to be recognised *as marriages*. For example, in the case of *Laramore,* the appellant's assertions about the importance of all personnel taking part in prayers for 'uniformity of behaviour… good order and discipline' were undermined by the fact that for 13 years non-Christian personnel had been excused from prayers.[167] In relation to subsection (b), it is difficult to imagine how the rights and freedoms of other persons are infringed by the mere existence of legally recognised same-sex marriage, in the absence of them being compelled to celebrate them. Indeed, it appears that it is the rights of the applicants to practise their religious beliefs that are interfered with by those professing contrary beliefs about the definition of marriage. As same-sex marriage had already been taking place for a year when the DPA came into force, it will be difficult for the Bermuda government to argue that its prohibition was

[164] Supra n 10 at para 57.
[165] Ibid. at para 58.
[166] Ibid. at para 81.
[167] Supra n 142 at para 29.

'reasonably required' absent evidence of some harm to others as a result of same-sex marriage during that year.

Given the frequent mentions of the 'margin of appreciation' and public opinion during the Parliamentary debates, it may be safe to assume that the Bermuda government would seek to argue that they enacted the DPA in response to widespread public opposition to same-sex marriage. They may contend that they should, therefore, be accorded a wide discretion as they are better placed to assess such policy considerations in the local context. While the margin of appreciation in the sense used by the European Court of Human Rights is not applicable in domestic courts,[168] they may nevertheless give the executive and legislature 'a measure of latitude'[169] to 'defer, on democratic grounds, to the considered opinion of the elected [Parliament].'[170] For example, in *Steinfeld* there was a potentially strong reason to give the UK government such latitude: they were in the process of evaluating whether civil partnerships should be retained at all following the introduction of same-sex marriage and the Secretary of State wanted to await the outcome of that review before extending them to different-sex couples. As Lord Justice Beatson noted in the Court of Appeal, finding in favour of the government on this point, the Strasbourg Court has afforded States 'a certain flexibility as to the timing' and content of legislative changes.[171] On the basis of the comments made in the Parliamentary debates, the Bermuda government may seek to argue that Bermuda is not yet 'ready' for same-sex marriage and that they ought to be able to determine the timing of its introduction. However, the UK Supreme Court's response to a much less vague (though still indeterminate) timescale in the UK government's 'wait and see' defence in *Steinfeld*, suggests that this argument would not be successful in the JCPC. Lord Kerr is particularly sceptical of such an argument where 'it was Parliament itself that brought about an inequality… where none previously existed':

> The redressing by the legislature of an imbalance which it has come to recognise is one thing; the creation of inequality quite another. To be allowed time to reflect on what should be done when one is considering how to deal with an evolving societal attitude is reasonable and understandable. But to create a situation of inequality and then ask for the indulgence of time – in this case several years – as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion.[172]

In a context where same-sex marriages had been taking place for a year and where existing same-sex marriages will continue to be recognised as such, it is difficult to see how an argument that Bermuda is 'not ready' for same-sex

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[168] *In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, para 118, per Lady Hale.
[169] Supra n 157 at para 29, per Lord Kerr.
[170] *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, at 381B, per Lord Hope. Cited in *Steinfeld*, ibid.
[171] Supra n 154 at para 138.
[172] Supra n 157 at para 36.

marriage could be accepted following *Steinfeld*. On this basis, it seems unlikely that the JCPC would reverse the decision of the Bermuda Courts. However, even if the Bermuda government were successful and the JCPC found that the DPA did not violate the Constitution, there remains the question of whether it is compatible with the UK's international obligations under the European Convention on Human Rights.

## 4. Beyond *Schalk* and *Oliari*: Is the DPA Consistent with the UK's International Obligations?

### A. Same-Sex Marriage under the ECHR

The case of *Oliari v Italy* was cited repeatedly as authority for the proposition that while some form of legal recognition was required, same-sex marriage was not. In the context of the facts of that case and the time at which it was decided, this is correct. *Oliari* has been confirmed in the subsequent cases of *Hämäläinen v Finland*,[173] and *Chapin and Charpentier v France*,[174] which both found that there was no violation of Article 14 taken together with Article 12 where States did not legally recognise same-sex marriages.

