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ADVOCATING FOR EQUALITY: RESTORING SAME-SEX MARRIAGE RECOGNITION IN BERMUDA

*by Coleman Watts**

I. Introduction: Legislative Background of Same-Sex Marriage in Bermuda

Bermuda, a British Overseas Territory located in the North Atlantic Ocean, has had a complex legal journey regarding recognizing same-sex relationships. In May 2017, Bermuda made significant strides towards marriage equality by legalizing same-sex marriage. The landmark ruling, delivered by the Supreme Court of Bermuda, declared that same-sex couples should be afforded equal rights and protections under the law, including the right to marry.¹

Following the general elections in mid-2017, Bermuda's newly elected PLP (Progressive Labour Party) government enacted legislation in December 2017 to replace same-sex marriage with domestic partnerships.² In February 2018, Bermuda enacted the Domestic Partnership Act, effectively banning same-sex marriage and replacing it with a system of domestic

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1 *Same-sex couples to have rights protected*, The Royal Gazette (Aug. 28, 2017), <https://www.royalgazette.com/other/news/article/20170828/same-sex-couples-to-have-rights-protected/>; see also *W. Godwin et al. v. Registrar General* [2017] SC (Bda) 36 Civ (May 5, 2017), <https://www.gov.bm/sites/default/files/Godwin-Deroche.pdf>.

2 *Id.*

partnerships.³ This move marked a stark reversal of the country's stance on LGBTQ+ rights. The legislation was contested with the Supreme Court, which ruled it as unconstitutional, violating the principles of freedom of conscience and creed by compelling those who do not believe in same-sex marriage to endorse it.⁴ In December 2018, the government appealed the ruling to the Judicial Committee of the Privy Council (JCPC), which reversed the Supreme Court's ruling and affirmed that banning gay marriage was not unconstitutional.⁵

Despite the controversial nature of this move, the British Crown did not intervene, and the Governor of Bermuda granted royal assent to the law in 2018.⁶ Consequently, Bermuda became the first territory globally to reverse marriage rights for same-sex couples through legislative means, as the law came into effect on June 1st, 2018.⁷ This move sparked controversy and outcry from LGBTQ+ rights advocates both within Bermuda and internationally, as it represented an apparent regression in terms of equality and human rights.⁸

II. Subsequent Legal Battles

A pivotal hearing occurred in May 2018, presided over by the Chief Justice of Bermuda's Supreme Court, focusing on the constitutionality of the ban

3 Emma Farge, *Bermuda top court reverses government's gay marriage ban*, Reuters (Nov. 24, 2018), <https://www.reuters.com/article/us-bermuda-gaymarriage/bermuda-top-court-reverses-governments-gay-marriage-ban-idUSKCN1NS22P/>.

4 *Summary Judgment: Ferguson et al v. Attorney-General*, Supreme Court of Bermuda (June 6, 2018), <https://www.gov.bm/sites/default/files/Judgment%20Summary-Ferguson-v-A-G-Out-Bermuda%20and%20Jackson-v-A-G.pdf>.

5 Fiona McWhirter, *Banning same-sex marriage not unconstitutional – Privy Council*, The Royal Gazette (Mar. 15, 2022), <https://www.royalgazette.com/same-sex-marriage/news/article/20220314/privy-council-same-sex-marriage-ruling-summary/>.

6 Sam Strangeways, *Furbert: same-sex Bill looks hopeful*, The Royal Gazette (July 28, 2017), <https://www.royalgazette.com/same-sex-marriage/news/article/20170728/furbert-same-sex-bill-looks-hopeful/>.

7 Christopher Brennan, *Bermuda becomes first nation to legalize gay marriage, then repeal it*, The New York Times, (Feb. 8, 2018), <https://www.nydailynews.com/2018/02/08/bermuda-becomes-first-nation-to-legalize-gay-marriage-then-repeal-it/>.

