Bermuda's Domestic Partnership Act 2018:

From "living tree" to broken branches?

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Abstract

It is often thought that affording rights is a progressive movement; rights are given to natural legal persons; the rights are normalised in societal expectations and they form part of a body of enforceable rights against the state. On the 7th February 2018, Bermuda became the first state in modern history to withdraw the right of same-sex couples to marry, bucking the trend of progressively affording rights. In a recent judgment, the Bermudian Supreme Court has ruled that taking away the right of same-sex couples to marry is unconstitutional. This article will briefly consider the development of the right of same-sex couples to marry in Bermuda, the connection between Bermudian human rights law and the European Convention on Human Rights and ask whether rights afforded under a constitutional arrangement can be taken away.

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Introduction

On the 7th February 2018, Bermuda's Governor approved The Domestic Partnership Act 2018 which withdraws the right for same-sex couples to marry in Bermuda with effect from 1st June 2018. The 'Domestic Partnership' purports to offer the same legal standing as marriage[2] though there is a degree of scepticism around whether this will be the case. There is a substantial body of writing[3] in the UK on whether the Civil Partnerships established under the Civil Partnership Act 2004 was in fact equal to marriage, or whether creating a second form of legal partnership also created a subordinate form of legal partnership[4]. Furthermore, the very recent decision of the UK Supreme Court[5] declaring[6] that the provisions of the Civil Partnership Act 2004 which restrict civil partnerships to same-sex

[2] This article is solely concerned with legal marriage and not with religious marriage.

[3] For example some perceptions are that the previous reservation of marriage for opposite-sex couples creates a hierarchy of legal partnership. Professor Howard NeJaime said in *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at para.19, that internationally speaking, partnerships are not perceived to attract the same respect as marriage. See H Fenwick and A Hayward, "Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically" [2017] 6 EHRLR 544; H Fenwick, "Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the court's authority via consensus analysis?" [2016] *3* EHRLR 248; R. Leckey, "Must equal mean identical? Same-sex couples and marriage" (2014) 10(1) International Journal of Law in Context 5; F. Hamilton, "Why the margin of appreciation is not the answer to the gay marriage debate" [2013] 1 EHRLR 47; R. Gaffney-Rhys, "Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite sex couples?" (2014) 26(2) *Child and Family Law Quarterly* 173; R. Sandberg, "The right to discriminate" (2011) 13(2) *Ecclesiastical Law Journal* 157.

[4] R. Wintemute, "Unequal same-sex survivor pensions: the EWCA refuses to apply CJEU precedents or refer" (2016) 45(1) Industrial Law Journal 89; N. Barker, D. Monk(eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge, 2015).

[5] *R (on the application of Steinfeld and Keiden) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32

[6] Under the powers conferred on them by Human Rights Act 1998 s.(4)

couples only, are incompatible with art.14 and 8[7] of the Convention, is a telling sign of the direction of progress in the UK law on partnership[8]. Both these ideas will be explored later in this article. This may not however, be the end of the story[9]. On the 20th February 2018, a Bermudian lawyer filed a motion asking for the Supreme Court of Bermuda to consider whether the Domestic Partnership Act 2017 ("DPA") is consistent with the Bermudian Human Rights Act 1981 ("HRA") and the Bermudian Constitution. In a judgment handed down on the 7th June 2018[10], the Supreme Court agreed that legislating against same-sex marriage was not permitted by the constitution and so the specific provision of the DPA was declared inoperative. More recently, on the 6th July 2018 the Bermudian government stated that it is to appeal the decision of the Supreme Court of Bermuda in *Ferguson*[11]. This matter is fast-paced and the role of the Judicial Committee of the Privy Council should be considered tentatively in light of any appeal beyond the Court of Appeal.

This article will aim to consider novel constitutional and human rights perspectives on same-sex marriage in Bermuda. It will consider whether the Bermudian Constitution is capable of growing using the living tree doctrine, established for the Canadian constitution. It will seek to draw a link between human rights in Bermuda, the UK and the European Convention on Human Rights. A number of theoretical principles from the UK and Europe will be drawn in to expand on the constitutional matters around same-sex marriage in Bermuda. Principles such as equality and the rule of law, majority rule and identity thinking will all be included to

[7] Human Rights Act 1998 Sch.1
[8] This will be discussed later in this article.
[9] E. Farge, "Bermudian lawyer goes to court to challenge gay marriage reversal" (February 20, 2018) *Reuters World News* < https://www.reuters.com/article/us-bermuda-gaymarriage/bermudian-lawyer-goes-to-court-to-challenge-gay-marriage-reversal-idUSKCN1G401N?il=0 > [Accessed June 26, 2018]
[10] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Ci
[11] J Bell, "Government appeals same-sex ruling" (July 6, 2018) *The Royal Gazette* < http://www.royalgazette.com/news/article/20180705/government-appeals-same-sex-ruling > [Accessed July 7, 2018]

foster discussion in this area. Throughout this article, the concept of the living tree and its associated doctrine will be revisited; it is therefore prudent to firstly consider the living tree doctrine.

Gifting a Constitutional Tree

It has long been established that legislative and common law inconsistencies arise across the Commonwealth, and that the result of these inconsistencies can lead to questions before the Judicial Committee of the Privy Council (JCPC)[12]. This has happened across the jurisdictions of Commonwealth and often leads to innovative doctrines being established. A salient example of this is a seminal case concerning the Canadian Constitution, decided before the JCPC in the early twentieth century. The case of *Edwards*[13] is a point of interest as it established a constitutional theory known as the "living tree" doctrine. Simply put, this doctrine asserts that the Canadian Constitution is a living or organic entity that must develop and evolve as the society it represents evolves. This case came about when a challenge was brought to the ban on women becoming senators in Canada. In handing down their judgment, the Canadian Supreme Court felt that women should continue not to be eligible for two reasons: first, that women under the Canadian common law were not permitted to hold office. Second, women were not 'persons' using a narrow reading of the word 'persons' found in the relevant Act[14], and the male emphasis in s.24[15]. Using both the Common Law principle and the intrinsic aid above, the Canadian Supreme Court maintained the prohibition on women becoming Canadian senators. However, on appeal to the JCPC, the prevailing authority that

[12] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] U.K.S.C. 45; [2015] A.C. 250, Lord Neuberger at 45.
[13] *Edwards v Canada* [1930] A.C. 124, 1929 U.K.P.C. 86
[14] British North America Act 1867
[15] *ibid*

had persuaded the Canadian Supreme Court came under the direct scrutiny of the JCPC; in handing down their judgment, the Court said:

> "their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development"[16].

This is a departure from the reserved approach taken by the domestic courts in Canada and the adoption of, arguably, a judicial activist[17] approach to ensuring that the laws of Canada reflect common and popular morality. It is also possible to argue that the JCPC introduced – or at least considered – equality before the law[18] when giving their opinion. Equality before the law will be addressed later in the article.