While it has not yet required same-sex marriage, the case law of the European Court of Human Rights has steadily progressed from recognising that same-sex couples can have a 'home life' together that falls within the ambit of Article 8 for the purposes of tenancy succession in 2003,[175] to recognising that a cohabiting same-sex couple could enjoy 'family life' by 2010.[176] In explaining this evolution in its interpretation of the Convention rights, the Court cites 'a rapid evolution' in attitudes towards same-sex couples in many member States.[177] By 2010 it was well established that 'differences based on sexual orientation require particularly serious reasons by way of justification', but a wide margin of appreciation was still given to States regarding matters of 'economic or social strategy'.[178] In the case of *Schalk and Kopf v Austria*, the Court noted 'an emerging European consensus' in favour of recognising same-sex relationships, though it had not yet become an established consensus.[179] As such, States must continue to 'enjoy a margin of appreciation in the timing of the introduction of legislative

[173] *Hämäläinen v Finland* Application No 37359/09, Merits and Just Satisfaction, 16 July 2014.
[174] *Chapin and Charpentier v France* Application No 40183/07, Merits and Just Satisfaction, 9 June 2016.
[175] *Karner v Austria* Application No 40016/98, Merits and Just Satisfaction, 24 July 2003.
[176] *Schalk and Kopf v Austria* Application No 30141/04, Merits and Just Satisfaction, 24 June 2010.
[177] Ibid. at para 93.
[178] Supra n 176 at para 97.
[179] Ibid.

changes,'[180] and there was no requirement that any recognition introduced must be comparable to marriage.[181]

By the time of the judgment in *Oliari* in 2015, that consensus had become established with over half of member States offering comprehensive marriage-like recognition to same-sex couples, and the margin had narrowed. The Court noted that it had already acknowledged in *Schalk* and the later case of *Vallianatos v Greece*,[182] that same-sex couples are in 'a relevantly similar situation' to different-sex couples regarding their need for legal recognition. Unlike Austria, Italy offered no form of relationship recognition to same-sex couples and in the context of 'continuing international movement towards legal recognition, to which the Court cannot but attach some importance',[183] the Italian government had 'overstepped their margin of appreciation'.[184]

Nevertheless, it remains the case that the European Court of Human Rights has not (yet) interpreted Articles 12 and 14 as requiring states to recognise same-sex marriage. The first reason the Court has given for this is the language of the text itself: 'Men and women of marriageable age…' has so far been read along side the final phrase in the Article, 'according to national laws governing the exercise of this right' to mean that Article 12 does not require States to recognise same-sex marriages.[185] Given that no other Article specifically references 'men and women', the phrase has been taken to be a deliberate reference to marriage as a heterosexual institution.[186] I would suggest, however, that it would be a strange emphasis for the drafters to have deliberately made given that sex between men was not decriminalised until almost 30 years after the Convention was ratified.[187] On that basis, it would be unlikely that the drafters had contemplated the possibility of same-sex marriage at all. Furthermore, Paul Johnson has argued based on the preparatory work of both the European Convention and the Universal Declaration of Human Rights that the objective in specifying 'men and women' was to address gender inequality and discrimination in marriage.[188] It is also well established that the Convention is 'a living instrument' that must be 'interpreted in present-day conditions',[189] and in *Schalk*, the Court indicated that it is not necessarily the case that 'the right to marry must *in all circumstances* be limited to marriage between two persons

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[180] Ibid. at para 105.
[181] Ibid. at para 108.
[182] *Vallianatos and others v Greece* Application nos. 29381/09 and 32684/09, Merits and Just Satisfaction, 7 November 2013.
[183] *Oliari,* supra n 17 at para 178.
[184] Ibid. at para 185.
[185] See: *Schalk*, supra n 176; *Hämäläinen*, supra n 173; *Oliari*, supra n 17.
[186] Supra n 176 at para 55.
[187] *Dudgeon v United Kingdom* Application No 7525/76, Merits, 24 February 1982. See also Johnson, '"The choice of wording must be regarded as deliberate": Same-sex marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) *European Law Review* 207, at 222.
[188] Johnson, ibid.
[189] *E.B. v France* Application 43546/02, Merits and Just Satisfaction, 22 January 2008; and *Goodwin v United Kingdom* Application 28957/95, Merits and Just Satisfaction, 11 July 2002, both cited in *Schalk*, supra n 176 at para 57.

