

Written evidence from Professor Nicola Barker (SOT22)

Public Administration and Constitutional Affairs Committee

The Status of the UK's Overseas Territories in the 21st Century inquiry

Biography

I am a Professor of Law at the University of Liverpool. I have expertise on the Bermuda Constitution and the impact of the European Convention on Human Rights (ECHR) on the UK's Overseas Territories, having published a number of articles on these subjects.¹ I also have expertise on marriage and the legal recognition of same-sex relationships globally and have published extensively on this topic, including in relation to the revocation of same-sex marriage in Bermuda.²

This submission relates to the first and last bullet points in the Terms of Reference:

- Are the UK's current constitutional arrangements as regards the overseas territories satisfactory and appropriate in the 21st Century?
- Are the rights and interests of British overseas citizens effectively protected by the current constitutional arrangements?

The answer to both questions as they relate to Bermuda is quite clearly "no" for the reasons I outline in this submission.

¹ See: Nicola Barker, Rights, Democracy and Decolonisation: An Argument for "Bermudianizing" the Constitution, in V. Memari (ed.) *The Bermuda Constitution at 50: Reflections on its Past and Future* (Hamilton, Bermuda: Centre for Justice, 2018) ISBN 978-1722955786; Nicola 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. *Public Law* (2016) (October), 595-612; Nicola Barker, Like Mixing Apples and Oranges? The Impact of the European Convention on Human Rights on LGBT Rights and Gender Equality in Bermuda, in V. Memari (ed.) *Justice in Bermuda Today 2014: Human Rights Since Emancipation* (Hamilton, Bermuda: Centre for Justice, 2014) ISBN 978-1530507962.

² Nicola Barker, "Marry in Haste..." The (Partial) Abolition of Same-Sex Marriage in Bermuda. *Human Rights Law Review* (2020) 20: 153-188. See also: Nicola Barker, *The Evolution of Marriage and Relationship Recognition* (UN Women, 2018); Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave, 2012); Nicola Barker and Suzanne Lenon (eds.), 'Radically Rethinking Marriage' *Special Issue: Oñati Socio-Legal Series* (2016) Vol.6(6); Nicola Barker and Daniel Monk (eds.) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge, 2015); Nicola Barker 'Ambiguous Symbolisms: Recognising Customary Marriage and Same-Sex Marriage in South Africa' (2011) 7(4) *International Journal of Law in Context*, pp.447-466.

Summary

1. There has not been a significant overhaul of the Bermuda Constitution since the 1960s. There was, by design, very little public engagement with the process of creating this constitution, which was for the most part simply a replica of the Bahama Islands pre-independence constitution. The expectation was that Bermuda was on a similar path towards independence and that this constitution would therefore be temporary. This expectation has not been borne out and while the current Bermuda government is committed to pursuing independence, public opinion does not appear to suggest this is likely in the near future.
2. The Bermuda Constitution is neither satisfactory nor appropriate for two main reasons, which are explained more fully in the submission. First, it lacks democratic legitimacy due to the process under which it was created and its historical context.
3. The current Constitution was created according to a process which sought to entrench existing (racial and class) inequalities and cement power in the hands of an existing white oligarchy who controlled the legislature and government at that time. Unequal constituencies and an additional vote given to landowners meant that the vote of a Bermudian living in the predominantly black and working-class constituencies was worth around one-tenth of the value of a vote of a Bermudian living in a white and middle-class constituency. The current Constitution improved the situation but did not create equal constituencies: the difference in voting value became around one-third, until the Constitution was revised to create roughly equal constituencies in 2003.
4. In the intervening period, inequalities became so inter-generationally entrenched as to be commonly referred to as “two Bermudas”, signifying the vast difference in peoples’ experiences of living in Bermuda and the opportunities open to them being such that they could be living in two different countries. It is, therefore, not sufficient to simply remove the root cause of the inequalities, as was done through limited constitutional reform in 2003.
5. Bermudians ought to be given the opportunity to consider constitutional provisions that acknowledge and require successive governments to actively redress the inequalities that have been created in Bermuda through its having been “a historically overtly racially segregated and fundamentally unfair society”.³ As noted in the separate submission by Dr Caroline Morris, they should also be given the opportunity to consider whether an alternative to the Westminster model of government and ‘first past the post’ voting system may be more suitable in a small jurisdiction.
6. Second, it fails to adequately protect human rights.