8 Kashmira Gander, *Truly evil': Calls to boycott Bermuda for unprecedented repeal of same-sex marriage*, IBT, (Feb. 18, 2018), <https://www.ibtimes.co.uk/truly-evil-calls-boycott-bermuda-follow-unprecedented-repeal-same-sex-marriage-1659854> [hereinafter *Calls to Boycott Bermuda*].

on same-sex marriage and its impact on the rights of LGBTQ+ couples. Subsequently, on June 6, 2018, the Supreme Court issued its judgment, striking down the provisions of the law that prohibited same-sex couples from marrying.⁹ The court emphasized that upholding or reinstating a definition of marriage that disadvantaged proponents of same-sex marriage amounted to discrimination based on creed, as outlined in section 12 of the Bermuda Constitution.¹⁰ Following the ruling, the Attorney General of Bermuda applied for a stay of the decision for six weeks to allow the government to consider an appeal.¹¹ The government filed an appeal with the Court of Appeal on July 5, 2018.¹² Oral arguments were heard in early November 2018, culminating in the Court of Appeal's decision on November 23, 2018, upholding the Supreme Court's ruling and refusing to stay the decision.¹³

However, the legal battle persisted as the government sought permission to appeal the ruling to the Judicial Committee of the Privy Council (JCPC).¹⁴ This process concluded on March 14, 2022, with the Council's decision to overturn the Court of Appeal's ruling.¹⁵ The JCPC concluded that the Bermudan Constitution did not provide same-sex marriage as a right.¹⁶ The Privy Council also concluded that no provision in the Bermuda Constitution would "nullify a legislative provision enacted by the Legislature on the ground that it had been enacted for a religious purpose."¹⁷ This interpretation underscored the view that legislative de-

isions made for religious reasons are not inherently unconstitutional under the Bermuda Constitution. This ruling provided a legal basis for upholding the ban on same-sex marriage, as it dismissed arguments that the legislation was unconstitutional due to its religious motivations because there is no constitutional verbiage prohibiting this.¹⁸

Despite this setback, advocates of same-sex marriage have remained hopeful, with efforts continuing on the international front to appeal the ruling.¹⁹ Currently, the case is waiting to be heard by The European Court of Human Rights ("ECtHR"), which has jurisdiction over human rights issue over Britain and its overseas territories, including Bermuda.²⁰ The ECtHR serves as a conduit of human rights protection within the European continent and is tasked with interpreting and enforcing the European Convention on Human Rights ("ECHR" or "the Convention").²¹ Among these rights is the right to marry, as enshrined in Article 12 of the Convention, which states, "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."²² While the ECtHR has not officially classified the absence of same-sex marriage as a violation of Article 12 of the Convention, the annulment of the right to marry for same-sex couples, previously acknowledged by national legal reform or legislation, fundamentally shifts the landscape upon which Convention-based arguments must be evaluated.²³

III. Analysis

The ECHR and the human rights principles of the Bermudan Constitution serve as important instruments for governing the legal standards of Bermudan

9 *OUTBermuda et al. v. Attorney General*, [2018] SC (Bda) 45 Civ (June 6, 2018), <https://www.gov.bm/sites/default/files/Final%20Judgment-Ferguson-v-A-G-OutBermuda%20and%20Jackson-v-A-G%20%285%29.pdf>.

10 *Id.*; see also Bermuda Const. 1968, Section 12.

11 *Govt Files Appeal In Same Sex Marriage Case*, Bernews (July 5, 2018), <https://bernews.com/2018/07/govt-filed-appeal-same-sex-marriage/>.

12 *Id.*

13 Owain Johnston-Barnes, *Government loses same-sex battle*, The Royal Gazette (Nov. 23, 2018), <https://www.royalgazette.com/same-sex-marriage/news/article/20181124/government-loses-same-sex-battle/>.

14 Fiona McWhirter, *Same-sex marriage case could succeed in European Court of Human Rights, says UK law professor*, The Royal Gazette (Mar. 19, 2022), <https://www.royalgazette.com/same-sex-marriage/news/article/20220319/same-sex-marriage-case-could-succeed-in-european-court-of-human-rights-says-uk-law-professor-2/>.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *European Court of Human Rights Revisits Same-Sex Marriage*, matrix chambers (July 3, 2023), <https://www.matrixlaw.co.uk/news/european-court-of-human-rights-revisits-same-sex-marriage/>.