of the opposite sex'.[190] In this context it is worth noting that it may be persuasive to the Strasbourg Court that the Inter-American Court of Human Rights in their recent Advisory Opinion rejected a restrictive interpretation of similar language in their Convention, finding that the phrase 'men and women of marriageable age' does not mean that 'this is the only form of family protected by the American Convention'.[191] In reaching this conclusion, the Court referenced the absence of discussion of same-sex couples in the preparatory work, which they attributed to 'the historic moment during which this instrument was adopted'.[192] Rejecting a procreation justification and noting that the meaning of 'marriage' has changed over time, they concluded that different treatment of same-sex and heterosexual couples 'does not pass the strict test of equality' because 'there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate'.[193]

This rationale for excluding same-sex marriage does appear to be decreasing in significance, as in the more recent Strasbourg cases more emphasis has been placed on a second reason for not requiring same-sex marriage to be recognised under Article 12: the margin of appreciation. In *Schalk*, the Court found that:

> …marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.[194]

The case law on the recognition of same-sex relationships (as described above) demonstrates that over time, as a consensus emerges, the margin of appreciation narrows.[195] In *Oliari*, despite the 'gradual evolution' on the matter and an increase in the number of States that by then recognised same-sex marriage, the Court reiterated that Article 12 does not require States to grant access to marriage for same-sex couples. It is unclear how many countries would need to recognise same-sex marriage before a consensus would be established, but at the time that the *Oliari* case required States to provide civil partnerships 24 out of the 47 member States had such a provision.[196] At the time of the *Oliari* judgment eleven countries within the Council of Europe recognised same-sex marriages, now sixteen do.[197]

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[190] As noted in *Oliari*, supra n 17 at para 191 (my emphasis).
[191] Supra n 107 at para 182.
[192] Ibid. at para 186.
[193] Ibid. at para 220.
[194] Supra n 176 at para 62.
[195] See also Hamilton, 'Same-sex marriage, consensus, certainty and the European Court of Human Rights' (2018) 1 *European Human Rights Law Review* 33.
[196] Supra n 17 at para 178.
[197] Ibid. at para 192. The countries recognising same-sex marriage at the time of writing are: Austria; Belgium; Denmark; Finland; France; Germany; Iceland;

## B. Violation of Article 12

The margin of appreciation on introducing same-sex marriage continues to narrow but has not yet reached the point where member states must create provision for same-sex marriage. However, my argument is that the situation in relation to Bermuda ought to be distinguished from the previous case law because there is a significant difference between declining to enact same-sex marriage and revoking it once it has already been recognised for a year. Once same-sex marriage is recognised by a State, Article 12 should be engaged in the same way as it is for different-sex couples for a number of reasons. First, the phrase 'men and women' in Article 12 has, as noted above, been interpreted restrictively at least in part due to the last phrase in the Article 'according to the national laws governing the exercise of this right'. The fact that in Bermuda at the time of revocation same-sex marriage was recognised in accordance with national law, removes this support for the narrow reading of 'men and women'. This, combined with the Court's previous statement in *Schalk* (noted above) that marriage may not *in all circumstances* be restricted to men and women and the persuasive authority of the recent Inter-American Court of Human Rights' Advisory Opinion, may lead the Strasbourg Court or the JCPC to reconsider this interpretation. Furthermore, as the Court emphasised in *Goodwin v UK*:

> It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.[198]

For marriage to be restricted or partially abolished by a State as it has been in Bermuda without this even *engaging* Article 12 would arguably render the right to marry 'theoretical and illusory'.

