'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*

Introduction

> The UK Government's long-standing objective is for the governments of the Overseas Territories to abide by the same basic human rights standards that the British people expect of the UK government.[1]

The European Convention on Human Rights was extended to 'virtually the whole dependent empire' in 1953.[2] Since then, the empire has receded dramatically and there remain fourteen colonies, now renamed British Overseas Territories (BOTs).[3] This article considers what impact the Convention has had on the BOTs through a case study focusing on lesbian, gay, bisexual and trans (LGBT) rights in Bermuda.

Bermuda is the oldest, most populated, and wealthiest[4] of the Overseas Territories. It is an archipelago of approximately 54 square kilometres in the North Atlantic with a population of around 65,000 people.[5] Bermuda is self-governing and has its own constitution[6] but as it does in relation to all British Overseas Territories, the UK retains responsibility for defence and foreign

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[1] Foreign and Commonwealth Office, *Human Rights and Democracy – The 2011 FCO Report* (Section VII-OTs), p.151
[2] A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001).
[3] British Overseas Territories Act 2002, s1.
[4] Measured by per capita income, of which Bermuda's is one of the highest in the world: Foreign and Commonwealth Office (2012) *The Overseas Territories: Security, Success and Sustainability* (Cm 8374), p.33.
[5] Ibid. pp.92-93.
[6] Bermuda Constitution Order 1968, SI 1968 No 182.

relations, as well as 'responsibility for the security and good governance of the Overseas Territories, flowing from international law, political commitments, and our wider responsibility for British nationals'.[7] This means that while the government of Bermuda has primary responsibility for protecting human rights, and the Constitution of Bermuda contains a fundamental rights chapter, the UK government remains accountable to international bodies for ensuring that Bermuda complies with international human rights conventions and court judgments. In this regard, the UK has, with the consent of the Bermuda government, formally accepted the competence of the European Court of Human Rights to accept individual applications from Bermuda under Article 56 (formerly Article 63), though no such cases have been heard to date.

Bermuda is a useful case study because it has the oldest constitution of the BOTs, which has not been updated to incorporate the Convention in the fundamental rights chapter. Though many of the rights in the Bermuda Constitution were clearly influenced by the language of the Convention, and some Convention rights were either replicated or paraphrased in the Constitution,[8] there is a significant gap in relation to the absence of a right to private and family life. Instead of the private and family life provisions of Article 8 there is protection only for the privacy of the home and other property in the context of searches.[9] Additionally, there is very limited protection in local law for LGBT people, which despite significant recent advances, certainly still falls short of Convention requirements in key respects (outlined below). As a result, the UK is vulnerable to having to respond to a case brought by an LGBT Bermudian in Strasbourg. This raises interesting questions about the extent to which the Convention has influenced or could influence Bermuda law and policy in these circumstances. To explore this, I undertook a series of semi-structured interviews during the summer of 2014 with key actors in Bermuda, including: the Attorney-General,

[7] Foreign and Commonwealth Office (2014) *Corporate Report: Human Rights and Democracy Report 2013*
[8] For example, section 2 of the Bermuda Constitution Order is very similar in language to Article 2 ECHR except section 2 offers defence of property and preventing the commission of a criminal offence as specified exceptions to the right to life. Section 3 and Article 3 are identical.
[9] Bermuda Constitution Order 1968, s7(1).

Mr Trevor Moniz MP; Mr Walton Brown, MP and Shadow Immigration Minister; and representatives from the Human Rights Commission, and activist group Two Words and a Comma,[10] as well as individual human rights lawyers. I also consider the case law from the Bermuda courts and the Privy Council in which the Convention has been mentioned in order to evaluate the extent to which Article 8 (combined with Article 14 in some cases) might be read in to Bermuda law even in its absence from the Bermuda Constitution.

I argue that the Convention has had some impact on Bermuda law, largely through statutory interpretation, but this can only reach so far and the UK's international obligations are not being completely met, particularly in the context of LGBT rights under Articles 8 and 14. I conclude by suggesting that the only way to ensure that these rights are respected would be to revise the human rights chapter of the Constitution. Given the colonial critiques of human rights in general[11] and the Convention in particular[12] along side the fact that the Bermuda constitution would need to be amended through primary legislation from the UK, this is not a perfect solution as it would reinforce colonialism in these various ways. However, it would ultimately put initial jurisdiction firmly in the hands of the Bermuda judiciary to decide these matters locally as part of constitutional law, rather than putting LGBT Bermudians in a position where they either forgo these legal protections or need to appeal to the UK (as the colonial power) to intervene, perhaps via the Strasbourg Court. Finally, I consider the broader implications of the findings of this case study, briefly considering the extent to which other BOTs are similarly situated in relation to the Convention, and arguing that a potential finding of a violation in Strasbourg could impact not only

[10] Two Words and a Comma was created to lobby for the amendment of the Human Rights Act 1981 to include sexual orientation as a prohibited ground of discrimination.
[11] See for example Pollis and Schwab, describing a 'cultural and ideological ethnocentrism' in human rights discourse: Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' in A. Pollis and P. Schwab (eds.) *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger Publishers, 1979), at p.1.
[12] See for example Simpson describing the origins of the Convention as essentially an export product for countries with less developed legal protections: A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001), p.18.

on the local LGBT communities but also more broadly on the relationship between Bermuda and the UK, or even between the UK and Strasbourg.

I begin by outlining two key ways in which Bermuda law is not yet compatible with the Convention in relation to LGBT rights, before considering the extent to which the Convention has made an impact in, firstly, public policy and discourse and, secondly, in the judgments of the Bermuda Courts and the Privy Council, which sits as Bermuda's final court of appeal.