The judgment refers to "[planting] in Canada a living tree capable of growth and expansion within its natural limits"[19]. This idea of a gift by the UK legislature, of a growing and evolving constitution in Canada, is a particularly relevant point when considering the current issue in Bermuda abovementioned. If the gift of a constitution by the UK to a Commonwealth country is an evolving gift which is everything but stagnant, then it follows to reason that the Bermuda Constitution Act 1967 and the Bermuda Constitution Order 1968 has also gifted a living organic constitution to reflect the society that it serves. If the Constitution is living,

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[16] *Edwards v Canada* [1930] A.C. 124, 1929 U.K.P.C. 86

[17] B. Wilson, "The making of a constitution: approaches to judicial interpretation" [1988] *Public Law* 370

[18] Equality before the law has a long and diverse history in the UK and has been codified in many written constitutions. It has been argued that it forms part of the Rule of Law by notable theorists such as Dicey and Dworkin amongst others (see J.W.F. Allison(ed) A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford University Press 2013, first published in 1885) and R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978)). There are many opinions on equality before the law and the connection with formal and substantive views of the Rule of Law makes for a lengthy discussion. For more see P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework" [1997] *Public Law* 467.

[19] *Edwards v Canada* [1930] A.C. 124, 1929 U.K.P.C. 86

then the rights contained within it can be expanded upon in the same way that the Canadian constitutional rights were expanded to include women senators. Two questions arise here: firstly, is the Bermudian HRA sufficient in its authority to expand upon constitutional rights. Secondly, can the Constitution in its living nature contract as well as expand; can it allow for the removal of rights which have lawfully been given? In considering whether the Constitution can contract, will UK common law on removing rights that have been given influence any potential appeal to the JCPC in the withdrawal of same-sex marriage in Bermuda? The case of *Blackburn*[20] is often cited when the discussion moves towards removal of rights. In *Blackburn* Lord Denning exclaimed that "[f]reedom once given cannot be taken away. Legal theory must give way to practical politics." Though this article does not assert Lord Denning's words as some form of authority, it does invite discussion on the merit of such a proposition. In relation to Bermuda, there are some fundamental questions to answer including whether allowing same-sex couples to marry would amount to giving a right to those in a same-sex relationship. In any event, should the matter come before the JCPC, would the Privy Council see it as their role to apply the logic found in the aforementioned statement in *Blackburn* literally? Whatever approach that is taken should the JCPC become involved in this matter, there is a warning of caution to sound, given that the Progressive Labour Party, which is currently in government in Bermuda, has always been vocal about its desire for independence[21]. Any tension between the JCPC and the domestics courts in Bermuda may give weight to the Progressive Labour Party's agenda.

Development of Same-sex Marriage in Bermuda

[20] *Blackburn v Attorney General* [1971] E.W.C.A. Civ 7; 1 W.L.R 1037

[21] Progressive Labour Party, "1972-1985" (2018) *History* < http://www.plp.bm/history > [Accessed June 26, 2018)

On the question of allowing same-sex couples to marry, this is not as straightforward as first may seem. The right of same-sex couples to marry came about following a ruling of the Supreme Court of Bermuda in *W Godwin et al*[22], which found that the Marriage Act 1944 was discriminatory in not allowing same-sex couples to marry. The Supreme Court of Bermuda issued a mandatory order requiring the registrar to publish banns of marriage for those same-sex couples that apply, and as such the right to marry became extant both domestically and onboard approved ships registered in Bermuda. This latter point is noteworthy, given that many large cruise lines have ships that are registered in Bermuda and so can offer same-sex marriage onboard their vessels[23]. Since the judgment of the Supreme Court of Bermuda in May 2017, the Governor of Bermuda has given Royal Assent to the DPA which withdraws the ability of same-sex couples to marry[24] and the DPA took effect from the 1st June 2018. Additionally, a number of legal challenges were brought in the case of *Ferguson*[25]*;* this will be considered shortly. Although the right was arguably created by the Bermudian common law, it is relevant here to apply some distinctly European (and more-so British) legal reasoning to this issue, given that Bermuda is a British Overseas Territory and has very closer reciprocal links with both the UK and Europe.

Looking at this matter from a rather Dworkinian perspective, it is reasonable to argue that *Godwin* could be an example of a Dworkinian "hard case"[26]. The Supreme Court in Bermuda drew on equitable principles (considering equality in the prescription of rights) and in turn,

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[22] *W Godwin et al v Registrar General* [2017] S.C. (Bda) 36 Civ

[23] Carnival Corporation, "Carnival Corporation Statement Regarding Bermuda's Domestic Partnership Act" (2018) *News Release* < http://www.carnivalcorp.com/phoenix.zhtml%3Fc%3D200767%26p%3Dirol-newsArticle%26ID%3D2340880 > [Accessed June 26, 2018]

[24] Government of Bermuda, "Governor signs Domestic Partnership Act" (February 7, 2018) *News* < https://www.gov.bm/articles/governor-signs-domestic-partnership-act#> [Accessed June 26, 2018]

[25] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ

[26] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) 81; Alan C Hutchinson and John N Wakefield, "A Hard Look at "Hard Cases": The nightmare of a noble dreamer" (1982) 2 *Oxford J Legal Studies* 86, 88.

espoused a new rule[27]. The rule previously did not exist, and so, in creating a rule the Court is imputing its inherent morality onto the statute book. Though this article does not have the scope to enter into jurisprudential arguments on judicial activism and ethics in hard cases, it is nonetheless a relevant (if not subtle) point to note. In taking away these rights, there is arguably an assault on the concept of justice and equality before the law. The Supreme Court of Bermuda decided the case in the way that it did, as the Marriage Act 1944 was perceived to be incompatible with the provisions of Bermuda's HRA. The HRA states that a person is discriminated against if they are treated less favourably than another because of, *inter alia*, that person's sexual orientation[28]. Though reasonable lawyers and lay people alike will disagree on the fundamental matter of same-sex marriage, the judgment of the Supreme Court in *W Godwin et al* is logical and coherent. It is also worth drawing attention to a connected point; Bermuda recognises the European Convention on Human Rights[29] and the HRA specifies that these rights apply in Bermuda. This was previously recognised, as the UK had extended the European Convention on Human Rights to "virtually the whole dependent empire" in 1953[30], following the UK's ratification of the Convention 1950[31]. Therefore, the provisions contained within the Convention are not novel in Bermudian courts or to the Bermudian legislature. Notwithstanding this, Bermuda, as with most British Oversea Territories, has a very complex relationship with the European Convention on Human Rights and with Strasbourg's jurisprudence[32]. Despite this, there is some inconsistency within

[27] Dworkin does not actually define what a hard case is other than to say that a hard case is where "both in politics and law, … reasonable lawyers … disagree about rights" and where "no established rule can be found". See *ibid.* See also T. Etherton, "Liberty, the archetype and diversity: a philosophy of judging" (2010) *Oct Public Law* 727.

[28] Human Rights Act 1981 s.2(2)(a)(ii)

[29] According to the preamble to the Bermudian Human Rights Act 1981 and prior to this art.63 ECHR allowed the UK to extend the Convention to its Overseas Territories.

[30] Treaty Series 71 (1953), UK Command Paper 8969

[31] A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001)

[32] N. Barker, ""I wouldn't get unduly excited about it": the impact of the European Convention on Human Rights on the British Overseas Territories. A case study on LGBT rights in Bermuda" [2016] *Public Law* 595.