³ Bank of Bermuda Foundation, quoted in Lisa Simpson, ‘Inequality behind change in funding approach’ 17 April 2017 *The Royal Gazette* <https://www.royalgazette.com/news/article/20170417/inequality-behind-change-in-funding-approach/> [last accessed 12 July 2023]

7. Although the current Constitution was written at around the same time as the right of individual petition to the European Court of Human Rights was extended to Bermuda, the fundamental rights chapter appears to have been an afterthought. Archival records of the constitutional discussions within Bermuda and the report of the constitutional conference in London suggest that it was given little consideration.
8. The Constitution only partially replicates the rights contained within the European Convention on Human Rights. There is no language equivalent to Articles 8, 12, or 14 (rights to private and family life, right to marry, prohibition of discrimination [on grounds other than race or religion]). As such, important rights relating particularly to women, LGBT+ people, disabled people, and children are missing from the Constitution. This both leaves Bermudians vulnerable to rights violations and leaves the UK vulnerable to having to respond to alleged violations of the European Convention on Human Rights in Strasbourg. The case of *Ferguson and Others v The United Kingdom* is a current example of this.⁴ It is, therefore, essential that the Bermuda Constitution is revised to, at a minimum, ensure that the UK's international obligations can be fully considered in domestic courts in the first instance so that any alleged violations can be addressed locally and at the earliest opportunity.
9. The UK's international obligations under the Convention are not currently being fully considered or protected in Bermuda due to the gap between the Convention obligations (which are not binding on the Bermuda government as the UK is the signatory state) and the Constitution (which is binding on the Bermuda government). This has led to little public or governmental knowledge of or investment in protecting Convention rights. This ought to be remedied by making the UK's Convention obligations fully and directly enforceable in Bermuda through full, rather than only partial, inclusion in its Constitution.
10. The Convention rights are a minimum, rather than maximum, required level of protection so Bermudians may want to consider the potential inclusion of additional rights, such as children's rights, socio-economic rights, and environmental rights, which have been included in other jurisdictions.
11. While my primary focus is on Bermuda, the issues raised in the second section of my submission (on fundamental rights) will also be applicable to other overseas territories that have only partially incorporated the provisions of the ECHR into their fundamental rights chapters. This includes some of the recently revised constitutions that have largely replicated the ECHR but with additional language restricting the parameters of some Convention rights. Most notably, this applies to the Cayman Islands, Turks and Caicos Islands, and Montserrat constitutions, which all specify that the right to marry only applies to opposite-sex marriage, whereas no such restriction exists in the Convention itself.

⁴ Application no.35043/22, communicated to the UK on 30 May 2023. As it is an ongoing case, I do not discuss it in this submission but more information about the case can be found here: Nicola Barker 'Can Same-Sex Marriage Be Revoked? *Ferguson and Others v the United Kingdom*' *Liverpool Law School Blog* (28 June 2023) <https://www.liverpool.ac.uk/law/blog/can-same-sex-marriage-be-revoked/>.

Submission

Introduction

1. The Bermuda Constitution of 1968 was written at a time when much of the former British Empire was in the process of becoming independent. The UK was actively pushing for decolonisation, to the extent that the new Colonial Secretary in 1964, Anthony Greenwood, was told by Prime Minister Harold Wilson to “work himself out of a job as soon as possible”.⁵ As such, there was an assumption that Bermuda’s new Constitution would be a pre-independence constitution;⁶ one which sets the scene for independence in the near future. Therefore, as Bermuda Premier David Burt said to the House of Assembly on the 50th anniversary of the Bermuda Constitution Order in 2018: “Bermuda’s 50-year-old Constitution is forty-five years beyond its intended shelf-life.”⁷
2. Rather than being the product of public engagement and responsive to both the needs and values of Bermudians and the UK’s international obligations, the Bermuda Constitution was based on an FCO template and is virtually identical to those of other territories written during that period: there is nothing uniquely Bermudian about it. Instead, it closely replicates the pre-independence constitution of the Bahamas and was described by the then leader of the Progressive Labour Party (PLP), Mr Walter Robinson, as an “unsatisfactory copy of an unsatisfactory constitution”. Bermuda, he said, “deserves something better than a shop-soiled and second-hand version of a constitution...”.⁸ It is difficult to disagree with this assessment.
3. There are two major flaws in the Bermuda Constitution, which I explain further below. First, it lacks democratic legitimacy due to the process under which it was created and its historical context. Specifically, it sought to entrench existing (racial and class) inequalities and succeeded in doing so. Second, it fails to adequately protect human rights. This failure both leaves Bermudians vulnerable to rights violations and leaves the UK vulnerable to having to respond to alleged violations of the European Convention on Human Rights, as in the case of *Ferguson and Others v The United Kingdom*.⁹

⁵ David Killingray, ‘British decolonization and the smaller territories: the origins of the UK Overseas Territories’ in P. Clegg and D. Killingray, *The Non-Independent Territories of the Caribbean and Pacific: Continuity and Change* (London: Institute of Commonwealth Studies, University of London, 2012), at p.6.

⁶ Howard Fergus, ‘Constitutional Reform in some British Overseas Territories in the Caribbean: Modernisation or Colonial Entrenchment?’ in D. Killingray and D. Taylor *The United Kingdom Overseas Territories* (London: Institute of Commonwealth Studies, 2005), at p.31.

⁷ Ministerial Statement by The Hon. E. David Burt JP MP, Premier and Minister of Finance, 4th May 2018, ‘The British Government vs The Bermuda Constitution’ <<http://www.royalgazette.com/assets/pdf/RG38540054.pdf>> [accessed 17 May 2018].