20 *Id.*; See also *European Court of Human Rights*, International Justice Resource Center, <https://ijrcenter.org/european-court-of-human-rights/> (Last visited May 3, 2024).

21 *BBC News - Profile: The Council of Europe*, BBC News (Feb. 5, 2015), <https://www.bbc.com/news/world-europe-17741526>.

22 UK Human Rights Blog on Article 12. <https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-12>.

23 *Schalk and Kopf v. Austria*, E.Ct.H.R., *Case Reports*, 30141/04, 2010, § [92], (June 24, 2010), <https://hudoc.echr.coe.int/fre?i=001-99605> [hereinafter *Schalk and Kopf*].

marriage equality. These principles, such as non-discrimination and marriage equality, are particularly applicable to Bermuda's case. Examining the withdrawal of same-sex marriage rights in Bermuda in contrast to precedent cases like *Oliari v. Italy*, *B and L v. United Kingdom*, and *Hirst v. United Kingdom* offers insight into fundamental legal principles and factors.²⁴

In *Oliari v. Italy*, the ECtHR established that while courts are not required to grant same-sex marriage, they must recognize unions and ensure that discriminatory treatment is not present under Articles 12 and 14.²⁵ However, the Bermuda case presents a distinction concerning revocation rather than implementing same-sex marriage rights.

IV. Article 8 of the European Convention on Human Rights

Article 8 of the ECHR stipulates that the revocation of rights (or any legislation) must not be arbitrary or disproportionate.²⁶ In the case of Bermuda's ban on future same-sex marriages, while continuing to recognize prior same-sex marriages, a clear discrepancy arises. This blanket prohibition on future unions contrasts starkly with the ongoing acknowledgment of past same-sex marriages, creating an inconsistency in the application of rights. This inconsistency is reminiscent of the findings in the case of *B and L v. United Kingdom*, a similar case involving the marriage between a father-in-law and a child-in-law, where prior marriages of this nature were permitted, but future marriages were banned.²⁷ This forced the couple to refrain from marrying despite having the right to for decades prior, which the plaintiffs believed was banned without cause.²⁸ The ECtHR determined that a similar illogical approach and inconsistency constituted a violation of

24 *Oliari et al. v Italy*, Applications Nos. 18766/11 and 36030/11 (July 21, 2015), <https://hudoc.echr.coe.int/eng?i=002-10668>; see also *Hirst v. United Kingdom* (No. 2), 40 Eur. H.R. Rep. 24 (July 8, 2003), <https://hudoc.echr.coe.int/eng?i=001-23304> [hereinafter *Hirst*].

25 *Hirst*, *supra* note 24.

26 Barker, Nicola. 'Marry in Haste ...': *The (Partial) Abolition of Same-sex Marriage in Bermuda*, 20 Hum. Rights Law Rev. 153 (March 2020) [hereinafter *Marry in Haste*].

27 *Id.*; see also *B and L v. United Kingdom*, Application No. 36536/02 (Dec. 13, 2005), <https://hudoc.echr.coe.int/eng?i=001-70136>.

28 *Id.*

Article 8.²⁹

By revoking the right to marry for same-sex couples while simultaneously upholding the validity of previous marriages, the Bermuda government's actions create an arbitrary distinction that undermines the principles of equality and non-discrimination enshrined in Article 8 of the ECHR. This inconsistency in treatment raises questions about the proportionality and rationality of the ban, particularly in light of the government's obligation to ensure equal protection of rights for all individuals, regardless of sexual orientation. It follows a similar illogical inconsistency that parallels *B and L* by providing a right to marriage and then seemingly retracting it without cause.³⁰ This revocation creates illogical and aimless legislation that lacks the consistency required under Article 8.³¹

