IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL CAUSE NO. 111 OF 2018
CIVIL CAUSE NO. 184 OF 2018

BETWEEN **1. CHANTELLE DAY**

2. VICKIE BODDEN BUSH **APPLICANTS/PETITIONERS**

AND **1. THE GOVERNOR OF THE CAYMAN ISLANDS**

2. THE DEPUTY REGISTRAR OF THE CAYMAN ISLANDS GOVERNMENT GENERAL REGISTRY

3. THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS **RESPONDENTS**

IN OPEN COURT
BEFORE THE HONOURABLE ANTHONY SMELLIE, CHIEF JUSTICE
THE 7TH, 8TH AND 11TH FEBRUARY, 2019; 29TH MARCH, 2019

APPEARANCES: Mr. Edward Fitzgerald QC, instructed by Mr. Ben Tonner, QC and Mr. Peter Laverack, for the Petitioner/Applicant

Sir Jeffrey Jowell QC instructed by Miss Reshma Sharma and Ms. Celia Middleton of the Attorney General's Chambers for the Respondents

HEADNOTE

The issue of marriage equality – whether same-sex couples have the right to marry and found a family – whether the Marriage Law definition of marriage as "union between a man and a woman as husband and wife" violates rights of same-sex couples to private and family life protected by Constitutional Bill of Rights – whether Marriage Law definition introduced for purpose of preserving a religious concept of marriage to exclusion of other beliefs and in violation of freedom of expression of conscience.

History of marriage in the Cayman Islands – whether a "traditional" form of marriage had emerged to prevent further constitutional development of the concept.

Entitlement of same-sex couples who are in committed stable relationships to be regarded as in analogous position to opposite-sex couples – whether denial of right to marry and found a family is unjustifiable discrimination prohibited by Constitutional Bill of Rights.

"Margin of appreciation" afforded to the State to decide when and how to remedy violation of fundamental rights protected by European Convention on Human Rights – whether margin of appreciation allowed where violation is of rights protected under the Constitutional Bill of Rights. Remedies where violation of rights found by the court – jurisdiction to amend the Marriage Law to bring it into conformity with the Constitution – whether amendment or declaration of violation of rights appropriate remedy.

JUDGMENT

1. This case raises the sensitive question whether the Applicants/Petitioners ("the Petitioners") who are both women, have a constitutional right to marry and found a family.

2. Their case arises against the background of prolonged social and political discourse in this jurisdiction and abroad on the subject of marriage equality, but in the continuing absence here of any affirmative measures put in place to recognize or protect the relationships of same-sex couples.

3. In light of legislative action taken in 2008 to be examined below, the dispute to be decided is stark and clear. It is tantamount to a dispute over the ownership of the very institution of marriage itself – is it or is it not to be in the Cayman Islands, for all time, the exclusive preserve of the heterosexual?

4. The institution of marriage has been recognized in the Cayman Islands ever since the mid-1700s, when the Islands were permanently settled. Governed by the Marriage Law (2010) Revision ("the Law"), it is therefore a secular institution, one which is regulated by the State.

5. In the present state of the Law, while opposite-sex couples are recognized by the State as committed couples and allowed to marry and so enjoy a variety of further legal rights and protections from the State[1], same-sex couples are denied access to marriage and so are denied access to those rights and protections.

6. The Petitioners submit that the present state of the Law violates their Constitutional rights. Specifically, their rights to private and family life, including the right to found a family; to freedom of conscience and perhaps most profoundly, to freedom from unjustifiable discrimination on the grounds of status; namely, their sexual orientation.

7. The Petitioners submit that they are entitled to a remedy from the Court that affords them equal access to marriage. Alternatively at least, to declaratory orders to the effect that they are entitled to have their relationship otherwise respected by the State, by way of legislation which recognizes and protects their relationship as a civil union. They nonetheless submit, that the right to marry, being the only remedy which the Court can itself provide and which would accord them full equality in the eyes of the law, is therefore the primary and proper remedy to which they are entitled.

8. Since 2009, the Constitution of the Cayman Islands enshrines a Bill of Rights[2] which contains, among others, fundamentally important provisions which are relied upon by the Petitioners. Primarily, they are those which mandate that: (1) *Government shall respect every person's private and family life, his or her home and his or her correspondence*[3]; (2) *No person shall be hindered by government in the enjoyment of his or her freedom of*

[1] Aspects of which to be considered further below.

[2] The Cayman Islands Constitution Order 2009, Schedule 2 Part 1, which contains the Bill of Rights and which actually came into effect, after a three year preparatory period, on 6 November 2012.

[3] Section 9(1).

conscience[4], and (3) *Government (subject to certain exceptions specified) shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*[5] In this section "*discriminatory*" means "*affording different and unjustifiable treatment to different persons on any ground*", such as sexual orientation, among others.

9. Also of central importance to the case is section 14(1) of the Bill of Rights which reads:

> "*Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family".*

10. The Petitioners assert that the foregoing provisions when taken together, and read and construed within the Constitution as a whole, mandate the remedies which they seek, notwithstanding that the right to marry is expressed in section 14 (1), so as to place a limited obligation on government to guarantee that right specifically for couples of the opposite sex .

11. The Respondents disagree. First, in relation to the right to marry, the Respondents assert that the words of section 14(1) not only guarantee the right for men and women as parties of the opposite sex, but also preclude, by necessary implication, access to marriage by parties of the same sex. Further, that as section 14 (1) is the constitutional provision that provides especially for the right to marry (ie: the "lex specialis", say the Respondents), it is impermissible for this Court to hold that that right is located elsewhere in the Bill of Rights, in particular in the rights to family life, to freedom of conscience and to freedom from discrimination. These, the Respondents describe as the other more general rights invoked by the Petitioners and which do not provide for the right to marry which is said to

[4] Section 10(1).
[5] Section 16(1).

be the exclusive domain of section 14. The aim of section 14(1) say the Respondents, is the "protection and promotion" of "marriage" and "family" in the traditional sense, as understood in the Cayman Islands, and that there is high judicial authority[6] for the proposition that this is a legitimate aim and can justify different treatment in relation to according access to married status.

12. As regards the Petitioners' plea that they should be entitled in the alternative to enter into a civil union protected by law, the Respondents say that this is a challenge to the absence of any law on the subject, not a challenge to any positive act of the Respondents. That therefore, this is perforce a matter for the Government to consider, not for the Court to address. Nonetheless, that the Respondents would of course respond to any ruling of the Court to the contrary, with respect for good administration and the rule of law.

13. That being in broad terms, a preliminary outline of the legal framework for the resolution of the present dispute, the questions which the Court must answer are these:

- Is the denial of access to the institution of marriage a violation of the Bill of Rights?
- Is the absence of an alternative institution to marriage that recognizes and protects the Petitioners' relationship, a violation of the Bill of Rights?
- If either of those first two questions is answered in the affirmative, how will the Court provide a remedy?

14. It is of course common ground, that the starting point for the analysis is that the Bill of Rights, being a part of the Constitutional Order in Council and so an Act of the United Kingdom Parliament, is part of the Supreme Law of the Islands. In the Cayman Islands, the Legislature's freedom to legislate is therefore constrained to the extent that it must not

[6] Citing *Karner v Austria* (App No 40016/98, 24 July 2003) at [40] ECtHR, among other cases from the ECtHR, to be discussed below.

pass legislation that is inconsistent with or repugnant to the fundamental rights and freedoms enshrined and protected by the Constitution.[7]

15. This is expressly settled by section 124 of the Constitution which defines the "Legislature" as "the Legislature *established by section 59(1)*" and further by section 59 itself which, even while establishing the Legislature, does so in the following terms:

> "*59(1) There shall be a Legislature of the Cayman Islands which shall consist of Her Majesty*[8] *and a Legislative Assembly*
>
> *(2) Subject to this Constitution, the Legislature may make laws for the peace, order and good government of the Cayman Islands."*
>
> [Emphasis added.]

The 2008 amendment of the Marriage Law

16. This case arises against the background of the Law having been amended, shortly before the introduction of the Bill of Rights, to express a definition of marriage[9] . In this regard, section 2 of the 2008 Marriage (Amendment) Law provided:

> ""*marriage" means the union between a man and a woman as husband and wife."*

17. Prior to this amendment, the Law was administered on the basis of what was taken to be the common law understanding that marriage indeed meant a union between a man and a

[7] As is the case of the Constitutional relationships between the U.K. Parliament and the other British Overseas Territories. See, for instance, in the case of Bermuda - *AG of Bermuda v Roderick Ferguson (and others)*, Civil Appeal Nos 11 an 12 of 2018, Judgment of the Bermuda Court of Appeal, delivered on 23 November 2018, per Baker P. at [7].

[8] Acting through Her Representative, the Governor.

[9] By the Marriage (Amendment) Law, 2008 (Law 15 of 2008), coming into effect on 27 October 2008.

woman but as classically stated by Lord Penzance[10], as also being an exclusive union for life:

> *"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."*

The background to the 2008 Amendment Law

18. It is clear, from the Hansard records of the debate upon the second reading of the Bill for the Amendment Law[11], that the statutory definition of marriage was regarded as important for reasons expressly aimed at excluding same-sex couples from the institution of marriage.

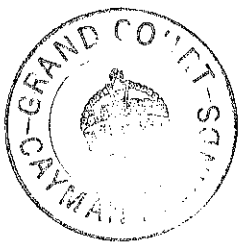
19. When the then-leader of Government Business, the Honourable D Kurt Tibbetts introduced the amendment he stated:

> *"For some years now, there has been mounting concern here in Cayman over the choices made by some other countries and states in the area of sexuality"*[12].

20. Similarly, the current Premier, the Honourable Alden M. McLaughlin stated:

> *"...there have been and continue to be concerns within these shores that somehow a marriage officer may be asked, requested, required, to carry out a ceremony between persons of the same sex."*[13]

21. He then however, acknowledged:



> *"I do not try to say that by making this amendment and by doing what we do that we shall forever preserve what we consider today to be the Caymanian value system and way of life. I say with some regret that I believe that that is going to change, and if I live the natural span of my life, probably within my lifetime. But that will be for other legislators, for another House in another time."*[14]

---

[10] As classically stated by Lord Penzance in *Hyde v Hyde and Woodmansee* (1865-69) L.R. 1 P&D 130 at 133.

[11] Official Hansard Report Electronic Version 2008/09 Session, Friday, 5 September 2008 pp 326-341 (referenced by both sides in the arguments). I note here that while the Respondents at [84] of their written submissions say that reference to the Hansards is impermissible for discerning the legislative intent behind the 2008 Amendment, they necessarily rely upon the debate in the Assembly (as well upon the constitutional consultation process) in support of the legislative policy objectives for which they contend.