⁸ Anon. ‘The wrangling is over in London but will begin anew in Bermuda’ (25 November 1966) *The Bermuda Recorder* [accessed 11 May 2018].

⁹ Application no.35043/22, communicated to the UK on 30 May 2023. As it is an ongoing case, I do not discuss it in this submission but more information about the case can be found here: Nicola Barker ‘Can Same-Sex Marriage Be Revoked? Ferguson and Others v the United Kingdom’ *Liverpool Law School Blog* (28 June 2023) <https://www.liverpool.ac.uk/law/blog/can-same-sex-marriage-be-revoked/>.

4. The Bermuda Constitution should, at a minimum, ensure that the UK's international obligations can be fully considered in local courts in the first instance so that any alleged violations can be addressed locally and at the earliest opportunity. This is not currently the case.

The Bermuda Constitution Lacks Democratic Legitimacy

5. I begin by outlining the historical context of the Constitution because that is significant not only in terms of explaining why the fundamental rights chapter is inadequate but also in terms of explaining the broader democratic deficit of the Constitution.
6. It was striking how little influence the people of Bermuda had on making this Constitution. The usual processes of that time saw the constitutional conference take place in London, chaired by the Secretary of State for the Colonies. Although some debate had initially taken place in Bermuda through a Joint Select Committee of the legislature, the legislature at that time was neither representative of Bermuda nor fairly elected (see further below). Furthermore, there had been little attempt to engage the public prior to the constitutional conference.
7. This lack of public consultation is documented in exchanges held in the Bermuda National Archives between the Governor Lord Martonmere and Sir Ralph Hone, who was the former head of the legal division of the Commonwealth Relations Office and an adviser to the Bermuda government at the time. The Secretary of the Bermuda Industrial Union (BIU) had written a letter to the Governor explaining that BIU was "gravely concerned" about the lack of public knowledge of the proposed constitutional changes and the forthcoming constitutional conference, noting that "there has been little attempt to hold meetings and forums on the above subject" nor to inform the public.¹⁰ This letter prompted the Governor to seek advice from Sir Ralph Hone, who confirmed that his impression concurred with the BIU's view:

*"Admittedly I am not really in a position to judge, but I certainly came away with the impression that while there had been a lot of talking in the two Houses, it was **far from clear to what extent the main sections of the general public supported or otherwise the various constitutional proposals** that were being bandied about. The proper time for political campaigns on the issues at stake was undoubtedly when the Select Committee was sitting, and subsequently, when the Report was being debated but I have the impression that there was **very little attempt at that time to seek popular support for any line of action.**"¹¹*

¹⁰ Letter from Barbara Ball, Secretary of Bermuda Industrial Union, to the Right Honourable Lord Martonmere. 10 September 1966. Bermuda National Archives 2735/B.

¹¹ Letter from Sir Ralph Hone to Governor Lord Martonmere. 20 September 1966. BNA 2735/B (emphasis added).

8. Nevertheless, Sir Ralph Hone considered that it would be “undesirable” for the Government to foster public engagement “at this late stage” and found it fortunate that it was the BIU rather than a political party who had expressed these concerns, as they could be said to have “no standing in the matter.”¹² It would have been more difficult, in his view, to turn down such a plea from a political party.¹³ As a result, the Governor replied to the BIU denying a lack of public engagement, as the report of the Select Committee had been “well ventilated in the House and well reported in the press”. He also expressed his view in that correspondence that it would better if the delegates to the constitutional conference “did not enter into public discussions which may force them to take attitudes and make commitments which they may regret at the Conference table.”¹⁴
9. It is clear, then, that Bermuda’s Constitution is very far away from having had the level of public involvement, preceded by civic education from an independent body, that we would expect to see in a constitutional reform process today.¹⁵ Furthermore, not only was there an absence of public participation in the process of constitutional reform, the Bermuda legislature itself, from which delegates to the constitutional conference were selected, was not democratic at the time.
10. The process of constitutional reform began in November 1963, when the two Houses of the Bermuda legislature created a Joint Select Committee “to consider and report on what constitutional changes, if any, were desirable”.¹⁶ The Committee made some recommendations for reform and as a result the Governor appointed a delegation to discuss this with the Secretary of State for the Colonies. The delegation was chosen to represent “all shades of opinion from among the members of the Legislature”.¹⁷ It consisted of 3 members from the (unelected) Legislative Council, and 15 from the House of Assembly: eight from the governing United Bermuda Party (UBP); three from the Progressive Labour Party (PLP); and four independents.¹⁸
11. However, while this delegation was representative of the legislature, the legislature itself was not democratic or representative of Bermuda at that time. The election that created this House of Assembly was the last election to allow landowners to have an extra vote.¹⁹ As a result, those who owned property in 1963 were over-

¹² Idem.

¹³ Idem.

¹⁴ Letter from Governor Lord Martonmere to Barbara Ball, Secretary General of BIU, 27 September 1966. BNA 2735/B.