Once it is engaged Article 12 is strong right. The European Court of Human Rights has previously noted that unlike Article 8:

> Article 12 does not include any permissible grounds for an interference by the State… [acting] "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others".[199]

Instead of applying the usual Article 8 tests of 'necessity' and 'pressing social need', then, the Court 'would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate'.[200] It may be that the Bermuda government would argue that

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Ireland; Luxembourg; Malta; Norway; Portugal; Spain; Sweden; the Netherlands; and the United Kingdom.

[198] *Goodwin*, supra n 189 at para 74.

[199] *O'Donoghue v United Kingdom* Application 24848/07, Merits and Just Satisfaction, 14 December 2010, at para 84.

[200] Ibid. at para 84.

the revocation provision was neither arbitrary nor disproportionate but rather a carefully crafted political compromise, reflecting local conditions. However, there are two features of the DPA in particular that suggest that it was in fact arbitrary and disproportionate: first that it constitutes a blanket prohibition on future marriages between those in a minority group; and second that existing same-sex marriages continue to be recognised as marriages.

The Strasbourg case law on Article 12, as the UK's House of Lords has noted, 'reveals a restrictive approach',[201] and the European Court of Human Rights has emphasised that any limitations introduced on the right to marry 'must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'.[202] For example, in *B and L v United Kingdom*, the applicants were unable to marry because they were parent-in-law and child-in-law. Having divorced their respective spouses, they sought to marry each other but under English law were unable to do so unless both of their former spouses were deceased or a private Act of Parliament was passed to permit the marriage. The Court noted that the bar on marriage between a parent-in-law and child-in-law 'is aimed at protecting the integrity of the family… and preventing harm to children'.[203] These are, it notes, legitimate aims. However, it also notes that the bar does not prevent such relationships from occurring and there are no other laws prohibiting them. Opinions on the issue of whether or not the bar should be lifted during a debate in Parliament had been divided and 'the significance that the Court would otherwise attach to the legislature's consideration of the matter is outweighed by one important factor': there is not an absolute prohibition on these marriages.[204] They can take (and have taken) place pursuant to a private Act of Parliament. As such:

> The inconsistency between the stated aims of the incapacity and the waiver applied in some cases undermines the rationality and logic of the measure.[205]

Therefore, the Court found that there had been a violation of Article 12. There are a number of common factors between this case and Bermuda's revocation of same-sex marriage. The prohibition of any future same-sex marriages does not prevent same-sex relationships from occurring or being recognised as marriage like; in fact, the same legislation provides a mechanism for a marriage-like form of recognition as 'domestic partnership'. There is also not an absolute prohibition on same-sex marriages: marriages that were formed during the twelve months in 2017-2018 in which same-sex marriage was legally recognised prior to the DPA (and those formed after the Court of Appeal decision to strike it down) will continue to be recognised *as marriages*. Like in the *B and L* case, this inconsistency undermines the rationality and logic of any claimed 'legitimate

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[201] *R (Baiai and another) v Secretary of State for the Home Department* [2008] UKHL 53, at para 14.
[202] *B and L v United Kingdom* Application no. 36536/02, Merits and Just Satisfaction, 13 September 2005, at para 34.
[203] Ibid. at para 37.
[204] Supra n 202 at para 39.
[205] Ibid. at para 40.

aim' in prohibiting future same-sex marriages from taking place. On this basis, there is a strong case to be made that Bermuda's revocation provision violates Article 12 and thus is incompatible with the United Kingdom's international obligations.

There is further support for this position from the case of *O'Donoghue v United Kingdom*,[206] where the Court went further than it had in *B and L*. The UK had introduced a Certificate of Approval scheme, which required those subject to immigration control to seek the Secretary of State's approval before they could marry in the UK. Pursuant to that, the immigration authorities had decided that those who did not have leave to remain, or who had less than three months remaining, would be denied a Certificate unless they could provide information confirming that their relationship was genuine. The Court held that a 'blanket prohibition on the exercise of the right to marry on all persons in a specified category' constituted a violation of Article 12. Citing *Hirst v United Kingdom (No.2),*[207] they reminded the UK that:

> … a general, automatic and indiscriminate restriction on a vitally important Convention right fell outside *any acceptable margin of appreciation*, however wide that margin was.[208]

If a restriction of the right to marry for those who fall within a specific category of being subject to immigration control is outside of any acceptable margin of appreciation and violates Article 12, the withdrawal of the right for another specified minority group must also be. On that basis, if I am correct that the introduction of same-sex marriage engages Article 12, the revocation of the right to marry for same-sex couples must violate Article 12.