[12] At page 327, 2nd column

[13] At page 334, 2nd column

[14] At page 335, 2nd column

22. It is also evident from Hansard that the 2008 Amendment was passed in order to promote and protect a view of marriage based on the proponents' understanding of the Islands' religious, moral and cultural heritage.

23. In this regard, the mover, the Honourable D. Kurt Tibbetts, also stated when introducing the Bill :

> *"Going back in history, marriage and family values, our Christian heritage, have been rooted in Caymanian society since the 1700s, from the days when our first settlers numbered only a few hundred. As early as 1773, history tells us that Caymanians formally expressed their desire for a resident "clergyman" – one of the main reasons being that he could perform local marriage ceremonies. For a generation or two, Caymanians had to sail to Jamaica for this purpose, that is, to get married. Eventually this function was undertaken by locally appointed magistrates, such as (and history calls names), William Bodden, James Bodden and James Coe. Then, in time, marriage ceremonies became a core function of the numerous churches that came to Cayman during the 1800s, including the Anglicans, Wesleyans, Methodists, Presbyterians, Baptists and Seventh Day Adventists, and in more modern times, a myriad of other Christian religions."*[15]

24. Further statements in support of the Bill also placed strident emphasis on religion and morality.

25. Again, the Honourable Alden McLaughlin:

> *"The Good Lord made us all with judgment, the ability to decide what we wanted to do – free will to choose right, to choose wrong. Homosexuality is not the only wrong in the world. If one accepts that it is a wrong. I make no judgment about any of those things. I just want to acknowledge that these are some of the realities of life .*[16]"

26. The Honourable Julianna O'Connor-Connolly:

> *"...by far the majority of constituents within Cayman Brac and Little Cayman are conservative by nature. And in no form or fashion, or misconceived way or misnomer, whatever, wish to see any other type of marriage within this jurisdiction except that of a man and a woman. And*

[15] Ibid, page 328, 1st column.
[16] Hon Alden McLaughlin, at page 335, 1st column.

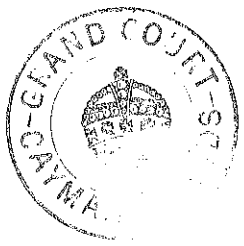
that said, from the background of my colleague from West Bay, based on the sex at time of birth."[17]

27. And, per the Honourable Anthony S. Eden who, after invoking well known verses from the Bible referring to marriage as a union between husbands and wives, concluded his contributions to the debate in these terms:

> *"Madam Speaker, back to the situation. We need to preserve our culture. We really do. I ask that as we go forward we think more about our families. ... it simply boils down, Madam Speaker, it is about the family. ... But we have a standard that we must go by. We cannot, we must not compromise the way that we have been brought up for the past 500 and something years and have other people come here and tell us "let's do it this way, it's a lot more fun". I do not agree with that."*[18]

28. This sentiment that the amendment was also necessary to protect the local culture from the influence of "*people who come to our shores as visitors*", was also expressed by other speakers[19].

29. The amendment was also described as necessary "*to clarify and confirm core values and beliefs*"[20]; to "*protect the institution of marriage and family as part of our Caymanian way of life*"[21] and because "*this country... has always held the institution of marriage as a solemn contract between a man and a woman. That is part of our cultural, social and religious fabric*"[22].



[17] At page 330 1st column. The reference to "my colleague from West Bay" being a reference to the contributions of the Second Elected Member for the District of West Bay, Mr. Rolston M Anglin where he stated (at page 328 2nd column): *"The Opposition would like to enquire of the Government as to whether or not we may need to go a bit further with this definition to insert the term "born", that is, that marriage is a union between a person who is born a man and [a person who is] born a woman. Certainly, if (and I stress if) we had circumstances where a person were to have a sex change operation, and were to reside within our country, whether or not the spirit of this amendment may be avoided and leave us as a community in a bit of a dilemma that we may not anticipate. I believe that that would not be the type of situation that Caymanians would look favourably upon and be accepting of"*
It should be observed in passing that the Amendment did not purport to address this further, sensitive issue.

[18] At pages 330 2nd column – 331 2nd column.

[19] For example, the Honourable D Kurt Tibbetts at page 328 1st column.

[20] Per the mover of the Amendment Bill, Hon D. Kurt Tibbetts, at page 327, 2nd column.

[21] Hon. D Kurt Tibbetts, at page 328, 2nd column.

[22] Hon Alden McLaughlin at page 335, 1st column.

30. In his arguments on behalf of the Respondents, Sir Jeffrey Jowell referred to and relied upon these latter concerns as justification for the Respondents' position even while, in his final submissions, expressly on behalf of the Respondents "*distancing ourselves*" from any arguments based on grounds of morality[23]. He submitted that it is the duty of this Court, in its construction of the Bill of Rights, to have regard for and to defer to the democratic will of the Caymanian people, as manifest in the Legislature's intention to preserve and protect their traditional view of marriage as a sacred union - one which can be entered into only between a man and a woman.

31. The idea of legal recognition for same-sex civil unions was also discussed but heavily discountenanced during the debate on the 2008 Amendment to the Marriage Law[24].

32. This steadfast refusal of the Cayman Legislature to provide any kind of legal recognition for same-sex unions, now more than a decade after the introduction of the Bill of Rights, is an important part of the background against which this action is brought.

33. In this regard it is appropriate here to record that the Courts must, of course, accord due deference and respect for the views of the members of the Legislature who are the democratically elected representatives of the people of the Cayman Islands. Accordingly, the Courts will not second guess their views expressed on matters of Caymanian tradition,

[23] Pointedly disagreeing with those views presented by the Cayman Islands Ministers Association in their uninvited "Amicus Brief", about which further comments will be made below.

[24] For instance, at page 333 1st column – page 334 2nd column per Mr. Cline A Glidden Jr, the Third Elected Member for the District of West Bay, referring to civil partnerships as "other ramifications and possibilities that could go against the norms" And at page 336, 1st column The Hon Alden McLaughlin referred to "*the spectre of civil unions*" and later, at 2nd column "*Now, the only way any of that could impact the Cayman Islands would be one of two ways: The first, and obvious, is that if the Legislative Assembly came to the view that this was right and proper and passed something akin to the Civil Partnerships Act in the United Kingdom and gave persons of the same sex relationships those rights and privileges. I do not think, at least in the presently constituted House, there is much fear of that. The other way would be if the United Kingdom extended to the Cayman Islands the provisions akin to those of the Civil Partnerships Act. Madam Speaker, when Minister Meg Munn was here earlier this year, and, indeed, when she returned to the UK and gave evidence before the Foreign Affairs Committee, she gave assurances that the UK had no intention or desire to apply the Civil Partnerships provisions or extend them to the Cayman Islands.*"

culture or social normative standards or beliefs. To the extent those views become embodied in local legislative policy and measures which are in keeping with the Constitution, the Courts are obliged to recognize and enforce them. But the problems which this case presents for resolution by this Court – and which it is therefore obliged to resolve – are quintessentially constitutional in nature.

34. They give rise to obvious questions of construction, first among these being the question whether the Marriage Law as a "(pre)-existing law" of the Legislature, is in conformity with or repugnant to the Constitution.

35. Equally, the question of construction arises whether the ongoing refusal (or from the perspective of same-sex couples, failure) of the Legislature, to provide a legal framework for the recognition and protection of same-sex civil unions, conforms with the Constitution.

36. As to the question of repugnancy or conformity of the Marriage Law (as amended) (hereinafter "the Law"), Sir Jeffrey Jowell acknowledged on behalf of the Respondents, that it is a Law which was in existence on the date when the Constitutional Order came into effect[25] and so was among the "existing laws" within the meaning of section 5 of the Constitutional Order. In this regard, section 5, subsection (1) of which is primarily relied upon by the Petitioners for the provision of the remedies which they seek, provides as follows:

> "5. *(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of this Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.* [Emphasis added.]

[25] The "appointed day" - 6 November 2009, appointed by Proclamation No.4 of 2009, published on 23 October 2009 in Extraordinary Gazette No 69/2009.

(2) *The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.*

(3) *In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day."*

37. The principles laid down by section 5 of the Constitutional Order are of fundamental importance to the task presented to this Court. They reflect the relationship between colonial legislatures and the Imperial Parliament which have been entrenched in British Constitutional law for more than 150 years, ever since the Colonial Laws Validity Act 1865 which states, in section 2 that:

> "*Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.*" [Emphasis added.]

38. It is acknowledged that the Constitution Order (including the Bill of Rights which it contains and entrenches), is an Order made under the authority of an Act of Parliament; viz: the West Indies Act 1962[26]. Accordingly, in keeping with settled constitutional principle, the duty of ensuring conformity with the Constitution - as the words in emphasis

[26] Pursuant to the powers vested in Her Majesty the Queen in Council under sections 5 and 7- see the Preamble to the Constitution Order itself.

from section 5(1) make plain – is a mandatory duty of the Court when called upon to interpret, pronounce and enforce the meaning of the Constitution[27].

39. As already noted, among the very sensitive questions of fundamental rights and obligations which arise, is that of the freedom of conscience and religious beliefs. Given the deference which should be accorded to the views expressed on this subject in the Legislature, it is just as well to lay down the marker here that this Court, when addressing this issue from the point of view of the constitutional principles and for reasons which will be more fully explained, may not do so simply by deferring to views expressed in the Legislature, or for that matter, those of the parties or even its own views. Rather, the task at hand requires strict adherence by the Court to the requirements of the constitutional principles.

40. The Respondents suggest that access to marriage – or even to the minimum legal requirements for the protection of same-sex civil partnerships – are inapplicable in the Cayman Islands because of the Islands' Christian heritage, culture and traditions. They further submit, as already mentioned, that any form of redress for the Petitioners should therefore be left to the Legislature as the political embodiment of the people's wishes and aspirations.

41. These latter propositions, I am obliged to note here, are on their face contrary to the settled principle that the judiciary as the guardian of the Constitution, must give practical, effective and timely consideration to complaints of injustice and must grant relief where the grant of relief is justified.

[27] Right of Access to the Courts for the resolution of claims arising under the Bill of Rights is also expressly provided by section 26 (1) under the heading "Enforcement of rights and freedoms" in these terms:
"(1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights or freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time."

42. Much depended from the Respondents' point of view therefore, on their ability to show that the issues raised by this very sensitive case for resolution by the Court are indeed issues which, if they are to be addressed at all, are such that only the Legislature might properly address.

The factual background to the Petitioners' case

43. Chantelle Day, the First Petitioner, is Caymanian. She was born in the Cayman Islands where she was raised by Caymanian parents. She became, in all respects, a well-integrated member of Caymanian society, manifest, for instance, by her representation of the Islands at the Commonwealth Games. She is a qualified lawyer and employed by a Cayman Islands law firm. She attests to being in love with and wishing to marry the Second Petitioner, Vickie Bodden Bush.