¹⁵ See for example: International IDEA, *A Practical Guide to Constitution Building* (15 December 2011) < <https://www.idea.int/publications/catalogue/practical-guide-constitution-building?lang=en> > [last accessed 14 July 2023].

¹⁶ Report of the Bermuda Constitutional Conference 1966 (London: Her Majesty’s Stationery Office) Cmnd. 3174, p.1.

¹⁷ Constitutional Conference Report, above, p.1.

¹⁸ Constitutional Conference Report, above, p.2.

¹⁹ This wasn’t abolished until 1966: James E. Smith, *Bermuda House of Assembly: How Bermuda’s Parliament Works* (2008) < [http://www.parliament.bm/uploadedFiles/Content/Visitors_Info/Legislature_Publications/How%20Parliament%20Works\(1\).pdf](http://www.parliament.bm/uploadedFiles/Content/Visitors_Info/Legislature_Publications/How%20Parliament%20Works(1).pdf) > [accessed 4 April 2018].

represented and those who did not were under-represented in that election. However, that was not the only issue.

12. According to a government report, just over half the population (23,672 people) lived in the three biggest Parishes – Pembroke, Devonshire and Sandys – and they elected sixteen Members to the House of Assembly. In contrast, the six other Parishes that between them had 5000 fewer people, elected twenty-four Members.²⁰ There was clearly an inequality of representation between the different Parishes and because of the demographics of those Parishes, combined with the extra vote for property-owners, the vote of a Bermudian living in the predominantly black and working class constituencies was worth “something in the order of one-tenth of the value of the vote” of a Bermudian living in a white and middle class constituency.²¹

13. Political control at that time was firmly in the hands of a white elite, an oligarchy. As Mr Walton Brown Jr argued:

“it had been commonly acknowledged that control really resided in the hands of a few men, known as the ‘Forty Thieves’ (to denote their acquisitive style), who made all-important decisions not in Parliament but at the Royal Bermuda Yacht Club. The House of Assembly was simply the locale where decisions were made public and given the stamp of legality.”²²

14. The power wielded by Bermuda’s ruling class was also recognised in the debates on the Bermuda Constitution Bill 1967 in the UK Parliament:

“The general manager of the Bank of Bermuda is Sir Henry Tucker, Parliamentary leader of the [United Bermuda Party (UBP)], who is also a director of the Bermuda Electric Light Company and of the Bermuda Telephone Company, and chairman of the Bermuda Broadcasting Company.... It takes a brave man with an overdraft or a mortgage to defy the oligarchy. Opposition by the Press is quickly slapped down. Recently a newspaper published an article mildly criticising the UBP. The Editor was sharply reprimanded.”²³

15. That those sent to the Conference, including Sir Henry Tucker himself, were more representative of this oligarchy than they were representative of the whole of Bermuda is arguably reflected in the undemocratic approach that they took to constitutional reform. Historians suggest that the ruling elite went into the constitutional reform process with a determination to maintain the status quo:

²⁰ See the PLP minority report setting out these figures: Report, above note 16, at para 7.

²¹ Mr Hugh Jenkins (Putney) HC Deb 19 June 1967 vol 748 cc1031-64, 1044. For example, in Pembroke there were 4977 voters, the vast majority (4381) of whom were black. They sent 2 Members to the House of Assembly. In Southampton West, there are only 331 electors and they also sent 2 Members to the House. In Southampton West about two-thirds of the voters were white: Mr Gerard Fitt (Belfast, West) HC Deb 19 June 1967 vol 748 cc1031-64, 1033-34.

²² Walton Brown Jr. ‘Race and Party Politics in Bermuda’ *The Journal of Commonwealth and Comparative Politics* (1989) 27:1, 103-126, at 105.

²³ Miss Joan Lestor (Eton and Slough) HC Deb 19 June 1967 vol 748 cc1031-64, at 1049.

“Records from the UK National Archives... show how Bermuda Governor Lord Martonmere, who served from 1964 until 1972, arranged the 1966 Constitutional Conference to support his and Tucker’s shared conservative vision of constitutional change.”²⁴

16. It is evident from the report of the constitutional conference that the three PLP representatives present were effectively marginalised. There are several places in the report which refer to there being “general agreement”, but the minority report written by the PLP representatives said:

“We are in almost complete disagreement with the summary of provisions for a new constitution for Bermuda...they are merely a copy in all essential particulars of those contained in the Report of the Bahamas Constitutional Conference held in London in May, 1963.”²⁵

17. The PLP representatives explained their view that the conference ought to have at least considered “an altogether different type of government than that thought appropriate to the Bahamas”.²⁶ They wanted to examine “other types of constitutions which have proved satisfactory for small territories”.²⁷