### C. Violation of Article 14 in Conjunction with Article 12

If Article 12 is not engaged, there is nevertheless a strong case to be made that once same-sex marriages have taken place, this must take them at least 'within the ambit of' Article 12 for the purposes of engaging Article 14. In order to come within the ambit of a Convention right it is not necessary for that right to be violated or even engaged.[209] In fact, Article 14 is arguably most useful where a state has extended a right beyond the minimum required in the Convention but has done so in a discriminatory way. For example, although a state is not required to accept immigrants for settlement and therefore there was no violation of Article 8 taken alone when a non-UK national who was married to a UK national was refused settlement, in *Abdulaziz v United Kingdom* the Court held that Article 14 was engaged in circumstances where the immigration rules

[206] Supra n 199.
[207] Application No. 74025/01, Merits and Just Satisfaction, 6 October 2005.
[208] Supra n 199 at para 89 (my emphasis).
[209] See for example *Carvalho Pinto de Sousa Morais v Portugal* Application No 17484/15, Merits and Just Satisfaction, 25 July 2017, at para 34.

for spouses differentiated based on sex.[210] Based on *Abdulaziz*, it is arguable that although states are not required by Article 12 to introduce same-sex marriage, where they have done so any subsequent discrimination in relation to same-sex marriages would engage Article 14. As the Court said in that case:

> The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.[211]

To revoke marriage only for same-sex couples is clearly less favourable treatment sufficient to engage Article 14 in conjunction with Article 12, even if Article 12 alone would not require same-sex marriage.

It would be discriminatory under Article 14 to treat differently 'without an objective and reasonable justification, persons in relevantly similar situations'.[212] In previous case law, same-sex couples have been distinguished from heterosexual spouses on the basis that the latter have been granted a 'special status' through marriage.[213] This distinction would not be applicable in relation to Bermuda at the time of the enactment of the DPA, as both groups could marry. The next question, then, is whether the difference in treatment is objectively and reasonably justified. The Court has previously determined that to meet this requirement, the different treatment must firstly pursue a legitimate aim and secondly 'there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[214]

It is well established in the case law on Article 14 that differences in treatment based on sexual orientation require 'particularly serious reasons' by way of justification.[215] As I have argued above in relation to domestic law, possible justifications based on preserving marriage as a heterosexual institution or strong public opinion against the recognition of same-sex marriages, are undermined by the continued recognition of existing same-sex marriages as marriages. Although the DPA was a political compromise, the time for this compromise was *prior to* the recognition of same-sex marriages. Had it occurred at that time, it would arguably have been considered a proportionate measure and within the UK's margin of appreciation in relation to the timing of progressive legislative change. While some have argued that the 'living

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[210] *Abdulaziz, Cabales and Balkandali v United Kingdom* Application Nos 9214/80; 9473/81; 9474/81, Merits and Just Satisfaction, 28 May 1985, at para 71.

[211] Ibid. at para 82.

[212] *DH v Czech Republic* Application No 57325/00, Merits and Just Satisfaction, 13 November 2007, at para 175.

[213] See for example *Gas and Dubois v France* Application 25951/07, Merits and Just Satisfaction, 15 March 2012, at para 68. Notably, Strasbourg Court's reasoning in this respect has been criticized by the Bermuda Supreme Court in *A and B*, supra n 30.

[214] *Stec and others v United Kingdom* Application Nos 6573/01 and 65900/01, Merits, 12 April 2006, para 51.