V. Article 12 European Convention on Human Rights

Article 12 of the ECHR establishes that any "general, automatic, and indiscriminate restriction on a vitally important Convention right fell outside any acceptable margin of appreciation, however wide that margin was."³² This provision emphasizes the need to avoid blanket prohibitions or restrictions that fail to consider individual circumstances or necessities. In the case of *Hirst v. United Kingdom*, which involved immigration bans for specific ethnic groups, the ECtHR ruled that a blanket prohibition on exercising the right to marry for a specified category of individuals constitutes a violation of Article 12.³³ The court reasoned that such blanket discrimination is prohibited as it demonstrates legislation enacted against a class of individuals, thereby contradicting the principles of equality and non-discrimination.

The relevance of the *Hirst* to the Bermuda situation lies in the parallel drawn between the blanket prohibition on same-sex marriage rights and the broader concept of blanket discrimination.³⁴ By explicitly targeting LGBTQ+ community members, the government's decision to revoke same-sex marriage rights in Bermuda effectively enacts legislation that discrimi-

29 *Hirst*, *supra* note 24.

30 *Marry in Haste*, *supra* note 26.

31 *Id.*

32 *Id.*

33 *Schalk and Kopf*, *supra* note 23.

34 *Id.*

nates against a particular group based on their sexual orientation.³⁵ This aligns with the precedent set in *Hirst v. United Kingdom*, where the ECtHR emphasized the prohibition of legislation that targets specific categories of individuals and infringes upon their fundamental rights.³⁶

VI. Contextual Lens

The JCPC's rulings appear to have been heavily influenced by a strict textual interpretation of the constitutions, with insufficient consideration given to the consequences of the same-sex marriage bans for LGBTQ+ communities in jurisdictions. The court's ruling in *Matadeen v. Pointu*, a 1998 discrimination case surrounding Mauritian children's secondary school placement, highlighted new procedural importance for constitutional claims.³⁷ Lord Hoffmann, who delivered the court's advice, wrote that "every utterance must be construed in its proper context, taking into account the historical background and purpose for which [it] was made."³⁸ This contextual approach has been further defined to include factors such as referendum outcomes, and the safeguards intended by Bills of Rights.³⁹ However, this contextual approach was absent from the court's decision which ultimately may have been quite different if it had properly done so.⁴⁰

Firstly, the JCPC's reliance on a narrow textual interpretation of the constitution and Bill of Rights of Bermuda neglected to adequately consider the historical background and purpose behind previous legislation enacting gay marriage and the sentiments expressed in referendums supporting same-sex marriage. 53 percent of Bermudans support same-sex marriage alongside the prior legislation permitting same-sex marriage.⁴¹ The ruling in *Matadeen* sets a precedent for considering contextual evidence, such as public opin-

ion polling, but is absent from the Privy Council's ruling.⁴² It also should have considered Section 1 of Bermuda's Bill of Rights, which declare a commitment to the equal protection of rights and freedoms of all its citizens.⁴³ Certainly, same-sex marriage falls within the scope of this language, especially when considering Canadian, South African, and US courts include this same commitment.⁴⁴ By failing to contextualize the bans on same-sex marriage within this broader context, the JCPC overlooked the significant impact of these prohibitions on the rights and dignity of the gay and lesbian community within Bermuda.

Additionally, the Privy Council's heavy reliance on ECHR jurisprudence at the expense of foundational principles such as liberty and equality raises concerns about the court's approach to human rights adjudication. It based much of its decision on ECHR court precedent and their interpretations of Articles 8 and 12.⁴⁵ While international human rights jurisprudence provides valuable guidance, it should not overshadow the fundamental rights and principles enshrined in domestic constitutions.⁴⁶ The JCPC's failure to prioritize these foundational principles in its interpretive methodology compromised its ability to fully consider the implications of the bans on same-sex marriage for the rights and freedoms of individuals within the affected communities.