LGBT rights in Bermuda and under the Convention

In making the comparison between Bermuda law and the Convention I do not want to imply that Bermuda is lagging behind the 47 signatories to the Convention in terms of LGBT rights, as the situation is more complex than such an implication would acknowledge. There is wide divergence between the standards of LGBT equality in the 47 high contracting parties (HCP) to the Convention. While some member states have recognised same-sex marriage and the final remaining law criminalising sex between men in a HCP was recently repealed in Northern Cyprus, 'new forms of criminalisation' of LGBT people are emerging through anti-propaganda laws in other HCPs, such as Russia.[13] There is, then, a wide diversity of attitudes towards LGBT rights in the member states of the Council of Europe, which has influenced the development of case law in the European Court of Human Rights in relation to this issue. Whilst the Court has repeatedly made strong judgments upholding some aspects of LGBT rights, these have tended to relate to issues that were framed as a matter of privacy and it is only recently that there has been recognition of the right to family life for same-sex couples without children and a narrowing of the margin of appreciation given to states on LGBT family matters, which marks a significant evolution in the case law.[14] However, this evolution has not been mirrored in

[13] ILGA Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe* (2014) p.12.
[14] See *Schalk and Kopf v. Austria* (2011) 53 E.H.R.R. 20.

Bermuda. While there are no explicitly anti-gay laws, even these relatively slow developments in Strasbourg case law have not, for the most part, been replicated in Bermuda law, which fails to comply with key privacy-based case law. I outline two examples in this section, before considering the more complex situation in relation to family recognition following a recent case in the Bermuda courts regarding a joint adoption by a same-sex couple.

The early case law in Strasbourg relating to LGBT rights concerned the decriminalisation of sex between men,[15] though the Court was still keen to emphasise both its neutrality on the issue of homosexuality, insisting that '"decriminalisation" does not imply approval',[16] and that the issue of age of consent fell within the margin of appreciation:

> it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law.[17]

This remained the case until 2003, when the Court held that an Austrian law criminalising sex between men if one party is between the ages of 14-18 (when sex between males and females of the same age was not a criminal offence) was a violation of Article 14 in conjunction with Article 8.[18] In addition to this, in a separate case, the Court held that laws requiring sex between men to be 'in private' in the sense of there being only two people present were also a violation of Article 8.[19]

[15] See for example *Dudgeon v. UK* (1982) 4 E.H.R.R. 149.
[16] Ibid, at para 61.
[17] Supra n.15 at para 62.
[18] *L and V v. Austria* (2003) 36 E.H.R.R. 55 and *SL v. Austria* (2003) 37 E.H.R.R. 39. See also *B.B. v. the UK* (2004) 39 E.H.R.R. 30.
[19] *A.D.T. v. the UK* (2001) 31 E.H.R.R. 33.

Bermuda appeared to be moving towards decriminalisation twelve years before the *Dudgeon* case[20] but ultimately it was not until twelve years after that judgment that decriminalisation occurred. In 1994 the *Criminal Code Amendment Act* (known as the 'Stubbs Bill') decriminalised sex between consenting men over the age of 18 if 'committed in private by two consenting persons'.[21] That the age of consent on decriminalisation was 18 rather than 16 (which it is for sex between a man and a woman in Bermuda) was unsurprising given local pressures and given that the UK's age of consent for sex between men at that time was also 18. However, a remaining unequal age of consent in Bermuda and the fact that the presence of a third person creates a criminal offence, means that there is once again an incompatibility with the more recent case law from Strasbourg. It would be very difficult for the UK to defend Bermuda's laws in this respect, particularly given that cases on these points have already been taken against the UK.

The second example of a significant incompatibility with established Convention case law in Bermuda is in relation to trans people's ability to change their legal sex on official documentation. This issue was before the Strasbourg Court on several occasions over a period of two decades through the 1980s and 1990s,[22] during which the Court initially gave the UK a wide margin of appreciation because 'transsexualism continues to raise complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the contracting states'.[23] It nevertheless had from the first case emphasised 'the seriousness of the problems affecting transsexuals' and recommended that the UK keep 'the need for appropriate measures under review'.[24] By 2002, it decided that the margin of appreciation had narrowed over time on the basis of 'changing

[20] For discussion of the private member's bill introduced in 1971, see: Northcott, David. *Stuck in the Middle of Nowhere: Queer Equality in Bermuda* LLM thesis, Keele University 2014 [on file with author], at pp.20-24.
[21] Section 3(b), amending *Criminal Code 1907, s177*.
[22] See: *Rees v. UK* (1987) 9 E.H.R.R. 56; *Cossey v. UK* (1991) 13 E.H.R.R. 622; *Sheffield and Horsham v. UK* (1999) 27 E.H.R.R. 163.
[23] *Sheffield and Horsham,* ibid. para 58.
[24] *Rees*, supra n.22, para 47.

conditions within the respondent state', and an emergence of a consensus amongst states.[25] In *Goodwin v. UK,* the Court held that the UK could therefore:

> no longer claim that the matter falls within their margin of appreciation…. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant.[26]

This case, along side the domestic House of Lords decision in *Bellinger v. Bellinger*[27] and lobbying from campaign groups, led to the UK passing the Gender Recognition Act 2004. In the absence of such campaign groups advocating for trans people in Bermuda there is no similar legislation available to them, despite the clear case law of *Goodwin,* and they remain unable to change their sex on legal documentation.