44. Vickie Bodden Bush is a dual citizen of the United Kingdom and Honduras. She was born in the Bay Islands of Honduras and moved to the Cayman Islands while in her 20's, to live with her family, which as both of her surnames suggest, has deep roots in Caymanian society. She has lived between the Cayman Islands and the United Kingdom for the past 20 years but does not have permanent residency or BOTC[28] status in the Cayman Islands. Although having undertaken formal training as a nurse, she is unassured of being able to obtain employment in that or any other field in the Cayman Islands, in the absence of legal recognition of her relationship with the First Petitioner. She attests nonetheless, to being in love with and wishing to marry the First Petitioner, Chantelle Day.

[28] British Overseas Territory Citizenship.

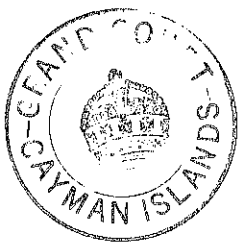
Formation of a family unit

45. The Petitioners met in the Cayman Islands, seven years ago, in 2012. They attest that throughout the course of 2013 they fell in love, began living together as a couple and formed a stable, committed and loving relationship. But practical problems arose in the Cayman Islands due to the lack of any legal recognition available for same-sex couples, most acutely at the time, the resultant tenuous nature of Vickie Bodden Bush's immigration status and the related uncertainty about the right to live and work in the Cayman Islands.

46. As a result, between September 2014 and August 2018, the Petitioners lived away from the Cayman Islands. They lived in Dublin, Ireland for a period of time, then moved to London, England. In both Ireland and England, the Petitioners each had the right to live and work by virtue of being British Citizens.

47. In 2016, whilst still living in Ireland, the Petitioners began acting as de facto guardian to a young girl "A", pursuant to an agreement with A's biological mother. A moved to London with the Petitioners later the same year. In July 2017, the Petitioners obtained indefinite leave for A to remain in the United Kingdom and immediately proceeded with an adoption application.

48. The laws of England, unlike those in the Cayman Islands[29], do not prohibit same-sex couples from adopting a child on grounds of sexual orientation, gender or marital status. The Petitioners' application to the Court in England for adoption of A as their daughter, was granted on 1 June 2018. The Petitioners accordingly, regard and treat A as their lawful daughter.



[29] The Adoption of Children Law 2003 which, in allowing single persons or "spouses" to adopt, defines spouses in terms of the context of marriage as defined in the Marriage Law. (The Adoption of Children Law, 2013 (Law 7 of 2013)). Note: This Law is only part in force – Definition of "child" Commencement Order GE74/014 s2.

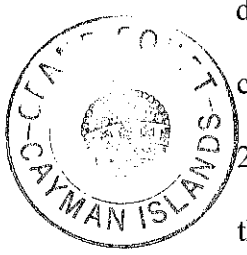
49. The First Petitioner proposed to the Second Petitioner in September 2017, and she accepted, and so the Petitioners became engaged to be married. As the First Petitioner attests[30], the Petitioners decided that they would return to the Cayman Islands in 2018 to be close to home, to raise A within their community of family and friends and to resume the First Petitioner's career path with her Cayman-based employer.

50. Further, and pertinently, that they strongly prefer to be married in the Cayman Islands because, as expressed by the First Petitioner[31]: "*it would be demoralizing to have married abroad*[32] *and have to return to Cayman to fight for our marriage to be recognized*".

51. In anticipation of their return, and in anticipation of the likely practical and legal difficulties they would face as a family due to the lack of legal recognition for their family unit in the Cayman Islands, the Petitioners contacted the Cayman Islands authorities in advance.

Attempts to avoid litigation

52. On 26 September 2017, the First Petitioner wrote to the Hon. Premier Alden McLaughlin, as well as to Her Excellency Governor Mrs. Helen Kilpatrick, to Hon. Attorney General Samuel Bulgin and to Human Rights Commission Chairperson, James Austin-Smith. In this correspondence, the First Petitioner highlighted what she perceived to be the discrimination she and the Second Petitioner face in the Cayman Islands as a same-sex couple, stated that it was their intention to apply to be married in the Cayman Islands in 2018 and urged the Government to introduce legislation to allow them to do so (to avoid the need for litigation).



[30] In in her First Affidavit at paras 20-42.
[31] At para 15 of her First Affidavit
[32] Marriage between same-sex couples being now authorized in England since the advent of the Equal Marriage (Same Sex Couples) Act 2013.

53. No response was received from the Premier himself but the Governor's office acknowledged receipt and engaged in dialogue with the Petitioners and their attorneys. However, no legislative action was taken. The Human Rights Commission responded expressing support for the Petitioners' plight.

54. The evidence shows that from September 2017 to April 2018, the Petitioners sought, with the help of their attorneys, to work with the Governor's Office to encourage a reading of the Marriage Law[33] which would allow for same-sex marriage or, alternatively, legislative change.

55. This included a letter of 1 December 2017 from Mr. Tonner QC on behalf of the Petitioners to Her Excellency the Governor, in which an explanation of the Petitioners' legal arguments was set out "*in order to find a non-litigious solution to the discrimination faced by (the Petitioners).*"

56. Under the heading "Executive Summary", it offered the following response to a request from the Governor's Office (as Representative of Her Majesty's Government), that the Petitioners set out the various options which they perceived to be available in ensuring that their partnership rights are guaranteed:

> "*We summarize the position as follows:*
>
> 1. *The Cayman Islands is obliged under the European Convention (on) Human Rights (ECHR) to allow Chantelle and Vickie access to an institution that provides the same package of rights as marriage (e.g. via marriage itself or civil partnership). The current situation is clearly a violation of the ECHR.*
>
> 2. *The United Kingdom is ultimately responsible for the Cayman Islands' breaches of the ECHR and for remedying them;*

[33] The 2010 Revision as amended in 2008 by the Marriage (Amendment) Law 2008, discussed above (hereinafter "the Law").

3. *Civil partnership is a bare minimum. Marriage is the standard to be achieved. If the issue is litigated, arguments can be made that under domestic Caymanian law, marriage must be offered to remedy the inequality that exists in the Cayman Islands. Indeed, the UK Government's position is that all UK Citizens should be entitled to marry in their home jurisdiction (as has been stated in respect of marriage inequality in Northern Ireland).*

4. *There are four options available to remedy the breach*

   a. *Introduce by Order in Council the equivalent of the UK's Equal Marriage (Same Sex Couples) Act 2013;*

   b. *Introduce by Order in Council the equivalent of the UK's Civil Partnership Act 2004; or*

   c. *Chantelle and Vickie apply to the Governor for a special licence to marry and the application is granted on the basis that the Governor has an obligation under Section 24 of the Bill of Rights and section 5 of the Cayman Islands Constitutional Order (CICO) to construe the Marriage Law in a way which gives effect to the Constitution and the Bill of Rights; or*

   d. *Chantelle and Vickie apply to the Governor for a special licence to marry and the application is refused thereby forcing Chantelle and Vickie to litigate*".

57. By any objective measure, it must be regretted that such efforts, at finding a non-litigious resolution, did not bear fruit.

58. Eventually, on 12 April 2018, the Petitioners attended in person at the Cayman Islands Government General Registry where they applied for a special licence to marry. A "special licence" in this sense was needed, as at the time they both resided outside the Cayman Islands.[34]

59. On 13 April 2018, the Deputy Registrar of the General Registry[35] (the Second Respondent), refused to grant a special licence to marry for the following reasons:

[34] Section 22 of the Marriage Law authorizes the Governor in this regard.
[35] Acting as the Governor's delegate.

"In the Cayman Islands, the ability to marry is restricted to opposite-sex couples by virtue of the definition of "marriage" in section 2 of the Marriage Law (2010 Revision) as "the union between a man and a woman as husband and wife". A special marriage licence can therefore only be granted to solemnize a marriage between a man and a woman....

As the proposed same-sex union between the above individuals would not fall within the definition of "marriage" under section 2 of the Law, a special marriage licence cannot be granted for the purpose of solemnizing that union. The application is therefore refused."

Commencement of these proceedings

60. Against that background these proceedings were filed, first in Cause 111 of 2018 on 31 July 2018 by grant of leave for judicial review of the Deputy Registrar's (and by implication the Governor's) decision to refuse a special licence. Subsequently, on the 28 September 2018, the Petitioners also filed a constitutional challenge pursuant to section 26 of the Bill of Rights (Cause number 184 of 2018) (the "Petition"), which seeks a declaration that the Cayman Islands has violated their rights enshrined by the Bill of Rights and asking for that breach to be remedied[36].

The institution of marriage

61. The legal and conceptual basis for the Petitioners' claim for a remedy by the State, is that in the Cayman Islands, as throughout the rest of the democratic world, the institution of marriage is a secular one, controlled by the State. This the State does through the regime of the Law. Accordingly, through the institution of marriage, two people may contract as equals, acquire rights and, in many instances mandated by law, come to owe duties and

[36] On the 5 October 2018 both proceedings were consolidated by order of this Court and directions given for the filing and service of affidavits intended to be relied upon and for the listing of the matter for trial.

obligations as equals. Thus, through the institution, the State grants them many rights and obligations which are unavailable by any other means.

62. Submitted by the Petitioners with their written submissions, is a detailed (if not exhaustive) schedule of the many statutory provisions which reflect these rights and obligations. By way of examples only, some of central importance to the Petitioners' concerns would be the Adoption Law and Immigration Law (for reasons, some already mentioned), the Succession Law, the National Pensions Law, the Matrimonial Causes Law (all of these relating to property rights derived from marriage), the Stamp Duty Law, the Labour Law, the Torts (Reform) Law and the Health Insurance Law (these being but a few of those bestowing rights or benefits which are contingent upon being married).

History of the State's control of the institution

63. As already mentioned and will come to be further discussed below, the Respondents' argument in support of their restrictive construction of the right to marry as guaranteed by the Constitution, is based upon a Caymanian "traditional" view of marriage, as being the exclusive preserve of parties of the opposite sex.

64. One might therefore expect to enlighten the discussion and task of constitutional construction by reference, at least briefly, to the history and traditions of the institution of marriage.

65. The institution, traditionally celebrated as a union between a man and a woman, is often said to be as old as civilization itself[37] and marriage of some kind is found in virtually every society. But throughout the centuries marriage has taken many forms.

[37] See for instance:www.yesterday.uktv.co.uk

66. Early marriage was born of ancient societies' need to secure a safe environment in which to procreate, control the granting of property rights and protect bloodlines. As but an instance, ancient Hebraic law required a man to become the husband of a deceased brother's widow.