Bermudian law regarding the protections from discrimination that are afforded. According to 'The Schedule to the Constitution of Bermuda: Forms of Oaths and Affirmations', "no law shall make any provision which is discriminatory either of itself or in its effect" [33]. Although this seems to be clear in its assertion, s.12(4)(c) of the same schedule states that the protection from discrimination does not apply to marriage, and other personal law applicable to the relevant persons[34]. It is positive that the Supreme Court of Bermuda has recently departed from its reliance on s.12(4)(c); in *Ferguson* the Court disagreed with the argument that discriminatory practices in relation to marriage are protected by s.12(4)(c), the Court feeling that the remit of this section was to support the expansion of beliefs and "[r]ather than permitting the State to prefer some beliefs over others, section 12(4)(c) is designed to facilitate diversity in beliefs"[35]. The Court goes on to say that "[t]he Jewish Marriage Act 1946, the Baha'i Marriage Act 1970, and the Muslim Marriage Act 1984, are examples of legislation which is facilitated by s.12(4)(c) of the Constitution"[36]. The status of the HRA is an important factor in determining how far an Act succeeding the Constitution can expand on constitutional protections and constitutional theory.

The HRA does not specifically state that it is a constitutional instrument in and of itself, though s.28 does state that the provisions of the HRA are in addition to the Constitution. It is commonly accepted that human rights are generally thought of as being constitutional in nature, as they enshrine natural rights which are accepted internationally. However, it is prudent to consider the status of the HRA in an attempt to establish how constitutional it is in

[33] Bermuda Constitution Order 1968 'The Schedule to the Constitution of Bermuda: Forms of Oaths and Affirmations'

[34] For more on the interaction between territorial law and personal law see H. Tagari, "Personal family law systems - a comparative and international human rights analysis" (2012) 8(2) *International Journal of Law in Context* 231

[35] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [104]

[36] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [104]

terms of Bermudian law. The Bermudian HRA does have a status which is over and above that of ordinary laws, as it allows the Supreme Court of Bermuda to declare an Act "inoperative" if it conflicts with the provisions of the HRA. A good recent example of this occurred in *A and B*[37]. In 2010, the JCPC has previously gone as far as to call the Bermudian HRA a quasi-constitutional document[38], and in *Bermuda Bred Company* the Supreme Court of Bermuda compared the authority it receives from the HRA to declare an Act inoperable with the power to strike down laws that conflict with the Bermudian Constitution[39]. In *Bermuda Bred Company* the Court states that although:

> "the rights protected by the HRA do not enjoy quite as elevated a status as the fundamental rights and freedoms provisions of the Constitution, Parliament has clearly conferred on this statute quasi-constitutional status".

However, in both *Bermuda Bred Company* and in *A and B* the courts took a "generous and purposive approach" to applying the HRA, and followed the higher standard of rights that were allocated under the HRA as opposed to the constitutional rights which precluded express protections for same-sex couples. Using this as a guide, it would seem to indicate that the HRA has given the courts the ability to liberally interpret the Constitution in light of the protections that are available under the HRA and thus expanding upon the rights already afforded under the Constitution. If this is in fact the case, it is another example of a constitution evolving to keep abreast of not just national, but international, changes in attitudes to rights. It is another demonstration of a living tree growing to reflect society. In support of the assertion that the convention grows positively to protect rights opposed to contracting to curtail rights, the recent case of *Lendore*[40] cited the earlier European Court of

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[37] *A and B v Director of Child and Family services and Attorney-General* [2015] S.C. (Bda) 11 Civ
[38] *Marshall v Deputy Governor* [2010] U.K.P.C. 9; [2010] W.L.R. (D) 133
[39] *Bermuda Bred Company v Minister of Home Affairs* [2015] S.C. (Bda) 82 Civ
[40] *Lendore and others v Attorney General of Trinidad and Tobago* [2017] U.K.P.C 25; [2017] 1 W.L.R. 3369

Human Rights case of *Tyrer*[41], where the European Court of Human Rights described the European Convention on Human Rights as:

> "a living instrument which … must be interpreted in the light of present day conditions … the court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe."[42]

Ferguson

The judgment of the Supreme Court contains a great deal of narrative of the case management and progression, and in terms of understanding the atmosphere that surrounds the proceedings this is very helpful. There were a large number of points raised in the judgment and this article could not feasibly consider them all with equal respect. As such, a small number of points have been selected to foster the public law and human rights discussions around this topic.

The first of such matters is the Court's summary dismissal of the argument that the judgment in *W Godwin* amounted to "legislating from the bench"[43]. This is an interesting point, though not particularly well-though out. The Supreme Court appropriately identified that Parliamentary Sovereignty in Bermuda is a qualified concept; one that states that the legislature is entitled to legislate "for the peace, order and good government of Bermuda"[44] according to the Constitution. This limitation must, by its inclusion in the Constitution, have an adjudicative venue to resolve disputes. The Bermudian Supreme Court is therefore a constitutional court, given that they possess the power to resolve and decide matters of a

[41] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 at [31]
[42] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 at [31]
[43] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 at [39]
[44] Bermuda Constitution Order 1968

constitutional nature. There will undoubtedly be some envy from the UK Supreme Court, whose status as a constitutional court is a matter of much debate[45]. The Court in *Ferguson* also cited a recent discussion on this matter of *Robinson,*[46] where Nazerath JA stated that the Colonial Laws Validity Act 1865 makes any law which in incompatible with the Bermudian Constitution void. Kawaley CJ summarised to that effect that

> "the Legislative branch of Government has not for 50 years had more than qualified Parliamentary sovereignty in Bermuda. The Judiciary has been tasked by Chapter I of the Bermuda Constitution with ensuring that both executive action and legislative provisions do not contravene the fundamental rights of freedoms of the citizens and residents of Bermuda."[47]

This poses some interesting conceptual questions, one being that the separation of powers in British Overseas Territories are subject to *caveats viz.* that the judiciary retains the right to curtail the parliament's sovereignty if the judiciary feels that the parliament is legislating contrary to the constitution. In Bermuda then, is it more appropriate to talk of constitutional supremacy supported by judicial superiority, and the subjugation to some extend of the legislature?

Although this last statement is intentionally evocative, there are some connected points to make on it from the *Ferguson* judgment which will be transposed in the opposite direction on current affairs in the UK. A statement from the affidavit of an intervener in the case, cited a quote which raises some further relevant points. The statement reads:

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[45] Lord Neuberger, "The UK Constitutional Settlement and the UK Supreme Court" (10 October 2014) speech at the Legal Wales Conference 2014, < https://www.supremecourt.uk/docs/speech-141010.pdf > [Accessed June 26, 2018]

[46] *Robinson v R* [2009] Bda LR 40

[47] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [43].

> "In any event, even if a majority of Bermudians were in favour of depriving a minority group of its human rights […] it would be wholly inappropriate for Government to legislate on that basis […]. In civilised societies, the majority does not get to pick and choose which of a minority's human rights should and should not be protected. In fact, in a great many instances the oppressive views of the majority are exactly what minorities most need their human rights to be protected against."