However, these two examples of violations of the Convention in Bermuda are not the whole story. The recent addition of sexual orientation as a ground for protection in the Human Rights Act 1981, along side the pre-existing ground of marital status discrimination, has provided the Bermuda courts with the tools to protect LGB Bermudians,[28] albeit in the narrower field of prohibiting discrimination in the provision of goods, facilities, and services.[29] This has meant that while Strasbourg continues to allow states to discriminate against unmarried couples in various ways, including same-sex couples where they cannot marry (following *Gas v. France*[30]), Bermuda's interpretation of direct discrimination has been much more progressive. Bermuda law has now, like UK law, overtaken Strasbourg jurisprudence on same-sex adoption after a same-sex

[25] *Goodwin v. UK* (2002) 35 E.H.R.R. 18.
[26] Ibid, at para 93.
[27] [2003] 2 UKHL 21.
[28] Gender identity was not included in the amendment so trans people remain without this avenue of legal challenge.
[29] Section 5. Other areas of protection under the Act include employment (section 6), the disposal of premises (section 4), and sexual harassment (section 9) but these are less relevant for the purposes of comparison with the ECHR.
[30] (2014) 59 EHRR 22.

couple successfully complained of discrimination on the basis of marital status and sexual orientation following the Department of Child and Family Services' (DCFS) refusal to assess their suitability for adoption as a couple.[31]

Finding that there was direct discrimination on the grounds of marital status and indirect discrimination on the grounds of sexual orientation, Hellman J declined to follow the reasoning of the European Court of Human Rights in *Gas v. France* that same-sex couples who are not permitted to marry can justifiably be treated the same as unmarried heterosexual couples who choose not to marry because marriage confers a 'special status'.[32] He was overtly critical of the Strasbourg Court's reasoning in this respect: 'I do not understand how that is supposed to provide a rational basis for prohibiting same-sex couples from adopting'.[33] However, his departure from the Strasbourg jurisprudence was based on the differences between the discrimination provision in the Human Rights Act 1981 and that in Article 14 ECHR. Unlike the prohibition of discrimination under Article 14, which can in some circumstances be permitted as long as it is proportionate, direct discrimination under the Human Rights Act 1981 is always unlawful regardless of the circumstances or reasons for the different treatment.[34] Although indirect discrimination that is justifiable would not be unlawful this was not the case here in relation to sexual orientation discrimination, as he found no justification for treating same-sex couples differently.[35]

Through this judgment, the court has paved the way for further challenges not only from same-sex couples but also from unmarried heterosexual couples where they are treated differently from married couples. This precedent also means that, somewhat ironically, while Bermuda continues to be out of line with

[31] *A and B v. Director of Child and Family Services and Attorney General* [2015] SC (Bda) 11 Civ (3 February 2015).
[32] Supra n.30, at para 68.
[33] Supra n.31 at para35.
[34] Supra n.31 at para 13.
[35] Supra n.31 at para 14.

well-established Convention case-law on privacy rights in relation to the age of consent for gay men and the ability of trans people to change their sex on legal documentation, it is likely in the near future to leap ahead of the case law in relation to family recognition to the extent that claims of marital status discrimination and sexual orientation discrimination can be successfully brought under the relatively narrow remit of the Bermuda Human Rights Act. This has already been evident in the context of an immigration case: 'spousal letters', permitting a non-Bermudian spouse to live and work in Bermuda, were not available to same-sex couples regardless of the length of the relationship but this was successfully challenged following A and B.[36] However, the more limited range of the Human Rights Act means that it cannot address all of the instances of discriminatory treatment based on private and family life that Articles 8 and 14 would, including the two examples given in this section.

Is 'The Conscience of Europe' in the consciousness of Bermuda? The Convention in public policy and discourse

In addition to a potential for the Convention to influence Bermuda law through statutory interpretation (discussed below), there are also possibilities for indirect impact, whether through diplomatic or other routes. One example concerns the decriminalisation of sex between men, discussed above. There were reports in the early 1990s of pressure from activists in the UK and US, who were publicly considering a complaint to the European Court of Human Rights after Bermuda had initially 'refused to follow other British territories' in decriminalisation following *Dudgeon*.[37] The impact of the Convention does appear to be evident in the preamble to the Criminal Code Amendment Act 1994 (Stubbs Bill), which reads:

> Whereas the European Convention of Human Rights and Fundamental Freedoms has been extended by Her Majesty to

[36] *Bermuda Bred Company v. Minister for Home Affairs and the Attorney-General* [2015] SC (Bda) 82 Civ (27 November 2015).
[37] John Millard, 'Britain urged to reform island law on homosexuality' *The Independent* 5 January 1993.

> Bermuda. Whereas Article 8 of the European Convention on Human Rights and Fundamental Freedoms protects the right of privacy….

However, the impact of the Convention is not uncontested in this example. There was also pressure from a local lobby group, the Bermuda Human Rights Alliance[38] and it is this local movement that was credited by my interviewees as resulting in decriminalisation rather than international pressure from the UK. For example, the current Attorney-General, who was involved in the passage of the Bill as an MP and responsible for an amendment that raised the age of consent for sex between men from 16 (in the initial draft of the Bill) to 18, told me that he was unaware of pressure from the Convention via the UK and in fact most of the pressure he felt was from local people opposing decriminalisation:

> *Mr Trevor Moniz, MP (OBA), Attorney-General:* I don't recall feeling pressure [from the UK]. The most pressure I felt was from people generally, constituents, family, or more blue-collar sort of people. And the Bermuda approach is pretty much "leave it alone it's a matter of privacy…. We have no problem with you being homosexual, we just don't want to know about it"…. So that was the most pressure I felt, with people saying "why are you interfering in this, leave it as it is, why are you getting involved in this, why are you advocating for that".