[215] See for example *Schalk*, supra n 176.

instrument' doctrine and principle of non-regression mean that rights can only expand and not contract,[216] it is not necessary to establish this in order to find Bermuda's actions in violation of the Convention. Rather, the burden would be on the UK to establish what the 'legitimate aim' was in the discriminatory revocation of a fundamental right, and why this aim is not undermined by the continued recognition of existing same-sex marriages.

The final part of the Article 14 test is whether Bermuda is within its margin of appreciation, or discretion.[217] In contrast to previous case law seeking the introduction of same-sex marriage, it would not be sufficient for the UK to point to the margin of appreciation with regard to the timing of the introduction of legislative changes: at the time of the DPA's commencement these changes had already been made, exercised for a year, and the marriages that were celebrated during that year continue to be recognised as marriages. It may be that Bermuda was not 'ready' for the introduction of same-sex marriage following *Godwin* in 2017, but that argument is moot now that marriages have taken place and those marriages continue to exist following the DPA. Instead, the question is whether it is within the margin of appreciation to remove a right that already exists. This is an altogether different proposition. Based on the UK Supreme Court's statement in *Steinfeld* against the idea that the legislature could create an inequality and then seek discretion in determining how to rectify it, I would suggest that there is a strong argument to be made that this is not within Bermuda's discretion. As such, there is arguably a violation of Article 14 in conjunction with Article 12.

## 5. Conclusion

The short and recent history of LGBT+ rights in Bermuda has been one characterised by a slow pace of change and local deliberation via the legislative process. This changed after the Human Rights Act 1981 was amended to include sexual orientation, with three cases in quick succession significantly expanding LGBT+ rights, culminating in the introduction of same-sex marriage. Public conversations about introducing same-sex marriage or civil unions, dominated by Preserve Marriage's opposition to both, had resulted in a stalemate the previous year. After the first same-sex marriages had taken place, a new

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[216] See: Alegre, 'Draft submissions relating to the contravention of the European Convention on Human Rights (ECHR) by the Bermuda Domestic Partnership Act 2018 – The living instrument principle and the principle of non-regression in international human rights law', 1 May 2018, available at: www.islandrights.org/wp-content/uploads/2018/06/Submissions-relating-to-the-contravention-of-the-European-Convention-on-Human-Rights.pdf [last accessed 24 January 2020]; Raznovich, 'The "living tree doctrine" – Bermuda Domestic Partnership Act 2018', 30 April 2018, available at: www.islandrights.org/wp-content/uploads/2018/06/LJR-Note-re-living-tree-doctrine.pdf [last accessed 24 January 2020].

[217] While the margin of appreciation is only applicable in international law, the UK House of Lords has recognized a similar principle in terms of 'discretion', recognizing the 'difficult choices' that must be made by governments: *Kebilene*, supra n 170 at para 34 per Lord Hope.

government was elected by a landslide on a platform that included replacing same-sex marriage with a domestic partnership provision. In the absence of the type of community engagement that had been required to enact the earlier legislative changes, backlash against the introduction of same-sex marriage was, perhaps, inevitable. The revocation of same-sex marriage was sought by PM and their supporters who opposed any form of recognition for same-sex couples, but instead the government introduced their 'compromise' of the DPA. However, it is my argument that this came a year too late to be a constitutionally acceptable compromise. In a context where marriages have already taken place and will continue to exist, there is no legitimate justification for revoking this right, either under Bermuda's Constitution or the ECHR. While the post-*Oliari* requirement for some form of recognition for same-sex couples under the European Convention on Human Rights appeared to be a key factor in the introduction of domestic partnerships to replace marriage for same-sex couples, little consideration was given to the implications of revoking the right to marry. Instead, there was an assumption that the revocation was compatible with both the Bermuda Constitution and the European Convention. I have argued that this assumption was mistaken on both counts.