This statement directly conflicts with the prevailing concept of majority rule. However, this is not novel; criticisms of law-making based on popular policy are long standing[48]. It is not unreasonable to conclude that human rights matters should be beyond the influence of majority rule in order that they are not impacted upon by popularist and often transient changes in public policy. For example, in *SAS*[49] the European Court of Human Rights considered France's ban on full-face covering in public in an attempt to incite cohesion and a sense of community. In terms of whether this is feasible, attention needs to be turned to the concept of "identity thinking" and its relevance in human rights matters[50]. In brief, identity thinking asserts that every person is "commensurable and identical" through an exchanging of unequal ideas known as "barter"[51]. As Adorno put it "identity becomes the authority for the doctrine of adjustment"[52] and this concept fundamentally underpins human rights theory. According to Nicholson, equality before the law and universal rights are predicated on the standard for equality, being the concept of the community. The community decides who is a member of it and so who is entitled to human rights and protections[53]. This, arguably, over-simplistic explanation does however fit with the idea of majority rule, but poses a legal

[48] W. Sadurski, "Legitimacy, political equality, and majority rule" (2008) 21(1) *Ratio Juris* 39; J. Jaconelli, " Majority rule and special majorities" [1989] *Public Law* 587
[49] *SAS v France* (2015) 60 E.H.R.R. 11
[50] An excellent discussion of this is available in M Nicholson, "Majority Rule and Human Rights: Identity and Non-Identity in S.A.S. v France" (2016) 67(2) *Northern Ireland Legal Quarterly* 115
[51] T W Adorno, *Negative Dialectics* (London: Routledge 2004)
[52] T W Adorno, *Negative Dialectics* (London: Routledge 2004)
[53] M Nicholson, "Majority Rule and Human Rights: Identity and Non-Identity in S.A.S. v France" (2016) 67(2) *Northern Ireland Legal Quarterly* 115

problem connected to majority rule. Society inevitably adapts and changes at different rates in different countries. The geo-political influence cannot be downplayed, and this can be seen in anecdotal statements in the media asserting that the majority of people in Bermuda are against same-sex marriage. The question then becomes, does majority rule legitimise discrimination? When a community decides not to include an individual, as that individual does not accord with the community's inherent identity, where does that leave the individual? To draw these points together, if the majority of Bermudian people oppose same-sex marriage and that formed the basis for political policy-making, then those same-sex couples are ostensibly ostracised from the marriage community. It is the role of the courts in Bermuda, in pursuance of their constitutional nature, to uphold the egalitarian nature of the Constitution and rule against the will of the majority to impose equality. Each reader will of course come to their own conclusion on whether this is acceptable or not. However, given the very brief mention made of identity thinking and human rights, and without affording further consideration to the impact and influence of European legal theory in the Caribbean[54], it is still possible to conclude that the court in *Ferguson* was right to be influenced by the assertion that the 'majority' are against same-sex marriage. By putting too much weight on this, the Court would have reinforced the concept of majority rule to the detriment of equality before the law. There are some comments in the *Ferguson* judgment that seem to indicate that the legislature had given weight to representative pressure groups when attempting to ban same-sex marriage. It is rather obvious to suggest that government is invariably interested in the opinion of the general public given that the government has its democratic mandate because of the public. In the earlier mentioned *SAS*, the French state banned all full-face coverings and this, in turn, is the state as a community ostracising those who chose to wear the niqab, for example. The community is stating that there is an identity which is

[54] Bermuda is an associate member of the Caribbean Community and the term Caribbean is used in that sense, not the geographical sense

incompatible with the community and so must either change or suffer exclusion. Yet, in Bermuda this is not the case; the judiciary exercised its authority over the government, and in turn the legislature, to set aside the will of the majority in favour of inclusion. The community is, by virtue of the judgment, forced to include same-sex couples; this could hopefully lead to the normalisation of same-sex marriage within the community. It could alternatively lead to hostility or resentment either towards same-sex couples or the Bermudian Supreme Court itself. Baroness Hale's statement in *Ghaindan*[55] is also cited in the *Ferguson,* when the court is referring to the case of *Re P*[56], where Baroness Hale said, "democracy values everyone equally even if the majority does not".

A final matter which will be considered from the judgment is the Court's very extensive dealings with the allegation that the Bermudian legislature had created the DPA under religious influence and persuasion[57]. The question that the Court sought to answer was whether "the revocation provisions of the DPA [are] invalid because they were enacted for a religious purpose?"[58] The Court spent some time on this matter and the nexus of the Court's discussion on these points was whether the Constitution is a secular one, or whether it permitted a religious inclination. If the latter were true, then there would also be scope to argue that a religiously charged law is permissible under the Constitution. The Court discussed this at length and in its judgment included statements from the Supreme Courts of Bermuda[59], Canada[60], and the UK all stressing that their respective constitutions are secular. However, the Court then goes on to find that the DPA has a religious motive in part, but that this is not sufficient enough to draw its validity into question. It is proposed that another

[55] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [132]
[56] *Re P and others* [2009] 1 AC 179
[57] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ summarised at [67]-[70]
[58] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ summarised at [67]-[70]
[59] *Centre for Justice v Attorney-General and Minister for Legal Affairs* [2016] Bda LR 140
[60] *R v Big M Drug Mart* (1985) 1 SCR 295

aspect has been neglected somewhat and only mentioned in passing during the judgment. In *McFarlane,* [61] Laws LJ clarified that art.9 of the ECHR is absolute in its protection of rights to hold or not hold a religion. The right to manifest a religious belief is subject to limitation; these have been discussed extensively in both UK domestic courts[62] and at the European Court of Human Rights[63]. Whether the Constitution is secular only satisfies half of the argument, even if the Constitution was not secular (which it is[64]), whether the HRA would permit the government to put forward a bill which manifests its religious belief in a discriminatory way is another matter entirely. In this case the relationship between the Constitution and the HRA is significant on several levels; if the HRA expands on the Constitution then the Constitution would be 'in harmony' with the HRA and its principles, including those emanating from European human rights jurisprudence, given the HRA's recognition statement. The impact of the HRA on the Constitution and whether it has any material impact on the Constitution needs to be considered further.

Living Tree or Broken Branches

The case of *Ferguson* has raised some issues which are relatively infrequently addressed in Bermudian domestic courts. Having rights, provided under the common law which are consistent with the HRA as a quasi-constitutional statute, taken away by an ordinary law is inconsistent with most UK jurisprudence and legal theory[65], though there seems to be limited Bermudian case law to refer to in this area. Given that the UK jurisprudence may inevitably

[61] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880
[62] *R (Begum) v Head Teacher and Governors of Denbeigh High School* [2006] 2 All ER 487
[63] *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8
[64] According to Kawaley CJ in *Centre for Justice v Attorney-General and Minister for Legal Affairs* [2016] Bda LR 140
[65] M Johnson, "The Models of Parliamentary Sovereignty" (2017) *University of Bristol Law School Blog* < https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/#_ftn6 > [Accessed June 26, 2018]

filter into the argument if the matter is appealed beyond the Bermudian Court of Appeal[66] to the JCPC, some UK points will be considered to add flesh to the bones of the argument.