67. The understanding of marriage contrasted greatly from culture to culture, varying from endogamy (marriage within one's social group), exogamy (outside one's social group) to polygamy (including polyandry) and, in today's modern western tradition, monogamy.

68. In early western tradition, marriage was considered a civil institution until circa 5AD, when the great Christian theologians such as Augustine wrote about marriage and the Christian Church started taking an interest in the ceremony. It was at this point that Christians began to have their marriages conducted by ministers as Christian ceremonies and in the 12th Century, the Roman Catholic Church formally defined marriage as a sacrament, sanctioned by God.

69. In Catholicism, it is still believed that the Sacrament of Matrimony is between God, the man and the woman[38], while the Protestant Reformation of the sixteenth century re-conceptualized marriage as the more temporal life-long and monogamous covenant between a man and a woman.

70. The current incarnation of marriage in the Cayman Islands, while coming from that western tradition, is also one that arose out of English law and which has evolved dramatically in England and throughout the common law world, since the State took control of it.

71. Nonetheless, it must be stated, the institution constantly remained until very recently[39], a union exclusively between members of the opposite sex.

---

[38] Hence the non-recognition by the Roman Catholic Church of the concept of divorce.

[39] By virtue of changes in England and elsewhere, to be discussed below.

72. In England, the State took control of the institution via the Marriage Act 1753. The 1753 Act was anti-Catholic in nature. It declared that for a marriage to be legally binding, the ceremony had to be conducted by a minister of the Church of England. Although Jews and Quakers were exempted from the 1753 Act, it required religious non-conformists and Catholics to be married in Anglican churches[40]. Catholics who married under their own religious sacrament were thus excluded from the State-granted benefits of marriage.

73. This anti-Catholic restriction was eventually removed by the British Parliament in the Marriage Act 1836, which allowed non-conformists and Catholics to be married in their own places of worship. The 1836 Act also allowed civil marriages to be held in registry offices, which were set up in towns and cities across the country.[41]

74. By the 1836 Act, the institution of marriage ceased to be a religious institution. This transformation to the State-controlled institution of marriage must be understood in the context of the Catholic Emancipation with which it was contemporaneous. The 1836 Act was passed seven years after the Roman Catholic Relief Act 1829, which, for example, allowed Catholics to sit as Members of Parliament.

75. The next major change came in the Ages of Marriage Act 1929. The classes affected were women, in particular, minor girls. The 1929 Act raised the minimum age to 16 for both sexes[42]. Again, this change was contemporaneous with other legislative changes, then aimed at ending women's status as second-class citizens. The 1929 Act was passed a year

[40] "The law of marriage": https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/. This source was relied upon by the Petitioners' attorneys in their written submissions and on which I rely here. In response to a query from me, Sir Jeffrey Jowell confirmed that the Respondents were satisfied about the research and accuracy of this aspect of the submissions on the history of the institution.

[41] Ibid.

[42] Ibid.

after the Representation of the People (Equal Franchise) Act 1928, which extended the voting franchise to all women on the same terms as men.

76. In other common law countries, which had different histories of oppression; marriage similarly opened to new classes as the common humanity of those classes was recognized. In the United States, individual State's bans on interracial marriage were held to be unconstitutional by the United States Supreme Court in *Loving v Virginia* 388 U.S. 1 (1967).

77. Similarly, in South Africa, the ban on interracial marriages ended in 1985 when the Prohibition of Mixed Marriages Act 1949 was repealed[43].

78. These changes to the institution of marriage were thus contemporaneous with other legislative changes which recognized the equal worth and human dignity of Americans and South Africans of colour.

79. As the institution of marriage evolved to incorporate different groups and ethnicities of people, it also changed from being a religious sacrament to a secular contract, and from being a gender-biased institution to a gender-neutral institution.

80. Thus, in England, the Matrimonial Causes Act 1857 reformed the law of divorce, moving litigation from the jurisdiction of the ecclesiastical courts to the civil courts[44] and established a model of marriage based on contract rather than sacrament. It also abolished adultery as a criminal offence.

81. Nonetheless, access to divorce was unequal between the genders; a wife's ability to divorce on the ground of her husband's adultery was more limited than vice versa.[45] This was only

[43] By the Immorality and Prohibition of Mixed Marriages Amendment Act 1985
[44] Per sections II and III which also created the Court of Divorce and Matrimonial Causes.
[45] Section XXVII.

much later changed by the Matrimonial Causes Act 1973 which further reformed the law of divorce so that the grounds for divorce were equally accessible "*to either party to a marriage*", thus removing the former bias towards men.[46]

82. Another major change for gender-neutrality came in the case of *R v R* [1991] 3 WLR 767, in which the House of Lords abolished the common law presumption that a wife gives irrevocable consent to sexual intercourse with her husband through the contract of marriage.

83. The institution of marriage in the Cayman Islands is an embodiment of a process of evolution similar to that in England (as well as in Jamaica as will be discussed below) and must be viewed, for an objective understanding of what is "traditional", against the history of the iterative changes.

The origins of marriage in the Cayman Islands

84. England's claim to the Cayman Islands, asserted as early as 1662, was acknowledged by Spain in the Treaty of Madrid in September 1670. The Cayman Islands were gradually settled from the beginning of the 18th Century[47]. Those first settlers brought with them English notions of marriage.

85. In the absence of a representative of the Church of England in the Cayman Islands, throughout the 18th Century those Caymanians who wished to have their marriages formally endorsed had to go to Jamaica to have them solemnized.

86. The first recorded marriage of Cayman Islands residents took place in Jamaica on 29 October 1732.[48] Twenty-eight marriages of Caymanians between 1733 and 1808 have so

[46] Section 1.
[47] "Founded upon the Seas", Michael Craton and the New History Committee (2003)
[48] Ibid, p 45.

far been traced in the parochial registers in Jamaica. From the late 1700s, Magistrates were appointed in the Cayman Islands and empowered to perform marriages but they were unable to perform religious sacraments and formal marriages by clergymen in Jamaica were preferred by those who had the means to travel.[49]

87. Marriage was open only to the "free" population. No formal marriages were ever performed for the enslaved population. This did not change until the Emancipation Proclamation was read in George Town on 3 May 1835[50], thereby ending a practice which had endured since the very inception of Cayman Islands permanent settlement and thereby, for the first time, opening the institution of marriage to the entire population of the Cayman Islands.

88. Although the Cayman Islands elected in 1831, its first legislature (consisting of appointed Magistrates and Vestrymen chosen by free adult males),[51] no law relating to marriage was passed.

89. Three decades later, the Cayman Islands Act of 1863 formalized the constitutional position that the Cayman Islands was to be administered as part of the colony of Jamaica. The significance of this development for present purposes is that certain Acts of the Jamaica Legislature, by virtue of the Act of 1863, applied by extension to the Cayman Islands.

90. The Cayman Islands Government Law 1893 was passed on 12 May 1893 and was significant for present purposes because Schedules 2 and 3 of the Law listed all the Jamaican legislation which had been in force in the Cayman Islands prior to the passing of the 1893 Law. This shows that several Jamaican laws governing marriage were in force in

[49] Ibid, p 74.
[50] Ibid, P 84.
[51] Ibid, p 2.

the Cayman Islands including the Marriage Law 1879 (Law 14 of 1879) and the Married Women's Property Law 1886.

91. As a colony of England, the Jamaica legislature kept abreast of developments in England and changes to the laws of England. As England introduced new laws or amendments to its laws, Jamaica would often follow suit after a period of time. Such laws of Jamaica became those of the Cayman Islands.

92. In England, by virtue of the Marriage Act 1836 (discussed above) the institution of marriage ceased to be a religious institution. The Marriage Law 1879 (Jamaica) is in similar terms. It provided for both civil and religious ceremonies of marriage. It also set out various procedural requirements for a valid marriage.

93. One will conclude by comparing the 1879 Law with the later Cayman Islands marriage laws (dealt with below), that the 1879 Law (Jamaica) was the template upon which the Cayman Islands marriage laws were later based.

94. Having changed the institution of marriage from a purely religious institution to a secular one, it was logical to make consequential changes to associated laws. This was achieved in England by various enactments to the Matrimonial Causes Act (mentioned above). And this was reproduced in the Divorce Law of 1879 (15 of 1879) (Jamaica) which was extended to the Cayman Islands.

95. Changes to the Jamaican (and therefore the Cayman Islands) laws of marriage continued over the early decades of the 20th century. One noteworthy change to the long-lasting historical position (which did not occur in the Cayman Islands until the mid-20th century) was the elimination of the disparity (mentioned above) between husband and wife in terms

of the grounds for divorce in 1926: (A Law to amend Law 14 of 1879 (the Divorce Law, 1879) 1926).

96. A further significant change to the law of marriage was the Law to Amend the Marriage Law (No 48 of 1957) which raised the minimum marriageable age to 16 for both sexes[52]. Prior to this, it had always been the position at common law (and by cannon law), that a person who had attained the age of puberty could contract a valid marriage and the legal age of puberty had been set at 14 years for males and 12 years for females[53].

97. Further legal developments continued throughout the remainder of the 20th century. The Cayman Islands was granted a new constitution in 1972 (although it did not contain a bill of fundamental rights) and the institution of marriage continued to evolve to accommodate changes to the hitherto traditional thinking on women's rights.

98. The "memorandum of objects and reasons" to *The Matrimonial Causes Law (Law 9 of 1976)*, is illustrative of the continuing development of the legal landscape of marriage:

"Under the new Law, the archaic remedy of a decree of restitution of conjugal rights is abolished and it is no longer possible for an aggrieved husband, while allowing his marriage to subsist, to sue for and recover damages from his wife's adulterer.

...

In the new Law, no distinction is made between the sexes for the purposes of financial provisions."

99. From the foregoing overview, one sees that it was only during the course of the 20th century that long standing but deeply undignified norms – such as male biased restitution of conjugal rights; inequality in the grounds for divorce; and marriage being lawful before

[52] Ibid.

[53] *Arnold v Earle* (1758) 2 Lee 529.

a girl attained true capacity to consent- norms which had hitherto been regarded as settled traditions of marriage, were finally consigned to the annals of history.

100. One also sees that the ongoing legal evolution of the institution of marriage is as constant as the institution itself. And so when one looks to its legal evolution to understand what may be regarded as Caymanian "traditional" marriage, one may not objectively ignore its heritage as evolved from English (through Jamaican) law.

101. The notion that there came a time when a Caymanian tradition of marriage had evolved, shorn of its legal heritage based in English law, is therefore not one that is supported by the legal history.

102. Accordingly, one might quite rationally conclude that the legal history certainly does not preclude further development of the Law to reflect an evolving view of marriage by reference to the Constitution itself.