VII. Recommendations

On appeal, appellants should argue based upon the precedents set by *Hirst* and *Matadeen* to emphasize these interpretations of Articles 8 and 12 and a contextual approach to the issues surrounding gay marriage in Bermuda.⁴⁷ They should highlight the inconsistency and arbitrariness of the blanket prohibition on future same-sex marriages, while recognizing past marriages, under Article 8 of the Convention. Additionally, they should underscore how the ban violates Article 12 by imposing a general, automatic, and indiscriminate restriction on a vitally important Convention right. By weaving these legal arguments with a contextual lens that considers historical background, societal sentiments, and

35 Calls to Boycott Bermuda, *supra* note 8.

36 *Hirst*, *supra* note 24.

37 *Matadeen v. Pointu*, [1998] UKPC 9 (February 18, 1998), <https://vlex.co.uk/vid/matadeen-v-pointu-802033061> [hereinafter *Matadeen*].

38 *Id.*

39 Derek O'Brien, *The Judicial Committee of the Privy Council, constitutional interpretation, and the right to same-sex marriage*, Int'l J. Const. L., (Jan. 29, 2024), DOI:10.1093/icon/moae001.

40 *Id.*

41 *OUTBermuda: 53% Favour Same-Sex Marriage*, Bernews (Sept. 17, 2020) <https://bernews.com/2020/09/outbermuda-53-favours-sex-marriage/>.

42 *Matadeen*, *supra* note 37.

43 Bermuda Const. 1968, Section 1.

44 *Matadeen*, *supra* note 37.

45 *Id.*

46 *Id.*

47 *Hirst*, *supra* note 24; *Matadeen*, *supra* note 37.

the principles of liberty and equality, the appellants can effectively challenge the revocation of same-sex marriage rights in Bermuda and advocate for the protection of fundamental human rights for LGBTQ+ communities.

However, proponents of the Bermuda government's decision may argue that the revocation of same-sex marriage rights does not inherently violate human rights principles but rather reflects the democratic will of the people as expressed through the legislative process. They may contend that the government has the authority to enact laws that align with the prevailing societal values and moral standards, even if they restrict certain rights for specific groups. Therefore, they might argue that the decision to revoke same-sex marriage rights in Bermuda is justified within democratic governance and respect for legislative authority.

However, it is essential to recognize that democracy encompasses more than majority rule. True democracy entails the protection of minority rights and the safeguarding of fundamental human rights for all individuals, regardless of popular opinion. The revocation of same-sex marriage rights in Bermuda represents a violation of these democratic principles by disenfranchising and discriminating against LGBTQ+ individuals, who constitute a minority group within society.

VIII. Conclusion

The legal arguments surrounding the revocation of same-sex marriage rights in Bermuda highlight fundamental principles of equality, non-discrimination, and the protection of human rights. The analysis of Article 8 of the ECHR underscores the arbitrariness and inconsistency inherent in the blanket prohibition on future same-sex marriages while recognizing past marriages. This raises questions about the proportionality and rationality of the ban, particularly concerning the government's obligation to ensure equal protection of rights for all individuals, regardless of sexual orientation.

Similarly, the examination of Article 12 of the ECHR emphasizes the need to avoid blanket prohibitions or restrictions that fail to consider individual circumstances or necessities.⁴⁸

Furthermore, the contextual lens applied to the analysis underscores the importance of considering the historical background, societal sentiments, and the principles

of liberty and equality when evaluating the validity of same-sex marriage bans. The failure to prioritize these foundational principles in the interpretive methodology compromises the ability to fully consider the implications of such bans for the rights and freedoms of individuals within affected communities.

Therefore, on appeal, appellants must argue based on the precedents set by cases like *Hirst* and *Matadeen*, emphasizing interpretations of Articles 8 and 12 of the ECHR and a contextual approach to the issues surrounding same-sex marriage in Bermuda. By weaving these legal arguments together, advocates can effectively challenge the revocation of same-sex marriage rights and advocate for the protection of fundamental human rights for LGBTQ+ communities not only in Bermuda but also in jurisdictions worldwide.

⁴⁸ Marry in Haste, *supra* note 26.