18. It is difficult to avoid the conclusion that this Constitution was about cementing power in the hands of the oligarchy and moving just enough in the direction of equality to diffuse the racial tension that was building up in the civil rights era, without creating true equality or true democracy. There was certainly a sense in the UK Parliament at the time that racial tension was building up in Bermuda and that something needed to be done to avert unrest.²⁸ The result was a constitution that ostensibly sought to end racial discrimination through an anti-discrimination requirement in the fundamental rights chapter,²⁹ but which simultaneously entrenched a significant inequality of voting rights through the perpetuation of unequal electoral constituencies. This devalued the voting power of black and working-class Bermudians for a further three decades, ensuring that their interests were marginalised in the political system. It was not until 2003 that an election was finally contested in single-seat constituencies of roughly equal size following subsequent constitutional reform.³⁰

19. While the constituency boundaries issue has now been resolved, racial discrimination continues in the unequal distribution of wealth and opportunities in

²⁴ Benedict Greening, *“This Island’s Mine”: Anglo-Bermudian power-sharing and the politics of oligarchy, race and violence during late British decolonization, 1963-1977* (PhD Thesis, London School of Economics, 2014), p.51.

²⁵ Minority Report from the Progressive Labour Party, above note 16, at p.19, para 3.

²⁶ Report, above note 16, at para 4.

²⁷ Report, above note 16, at para 4.

²⁸ See for example: Sir Frederic Bennett (Torquay), *HC Deb 14 June 1967 vol 748 cc480-519* at 488; Mr Tom Driberg (Barking) *HC Deb 14 June 1967 vol 748 cc480-519*, at 497.

²⁹ Bermuda Constitution, s12.

³⁰ The Bermuda Constitution (Amendment) Order 2003.

Bermuda³¹ and the current Constitution undoubtedly played a key role in cementing this inequality across multiple generations. The provisions in the current constitution remain inadequate to address those inequalities which became entrenched during this period.

20. The legacy of these inequalities today is sometimes referred to as the ‘two Bermudas’, summarised by the Bank of Bermuda Foundation as:

“one [Bermuda] where access to opportunity, financial security and general well-being is very difficult to achieve, and another Bermuda where, for some, there appear to be few obstacles in their path”.³²

21. Ms Martha Dismont of Bermuda’s Family Centre, noting in 2018 that around 23% of the population of Bermuda live below the poverty line, said:

“... it will continue to be difficult for a “wealthy country” to eliminate the poverty and the inequity, when those individuals who will benefit most from the investments in this area are the least likely to have the strong voice of advocacy, and where it remains difficult for many who are distant from the challenges to understand the fight and the importance of this battle.... Inequality exists in full throttle when there is no genuine consciousness to lead with intentionality and proactivity.”³³

22. A more modern constitution could be much better directed towards addressing the structural inequalities that result from being “a historically overtly racially segregated and fundamentally unfair society”, such as Bermuda.³⁴ It could, for example, introduce robust protection for socio-economic rights, similar to those contained in South Africa’s constitution.³⁵ It may be that a different voting system to ‘first past the post’ is appropriate, as Dr Caroline Morris has suggested, along with other possible reforms to the system of government that have been found to better suit small jurisdictions than the Westminster model does.³⁶

³¹ This is evidenced by the figures from the Bermuda Department of Statistics, which show that in 2020, white job holders in Bermuda earned on average \$87,876 per year, while black job holders earned on average \$59,113, while those of mixed and other races earned on average \$53,949. Black workers earned 39.1% less than white workers, a difference of \$28,763: Bermuda Department of Statistics, *The Bermuda Job Market: Employment Briefs* (September 2021) <https://www.gov.bm/sites/default/files/2021_Employment_Brief_0.pdf> p.3.

³² Lisa Simpson, ‘Inequality behind change in funding approach’ 17 April 2017 *The Royal Gazette* <https://www.royalgazette.com/news/article/20170417/inequality-behind-change-in-funding-approach/> [last accessed 12 July 2023]. See also: David Burt, *Race, Ethnicity and Two Bermudas*. Speech at Hamilton Rotary Club, 16 May 2017 <<http://bernews.com/2017/05/david-burt-race-ethnicity-two-bermudas/>> [last accessed 11 May 2018].

³³ Martha Dismont, ‘Poverty and Inequality in Bermuda’ in V. Memari (ed.) *The Bermuda Constitution at 50: Reflections on its Past and Future* (Hamilton, Bermuda: Centre for Justice, 2018) ISBN 978-1722955786.

³⁴ Simpson, above, quoting the Bank of Bermuda Foundation.

³⁵ See: Beth Goldblatt, ‘Constitutional Social and Economic Rights to Address Poverty and Inequality – Thoughts from the South African Experience’ in V. Memari (ed.) *The Bermuda Constitution at 50: Reflections on its Past and Future* (Hamilton, Bermuda: Centre for Justice, 2018) ISBN 978-1722955786.

³⁶ Caroline Morris, ‘Beyond Westminster: Principles, Processes and Possibilities’ in V. Memari (ed.) *The Bermuda Constitution at 50: Reflections on its Past and Future* (Hamilton, Bermuda: Centre for Justice, 2018)

23. At a minimum, there is no question that a new fundamental rights chapter is required to ensure that the UK's international obligations under the European Convention on Human Rights are met, as discussed next, but there is no reason why Bermudians could not decide to go further and include additional rights where these might reflect the values, needs, and aspirations of Bermudians. In addition to the possibility of socio-economic rights aimed at redressing the structural disadvantage caused by the history described above, Bermudians ought to have the opportunity to consider including environmental rights and children's rights, for example, as other overseas territory constitutions have done.³⁷ The provisions contained within the ECHR are a minimum rather than a maximum standard of human rights protection.