This suggests that perhaps the mention of the Convention in the preamble to the Act was less of an acknowledgment of the importance of Convention rights and more of an excuse, or shield from the criticism of constituents. However, the pressure, whether felt or not, was real or would become so for other BOTs: six years after the Stubbs Bill passed in Bermuda, the UK took the unusual step of directly legislating for other Overseas Territories against the will of their legislatures when they refused to decriminalize sex between men.[39] This threat of legislating directly (albeit rarely carried out) provides a mechanism through which the governments of the Overseas Territories can be forced to take

[38] Northcott, supra n.20, at p.27-29.
[39] Caribbean Territories (Criminal Law) Order 2000.

seriously Convention requirements, despite their absence of direct applicability in local law. For example, in 1999 Bermuda abolished the death penalty after the UK threatened to legislate directly through an Act of Parliament in order to ensure compliance with the Convention. The Secretary of State for Foreign and Commonwealth Affairs said at the time:

> We have raised our concerns with the Government of Bermuda about the continuing existence of capital punishment for murder. We hope that the Bermuda legislature will take early steps towards removing this punishment from the statute book…. But if local action is not taken, we will consider whether to impose abolition by means of an Act of Parliament. [40]

Such overt threats are incredibly rare and, although the UK does appear to be moving away from its period of benign neglect of the Overseas Territories and towards a more interventionist approach based on managing risk,[41] it still seems unlikely that absent a direct ruling from the Strasbourg Court on a case from Bermuda the UK would want to make such an intervention on an issue of LGBT rights. Given the UK's recent defiance on the issue of prisoner voting[42] and the Conservative government's apparent determination to remove the UK from the jurisdiction of the Strasbourg Court, perhaps it would not even do so following a ruling. The absence of clarity and predictability on this point means that there is no incentive for the Bermuda government to make laws in favour of LGBT rights which may be unpopular with the electorate but which are technically required by the UK's Convention obligations.

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[40] Secretary of State for Foreign and Commonwealth Affairs (1999) *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (Cm 4264), p.21.

[41] See for example: Comptroller and Auditor General, *Managing Risk in the Overseas Territories* (HC 4 Session 2007-2008) (16 November 2007) at p.4. This trend has also been noticed in Bermuda: '[The UK have] actually moved away from what had been their position ten years ago whereby there was a clear separation of the UK powers versus local government powers…. [They] have been more assertive in their power over the Territories and its all based on this notion of contingent liabilities….' (interview with Mr Walton Brown, MP, Shadow Immigration Minister).

[42] See for example the fallout following the judgment in *Hirst v. UK (No.2)* (Application no. 74025/01) (2005).

The indirect nature of Bermuda's relationship with the Convention and the fact that it can only be held responsible through (rare) exercises of colonial power such as this, arguably also result in a lack of local investment in the provisions of the Convention. This is not necessarily because of disinterest in human rights protection generally, but rather due to a lack of local involvement in discussions about the Convention:

> *Mr Walton Brown MP (PLP), Shadow Minister for Immigration*: I don't think any progressive person would have any issue with anything that involves basic human rights…. I have an issue with the application of the principle of extra-territoriality and so I have always been against the death penalty but I resented the UK telling us in 1999 that we should get rid of it or they'll do it for us. We did the right thing but for the wrong reasons. When it comes to the European Convention I don't think we have been involved at any level in the discussions about the Convention so we have a whole set of laws and practices that are meant to be applied to us but the public are not informed about it…. We should actively identify our acceptance of those principles instead of just having it applied to us… it should be part of public discourse.

It was clear from my interviews that the Convention is not part of human rights discourse in Bermuda. For example:

> *Ms Lisa Reed (Executive Officer, Human Rights Commission)*: I think that there's increasing understanding about the scope of people's rights… but I think that if you were to ask the average person about the ECHR, it may just go over their head. And most people who do have some understanding still are not clear on how to access their rights.

As a result, the Convention is not uppermost in the minds of the Bermuda government and legislature since they neither need to directly defend their

actions in Strasbourg nor be answerable to an informed electorate on this issue. Even the potential for difficult conversations with the Foreign and Commonwealth Office, as in the death penalty example, appears to be of little concern:

> *Q:* What I'm trying to figure out… is what impact the UK having signed Bermuda up to the Convention is having on Bermuda.
> *Mr Trevor Moniz, MP (OBA), Attorney-General*: Not much.
> *Q:* It's not really relevant?
> *AG*: No because in most cases the issue you're going to come back to is the fact that it's not directly applicable. It's often threatened… [but] it usually comes to nothing at the end of the day…. I think if a person wants to take a case let them. You know I'm all for people exercising their democratic rights, even if they're [exercising them] against me…. So I'm not too worried if someone wants to do that.
> *Q:* What happens if they win, from your point of view?
> *AG*: Deal with it as and when it comes. I mean, I wouldn't get unduly excited about it I don't think.

When I explored this issue in the context of the campaign to add sexual orientation to the Human Rights Act, it was evident that the indirect relationship of the Convention to Bermuda and the colonial context in particular, limits the value and effectiveness of the provision. The Human Rights Act 1981 is primarily a non-discrimination provision and it is limited to only certain areas of law, though within those areas it is a powerful tool, much more so than the Convention in some circumstances (as discussed above). However, it is nevertheless quite surprising that the campaign group Two Words and a Comma spent six years fighting to have sexual orientation included in the Human Rights Act without really considering the extent to which Article 14 could *already* be used in conjunction with other Convention rights to combat some forms of sexual orientation discrimination in Bermuda. There were, though, several good reasons for this, which relate to the limitations of litigation as a tool for social

change[43] in addition to the general absence of the Convention in popular discourse:

> *Mr David Northcott (Two Words and a Comma)*: [The ECHR] wasn't a piece of legislation that was primary in any of our minds as being useful or applicable…. The colonial relationship wasn't discussed but we as a group were very conscious of not going down the route of having Britain impose something on us…. We felt that for a more sustainable, accepted, cultural change to take place it had to be contextualised in Bermuda by Bermuda residents… We started at the beginning in a relatively hostile environment in terms of public perceptions around sexual orientation. But as the issue was discussed… the resistance lessened and that's what we wanted because we didn't want it to be a legal imposition by Parliament without any grounding in understanding in the community.