Earlier, reference was made to *Blackburn* and specifically to Lord Denning's point that "[f]reedom once given cannot be taken away". It could be argued that a legislature could legislate to remove rights; the UK Parliament could repeal the Human Rights Act 1998 and withdraw from the European Convention on Human Rights and all proceeding domestic laws on rights and civil liberties, and therefore remove rights from the individual. However, this is an abstract argument given that doing so would invariably result in a considerable, politically charged discourse. There is also a common law presumption in the UK that Parliament does not legislate contrary to the common law unless it does so explicitly[67]. Although the DPA seems express and certain in both its wording and its intention, there is a slightly confusing *caveat* that has been included in s.53 which was a disputed section in the *Ferguson* case. The first phrase states "[n]otwithstanding anything in the Human Rights Act 1981…" Given that the HRA specifically precludes less-favourable treatment on the basis of sexual orientation, it is difficult to reconcile s.53 of the DPA with s.2(2)(a)(ii) of the HRA, specifically. Whether this is the government's attempt to legitimise the revocation of same-sex marriage by including a reference to the HRA, and to attempt to persuade the public that due consideration has been given to the HRA, is unclear. The Bermudian government states that the DPA gives a statutory right to all couples to enter into a legally recognised partnership, but the result of that is simply that same-sex couples could no longer get married. This does directly discriminate against same-sex couples as (using the standard set out in s.2 of the HRA) same-sex couples cannot enter into a legal marriage and so are treated less-favourably,

[66] At the time of writing, permission to appeal to the Court of Appeal in Bermuda had not been granted
[67] *Leach v R* [1912] A.C. 403; (1912) 7 Cr. App. R. 157

thus making out the grounds for discrimination under the Bermudian HRA. There are material differences between the domestic partnership and marriage, though the one difference that seemed to hold weight with the court in *Ferguson* was the international recognition of partnerships as sub-standard to marriage, according to Professor Howard NeJaime[68]. Given that the DPA does in fact discriminate against same-sex couples, then the Supreme Court of Bermuda is correct in declaring that the DPA is inoperable, as the HRA carries the quasi-constitutional status mentioned earlier. The point which is due discussion is whether the quasi-constitutional HRA is 'in harmony' with the Bermudian Constitution, and if it is adequate consideration needs to be given to the impact of matters such as the art.9 limitations on manifestation of beliefs and the making of religiously charged laws.

As abovementioned, the Bermudian Constitution includes a clause exempting marriage[69] from discriminatory protection, whereas the HRA does not and so the discriminatory protections contained in the HRA do apply to marriage[70]. Here, a somewhat theoretical approach needs to be taken to answering the question. In the Bermudian case of *A v Attorney General*[71], the Supreme Court grapples with a post-constitution statute (the Companies Act 1981), which seems inconsistent with the constitution. The Court affirmed that it is the duty of a court to construe an Act "subject to the presumption of constitutionality" if it precedes the Bermuda Constitution Order 1968. Where this is not possible, to declare that the later Act is repugnant in accordance with the Colonial Laws Validity Act 1865. The presumption of constitutionality asserts that an Act passed is constitutional unless a subject can prove that it

[68] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [19]
[69] It also exempts personal law, though this article does not consider this matter further as it warrants its own independent piece.
[70] *Godwin and DeRoche v The Registrar General and others* [2017] S.C. (Bda) 36 Civ
[71] *A v Attorney General* [2017] S.C. (Bda) 90 Civ

is not[72]. Given that the HRA has not yet been declared repugnant to the Constitution, it is possible that the former option *viz.* the HRA is being read compatibly with the Constitution and so affording rights in addition to the Constitution, is true. This is, however, a weak assumption as it is based on the lack of evidence to the contrary in terms of the common law and logical reasoning. Notwithstanding this point, assuming that the HRA is compatible with the Constitution, the constitutional rights have, therefore, been extended under the HRA to include discrimination protections for same-sex couples, and that these are not exclusive of marriage as was originally the case.

There is an alternative argument which should be considered; does the HRA provide protection against discrimination based on sexual orientation, save for the marriage exception which is found in para.12(4)(c) of the Constitution? In order to make this argument fit, a number of Commonwealth principles need to be ignored including (but not limited to), the living tree doctrine established in the Canadian constitutional case and the logic invoked by Lord Denning in *Blackburn* above. The statement of the Supreme Court of Bermuda in *A v Attorney General* would also need to be reviewed; it would no longer be sufficient to read an Act compatibly with the presumption of constitutionality, the Act would need to be construed as to apply subject to any exceptions which can be found in the Constitution. This seems like a considerable step from the current path trodden by the Supreme Court of Bermuda in terms of logical reasoning and from the judgment in *Ferguson*. From this, it is possible to argue the judgment in *Ferguson* is a strong one, even if the reasoning in this article differs from that in the judgment. In addition to this, over the past two decades the move in Commonwealth

[72] E. Carolan, "Leaving behind the Commonwealth model of rights review: Ireland as an example of collaborative constitutionalism" and C. Kelly, "A tale of two rights-based reviews or how the European Convention on Human Rights Act 2003 has impacted on the Irish model of review" in J. Bell and M. Luce(eds) Rights-Based Constitutional Review Constitutional Courts in a Changing Landscape (Cheltenham: Edward Elgar, 2016).

countries from all corners of the world has been to expand their constitutional rights to include same-sex marriage; jurisdictions such as Canada[73], Australia[74], Malta[75], South Africa[76], Saint Helena, Ascension and Tristan da Cunha[77] have either allowed, or are due to allow same-sex marriage. Even the remote islands of South Georgia and the South Sandwich Islands allow same-sex marriage[78]. As the Bermudian legislature has chosen to appeal the decision in *Ferguson*, it is 'bucking the trend' considerably in the progression of rights across the Commonwealth. Bermuda's recent enactment of the DPA plots a substantially different course to that of Commonwealth countries mentioned above, and it is right to question if such an attempted divergence in rights is consistent with the objectives of the Commonwealth. Though Bermuda is itself not a member of the Commonwealth of Nations, it is a British Overseas Territory and the Commonwealth of Nations sees the people who live in "associated and overseas territories" as "part of the Commonwealth family"[79]. It is therefore not necessary to draw a distinction between Bermuda and Commonwealth countries given that the perception of the Commonwealth of Nations is that a link exists between it and overseas territories of full members.

As the UK is a Member of the Commonwealth of Nations, it is incumbent upon the UK to lead its territories towards compliance with the Charter's aims; although it is recognised that other Commonwealth nations do discriminate against LGBT+ people, this should not justify