103. Put another way, the legal concept of marriage in the Cayman Islands - being the secular State –regulated and controlled institution that it is - may not be regarded as immutable for all time in deference to a particular religious view, even a Christian majoritarian view. Yet, in reality, consonant with the sentiments which carried the 2008 Amendment through the Legislature, this is what the Respondents contend in their arguments for a view of the institution, as one which has evolved from Caymanian traditional Christian beliefs and sense of moral values.

104. As was confirmed very recently by the Bermuda Court of Appeal[54], that is not a permissible basis for ascribing to the State-regulated secular institution of marriage, an immutable

[54] In *AG for Bermuda v Ferguson* (above).

status in the name of tradition, capable of excluding persons on grounds of discrimination because of their perceived "non-Christian" sexual orientation or morality.

105. Indeed, such an approach, as I will now further attempt to explain, is anathema to the approach that this Court must take when ascribing their true meaning to the provisions of a Constitutional Bill of Rights.

The principled approach to the construction of a Constitutional Bill of Rights

106. As already noted[55] the 2009 Constitution of the Cayman Islands and the Bill of Rights which it enshrines, are less than a decade old. The Bill of Rights evolved however, from a much older lineage. It joined the family of written constitutions of the common law world, with its oldest member being the Constitution of the United States 1787. Like the Bill of Rights in the United States Constitution, the Bill of Rights in the Constitution of the Cayman Islands must therefore develop its own jurisprudence that gives life and true meaning to the rights and freedoms which it protects. Given the changes in society as they have evolved over time, the jurisprudence will necessarily develop in ways that may not or could not have been envisaged by the original drafters of constitutions.

107. Nowhere is the correct approach to constitutional interpretation more classically and authoritatively articulated than by Lord Wilberforce in the seminal authority of *Minister of Home Affairs v Fisher*[56], on an appeal to the Privy Council from Bermuda:

> *" Here, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom S.I. 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter 1 is headed "Protection*

[55] FN 24 above- the Bill of Rights itself coming into effect 3 years later
[56] [1980] A.C. 319, 328.

of Fundamental Rights and Freedoms of the Individual". It is known that this chapter; as similar portions of other constitutional instruments drafted after the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda[57]*. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. 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."*

108. Further guidance was subsequently provided by Lord Hoffman in his speech on behalf of the Privy Council in a constitutional appeal from Mauritius in *Matadeen v Pointu* in these terms:[58]

> *"It is perhaps worth emphasizing that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial context is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents.*
>
> *They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however, a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in*

[57] As is well known, including the Cayman Islands.
[58] [1999] A.C. 98, 108.

> *State v Zuma, 1995 (4) B.C.L.R. 401, 412: "If the language used by the lawyer is ignored in favour of a resort to "values" the result is not interpretation but divination."*

109. More recently Lord Bingham of Cornhill, after a review in *Reyes v R [2002] 2 A.C 335*[59] of many of the leading case authorities, emphasized that the court's duty remained one of interpretation of a fundamental Bill of Rights , a very special instrument[60]:

> "A*s in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in light of evolving standards of decency that mark the progress of a maturing society: see Trop v Dulles 356 US 86, 101*[61] ".

110. Seen in the light of this venerable and authoritative body of judicial dicta the Court's duty, when construing a constitutional Bill of Rights, is unmistakable. The court must begin with a careful consideration of the language used and while being faithful to the meaning of the words (abjuring its own predilections and moral values), must be always mindful of the fact that they are the words, not of a private document, but of a Bill of Rights which enshrines fundamental constitutional rights and freedoms for everyone in society. The court must therefore ascribe a meaning which while consonant with the language, is also suitable for ensuring the contemporary protection of "*the full measure of the fundamental*

[59] A case on appeal to the Privy Council from Belize, in which it was held, despite the then mandatorily expressed punishment for the offence, that a mandatory penalty of death was unconstitutional for being "inhuman or degrading punishment" and that following a conviction, the trial judge must have discretion to impose a lesser penalty, if the circumstances of the offence so required.

[60] [2002] 2 A.C 335 at [26]

[61] In which the United States Supreme Court ruled that it was unconstitutional to revoke citizenship as a punishment for crime (as had formerly been the state of the law in some states).

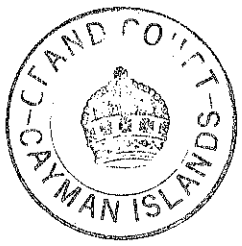
rights and freedoms[62]" to which individuals are entitled, in keeping with *"the evolving standards of decency of a maturing society"*[63]; as well as in keeping with any express limitations which apply as being "reasonably justifiable in a democratic society" (or in the modern language of the formulation of limitations).

111. This process of interpretation, it must be acknowledged, is seldom a simple task. But the judge's burden is made immeasurably less onerous by the wealth of judicial precedent which has become available from around the world[64], in response to humanity's common quest for the realization and enforcement of rights.

Freedom of conscience

112. To the extent that the 2008 Amendment to the Law was passed to preclude, on religious grounds, the right of same-sex couples to marry, the Petitioners' submit that it infringes their right to freedom of conscience. This right is enshrined in section 10 of the Bill of Rights which provides, under the heading "Conscience and religion" as follows:

> "10. *(1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience.*
>
> *(2) Freedom of conscience includes freedom of thought and of religion or religious denomination; freedom to change his or her religion, religious denomination or belief; and freedom, either alone or in community with others, both in public and private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship" [emphasis added]*



[62] Per Lord Wilberforce from *Fisher* (above).

[63] Per Lord Bingham (approving of dicta from *Trope v Dulles*) in *Reyes v R* (above).

[64] Going beyond the common law world to include also the ECtHR with respect to that Court's pronouncements upon the meaning and effect of the European Convention on Human Rights which was extended to the Cayman Islands by the United Kingdom as long ago as March 2006. See Second Supplementary List of Ratifications, Accessions, Withdrawals, Etc., for 2006 [in continuation of Treaty Series No. 20 (2006), Cm 6911, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty , November 2006, at page 18.

113. Section 10(6) then prescribes a closed list of limitations to this right:

> "(6) *Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) In the interests of defence, public safety, public order, public morality or public health; or*
>
> *(b) For the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion or belief without the unsolicited intervention of adherents of any other religion or belief."*

114. From the case law, it will be immediately apparent that the right to freedom of conscience is engaged by the denial to same-sex couples of the right to marry. Freedom of conscience encompasses not only freedom of religious belief and practice, it also encompasses freedom from restraint or coercion from others to act in a way which is contrary to one's own conscience and beliefs.

115. The Privy Council, in declaring the said principle, also defined "*freedom of conscience*" in the case of *Laramore*[65], in the following terms:

> "*Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment but it arises only once the nature of the individual's particular belief has been identified*". [Emphasis added.]

116. Here, the Petitioners attest expressly, to their belief in the institution of marriage. The First Petitioner states in her First Affidavit as follows, at paragraphs 28, 30 and 37:

> *"28. Vickie and I believe in the institution of marriage. We want to get married.*
>
> ...

[65] *Commodore of the Royal Bahamas Defence Force and others v Laramore* [2017] UKPC 13 at [14].

> *"30. In addition to our ideological belief in marriage, there are other legal reasons why we want to get married and why Cayman as a venue is important.*
>
> ...
>
> *"37. It is degrading just to have to explain why we want to marry rather than have a civil partnership; opposite-sex couples do not have to justify why they deserve the right to marry, why should we?"*

117. The Second Petitioner in her Affidavit at paragraph 4 agreed with and adopts those sentiments expressed by the First Petitioner. It is not disputed that these beliefs of the Petitioners are sincerely held.

118. The question therefore arises for resolution, whether the right of the Petitioners to hold their belief in the institution of marriage, and its applicability to same-sex couples, is protected by section 10 of the Bill of Rights and if so, whether its purported infringement by the Law is "reasonably justified" within the meaning of section 10(6).

119. An appropriate starting point for the analysis is therefore with an examination of the nature and implicitly apparent reasons for the purported infringement of the right.

120. There are compelling pronouncements from Commonwealth cases which explain why legislatures may not validly promulgate laws which are motivated by an intention to curtail fundamental rights on religious grounds. The same principle applies with equal force by necessary implication to preclude judge-made law motivated by such objectives. Perhaps the clearest explanation of this principle in English law is to be found in *McFarlane v Relate Avon Limited* in the judgment of Lord Justice of Appeal Laws:[66]

> *"21 ...The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed law. <u>But the conferment of any legal protection or preference upon a particular substantive moral position on the ground that it is espoused by the adherents of a particular faith, however long</u>*

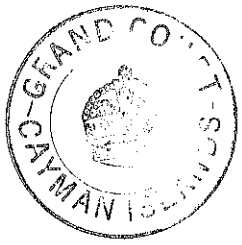
[66] [2010] EWCA Civ. 880, at paras 21-23

its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which the laws are made in a reasonable society. Therefore it lies only in the heart of the believer who is alone bound by it: no one else is or can be so bound, unless by his own free choice he accepts its claims.

22. *The promulgation of laws for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law, but the State, if its people are to be free, has the burdensome duty of thinking for itself.*

23. *So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime".* [Emphases added.]

121. Equally compelling is the following earlier dicta on the subject from Justice Dickson of the Supreme Court of Canada:[67]



"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter.[68] *Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by*

[67] *In R v Big M Drug Mart* (1985) 1 SCR 295

[68] Which guarantees among other rights, equality from discrimination on grounds of race and sexuality.

worship and practice or by teaching and dissemination. But the concept means more than that.

> *95. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he [or she] would not otherwise have chosen, he [or she] is not acting of his [or her] own volition and cannot be said to be truly free. One of the purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his [or her] beliefs or his [or her] conscience".* [Emphasis added.]

122. From these compelling dicta, one is led to the conclusion that absent some overriding provision in the Constitution itself or some reasonable ground of justification (and we will come to how the Respondents argue this issue), a measure aimed at constraining the otherwise lawful exercise of the right of same-sex couples to manifest their belief in the institution of marriage, cannot be upheld.

123. As will be more fully examined below in the context of discussion on section 16 of the Bill of Rights (the right of freedom from discrimination), contrary to the sentiments which propelled the 2008 Amendment, no notion of the need to preserve a "Christian tradition of family" is expressly sought to be relied upon by the Respondents in this case. Rather, they rely upon the notion of a "Caymanian tradition of marriage and family. And so, it is just as well all the same, to note here that the notion of "tradition" is certainly not listed as a ground of limitation under Section 10(6).