The Bermuda Court of Appeal has held that the revocation of marriage was enacted for a religious purpose and, as such, violates the Constitution, section 8. It also upheld the Supreme Court's judgment that it violates the right to freedom of conscience of not only same-sex couples who have a strong belief in the institution of marriage, but also religious organisations and individuals for whom marriage, including same-sex marriage, is a central tenet of their faith. The Bermuda government did not seek to justify the discrimination or violation of freedom of conscience but I have argued that, should they attempt to do so on appeal to the JCPC, the fact that this was a revocation of, as opposed to failure to create, same-sex marriage could be significant. On the basis of the JCPC ruling in *Laramore,* it will be difficult to establish that the revocation of same-sex marriage was reasonably required where (a) same-sex marriages have already taken place; and (b) those that have already taken place remain legally recognised. The UK Supreme Court judgment in *Steinfeld* will also be persuasive authority for the proposition that where a legislature has brought about an inequality, they would be 'less obviously deserving of a margin of appreciation'.[218]

I have also argued that the fact of revocation should alter the 'reading' of both Article 12 and Article 14 (in conjunction with Article 12). Whereas previously national authorities have been afforded a wide margin of appreciation based on the divergence of views on this issue between member states, the post-*Schalk* case law suggests that this margin is beginning to narrow. In a case where same-sex marriage had been, and in relation to existing marriages continues to be, recognised in accordance with national law a wide margin of appreciation in relation to the timing of the introduction of same-sex marriage would not apply. Instead, Article 12 would arguably be engaged by the fact that legally recognised same-sex marriages exist and the government would need to justify a *prima facie* discriminatory partial revocation of that right. Case law relating to the placing of limitations on the right to marry of those subject to immigration control suggests

[218] Supra n 157 at para 36.

that Article 12 is a strong right[219] and that the Court would take a dim view of a blanket prohibition on the right to marry for a particular group.[220] Case law relating to the prohibition of marriage between certain in-laws without a private Act of Parliament also suggests that the continued recognition of existing, but not new, same-sex marriages will be seen as arbitrary rather than proportionate.[221]

If the JCPC upholds the Court of Appeal's judgment in this case, its impact could be felt far beyond Bermuda's shores. With a number of Overseas Territory and post-colonial commonwealth constitutions with similar provisions to Bermuda's, same-sex marriage advocates may see a positive JCPC judgment as a foundation for similar cases. Other than the Inter-American Court of Human Rights' Advisory Opinion noted earlier, the international courts have tended to take a conservative and incremental approach to the question of same-sex marriage. National courts, however, have been much more willing to find a constitutional requirement for same-sex marriage. While it may well be that a constitutionally protected 'belief' in marriage is easier to establish where same-sex marriage has already existed (and thus been exercised), the Bermuda judgments may equally provide a new basis for constitutional challenge in those jurisdictions that have strong 'belief' protections but none for sexual orientation.

More broadly, what the revocation of same-sex marriage in Bermuda has clearly illustrated is the difficulty of negotiating a modern colonial relationship. While the House of Commons Select Committee on Foreign Affairs has recently announced an inquiry into the relationship between the UK and the British Overseas Territories[222] this does not appear to include the possibility of progressive de-colonisation, yet the political quagmire that the UK found itself in when asked to give Royal Assent to legislation revoking a fundamental right highlights the inadequacy of the current constitutional arrangements. At the very least, to avoid similar difficulties in the future, the Bermuda Constitution should be updated to fully replicate the Convention rights that the UK is responsible for upholding in Bermuda. This would remove the need for the UK government to be an arbiter on whether controversial domestic legislation complies with the Constitution and the Convention, which would instead be more appropriately determined by the local courts and, ultimately, the Judicial Committee of the Privy Council.[223]

ACKNOWLEDGEMENTS

[219] See also *Baiai*, supra n 201 *per* Lord Bingham.
[220] *O'Donoghue*, supra n 199.
[221] *B and L*, supra n 202.
[222] Foreign Affairs Committee, 'Future of the UK Overseas Territories inquiry', available at: www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/inquiries1/parliament-2017/inquiry13/ [last accessed 24 January 2020].
[223] Though the Judicial Committee of the Privy Council's origins are, of course, colonial, the Committee having been established to hear appeals from the colonies. Cf: Lord Neuberger of Abbotsbury, 'The Judicial Committee of the Privy Council in the 21st Century' (2014) 3(1) *Cambridge Journal of International and Comparative Law* 30.

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