The Bermuda Constitution Does Not Adequately Reflect the UK's International Obligations

24. The European Convention on Human Rights was extended to Bermuda in 1953 and by 1967, at around the same time as the Bermuda Constitution Act was being debated in the UK Parliament, the right of individual petition to the European Court of Human Rights was also extended to Bermuda.³⁸ However, despite this timing, there is very little evidence of the UK's obligations under the Convention being considered during the drafting of the fundamental rights chapter of the Bermuda Constitution Order 1968.

25. The Joint Select Committee of Bermuda's legislature barely discussed the matter of human rights according to the minutes of its meetings. In fact, during one meeting Bermuda's Attorney General, Mr Summerfield, expressed his hesitance to recommend a Bill of Rights at all, though on further reflection and after examining the Bahama Islands Constitution, he concluded that it might be good "window dressing".³⁹

26. The constitutional conference in London fared little better. Other than the PLP Minority Report, which dedicates a paragraph to the importance of civil and political rights, there is barely any mention of fundamental rights in the Report.⁴⁰ The fundamental rights chapter appeared to be something of an afterthought and this would be consistent with the general approach of the UK to fundamental rights chapters at that time.⁴¹ They tended to be dealt with by junior officials and were seen as beneath the more senior officials who had "bigger fish to fry".⁴²

ISBN 978-1722955786.

³⁷ See for example: British Virgin Islands Constitution 2007, sections 29 and 30; Cayman Islands Constitution 2009, sections 17 and 18.

³⁸ See: Speech by Sir Elwyn Jones, Attorney General of the United Kingdom to the Consultative Assembly (Legal Debate) Strasbourg, 31st January 1968 < <https://rm.coe.int/0900001680677a38> > [accessed 16 April 2018]. The right of individual petition was made permanent in 2010.

³⁹ Comprehensive Report of Meeting No. 7 of the Joint Select Committee to Consider Constitutional Changes. Held in the Committee Rooms of the House of Assembly. Thursday, May 21st, 1964 at 9:30am. Bermuda National Archives: Constitution of Bermuda Minutes of Meetings 2735/a/4.

⁴⁰ Report of the Bermuda Constitutional Conference 1966 (London: Her Majesty's Stationery Office) Cmnd. 3174.

27. Some Convention rights are replicated in the Constitution, either verbatim or paraphrased, and Bermuda law will be interpreted by domestic courts “as far as possible so as to conform to Convention rights”.⁴³ However, this interpretation is not possible in relation to Convention rights that are not replicated in the Constitution and important rights are missing, as outlined below. This means that these rights and their associated case law cannot be considered in the domestic courts:

“ECHR cases are only relevant and highly persuasive in terms of construing fundamental rights and freedoms under the Bermuda Constitution when the relevant ECHR provisions have been incorporated into Bermuda’s Constitution.”⁴⁴

28. The key Convention rights that are missing from Bermuda’s Constitution are: the right to private and family life (Article 8 ECHR); the right to marry (Article 12 ECHR); and the prohibition of discrimination (Article 14 ECHR) other than on grounds of race, religion or creed, which are the only protected characteristics in the Constitution.
29. A Bermudian seeking to access these rights with no redress in the domestic courts has little option but to take their case to the European Court of Human Rights, with the UK as the respondent state. This is a potentially serious problem for the UK because a successful application to Strasbourg would result in the UK being responsible for remedying a violation, but the Bermuda government would have no corresponding obligation to cooperate with efforts to do so. This could result in the UK being put into a position where it would need to either legislate directly for Bermuda or fail to comply with its international obligations.

Right to Private and Family Life (Article 8)

30. There is no equivalent in the Bermuda Constitution to Article 8 ECHR: the right to private and family life, home and correspondence. The closest corresponding provision in the Constitution is section 7. This protects only the privacy of the home in the context of entry and searches, whereas the right in Article 8 ECHR is much broader and has been used in a variety of situations that would not necessarily be covered by section 7 of the Constitution. This includes issues such as: protections for victims of violence and abuse; reproductive rights; legal recognition of gender identity; and the legal recognition of same-sex relationships.⁴⁵

⁴¹ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), at p.5-6.

⁴² Simpson, above, at p.6.

⁴³ *Marshall v. Wakefield and Accardo* [2009] SC (Bda) 22 Civ [13], per Kawaley J. The domestic courts will also give a ‘generous interpretation’ to enable individuals to access ‘the full measure of the rights and freedoms referred to’ in the Constitution: *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 328, per Lord Wilberforce.

⁴⁴ *Ferguson v Attorney General and OUTBermuda and Others v Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018), [85], per Kawaley CJ.