[73] Civil Marriage Act 2005
[74] D. McKeown, "Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide" (*Research Papers 2017/18*, Parliament of Australia 2018) < https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/SSMarriageBills > [Accessed June 26, 2018]
[75] Marriage Act 2017
[76] Civil Union Act 2006
[77] Marriage Ordinance 2017
[78] By virtue of its legal relationship with the United Kingdom
[79] Commonwealth of Nations, "Associated and Overseas Territories" (2018) *Commonwealth Membership* < http://www.commonwealthofnations.org/commonwealth/commonwealth-membership/associated-and-overseas-territories/ > [Accessed June 26, 2018]

the UK's acquiescence towards the Charter's aims. The Charter of the Commonwealth is a set of values that each Commonwealth state signs to uphold and embody. Within the values can be found two statements: the first, "We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively"[80], and second, "We emphasise the need to promote tolerance, respect, understanding […] and recall that respect for the dignity of all human beings is critical to promoting peace and prosperity"[81]. Although the Charter does not protect LGBT+ rights by specifically stating them, the phrases "rights cannot be implemented selectively" and "respect for the dignity of all human beings" fit well with the earlier mentioned notion of equality before the law as a fundamental constitutional right. It is acknowledged that the author is attempting to draw specifics from a vague statement and that this poses several inherent challenges, however, statements written in vague terms can have longevity as they can apply to the ever-changing shape of society. Therefore, it is not problematic to attempt to apply these vague statements to modern society, though it is problematic to close one's ears to potential criticisms of that exercise. LGBT+ rights in the Commonwealth are a matter attracting much media coverage[82] and so a jurisdiction moving against the grain on this matter would inevitably come under the spotlight of public scrutiny. Notwithstanding these points, and drawing back to the purely legal question of the inoperability of the DPA, given the strength of feeling that the Bermudian government seem to have demonstrated in favour of the DPA, it is possible that the matter will eventually end up before the JCPC. If that does happen, it will offer the JCPC the opportunity to mend the broken branches and treat the constitutional tree. However,

[80] Relating to the application of the Universal Declaration of Human Rights and found in Charter of the Commonwealth 2013, II

[81] Charter of the Commonwealth 2013, IV

[82] B. Dittrich, "Commonwealth Nations Must Decriminalize Gay Sex" (2018) *The Advocate* < https://www.advocate.com/commentary/2018/4/16/commonwealth-nations-must-decriminalize-gay-sex > [Accessed June 26, 2018]

should the JCPC choose not to engage 'actively'[83] in a similar way to their predecessors in *Edwards* (possibly in deference to the PLP government and concerns that doing so would strengthen the call for independence), then the JCPC runs the risk of condoning the pruning of the constitutional tree by the Bermudian government. In deciding which approach to take, it may be prudent for the JCPC to recall, should the matter come before them, that twisting the branch will incline the tree[84].

Separation of Powers

The point made here refers to the earlier mentioned case of *Lendore*[85] and a statement made by Lord Hughes JSC at para.16, where His Lordship considers whether the separation of powers is relevant and persuasive when the executive has the right to grant clemency when the courts have sentenced to death. His Lordship considered whether one branch of the state can lawfully interfere with the execution of another's role. His Lordship was not satisfied by the argument in *Lendore*¸ referring to the earlier case of *Boyce v The Queen*[86], in which Lord Hoffman stated that arguing a constitution was "based upon the principle of the separation of powers" as "pithy". Lord Hoffman felt that constitutions create their own version of the separation of powers and transcribe that into domestic law; the role of the court is to then uphold that constitutional view of the separation of powers. The difficulty here lies in vague description of the separation of powers laid-down in the Constitution. In the absence of specific model of separation, how does the judiciary and legislature establish their remit without testing the limits of their power?

[83] In terms of Judicial Activism
[84] A. Pope, *Epistles to Several Persons: Moral Essays* (First Published 1732, London: Metheuan 1961) Epistle to Cobham "Just as the Twig is bent, the Tree's inclin'd".
[85] *Lendore and others v Attorney General of Trinidad and Tobago* [2017] U.K.P.C. 25; [2017] 1 W.L.R. 3369
[86] [2004] U.K.P.C. 32; [2005] 1 A.C. 400

In *Godwin* and *Ferguson* there is currently no indication that the decision of the Courts were *ultra vires*; however, the author acknowledges the pending appeal of the government against the *Ferguson* decision. Notwithstanding this, the curious approach was taken to legislate to stop the decision in *Godwin* applying going forward, without affecting the authority of the decision between the time the judgment was handed down and the time the DPA provisions commenced. This is distinctly different from the *Lendore* and *Boyce* examples listed above, in that the question is whether an action which is inconsistent with the separation of powers in Bermuda is unconstitutional. The Bermuda Constitution Order 1968 mentions an "independent court" several times, and yet it is questioned whether the court is truly independent if the legislature can legislate to confine a ruling of a court without preceding through an appeal in pursuance of natural justice?[87] Little comment was made in *Ferguson* about the legislature's apparent indifference towards the independence of the judiciary and the separation of powers, so this matter continues to be unresolved.

The Supreme Court of Bermuda itself has recently stated in the case of *Centre for Justice*[88] that the Constitution has created an "independent judiciary based on the separation of powers"[89]. In *Centre for Justice* the claimants were seeking judicial review of, *inter alia*, the decision of the executive to designate six churches as polling stations in a referendum on same-sex relationships, which were actively supporting Preserve Marriage Limited, an organisation established to resist same-sex marriage. In addition to this, the Court was asked to consider the constitutionality of calling a referendum on same-sex marriage, and the Court

[87] S.53 of the DPA states "[n]otwithstanding anything in the Human Rights Act 1981, any other provision of law or the judgment of the Supreme Court in *Godwin and DeRoche v The Registrar General and others* delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female."
[88] [2016] SC (Bda) 64 Civ
[89] [2016] SC (Bda) 64 Civ at [3]

made comments generally on the use of referendums to make policy on human rights matters. The Court seems to indicate that the convention of not using referendums to drive policy reforms in areas of human rights was not as absolute as previously considered. This raises the potential of government tabling legislation to reduce rights and citing a referendum as the driving force or justification for such a reduction – a matter not too distant from some discussions in the UK regarding the referendum on exiting the European Union. The Court also felt that it had jurisdiction to oversee the legality of a referendum, but that the Bermudian government was able to convene a referendum that proposed to limit or extinguish rights that were enjoyed under the HRA. The Court also stated that "fundamental rights could not be diluted or negotiated by the electorate"[90]. There seems to be some disconnect between these statements. Furthermore, these statements do not seem to rest easy with the living tree analogy used earlier, or the UK and EU perspective that rights grow as society grows[91]. It can, however, be married with the statement made by the European Court of Human rights *viz.* the development of rights must be "in the light of present day conditions"[92]. Therefore, if the opinion of the Bermudian people has changed and is now more hostile towards same-sex marriage rights, the government could argue that it is simply responding to this change. However, if the majority of a referendum are not in favour of same-sex marriage, should rights be interpreted in light of domestic Bermudian communities, British Overseas communities, UK, Commonwealth or international communities? Each one would potentially lead to a different outcome. In June 2016 the same sex relationships referendum was held in Bermuda, and 69% of the votes cast were against same-sex marriage. Despite these figures, the turnout was only 46.89% of eligible voters, which is below the 50%

[90] *DeRoche v The Registrar General and others* [2016] S.C. (Bda) 64 Civ at [8].
[91] *Edwards v Canada* [1930] A.C. 124, 1929 U.K.P.C. 86
[92] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 at [31]

required for the referendum result to be valid[93]. It may be hard to justify using the referendum as support for removing same-sex marriage, as it is not a valid referendum due to poor turn out. If there seems to be at best an indifference amongst the communities of Bermuda as to same-sex marriage (given the low turnout despite campaigning by both sides), how does this translate into the interpretation of rights in light of the community that they serve? This conundrum does demonstrate the tension between the courts, who are seeking to assert legal certainty, and the government who may be more inclined to make policy based on the view of 14,192[94], or 21.70% of Bermuda's population[95]. The weight of international jurisprudence in Bermuda will certainly be under the spotlight if the government seeks to appeal the decision to the Bermudian Court of Appeal or seek the involvement of the JCPC. A connected issue has recently been decided in the UK's Supreme Court; equal access to civil partnerships has been debated for a number of years and this is a salient point which can be discussed in brief in relation to Bermudian same-sex marriage.