124. The fundamental right to freedom of conscience was expressly found by the Bermuda Courts in the *Ferguson* case[69] to have been denied. In that case, the first question was whether section 53 of the Domestic Partnership Act[70] (the "DPA") breached the equivalent right to freedom of conscience protected by the Bermuda Constitution because section 53 was enacted for a religious purpose. The religious purpose was the reversal, for religious reasons, of the right of same-sex couples to marry as established by the earlier decision of the Bermudian Supreme Court in *Godwin and DeRoche*. In *Ferguson*, the courts addressed the issue of the constitutional validity of the revocation provisions which were incorporated in the DPA, even while the DPA also provided for same-sex domestic partnerships.

125. The freedom of conscience was engaged for reasons articulated by Chief Justice Kawaley at first instance, as follows:[71]

> "*...The battle over the ownership of the very idea of marriage in Bermuda and elsewhere is irresistible proof of the fact that a belief in marriage matters. It is self-evident that the beliefs (as regards same-sex marriage) qualify for protection.*"

126. He concluded as follows that the right to freedom of conscience had been violated, at paragraph 112:

> "*... The impugned provisions of the DPA interfere with the rights of those who believe (on religious or non-religious grounds) in same-sex marriage of the ability to manifest their beliefs by participating in legally recognized same-sex marriages (as parties or as religious officiants).*"

---

[69] Above, construing section 8(1) of the Bermuda Constitution which is written in almost identical terms to section 10(1) and (2).

[70] Section 53 provided: "*Notwithstanding anything in the Human Rights Act 1981, and any other provision of law or the judgment of the Supreme Court in Godwin and DeRoche and others v The Registrar General and others delivered on 5 May 2017, [(which judgment declared the right of same-sex couples to marry in Bermuda)] a marriage is void unless the parties are respectively male and female*".

[71] *Ferguson v The Attorney-General* [2018] SC (Bda) 46 Civ (6 June 2018) at paragraph 80.

127. Upon appeal to the Court of Appeal[72], Chief Justice Kawaley's decision on freedom of conscience was upheld for reasons expressed on behalf of the Court of Appeal by President Baker in these terms:

> "*71. ...We agree with the Chief Justice that the State cannot pass a law of general application that favours those who disagree with same-sex marriage. Section 8 of the Constitution is there to protect the beliefs of minorities and their freedom of conscience. Their freedom of conscience matters and is not lightly to be interfered with. Indeed, no evidence has been advanced by the Appellant to justify that interference in the present case.*
>
> *72. It is true that the draughtsman of the Bermuda Constitution 50 years ago is unlikely to have had same-sex marriage in the forefront of his mind, or indeed in his mind at all, but that is not the point. It was drafted with sufficient flexibility to protect everyone's freedom of conscience in a changing world. Interference with that freedom can be by both positive and negative acts, in this instance by the negative act of preventing same-sex couples having the right to marry.*
>
> *[...].*
>
> *77. The revocation provisions in section 53 of the DPA were passed for a mainly religious purpose to meet the wishes of the PMB[73]. They are therefore invalid and must be struck down."....*

128. Just as in *Ferguson*, here the Petitioners say that they wish to manifest their beliefs by becoming married to each other. They say that their right to hold and manifest these beliefs is protected by section 10 of the Bill of Rights but that this right has been violated by the State's pre-emptive denial of the right to marry by the 2008 Amendment on mainly religious grounds and by the subsequent refusal of the licence to do so by reliance on the Law (as amended). This they say the State has done, impermissibly in the name of tradition, by reliance on the Law as it reflects a majoritarian religious definition of marriage.

[72] *The Attorney-General v Ferguson Civil Appeal* Nos 11 and 12 of 2018

[73] A pressure group calling themselves "Preserve Marriage Bermuda".

129. While I conclude this argument of the Petitioners to be well-founded, my conclusion requires clarification. To the extent that the Petitioners are to be taken as arguing for a free -standing right to marry based on their section 10 rights of freedom of conscience, I agree with the Respondents that the *Ferguson* decision cannot be read that widely. In it, the Bermudian Courts were not considering whether the right to freedom of conscience itself provided a constitutional right to marry. Indeed, the Constitution of Bermuda is silent on the subject of the right to marry, containing no provision equivalent to section 14(1) of the Cayman Constitution. Rather, as I think the passages quoted above from *Ferguson* make clear, the question was the validity of the DPA itself; its enactment having been for the express purpose of revoking, for impermissible religious purposes, the effects of the earlier case of *Godwin and DeRoche*, in which the right of same-sex couples to marry was recognized.

130. It should be understood therefore, that, in light of the foregoing analysis, I do not proceed to assess the Petitioners' claims for relief under the Bill of Rights as premised upon a right to marry founded upon their right, in and of itself, to hold and manifest their belief in marriage as a belief which is protected by section 10 as a free standing right.

131. As I understand the gravamen of their case, it is that taken as a whole, the Bill of Rights must be construed as recognizing and protecting their right to marry. This right they say is founded primarily in the right to private and family life (including the right to found a family), and in the right to equality of treatment and freedom from discrimination in the exercise of all their rights under the Constitution. If so, then the 2008 Amendment as a Law passed mainly for the religious purpose of preferring a Christian majoritarian religious view of marriage by precluding same-sex marriage, interferes with the Petitioners' right to

marry and with it, their related right to freedom of conscience and the manifestation of their belief in marriage by becoming married.

The Respondents' response to the section 10 claim

132. The Respondents argue that section 10 of the Bill of Rights – the right to freedom of conscience- is not engaged in this case. They say that it is contrary to interpretive principle to seek to locate in section 10 of the Bill of Rights a wider right to marry (on grounds of conscientious belief) than has been conferred in the *lex specialis* on that topic, that is: section 14. They say that to do so would be to apply section 10, in effect, to repeal the words "*a person of the opposite sex*" used expressly in section 14(1) of the Bill of Rights itself.

133. As I have sought to explain above, I do not proceed on this view of the Petitioners' case as arguing for a right to marry founded in section 10 itself in a way that would negate section 14. As I understand their case it is worth repeating in this regard albeit in different terms: it is that the denial of the right to marry based as it is upon religious grounds which propelled the 2008 Amendment, offends and denies their right to freedom of conscience and belief as persons who wish to manifest their beliefs by entering into the institution of marriage, an institution which they revere like all others who are allowed to marry. That right to marry is to be found, if nowhere else, in the rights to private and family life.

134. But it is the denial also of the right to freedom of conscience that the 2008 Amendment brought about and in respect of which they are also entitled to redress. Notwithstanding their apparent misunderstanding of the Petitioners' case, I will take the time in deference to the Respondents' case, to consider the cases Sir Jeffrey Jowell relied upon here. The

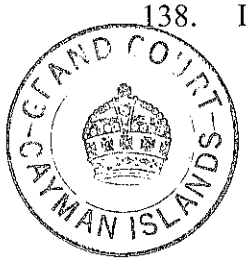
issue of the appropriate redress will be dealt with at the end, when the other complaints will also have been considered.

135. Sir Jeffrey Jowell cited as direct authority on the point the decision of the ECtHR[74] in *Khan v United Kingdom*[75], where the applicant, a Muslim, professed the belief on religious grounds that he ought to be permitted to marry an underage girl (his Islamic religion permitting marriage of girls as young as 12). The point of the Respondents' reliance on this case is of course, that one's freedom of conscience will be relegated by public morality and policy as reflected in domestic marriage legislation.

136. There are however, obvious and important distinctions between that and the present case. The criminalization in domestic law[76] of what was done and proposed by Mr. Khan as his religious right to conjugal relations with a 12 year old girl , as well as the minority, tender age and therefore obvious legal incapacity of the girl to give true consent, were all concerns which do not arise in the instant case.

137. But while no such concern would arise in the context of a proposed union between consenting adult same-sex couples, I will nonetheless consider this case for what Sir Jeffrey Jowell contends it establishes by way of constitutional principle.

138. In it the Commission held as follows:



> *"It is true that Article 9 secures to everyone the right to freedom of thought, conscience and religion and to manifest their religion or belief in worship, teaching, practice or observance. However, the term "practice" as employed in Article 9 para 91 does not cover each act which may be motivated or influenced by a religion or belief. While the applicant's religion may allow the marriage of girls at the age of 12, marriage cannot be considered simply as a form of expression of thought, conscience or*

[74] A special tribunal to which individuals had access before the right of access was given to individuals to the ECtHR. It was later abandoned after full right of access to the ECtHR was given for individuals.

[75] Application No. 11579/85, 7 July 1986

[76] Khan had been convicted and imprisoned for having sexual relations with the girl and made his application from prison.

religion, but is governed specifically by Article 12 [citation omitted]. The Commission therefore must examine the Applicant's complaints under Article 12.

[...]

The Commission recalls that under English law, a girl may lawfully marry with her parents' consent on attaining the age of 16 and without their consent on reaching the age of 18. A marriage contracted with a girl under the age of 16 is invalid and sexual intercourse with a girl under 16 is an offence under section 6 of the Sexual Offences Act 1956, the provision under which the applicant was lawfully sentenced to nine months' imprisonment. The applicant's girlfriend was therefore not of the marriageable age required by internal law. Since the right to marry guaranteed under Article 12 is subject to the internal laws governing the exercise of this right, the Commission concludes that in the circumstances of the case there is no appearance of a violation of the rights under the Convention and in particular of Articles 9 and 12".

139. Relying upon this extract the Respondents submitted that "*a belief in an entitlement to marry in circumstances not recognized by the applicable law is accordingly not an opinion or belief that one is entitled, by dint of Article 9 (of the Bill of Rights), to demand that the States satisfies.*" I record my deep reservations about the recognition of such a principle as being applicable in this case, where, far from the circumstances of the Khan case and Mr. Khan's personal beliefs being merely "not recognized by the applicable law", they were positively prohibited by the applicable law- a prohibition which would be acceptable, given the "margin of appreciation"[77] allowed member States, and so as being manifestly reasonable and justifiable in any democratic society[78].

[77] In the meaning developed in ECtHR jurisprudence to be more fully discussed below in the context of the *Oliari* and other cases (below)

[78] Other ECtHR cases were relied upon here by the Respondents for the proposition that not all opinions or convictions constitute beliefs in the sense protected by section 10 of the Bill of Rights (Article 9 of the Convention).See, for instance, *Johnson v Ireland* (Application No. 9697/82, 18 December 1986); *Pretty v United Kingdom* (Application No. 2346/02, 29 April 2002) and *Eweida v United Kingdom* (For the reason already discussed recognizing that Petitioners do not contend that section 10 by itself recognizes and protects a right to marry, I will not examine those cases here).

140. No such prohibition arises in this jurisdiction in relation to consensual relations between same-sex adults. The Respondents' argument therefore rests, in my view, upon a false analogy.