⁴⁵ See further: European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (31 August 2022) <https://www.echr.coe.int/documents/d/echr/guide_art_8_eng> [last accessed 18 July 2023].

31. One example of a gap between the theoretical protections available to Bermudians under Article 8 ECHR and the actual protections in Bermuda law is that there is no possibility for a trans Bermudian to change their legal documentation to match their gender identity. This is contrary to the clear position under the Convention as set out in *Goodwin v the United Kingdom* and subsequent cases since 2002.⁴⁶ Should a trans Bermudian want to avail themselves of their Article 8 right, they would have no basis to do so under Bermuda law because neither the Constitution nor the Human Rights Act 1981 include rights to personal privacy or bodily autonomy, nor is gender identity a protected characteristic under either the Constitution or the Human Rights Act. Instead, their only option would be an application to the European Court of Human Rights in Strasbourg, making the UK responsible for responding to a Convention violation that has not been present in the UK's own domestic laws for two decades.⁴⁷
32. The 'private and family life' protections that do exist for LGBT Bermudians in domestic law generally result from the anti-discrimination protections contained within the Human Rights Act 1981. This Act contains strong anti-discrimination provisions on the grounds of sexual orientation in employment, in the provisions of goods, facilities and services, and other areas. Cases brought by LGBT Bermudians under this legislation have resulted in access to joint adoption for same-sex couples,⁴⁸ and permission for non-Bermudian same-sex partners to live and work in Bermuda.⁴⁹ It also resulted in the introduction of same-sex marriage in Bermuda in 2017.⁵⁰ However, the subsequent revocation of same-sex marriage illustrates the precarity of relying on the Human Rights Act as the sole means to protect the UK's international obligations in relation to the rights of LGBT Bermudians, as discussed next, as well as those of women and disabled people, for example, who are also not protected in the fundamental rights chapter of the Constitution.

Right to Marry (Article 12)

33. There is no equivalent provision in the Bermuda Constitution to the Article 12 ECHR right to marry.
34. Same-sex marriage was introduced in Bermuda in 2017 after the decision of the Bermuda Supreme Court in *Godwin and DeRoche v Registrar General and Others*, based on the anti-discrimination provisions of the Human Rights Act 1981.⁵¹ The Bermuda government of that time accepted that this judgment was correct and

⁴⁶ *Goodwin v the United Kingdom* (no.28957/95) 11 July 2002.

⁴⁷ The Gender Recognition Act 2004 responded to the ECtHR judgment in *Goodwin*, above, by enabling trans people to change their legal documentation in the UK but this was not extended to the UK's overseas territories.

⁴⁸ *A and B v Director of Child and Family Services and Attorney General* [2015] SC (Bda) 11 Civ (3 February 2015).

⁴⁹ *Bermuda Bred Co v Minister for Home Affairs and the Attorney General* [2015] SC (Bda) 82 Civ (27 November 2015).

⁵⁰ *Godwin and DeRoche v Registrar General and Others* [2017] Bda LR 46 (5 May 2017).

⁵¹ *Godwin and DeRoche v Registrar General and Others* [2017] Bda LR 46 (5 May 2017).

declined to appeal. The first same-sex marriage was conducted in Bermuda a few weeks after this judgment.⁵²

35. However, the vulnerability of the Human Rights Act was demonstrated when a new government introduced the Domestic Partnership Act, which took effect in June 2018, after same-sex marriages had already been taking place in Bermuda for a year. Section 53 of this Act specifically excludes both the operation of the Human Rights Act and the Supreme Court's judgment in the 2017 case:

"Notwithstanding 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".

36. This was challenged in the domestic courts by a coalition of litigants including gay individuals, an LGBT organisation, a Church, and a Pastor, who successfully invoked the discrimination provisions of the Constitution on the grounds of religious and non-religious belief, in both the Bermuda Supreme Court⁵³ and Bermuda Court of Appeal.⁵⁴ Following the Court of Appeal judgment, same-sex marriages resumed in November 2018. However, the Judicial Committee of the Privy Council, Bermuda's final appellate court, allowed the Bermuda government's appeal and same-sex marriage has once again been unavailable in Bermuda since March 2022, though existing same-sex marriages remained legally valid.⁵⁵
37. The inadequacy of the Bermuda Constitution meant that in none of these three cases were the courts able to consider the implications under Article 12 ECHR of the revocation of an existing right to marry. Had they been able to do so, the current application to the ECtHR in *Ferguson and Others v the United Kingdom*⁵⁶ may have been unnecessary. Alternatively, the deliberations of the Strasbourg Court in this case may have been greatly assisted by the considered views of the domestic courts on the matter, as they generally are in cases from the UK where Convention rights have been previously adjudicated in the domestic courts.

Prohibition Against Discrimination (Article 14)

38. While Article 14 of the ECHR prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*", the Constitution only prohibits discrimination on the basis of race, place of origin, political opinions, colour or creed. Therefore, there are significant omissions of sex, disability, sexual orientation, and gender identity, amongst others.

⁵² Sam Strangeways, 'Bermuda has first gay marriage' *The Royal Gazette* (2 June 2017).