My research suggests, then, a very limited impact of the Convention on people's consciousness in Bermuda. The UK has once publicly threatened to legislate by Act of Parliament if Bermuda did not comply with the abolition of the death penalty required by the Convention, and, as discussed above (see page X), there were reports (though contested) of pressure also being brought to bear in relation to the decriminalisation of sex between men. Such direct threats are rare and there is little to suggest that the Convention influences Bermuda law and policy at a less formal level, as its provisions do not appear to have penetrated the consciousness of either politicians or ordinary Bermudians. I would argue that this is largely due to the arm's length applicability of the Convention to Bermuda and a consequence of the nature of Bermuda's constitutional relationship with the UK, which places responsibility for compliance with the Convention on the UK, combined with local control of internal affairs and a high degree of constitutional autonomy from the UK. This effectively means that Bermuda is neither invested in the provisions of the Convention, because its

[43] See further: Didi Herman (1993) *Rights of Passage: Struggles for Lesbian and Gay Equality* (Toronto: University of Toronto Press); and Carol Smart (1989) *Feminism and the Power of Law* (London: Routledge).

status as an Overseas Territory takes away its ability to either negotiate international treaties or change its own constitution to reflect their provisions, nor is it directly responsible for the consequences of failing to comply with it as the UK would have to both respond to an application to Strasbourg and be accountable to the Council of Ministers for paying damages (if applicable) and rectifying any breach. However, there is another possible avenue for the Convention to influence Bermuda law: through the Courts' powers of statutory interpretation. There has recently been a significant victory in the *A and B* case, discussed above, combined with disappointment that Bermudians, as British citizens, are not able to access the Marriage (Same Sex Couples) Act 2013 in their home country, despite it being available to British citizens at Consulates around the world (in non-BOT countries).[44] Many LGBT Bermudians are in transnational relationships and have legally married overseas but are not able to return home with their spouse due to lack of recognition of that marriage.[45] A combination of these factors is likely to lead to both more confidence to litigate and more incentive to do so.

The Power of Interpretation: Reading the Convention into Bermuda Law

Although the Convention has not been incorporated into Bermuda law, as noted above it did have an influence on the drafting of the fundamental rights chapter of Bermuda's constitution, with many Articles of the Convention replicated or paraphrased in the constitution. As the Privy Council, the final court of appeal for Bermuda, has famously said of the fundamental rights chapter of Bermuda's constitution:

> It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period,

[44] Sam Strangeways, 'Island Misses Out on UK's Gay Marriage Move' (2 July 2014) *The Royal Gazette* <http://www.royalgazette.com/article/20140702/NEWS/140709937> [accessed 20 March 2015].
[45] A group in this situation created the 'Bermuda Bred Company' specifically to challenge the restrictions on immigration for same-sex partners: Owain Johnston-Barnes 'Landmark same-sex partnerships ruling' (28 November 2015) *The Royal Gazette* <http://www.royalgazette.com/article/20151128/NEWS/151129693> [accessed 2 December 2015].

> starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention…. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda…. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.[46]

Therefore, although the Convention cannot be directly enforced in the Bermuda courts, most of the rights of the Convention have influenced those in the Constitution and in cases resulting from alleged breaches of such rights, the Privy Council indicated that it would interpret the fundamental rights chapter of the Bermuda Constitution 'generously'.[47] There is also evidence of this approach being taken in relation to Bermuda's Human Rights Act 1981 (as amended). In *Thompson v. The Bermuda Dental Board*,[48] the Privy Council put some weight on the fact that the preamble to the Human Rights Act 1981 references Bermuda's obligations under the ECHR. This case was about alleged discrimination in the Dental Board's policy of not permitting non-Bermudians to register: the 'wide ambit' of the Convention's Article 14, which prohibits discrimination on a range of specified grounds or 'other status', thus supported a 'wide construction' of section 2(2)(a)(i) of Bermuda's 1981 Act (prohibiting discrimination on the narrower grounds of race, place of origin, colour, or ancestry), as that 'would tend to minimise the circumstances in which discrimination that would fall foul of Article 14 would be permitted under the 1981 Act'.[49] The European Court of Human Rights (ECtHR) interpretation of 'national origin' under Article 14 was therefore read into the slightly different term 'place of origin' in Bermuda's Human Rights Act 1981. However, even with generous interpretation and wide construction, it will be very difficult for the Bermuda judiciary or the Privy

[46] *Minister of Home Affairs v. Fisher* [1980] A.C. 319 at 328, per Lord Wilberforce.
[47] Ibid.
[48] [2008] UKPC 33
[49] Ibid, at para 30

Council to read in the absent provisions of Article 8.[50] Nevertheless, there may be a couple of reasons for cautious optimism, as I discuss in this section.

Although the provisions of the UK's Human Rights Act 1998 (HRA) requiring courts to take account of Strasbourg jurisprudence and to interpret legislation in line with Convention rights so far as it is possible to do so[51] do not extend to Bermuda's domestic legislation,[52] the judiciary in Bermuda have developed their rules of statutory interpretation to approach the Convention in a similar way to judges in the UK courts, using language that resonates with that in the HRA. They have done so on the basis of the presumption that Parliament would not intend to legislate contrary to the UK's international obligations. For example, in *Marshall v. Wakefield and Accardo,* Kawaley J said,

> local statutes must be interpreted as far as possible so as to conform to Convention rights, applying the presumption that Parliament does not intend to legislate in a manner inconsistent with Her Majesty's international obligations in respect of Bermuda.[53]

This extends the Convention's reach much further than just those sections of the Constitution that mirror its provisions. It allows the Convention to be applied where there is an ambiguity in the meaning of legislation in that it *could* be interpreted in such a way as to be compatible. Similarly, the Bermuda Supreme Court has also 'read in' Article 8 in a case involving the use of executive discretion, on the basis that the legislature would not have intended for Ministers to exercise their discretion in a way that was incompatible with the Convention and that 'litigants in Bermuda have a legitimate expectation that the rights protected by the Convention will be adhered to by the Executive in

[50] The Privy Council has noted the limits to the powers of generous interpretation, particularly where exercise of this power would require the courts to make choices more appropriately made by the legislature: *Boyce and another v. The Queen* [2004] UKPC 32, per Lord Hoffman at para 49.
[51] As required by *Human Rights Act 1998*, section 2 and 3.
[52] It would, however, arguably apply to the provisions of the Bermuda Constitution and any other legislation passed by the UK Parliament in respect of Bermuda.
[53] [2009] SC (Bda) 22 Civ, at para 13.