Equal Access to Civil Partnerships

Brief consideration will be given here to the recent decision of the UK Supreme Court in the case of *Steinfeld and Keidan*[96], and the insight that it may give the government of Bermuda should they seek to refer the matter to the JCPC. After all, the JCPC may *de jure* be a different chamber of adjudication, and the relationship it has with overseas and Commonwealth territories is unique and subject to political and legal sensitivities. However,

[93] S. Jones, "Voters roundly reject same-sex marriage" (June 24, 2016) *Royal Gazette* < http://www.royalgazette.com/news/article/20160624/voters-roundly-reject-same-sex-marriage > [Accessed June 26, 2018].
[94] *ibid*
[95] According to World Bank, "Data: Bermuda" (2016) < https://data.worldbank.org/country/bermuda?view=chart > [Accessed June 26, 2018].
[96] *R (on the application of Steinfeld and Keiden) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32

given that the same Justices decide cases in the JCPC as do in the UK's Supreme Court it would be prudent to acknowledge the decisions of one, when it deals with a relevant subject, even if it does not bind the other[97]. On the 27th June 2018 the UK Supreme Court handed down its judgment in the abovementioned case of *Steinfeld and Keidan,* issuing a declaration of incompatibility stating that the provisions of s.1 and s.3 of the Civil Partnership Act 2004 ("CPA") were incompatible with art.14 in conjunction with art.8 of sch.1 of the Human Rights Act 1998. This is because the CPA only permitted same-sex couples to form civil partnerships and not different-sex couples. It is noteworthy that this decision has come about following the UK's creation of same-sex marriage, and one might ask what could have been the logical reason for allowing same-sex couples to form civil partnerships, civil marriages and religious marriages while not allowing different-sex couples the same rights. This has been discussed at length by authors such as Gaffney-Rhys, who argues that the CPA should be extended to heterosexual couples on the grounds of equality, privacy, dignity and autonomy and argues that denying mixed-sex couples the right to form a civil partnership contravenes art.8 and 14 ECHR.[98] This is the same logical reasoning that the judiciary has adopted in the case of *Steinfeld and Keidan* and this leads to two points; first what impact would this have should the Bermudian DPA and decision in *Ferguson* be challenged before the JCPC, and secondly what does this say about the notion of equality that is adopted by the UK Supreme Court? This latter point will be addressed under the next heading.

In reference to the impact of this decision on any potential referral to the JCPC by the Bermudian government, it should not fill the Bermudian government with much confidence if

[97] For a Justice's opinion on the role of the JCPC and UK Supreme Court see 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.

[98] R. Gaffney-Rhys, "Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite sex couples?" (2014) 26(2) *Child and Family Law Quarterly* 173

they continue with the arguments used in *Ferguson.* One difference here is that the DPA does extend to same-sex and opposite-sex couples and so the question is not analogous, rather the logic in the decision of the UK Supreme Court is key. If the CPA is incompatible with art.14 taken with art.8 because it discriminates against different-sex couples, then the Bermudian Marriage Act 1944 would also be incompatible with art.14 and art.8 if it does not permit same-sex couples to marry; this of course is similar to the decision in *Godwin*[99]. The second matter needs a greater look at the meaning of equality and its role in legal theory on the Rule of Law.

Equality Before the Law

Exigencies of space preclude a full consideration of the historical development of, and the later codification of, equality before the law in constitutional terms. However, some key and salient points can be made in the short space allowed to explore the nuances of same-sex marriage in Bermuda and the approach to equality taken by the court in *Steinfeld and Keidan*. The Diceyan concept of the Rule of Law includes reference to the law applying equally to all, but makes no judgment on the quality or content of the law itself[100]. This is often termed the "equal subjection of all classes to a common rule"[101]. At the opposite end of the spectrum lies the substantive approach, which often cites that the Rule of Law draws its authority from notions of equality, liberty and fundamental freedoms[102]. This distinction is necessary before considering equality before the law clause in Bermuda. Each person will have a favoured

[99] *W Godwin et al v Registrar General* [2017] S.C. (Bda) 36 Civ
[100] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford: Oxford University Press 2013, first published in 1885); G. Marshall, Constitutional Theory (Clarendon Law Series, Oxford University Press 1980).
[101] P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework" [1997] *Public Law* 467.
[102] T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, Oxford University Press, 1994)

perspective on whether equality as a term simply denotes the "equal subjugation", or whether it goes further in referring to a common set of fundamental rights everyone can enjoy. Depending on a person's semantic preference, a formalist would say that the law can be legitimately discriminatory[103], whilst a substantivist would say that the authority of law is reliant on the content of law being compatible with a normative set of rights. Applying this to same-sex marriage in Bermuda, the very beginning of the Bermudian Constitution states that "every person is entitled to the fundamental rights and freedoms of the individual"[104]. This statement has a distinctly substantive approach to the formulation of the words in that it refers to an inherent set of freedoms all enjoy.

The first paragraph of the Constitution specifically refers to rights and their universality. This poses a question: if the Constitution sets out certain rights and characteristics which are protected, is *ejusdem generis*[105] permitted to expand the list in the constitution? *Ferguson* would seem to imply that the list is not finite and that the HRA, along with the common law, can expand on the specific rights and characteristics protected in the Constitution. Here, one criticism of the substantive conception rings true too *viz.* against who's moral or ethical standard is the list of rights benchmarked. It has already been stated in this article that the collective opinion of the people is not a sufficient benchmark against which to set fundamental rights. Doing so will marginalise minority groups, which are arguably in greater need of protection from discrimination. It is therefore the responsibility of a few people in positions of authority – such as legislatures and the judiciary – to decide which characteristics are protected from discrimination and how wide universal rights extend. The issue that arises

[103] In the formal conception as the content of law is irrelevant, see J Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195
[104] Bermuda Constitution Order 1968, The Schedule to the Constitution of Bermuda Chapter 1(1)
[105] Halsbury's Laws of England, Statutes and Legislative Process (Volume 96, 2012) para.1199.

when a small number of people decide such an important factor is that severe change can occur when a post-holder changes to one with a different moral compass or conception on the rule of law. A judge with a purely formal conception on the rule of law might hold that even oppressive laws are neither arbitrary nor contrary to equality[106]. This leads on to a discussion documented by Fairgrieve[107] and is beyond the scope of this article. In brief, however, when one considers the role of equality before the law as an argument to expand discrimination protections, it is right to ask to what extent should they be expanded upon and to reflect on the opinions of those imbued with the power to adjudicate on such matters. It would have been difficult for the Court to assert that discrimination on the grounds of sexual orientation was prohibited by the HRA, and that same-sex marriage discrimination was not prohibited, on the basis that one begets the other. The Courts view in *Ferguson*, that the Constitution protects every individual's right to hold a belief is perfectly acceptable[108], and the use of that logic to dismiss the proposition that the constitutional right to believe only in opposite-sex marriage precludes same-sex marriage is utilitarian. It does address equality before the law in a round-about way, in that it asserts a view that everyone has the right to a belief save in the instance that it impacts on others. How far that impact is measured, and what substantive view on equality before the law is being adopted to reach that conclusion, are questions that cannot yet be answered pending either an appeal or further case law from Bermuda.