141. The Respondents also cited the case of *Halpern v Attorney General*[79] in which a church complained that the refusal to allow it to solemnize same-sex marriages infringed its freedom of conscience. The Ontario Court of Appeal rejected the challenge, holding that the right to practise same-sex marriage does not engage religious rights and freedoms:

> "*53. In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.*"

142. Here the Petitioners may well say that this dictum is *a fortiori* supportive of their case. Indeed, precisely because marriage is the secular legal institution that it is, they say that it may not become the subject of legislation which defines it discriminatorily, on the basis of "*the religious validity or invalidity of various forms of marriage*".

143. This is not the same as a conclusion, such as Sir Jeffrey Jowell also discountenances[80], that laws may never be passed to protect religion. Indeed, as he also notes, Article 9 of the Convention (and section 10 of the Bill of Rights which derives from it) both require that positive steps be taken by the State to protect the right to the free exercise of religion[81]. But that, I also am compelled to recognize, is different from an obligation to prefer, by way of

[79] (2003) 65 O.R. (3d) 161.

[80] At [85]-[86] of the Respondents' skeleton arguments.

[81] Indeed, for this reason, I am made to understand that section 10(4) of the Bill of Rights was included to protect the right of religious conventions or denominations (such as schools) to impose requirements on employment, admission or curriculum-design necessary to maintain their religious ethos, subject to applicable employment laws in force.

legislation, any particular religious belief to the detriment of the exercise of any other beliefs.

144. Nor, as I understand the principles from the case law, is it a requirement, as Sir Jeffrey Jowell contends, that the legislative intent, to be regarded as repugnant, must have been to exclude same-sex couples on "purely religious grounds"[82]. The concern of the Petitioners here is that the 2008 Amendment was passed for a religious purpose discriminatory of their beliefs in marriage and of their sexual orientation. That was undeniably its main purpose, as disclosed by the Hansards report of the debate.

145. Certainly, as the review of the history of marriage in the Cayman Islands confirms, its legal and social history derives from that of England (through Jamaica), leaving any claim to a unique and distinct Caymanian heritage or tradition of marriage to stand only on the footing of "Christian tradition." While not so argued in terms here by the Respondents, it is implicit from the debate on the passing of the 2008 Amendment, that on religious as well as other grounds, same-sex unions should never be regarded as marriages, or even as marriage-like equivalent to marriages. The prevailing sentiment was that to disrupt and radically alter an institution which is of centuries-old religious significance, would infringe the Bill of Rights in section 10 itself, by violating the religious freedom of the Christian majority of Caymanians in a most substantial way. This sentiment, it must also be recognized, was not free from prejudice in its suggestion that same-sex marriage would somehow "violate" the religious beliefs of the Christian majority.

146. In reality the arguments here bring into sharper focus the relationship between the sacred and the secular. While the task now engaged before the Court involves essentially the

[82] Quoting from Laws LJ's dictum from *McFarlane* (above) at [24]

secular exercise of determining the constitutional relationship between citizen and state, I feel compelled to acknowledge that it would be wrong and unhelpful to dismiss the opposition to homosexuality on religious grounds simply as an expression of bigotry, to be equated to other indefensible expressions of bigotry such as racism. Ultimately however, the Court's task is not to resolve the conflict of convictions and emotions.

147. As was said in *Fourie and Bonthuys*[83] (quoting from Ackermann J in the earlier so-called *Sodomy* case) and consonant with the English and Canadian case law already cited:

> *"The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crudes or bigots. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law.*
>
> *It is also necessary, however, to highlight this qualification:*
> *It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on grounds of sexual orientation.*
>
> *It is one thing for the Court to acknowledge [(as this Court does)] the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies....*
>
> *In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will*

[83] Below at [91], quoting from the earlier case *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (*The Sodomy Case*)

legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the (general) law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."

148. Those words from the Constitutional Court of South Africa are of equal applicability to the task engaged before this Court of assessing whether the Law is in conformity with our Constitution or whether it seeks to promote a view which is unfairly discriminatory against a minority- whether it seeks to deny them the same rights of human dignity and freedom which the Constitution ensures for everyone.

149. Accordingly, subject to whether the Law is to be necessarily and justifiably construed, in deference to section 14(1) of the Bill of Rights, as being preclusive of same-sex marriage; the question of its repugnancy to section 10 of the Bill of Rights, for having been passed for the purpose of preferring a particular religious view of marriage, is clearly engaged.

The Law and section 14(1) of the Bill of Rights

150. The next logical question is whether the definition of marriage as it now stands in the Law, must be regarded as excluding further development of the institution of marriage by reference to the Constitution itself, the Supreme Law.

151. Sir Jeffrey Jowell's argument on behalf of the Respondents is ultimately that section 14 (1) is included in the Bill of Rights as the *lex specialis*, not only as an express recognition and protection of the right of opposite-sex couples to marry but also as being utterly preclusive of any such right or the development of any such right, for same-sex couples. I set out section 14(1) here again for convenience:

"Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family".

152. Sir Jeffrey Jowell prefaces his argument for the interpretation of section 14 (1) by reference to the "*comprehensive negotiation process*" leading to the 2009 Constitution. This process he said resulted in the special wording of section 14 (1) which, for the avoidance of doubt, adds the explicit limitation that marriage must be between members "of the opposite sex" (together with the further limitations that persons seeking to enter into marriage must be unmarried and of marriageable age). He submits that the result of this long and comprehensive negotiation process should be respected and fidelity paid to what is the clear intent that the right to marry be confined, rightly or wrongly, to persons of the opposite sex. The negotiation process will therefore be examined below.

153. He submitted that the Petitioners' claim is misconceived as they say that section 14(1) only requires Government to "respect" the right to marriage, in the form of a guarantee (albeit for persons of the opposite sex only). And that equally misconceived, is their argument that the right of members of the same sex to marry is found in different parts of the Bill of Rights, in particular section 9 (private and family life) as read with section 10 (freedom of conscience and religion) and section 16 (freedom from discrimination).

154. He submitted that if the man and woman in the street were asking who is entitled to marry, they would not turn to the sections in the Bill of Rights on private life, conscience or discrimination. They would look at the table of contents and see that "marriage" is set out in section 14. Further, that the section rightly or wrongly, does guarantee the right to marriage with one hand, but then, with the other hand, excludes from it the under-aged, (as

do Article 12 of the European Convention on Human Rights ("the Convention") and Article 23(2) of the ICCPR[84]) as well as those already married and members of the same sex.

155. On behalf of the Respondents, Sir Jeffrey Jowell further submitted that it is not permissible to provide a right which is clearly forbidden by the intent of section 14(1), by locating that right in other more general provisions of the Constitution. That would be unorthodox, he said. In this regard reliance was also placed upon the leading ECtHR case on this matter, *Schalk & Kopf*[85]:

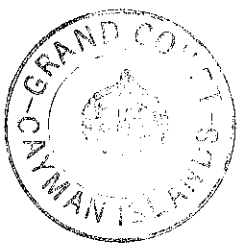
> *"101. Insofar as the applicants appear to contend that, if not included in Article 12 [the right to marry] the right to marry may be derived from Article 14 [equality of treatment] taken in conjunction with Article 8 [the right to private and family life], the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another... Having regard to the conclusion reached above, namely, that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."*

156. Thus, it is submitted by the Respondents, that the clear limitation in the clause governing marriage could not possibly be evaded, side-stepped or circumvented by more general clauses. The governing clause about marriage, realistically and practically, is section 14(1). In the case of *Hamalainen*[86], the ECtHR held the equivalent Article 12 of the Convention to be "*the lex specialis for the right to marry*". It clearly, they argued, excludes same-sex marriage which cannot then be found in any other section of the Constitution, goes the submission. Thus, there is "*differentiation*" said Sir Jeffrey Jowell, but it is constitutional

[84] The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966.
[85] *Schalk and Kopf v Austria* (App 301414-04), ECHR 22 November 2010 and see further below.
[86] (Below)

differentiation which has great force and gravity – other provisions of the constitution cannot be brought into play, to in effect, judicially review a *lex specialis* of the Constitution itself.

157. However, as will be seen from the case of *Oliari v Italy* and other cases[87] to be considered below, the ECtHR has itself declared that member states have an obligation to respect and provide a legal framework for the protection of same-sex unions. Moreover, Sir Jeffrey Jowell went on frankly to admit, that this treatment of section 14(1) for which he argues would also mean, given its contended preclusive effect, that the conjunctive right to found a family of which section 14(1) also speaks, must be confined only to married couples of the opposite sex. The answer, he submitted, is surely that unmarried couples or single parents are not indeed given a right to found a family. They have the right to marry, provided they meet the criteria under section 14(1). They also have the right to "family life" under section 9 of the Bill of Rights and the right to any benefits or rules under relevant common law or statutory provisions; as do same-sex couples. But in contrast to unmarried or single persons, same-sex couples do not have a right to marry for the reasons already submitted above. The extent to which their right to family life, under section 9 of the Bill of Rights or under Article 8 of the Convention, includes the right to an arrangement which recognizes civil unions is a different matter which, for reasons already discussed and to be further discussed below, must, say the Respondents, be left to government to decide.



158. While only guardedly admitted by Sir Jeffrey Jowell as set out above, this construction of section 14(1) - as a provision which not only guarantees the rights to marry and found a family for heterosexuals but also denies it completely for homosexuals, and moreover,

[87] (Below)

which precludes for them the founding of those rights in other provisions which might otherwise be open to that construction - faces two obvious problems.

159. First, the delimiting construction arises only as a matter of implication because no such delimiting words are expressed in section 14(1) itself. Yet, had the British Parliament so intended in the enactment of the Constitution, section 14(1) could simply have included the word "only" before "a person of the opposite sex".

160. Secondly, and notwithstanding the *lex specialis* argument[88] the contended meaning is plainly discriminatory because on its face it would preclude access to same-sex couples on the basis only of their sexual orientation. It follows, that in order to comport with section 16 of the Bill of Rights, the contended construction must be grounded in justification. As will be further examined below, it cannot suffice for a blatantly discriminatory construction to be advanced simply on the basis that that is the clear intention of those who took part in the constitutional negotiations or on the purely technical argument of a "*lex specialis*". That would itself, be a wholly unorthodox approach to construction. The analysis must therefore continue by reference also to the other constitutional provisions invoked by the Petitioners, and ultimately to engage the justification analysis, to see whether this discriminatory argument of the Respondents' is capable of being upheld. More will therefore need to be said also about the constitutional negotiation process in that context.

The Respondents general defence: section 14's "definition" of marriage and the constitutional negotiation process

161. The Respondents based their defence on three main premises set out in their written submissions that:

[88] As derived from *Schalk and Kopf* and *Hamalainen* (both above).