Bermuda'.[54] As one interviewee said, 'it's a stopgap measure but that is how the ECHR has been stitched into at the very least our judicial review' (Mr Allan Doughty, litigator, BeesMont Law).

We can see both an illustration of this approach to international human rights obligations and its limitations in the case of *Davis and Davis v. The Governor and the Minister for National Security.*[55] It concerns two 'missing' fundamental rights provisions of the Bermuda Constitution that are available under the Convention: the right to family life and the prohibition of sex discrimination.[56] Mr Davis was not Bermudian so following a lengthy prison sentence for the supply of drugs he was informed that he was to be deported. He was married to a Bermudian woman who he was estranged from and had three Bermudian children (two with his wife and one with his subsequent girlfriend). The sex discrimination issue arises because under Bermuda law foreign husbands are treated less favourably than foreign wives in terms of protection from deportation under s11 of the Constitution. The Supreme Court of Bermuda held that:

> …to the extent that the Minister was exercising a statutory discretion [in recommending deportation], the Applicants (and their children) may fairly be said to have had a legitimate expectation that their family law rights under Article 8 ECHR… would be taken into account.[57]

On the facts of this case, those rights had in fact been taken into account when the Minister took 'considerable care to assess the quality of the relationship between the 1st Applicant, his wife and their children….'[58] Kawaley J, in concluding his judgment, acknowledges that the applicants would likely have had more success at the Privy Council or in Strasbourg, but: 'in any conflict between international human rights obligations (which are not incorporated into

[54] *Davis and Davis v. The Governor and Minister for National Security* [2012] SC (Bda) 22 Civ (30 March 2012), at para 31.
[55] Ibid.
[56] The Human Rights Act 1981 does prohibit sex discrimination but due to its narrow remit could not be relied on in this case.
[57] Supra n.54 at para 41.
[58] Supra n.54 at para 42.

domestic law) and *unambiguous* provisions of domestic statutory law, domestic statutory law trumps all in the domestic court domain'.[59] Interestingly, Kawaley J appeared to be virtually inviting an application to the Strasbourg Court:

> Although the Applicants' case has failed under Bermuda domestic law, it is entirely possible that their complaints might gain greater traction at the international human rights level… it is not blindingly obvious from an ECHR perspective that the Applicants' dissatisfaction with the merits of the deportation decision is frivolous.[60]

This case illustrates that where there is ambiguity or a discretionary power the domestic courts may draw on even Article 8, which is completely absent from Bermuda law, but they would have more difficulty doing this where there is no ambiguity. However, a recent case from another BOT (Gibraltar) suggests that the Privy Council may be prepared to go further than the Bermuda courts and read in Convention rights even without ambiguity in the legislation. If that were to happen, the Bermuda courts would be bound to follow the precedent of the Privy Council. In *Rodriguez v. Minister of Housing*,[61] the policy of the Gibraltar Housing Allocation Committee was to grant joint tenancies only to married couples or those who have 'a child in common'. As same-sex couples can neither marry in Gibraltar nor have children together, they were effectively excluded from any joint tenancy. The question was whether this went against the Gibraltar constitution. The Gibraltar constitution is much more recent than Bermuda's and it mirrors the language of the Convention more closely, particularly in relation to private and family life, so it was inevitable that the Privy Council would look to the interpretation of the Convention for guidance. However, they gave two reasons for supposing that the provisions of the Gibraltar Constitution were intended to provide 'at least a similar level of protection' as that provided by the Convention and the first of these reasons also applies to Bermuda. This first reason is that the UK has extended the Convention to Gibraltar, so 'it would be surprising if Gibraltarians were to enjoy a lesser level of protection for their fundamental human rights under their Constitution than they do under the

[59] Supra n.54 at para 49, my emphasis.
[60] Supra n.54 at para 46-47, emphasis in original.
[61] [2009] UKPC 52.

ECHR'.[62] The second reason does not apply to the Bermuda Constitution Order, but it partially does to the Bermuda Human Rights Act 1981: 'the second is that the Constitution [of Gibraltar] refers to the ECHR in several places', including a provision which requires the Courts to take into account the jurisprudence of the European Court of Human Rights. The Bermuda Human Rights Act does not require the Courts to take account of Strasbourg jurisprudence but, as noted above, they will already, so far as it is possible, do so and the preamble to the Act references the Convention.

The Privy Council applied the case law of the Strasbourg Court to the Constitution of Gibraltar, finding that discouraging same-sex relationships is not a 'legitimate aim'[63] and therefore, as Baroness Hale held in *Mendoza:*

> If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships….[64]

There is at least some argument to be made that the Bermuda Constitution ought to also be interpreted as providing a similar level of protection as that provided by the Convention on the basis that Her Majesty's international obligations should be taken into account and this certainly appears to be the view of (the now) Chief Justice Kawaley in the cases cited above, at least where there is an ambiguity in the law. However, interpreting local legislation 'through the lens' of the Convention so far as is reasonably possible is, as one of my interviewees described it above, a stopgap measure. It will not always be possible for the Privy Council or the Bermuda Courts to read in the absent right to a private and family life,[65] particularly where there is no ambiguity in the law. It would, therefore, be advisable for the UK and Bermuda to seriously consider updating Bermuda's constitution to allow local courts to more fully take into account the Convention rights. In the meantime, it may be necessary for LGBT Bermudians seeking their

[62] Ibid, per Lady Hale, para 11.
[63] See *Dudgeon v. United Kingdom* (1981) 4 EHRR 149.
[64] *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30 at para 143.
[65] See *Boyce*, note 50 above, on the limitations of a generous construction.

rights to private and family life to take their case to Strasbourg, with the difficult political consequences that are likely to follow a victory in such a case.