In terms of the UK Supreme Courts demonstrable view, however, *Steinfeld and Keidan* seems to be drawing on both the substantive conception of equality having a relation to the fairness of the law to all. This draws on three of Lord Bingham's key principles in his theory

[106] M. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 *Yale Law Journal* 561; U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Oxford: Blackwell, 2008); D. Fairgrieve, "Etat de droit and rule of law: comparing concepts - a tribute to Roger Errera" [2015] *Public Law* 40.
[107] *ibid*
[108] *R Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [103]-[105].

on the Rule of Law. First that the law applies equally to all, this in itself is formalist as it passes no comment on the content of law and so laws could be discriminatory[109]. Secondly, however, that the courts must protect fundamental human rights, and thirdly, that the courts must act fairly when deciding cases. The courts have already demonstrated, not least in *Steinfeld and Keidan,* that forming a legal relationship is a matter which is relevant to the right to a private and family life protected under art.8. It has also demonstrated that treating people differently on the basis of their sexual-orientation is discriminatory and contrary to both art.8 and art.14. Coupling this together, then the UK Supreme Courts seems to have decided matters relatively consistently with the Bermudian Supreme Court, even if the reasoning behind the eventual decision were different. The courts are clearly utilising that distinctly substantive idea of fairness when looking at who should be entitled to marry and form civil partnerships and adopting a broad understanding of equality. Differences in reasoning demonstrate that Bermuda has its distinct jurisprudence, the fact that both the UK Supreme Court and the Supreme Court of Bermuda came to similar conclusions in relation to marriage in Bermuda and civil partnership in the UK demonstrates that, despite those differences in jurisprudence, there is a common acknowledgment of equality and fairness that permeates the jurisdictional divide.

Conclusion

The strong statement of intent included in the DPA does lead one to wonder whether the Act has been a knee-jerk reaction to a move by the Supreme Court of Bermuda to apply the HRA in a liberal fashion. Whether this matter warrants a knee-jerk legislative response will partly depend on whether one sees merit in the arguments for or against same-sex marriage.

[109] T Bingham, *The Rule of Law* (London: Penguin UK, 2011)

Notwithstanding this point, legislating on equality and enshrining in legislation a form of discrimination seems, *prima facie*, contrary to the ethos of the Bermudian Constitution and its HRA. Permitting an Act to treat people less-favourably as a result of their sexuality is intrinsically discriminatory. Sexual orientation and same-sex marriage are fundamentally linked by their definition[110]. Therefore, to argue that discrimination should be sanctioned against same-sex couples wanting to marry, and not sanctioned against a person's sexual orientation is illogical, as same-sex marriage is by definition reliant on those parties of the same sex wishing to marry. It is concluded that there is a strong argument for declaring that same-sex marriage should persist in Bermuda by drawing the inference that the DPA is inconsistent with the objectives of the Bermudian HRA insofar as it aims to treat same-sex couples less favourably than opposite-sex couples. A further argument is that the HRA's quasi-constitutional status gives rights which cannot easily be taken away by ordinary law in support of both the living tree doctrine and the statement mentioned above in *Blackburn.*

What will be the approach taken by the Bermudian Court of Appeal should it grant permission to appeal, considering tensions between the opinions of a proportion of their residents and the UK's approach? The UK supports same-sex marriage, the European Court of Human Rights has considered same-sex marriage extensively[111], and whether either of these would trickle into the judgment of the Bermudian Court of Appeal is a matter to be seen. It is not limited to impact from the UK and European jurisprudence, the case of *Jones*[112] (the very recent case in Trinidad and Tobago) saw the Court declare that criminalising same-

[110] *Lee v McArthur* [2016] N.I.C.A. 39; [2016] H.R.L.R. 22

[111] European Court of Human Rights, "Factsheet - Sexual orientation issues" (February 2018) < https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf > [Accessed June 26, 2018]

[112] Case name and citation not available, full judgement due in July S. Chaudhry, "Trinidad and Tobago court says laws barring gay sex are unconstitutional" (April 13, 2018) *Reuters* < https://www.reuters.com/article/us-trinidadtobago-judiciary-lgbt/trinidad-and-tobago-court-says-laws-barring-gay-sex-are-unconstitutional-idUSKBN1HK21I > [Accessed June 26, 2018]

sex sexual activity was unconstitutional. Though Trinidad and Tobago may not be at the point of discussing same-sex marriage yet, it is nonetheless a positive move in terms of LGBT+ rights in the Caribbean.

If the Bermudian Court of Appeal grants permission to appeal then the role of the JCPC may be of interest, and the latter arguments in this article may warrant further discussion. Would the JCPC apply the living tree doctrine, which will advance Bermudian rights and, if so, how much will UK and Strasbourg jurisprudence influence the JCPC? If the JCPC did decide to assert rights as it has done more recently in the case of *Steinfeld and Keidan*, can they be of assistance with harmonising the inconsistencies more widely seen across the Commonwealth? There are approximately[113] 36 Commonwealth countries which criminalise homosexuality or the LGBT+ community in some way, and the JCPC could be a source of authority to encourage equality and tolerance across the Commonwealth. This is hypothetical at this point; the next few months will be very important in terms of Bermudian constitutionalism and, potentially, of interest across the Commonwealth also.

Given that the matter is pending an appeal by the Bermudian government, the domestic courts in Bermuda should not lose sight of the separation of powers and the substantive notion of equality before the law motioned above. The court's decisions are handed down in pursuance of upholding the constitution as the supreme law, and (using the living tree doctrine) expanding the rights contained in the constitution to reflect society as a whole. In

[113] Varying figures quoted on this, see Royal Commonwealth Society, "A Commonwealth Approach to LGBT Equality" (LGBT Rights, Date unknown) < http://thercs.org/our-work/campaigns/lgbt-rights/ > [Accessed June 26, 2018]; *cf.* B. Dittrich, "Commonwealth Should Address LGBT Rights: Two Thirds of Member States Criminalize Consensual Same-Sex Acts" (2018) *The Advocate* < https://www.advocate.com/commentary/2018/4/16/commonwealth-nations-must-decriminalize-gay-sex > [Accessed June 26, 2018].

doing so the court should consider the impact and shortcomings of majority rule and identity thinking; the opinions of the population of Bermuda are anecdotally relevant but should not be used as authority for a contraction of rights or the living tree. Minority groups inevitably form a smaller share of the population and so their voices can be drowned out by the masses. It is the role of the Bermudian courts to resist the marginalisation of minority groups to achieve the aims in the first paragraph of the Bermudian Constitution. The courts cannot do this if it submits to the will of the legislature or of some public opinion.

The living tree doctrine was planted nearly a century ago in a society and situation very different from the one that is currently being discussed, however, the author is reminded that trees are planted "for the benefit of another generation"[114].

[114] Cicero, *Cato Maior de Senectute* (Cambridge, Massachusetts: Loeb Classical Library 1923)