⁵³ *Ferguson v Attorney General and OUTBermuda and Others v Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018).

⁵⁴ *Attorney General v Ferguson and OUTBermuda and Others* [2018] Bda LR 106 (23 November 2018).

⁵⁵ Domestic Partnership Amendment Act 2022, s2.

⁵⁶ Application no.35043/22, communicated to the UK on 30 May 2023.

39. While the Human Rights Act 1981 prohibits discrimination on a range of grounds including those listed above (except for gender identity), as an ordinary statute it is vulnerable to being overridden by subsequent legislation. Bermuda's Human Rights Commission has also expressed concerns about this:

*"The vision of the Commission is a Bermuda that honours human rights for all.... From the Commission's perspective, the establishment of sections 48 and 53 of the DPA [revoking same-sex marriage] represent the start of a potentially dangerous trend; the selective removal of human rights protections. The erosion of the Human Rights Act in this instance has resulted in a limitation on the effectiveness of the prohibited ground, sexual orientation."*⁵⁷

40. A new Bermuda Constitution should provide anti-discrimination protection for a wider range of characteristics matching the ECHR. While the Human Rights Act 1981 does provide additional protections against discrimination on a range of grounds, including sex and sexual orientation, its lack of constitutional status leaves it vulnerable to being overridden by a legislature determined to remove the rights of a minority group, as we have seen in relation to same-sex marriage. This has clear implications for the UK's international obligations.

Conclusion

41. Bermuda has not had a major programme of constitutional reform since the 1960s. In contrast, Gibraltar (2006), the British Virgin Islands (2007), the Cayman Islands (2009), St Helena, Ascension and Tristan da Cunha (2009), Montserrat (2010), the Pitcairn Islands (2010), and the Turks and Caicos Islands (2011) have all had their constitutions updated in the last two decades.
42. Given the historical context in which Bermuda's current constitution was written and the gaps in rights protection outlined above, Bermudians should have the opportunity to participate in a democratic process to create a new constitution that can reflect their needs and values while also properly ensuring that the UK's international obligations are complied with and enforceable in the first instance in the domestic courts.
43. The UK's international obligations under the European Convention on Human Rights are not currently being fully considered or protected in Bermuda. There are several reasons for this: the UK, rather than Bermuda, holds responsibility for compliance with the Convention; there is a high degree of constitutional autonomy for Bermuda's government and legislature; and there is a lack of public discussion or awareness of the Convention. These factors have led to little public or governmental investment in its provisions.⁵⁸

⁵⁷ Bermuda Human Rights Commission, *Annual Report 2022/3* < https://humanrights.bm/wp-content/uploads/2023/06/HRC_Annual-Report_2022SinglePages_F.pdf > [accessed 26 July 2023] at p.47.

⁵⁸ For a fuller discussion of these issues, see: Nicola Barker, "I wouldn't get unduly excited about it", above n1.

44. It is, therefore, essential that Bermuda's fundamental rights chapter reflects, at a minimum, the UK's obligations under the Convention. The Gibraltar Constitution provides an example of how this could be done. It closely replicates the rights in the Convention and its text includes a clear direction to the domestic courts to "take into account" the decisions of the European Court of Human Rights, Commission, and Committee of Ministers.⁵⁹ The protection from discrimination provision also explicitly includes reference to "such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory".⁶⁰ This ensures that the level of protection in Gibraltar should not fall behind that contained within the Convention as the interpretation of the Convention develops over time. This is essential to protect both the rights of the people of Gibraltar and the UK's international obligations.
45. Other overseas territory constitutions that have been more recently updated do not mention the ECHR.⁶¹ This, in my view, is a mistake because there is a risk that these constitutions will become outdated as the interpretation of the Convention evolves in the decades to come. The Cayman Islands, Montserrat, and Turks and Caicos Islands constitutions were particularly ill-advised in specifying that the right to marry only extends to "a person of the opposite sex".⁶² The margin of appreciation given to states under the ECHR regarding the timing of the introduction of same-sex marriage will inevitably narrow as societal attitudes continue to evolve and a consensus on the issue emerges across the signatory states. It is, therefore, likely that the UK will in the future once again find itself in Strasbourg responding to an application from a UK overseas territory on this issue.
46. Constitutions should be designed to endure the test of time. In seeking to entrench a narrow interpretation of marriage within the right to marry, or otherwise restricting or limiting rights that should be available through the Convention, these constitutions are likely to fail this test. This will have negative consequences for the UK's international obligations as well as minority groups within those jurisdictions.

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⁵⁹ Gibraltar Constitution Order 2006, s18.

⁶⁰ Gibraltar Constitution Order 2006, s14(3).

⁶¹ See for example the constitutions of the Virgin Islands, St Helena, Ascension and Tristan da Cunha, and the Cayman Islands.

⁶² Cayman Islands Constitution Order 2009, s14; Montserrat Constitution Order 2010, s10; Turks and Caicos Islands Constitution Order 2011, s10(1).