Concluding Thoughts

A New Constitution?

Although the philosophy of the Convention and the attitude of those interpreting it have arguably developed from its neo-colonial beginnings, the legacy of colonialism continues in the structure of its application to the Overseas Territories as mediated through the UK. This has resulted in a lack of knowledge about and investment in the provisions of the Convention in Bermuda and, by extension, likely other BOTs whose constitution does not fully incorporate the Convention.

To the extent that the Convention has failed to impact on the consciousness of Bermuda, LGBT Bermudians have not been able to rely on its provisions to the same extent as British nationals living in the UK, even in relation to very well established principles of privacy such as trans people being able to alter their legal documentation. This is a problem for those individuals, but (as I outline further below) it is also likely to pose a problem for the relationship between Bermuda and the UK, particularly if a case were to succeed in Strasbourg on an issue, such as the unequal age of consent, that is likely to be unpopular within Bermuda. A generous interpretation of the Constitution by Bermudian judges and the Privy Council will not always be enough to avoid conflict between Bermuda law and the Convention, especially in the absence of a right to private and family life and as the Strasbourg jurisprudence on LGBT equality continues to develop.

In 2011, as I quoted at the beginning of this article, the Foreign and Commonwealth Office stated the UK government's 'long-standing objective' for

the BOTs to 'abide by the same basic human rights standards' as people expect of the UK government.[66] In order to achieve this objective, and to limit the UK government's risk and potential liability on this issue, it is necessary for the Bermuda Constitution Order to be revised in order to fully incorporate the Convention. This would allow the local courts and Privy Council to interpret and apply all ratified Articles of the Convention. When the Bermuda Constitution Order 1968 was proposed, the Minister of State for Commonwealth Affairs told the people of Bermuda that:

> Any constitution is an interim Constitution. I think that you must regard constitutional development as a steady process. Bermuda's new constitution is a very big advance on the previous one. It will be a good thing if people are interested enough to discuss how it will evolve further. If there is a demand for further change, then further change will no doubt occur.[67]

Amending the Constitution would not be simple. There are likely to be competing interests in terms of the extent of the constitutional amendments: those advocating independence would prefer 'the totality of the relationship [with the UK] looked at' (Mr Walton Brown, MP, Shadow Immigration Minister), whilst those currently in power may have their own priorities:

> Since I've become Attorney-General various people have been giving me their shopping list of what they would like to see but you know from my point of view it is to be driven by the OBA government and what do we want to see, not somebody else's shopping list, be it the British or anybody else (Mr Trevor Moniz MP, Attorney-General).

It is also not necessarily clear that, once a programme of constitutional change begins, particularly if it is to be one that considers the future of Bermuda's relationship with the UK, that the Convention is the most appropriate model of

[66] Supra n1.
[67] Mrs Judith Hart, HC Deb 14 June 1967 vol 748 cc480-519, quoting her own comments in the *Royal Gazette*, 18 March 1967.

human rights provision for Bermuda. If Bermuda is looking towards a post-colonial future, it may well prefer to model its updated human rights provision on one that also seeks to move beyond a colonial and racist past, such as that of the South African Constitution, rather than the Convention. However, that must be the subject of further discussion elsewhere. In the absence of an imminent move towards independence,[68] and on the basis that if there were to be independence a new constitution would be appropriate in any case, I would argue that it is important to incorporate the Convention, not only to avoid a potentially awkward political situation resulting from a Strasbourg judgment but also because Bermudians have been theoretically extended the protection of the Convention but are currently receiving it only in a patchwork way. Until the Convention is directly incorporated into Bermuda law, ideally following public consultation and education so that Bermudians can know about and be invested in its provisions, the impact of the Convention in Bermuda will continue to be limited. Ultimately, the situation was summed up by one of my interviewees:

> The bottom line is we were supposed to have the full protection of this Convention and we don't. So United Kingdom, what are you going to do about this? (Mr Allan Doughty, litigator, BeesMont Law).

The Relationships Between Strasbourg, the UK, and the British Overseas Territories: Broader Implications and Lessons from Bermuda

Although there are significant differences between the BOTs in terms of their constitutional fundamental rights provisions and degree to which they incorporate the Convention or replicate its provisions, as I outline next, this case study on Bermuda's relationship with the Convention nevertheless has some general relevance.

[68] Though unscientific, a poll in September 2014 by *The Royal Gazette* newspaper indicated that 69.9% were against Bermuda holding a new referendum on the question of independence: <http://www.royalgazette.com/section/pollarchive> [accessed 20 March 2015]. For more information about the previous independence referendum, see: Walton Brown Jr, *Bermuda and the Struggle for Reform: Race, Politics and Ideology, 1944-1998* (Bermuda, Cahow Press, 2011), pp.171-172.

Bermuda is unusual in that it remains one of the few BOTs to not yet have an updated fundamental rights chapter.[69] However, even those BOTs that have updated constitutions do not necessarily incorporate, or even mention, the European Convention on Human Rights. For example, the new Constitutions of the Virgin Islands, and of St Helena, Ascension and Tristan da Cunha do not mention the Convention at all, nor does that of the Cayman Islands. However, there are indirect references that would arguably allow the Privy Council or local courts to infer any missing Convention rights or follow Strasbourg jurisprudence in certain circumstances in much the same way as has been done in relation to Bermuda. For example, the St Helena, Ascension and Tristan da Cunha Constitution Order provides for a duty to 'give effect to partnership values', which includes 'compliance with applicable international obligations of the United Kingdom…'.[70] In contrast, the new Gibraltar constitution explicitly requires its courts to 'take into account' decisions of the European Court of Human Rights[71] and the new Pitcairn Islands Constitution instructs 'every court' to take into account not only decisions of the ECtHR but also those of the superior courts in the UK on the interpretation of the Convention.[72]

Some other BOT constitutions that have been recently updated still omit certain Articles of the Convention altogether or broadly replicate most of them but at times using different language, as Bermuda's fundamental rights chapter does. For example, while the Turks and Caicos Constitution Order 2011 also instructs 'every court' to take into account judgments of the ECtHR and the UK superior courts in interpreting its fundamental rights chapter, it attempts to exclude the future possibility of same-sex marriage from its protection of the right to marry and found a family by specifying that it is a right to marry 'a person of the opposite sex'.[73] As such, for the moment the language is compliant with Strasbourg case law but may not be should the Strasbourg jurisprudence evolve.

[69] See Ian Hendry and Susan Dickson, 'British Overseas Territories Law' (Hart), p.32-34.
[70] St Helena, Ascension and Tristan da Cunha Constitution Order 2009, section 2(h) and section 4.
[71] Gibraltar Constitution Order 2006, section 18(8)
[72] Pitcairn Islands Constitution Order 2010.
[73] Section 10(1). This is also the case in the Cayman Islands Constitution Order section 14.

There is, therefore, an uneven level of incorporation of the Convention rights and as a result, a lack of uniformity in terms of compliance with those rights and access to national remedies, amongst the BOTs. Similarly, the consequences of a finding that the UK had violated the Convention through the actions of a BOT could be very different depending on the relationship of the individual BOT with the UK. For example, it is difficult to imagine Pitcairn being able to resist a request from the UK to change its law in response to an adverse Strasbourg ruling given how heavily reliant it is on funding from the UK government, despite the increased autonomy in its revised constitution:

> Without budget aid, the existence of residents on the island would quickly become untenable. Public services would collapse and the islanders would have to return to basic subsistence or leave the island.[74]

In contrast, BOTs such as Bermuda that are not financially reliant on the UK are more able to resist any pressure from the UK to pass unpopular laws in response to a finding of a violation. As such it would be more likely to potentially trigger a constitutional crisis, or at least renewed calls for independence, than perhaps would be the case in other BOTs that are more politically tied to the UK (such as the Falkland Islands and Gibraltar) and/or financially dependent. For this reason, the implications of a violation from Bermuda could be much more far-reaching than from most other BOTs.

Furthermore, the implications of a Strasbourg judgment that Bermuda law is incompatible with the Convention would not only potentially impact on the relationship between Bermuda and the UK, but also that between the UK and Strasbourg. As noted at the beginning of this article, the indirect nature of Bermuda's relationship with the Convention means that any potential violation

[74] Department for International Development, 'Pitcairn Islands Budget Aid 2013-14: Business Case' (June 2013), at para 10.

is the UK's responsibility, despite Bermuda's autonomy over its own internal law and policy. In fact it is constitutionally quite difficult for the UK to interfere in Bermuda's domestic affairs as it could only do so through an Act of Parliament, rather than through any reserved powers in Bermuda's constitution. As such, the UK has no direct control over the arguable violations that I set out in this article, yet it would be the defendant in a case and responsible to the Council of Ministers for addressing any breach of the Convention. Should the UK decide not to interfere with Bermuda's domestic law to rectify the violation (assuming that Bermuda is unwilling to do so itself), this would clearly have implications for the UK's already strained relationship with Strasbourg.

There is no precedent to suggest how either the UK or the Council of Ministers might respond to such a situation, but in the context of the current UK government's hostility to the Convention's impact on UK domestic law, one may speculate that it could be similarly protective of the domestic law of the BOTs. In this case any resulting conflict with the Council of Europe could well be used as a trigger for the UK's withdrawal from the Convention, as some within the current government seek.[75]

However, the UK has historically viewed the Convention as an export provision,[76] and there is evidence to suggest this attitude may remain: despite the government seeking to withdraw it from UK law by proposing repeal of the Human Rights Act 1998, under the previous Coalition government a duty to follow the Convention jurisprudence was incorporated into the recently revised constitutions of some BOTs, as noted above. This suggests that the government may not be as hostile to the Convention's application to the Overseas Territories

[75] See: Conservatives, 'Protecting Human Rights in the UK: Conservatives' Proposals for Changing Britain's Human Rights Laws' <https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf> [accessed 31 August 2015], setting out proposals to make the Court's decisions advisory only and threatening withdrawal from the Convention if the Council of Europe does not agree (at p.8).
[76] See: A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001), p.18.

as it is to its application to the UK. Furthermore, the Conservatives have made significant efforts to appeal to LGBT voters in the UK with the recent passage of the Marriage (Same Sex Couples) Act 2013 and there is some evidence that they have requested that the BOTs also allow same-sex marriage. For example, Pitcairn, an island of approximately 48 residents (and reportedly no same-sex couples) recently enacted same-sex marriage legislation at the request of the UK government.[77] In this context, it would be somewhat surprising if the government were to want to strongly resist expanding protection for the types of LGBT rights that I identified earlier as current violations of the Convention in Bermuda. In this case, a finding of a violation could be much more likely to impact on the UK's relationship with the Overseas Territories, if it were to impose legal reform against the will of the local democratically elected legislatures, than its relationship with Strasbourg.

If Bermuda, or another similarly situated BOT, were not willing to change its laws to become fully compatible with the Convention, the UK would find itself in a difficult position. Whichever path it chose to take, the consequences of Bermuda's incompatibility with the Convention could extend far beyond the lives of the LGBT Bermudians who are directly affected by these laws.

[77] Associated Press, 'Pitcairn Island, population 48, passes law to allow same-sex marriage' *The Guardian* (22 June 2015) <http://www.theguardian.com/global/2015/jun/22/pitcairn-island-population-48-passes-law-to-allow-same-sex-marriage> [accessed 31 August 2015].