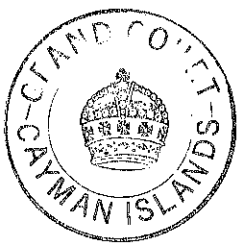
(i) Section 14(1) of the Bill of Rights is clear in its language, intent and purpose;

(ii) Section 14(1), perhaps more than any other provision of the Constitution, was fully considered and debated and then acceded to during the process of constitutional negotiations from 2007-09, a process of consultations which was endorsed in a subsequent national referendum by "a resounding majority of 62%";

(iii) Any revision or modification of the clear intent of section 14(1) would significantly dent the confidence of the people of the Cayman Islands in the legitimacy of the constitutional process and the stability of its agreed content.

162. Thus, the Respondents relied heavily upon the constitutional negotiations process for what Sir Jeffrey Jowell described as "*the deliberate (and recent) constitutional choice to confine the right to marry to opposite-sex couples within section 14(1)*" and his further argument that it would therefore be "*contrary to principle (and persuasive authority) to read other, more general provisions of the Bill of Rights as reversing or repealing the express choice made in section 14(1)*"- this latter being the "*lex specialis*" argument already mentioned above.

163. Here it must be again noted – as indeed was immediately engaged by me with Sir Jeffrey Jowell during the arguments – that section 14(1) read in keeping with its plain words does not expressly "confine the right to marry to opposite-sex couples". Section 14(1), by its plain words, requires the Government to respect the right of men and women to marry. Nor, as already mentioned is the word "*only*" used as it could readily have been used, to delimit the meaning.



164. Being silent as it is as regards the right to marry for persons of the same-sex, the preclusive meaning advocated by Sir Jeffrey Jowell was one which he nonetheless primarily

submitted arose as a matter of "syntax and logic". I can do no better than to set out the argument as he presented it[89]:

> "As *a matter of syntax and logic the words "the right of every unmarried man and woman of marriageable age... freely to marry a person of the opposite sex" make up a single, composite expression. Within that expression, the "right... freely to marry" is clearly qualified not only by the status and age limitations (which are found in other constitutions and international human rights instruments), but also by the gender limitation ("a person of the opposite sex"). The inescapable conclusion is that the inclusion of the specific words 'of the opposite sex" limits the availability of the right to marry to opposite-sex couples.*
>
> *The Respondents' primary submission rests on the plain meaning of section 14(1), which forces the conclusion that it is not open to read out or modify the gender limitation any more than it would be to read out or modify the status limitation (in the case, for example, of a married man refused the registration of a polygamous marriage sanctioned by his religious beliefs , or an unmarried applicant refused registration of a marriage to an underage girl* – see Khan v UK (above) at [73].
>
> *The difficulty with the Applicants' preferred reading of section 14(1) is that it gives no meaning or effect whatsoever to the words "a person of the opposite sex". Their suggested interpretation effectively blue-pencils these words. This contradicts the presumption of effectiveness – that the legislator is assumed not to include surplus or meaningless words or expressions. The clear intention of these words, the Respondents submit, is precisely to exclude same-sex marriage from the ambit of the provision.*

Contextual reading of section 14(1)

40 *The Respondents' submission on the plain meaning of section 14(1) is reinforced by the fact that it confers the right to marry on "every [unmarried] man and woman". In contrast, all of the other fundamental rights enshrined in the Bill of Rights are conferred upon "any person"[90], "a person", "everyone"[91] or "all persons"[92] or in the case of the negative injunctions such as the prohibitions against torture, these refer to "no one", "no person"[93], etc. Even section 9 of the Bill of Rights which, like section 14(1) requires the government to*

[89] As taken from [37] –[41] of the Respondents written submissions.
[90] Section 15(1) (Right to property)
[91] Section 7(1) and (2) (Fair Trial)
[92] Section 6(1) (Treatment of Prisoners)
[93] Section 2(2) (Right to Life); section 3 (Prohibition of torture and inhuman treatment); and section 4(1) and (2) (Prohibition of slavery or forced or compulsory labour).

accord "respect", requires respect in relation to "every person's" private and family life.

41 *The ECtHR accepted this reasoning in relation to Article 12 (the right to marry) of the (Convention) in Schalk & Kopf v Austria (above). In that case, the applicants requested the competent authorities in Austria to allow them to contract a marriage as a same-sex couple. Their request was rejected on the basis that marriages could only be contracted between opposite-sex couples. Their claim to a violation of Article 12 and the prohibition against discrimination was rejected by the ECtHR on the basis that Article 12 did not oblige the government to grant same-sex couples access to marriage.*

42. *Article 12 provides that:*

> *"Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right"*

43. *It will be seen that the express words of Article 12 of the (Convention) are less clear in relation to the question of same-sex marriage than those of section 14(1) of the Bill of Rights, since the former is not confined to a right of men and women to marry "a person of the opposite sex". Nevertheless, the Strasbourg Court in Schalk & Kopf made the following observation:*

> "55. *The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording in Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted".*

44. *The Court highlighted the following:*

(i) "in the 1950s marriage was clearly understood in the traditional sense of being a union of partners of different sex" [para 55];

(ii) *however, notwithstanding radical changes to the institution of marriage since the adoption of the Convention, there was "no European consensus on regarding same-sex marriage"; indeed, at the time of the Court's ruling (the year 2011) only 6 of 47 Convention States allowed same-sex marriage [para 58];*

(iii) *The question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State [para 61]; and*

(iv) *"marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities , who are best placed to assess and respond to the needs of society" [para 62]*

45. *The reasoning and result in Schalk & Kopf have been repeatedly reaffirmed by the ECtHR . The finding that States are still free, under Article 12 to restrict access to marriage to different-sex couples was cited with approval in Hamalainen v Finland*[94] *where the applicant, a male to female transsexual, unsuccessfully challenged the absence of any procedure allowing for the legal recognition of her new gender while remaining married. The majority of the ECtHR found no violation of Article 8 or Article 14 taken with Articles 8 and 12. See also Orlandi and Others v Italy (above)*[95] *where the applicants complained of a violation of their rights arising from their inability to register their overseas same-sex marriages."*

165. Sir Jeffrey Jowell then also proceeded to note the similarity between section 14(1) of the Bill of Rights and Article 23 of the ICCPR which was extended to the Cayman Islands.[96] He submitted that the United Nations Human Rights Commission ("UNHRC") has rejected any claim that Article 23 of the ICCPR imposes an obligation on States Parties to provide for same-sex marriage[97].

[94] App No 37359/09 ECHR _2014. The majority of the ECtHR found no violation of Article 8 or Article 14 taken with Articles 8 and 12

[95] And citing *Chapin and Charpentier v France* (above)

[96] By the UK's act of ratification on 20 May 1976

[97] Citing General Comment No 19

166. Notably he submitted, in *Joslin v New Zealand*, Communication No 902/1999[98], the authors claimed that failure of the Marriage Act 1955 to provide for same-sex marriage discriminated against them on the basis of their sex and indirectly on the basis of their sexual orientation. The UNHRC, exercising its judicial function under the First Optional Protocol to the ICCPR, found that the non-provision of such a right to same-sex marriage did not constitute a violation of Article 16 (right to recognition before the law), Article 17 (right to privacy), Article 23(1) (the family) or Article 26 (right to equality) of the ICCPR.

167. The UNHRC's contextual reasoning that Article 23(2) was the only substantive right under the ICCPR expressed in the gender-specific terms of "men and women", with all other rights expressed in gender-neutral terms, is very similar, Sir Jeffrey Jowell submits, to that adopted by the Strasbourg Court in *Schalk and Kopf.*

168. In conclusion on this point, he submitted that the utility of these authorities is underscored by the similar drafting reflected in section 14(1) of the Bill of Rights, which also- uniquely within the context of the Bill as a whole – refers to "men and women". And as already noted, section 14(1) is significantly clearer than both Article 12 of the Convention and Article 23 of the ICCPR, explicitly confining the right of marriage to "*persons of the opposite sex*" thus "*putting the matter beyond any doubt*".

169. At this stage, I note the heavy reliance placed by Prof Jowell, by parity of reasoning, upon the cases from the ECtHR and UNHRC. This reasoning affirmed the margin of appreciation left to the Contracting States to decide whether or not to open the institution of marriage to same- sex couples. This was the context in which those tribunals ascribed to the marriage clauses the quality of "*lex specialis*" for which Sir Jeffrey Jowell contends.

[98] UN Doc A/57/40 (2002)

It will become clear why I consider this reasoning to be misplaced in the present context of the application of a domestic Bill of Rights.

170. Sir Jeffrey Jowell also made reference to the Preamble to the Constitution for what he describes as "*an additional element of context for the construction of section 14(1) of the Bill of Rights*". He submitted that by the Preamble, the people of the Cayman Islands:

> "*Affirm their intention to be ...*
>
> - *A God-fearing country based on traditional Christian values, tolerant of other religions and beliefs', and*
> - *"A community protective of traditional Caymanian heritage and the family unit"*

171. These recitals – the latter in particular, submits Sir Jeffrey Jowell – "*unmistakably refer, in the Respondents' (view), to the traditional form of the family hitherto practiced in the Cayman Islands. That is to say, they have in mind the traditional formulation of marriage expounded by Lord Penzance in Hyde v Hyde (above): "Marriage is the voluntary union for life of one man and one woman, to the exclusion of all others". This further buttresses the conclusion that section 14(1) of the Bill of Rights enshrines the right to marriage as traditionally formulated, i.e. between persons of different sexes.*"

172. I interrupt the narrative of Sir Jeffrey Jowell's submission here to note the following comments about reliance on the Preamble. First, there are other aspects of the Preamble which could with equal persuasiveness be applied to the controversy engaged in this case. We see for instance, the equal Affirmation of the people of the Cayman Islands to be:

> - *"A caring community based on mutual respect for all individuals and their basic human rights;*

- *A country committed to the democratic values of human dignity, equality and freedom; and*
- *A community that practices honest and open dialogue to ensure mutual understanding and social harmony..."*

173. This therefore begs the question whether a court could rationally give more force or credence to the aspirations of the Preamble relied upon by the Respondents than it may to these latter or any others. An authoritative answer to this question I think is to be found in Lord Mance's judgment on behalf of the Privy Council in the *Laramore* case on appeal from the Bahamas:[99]

> "7. *While the recitals to the Constitution express a commitment to the supremacy of God and to an abiding respect for Christian values, it is not suggested that this qualifies or limits the freedoms guaranteed by the substantive text of [the Bill of Rights] of the Constitution, though it could, arguably, have some relevance to an issue of justification.*"

174. So here too, the Respondents' arguments which would ascribe ascendency to certain aspirations of the Preamble over others, will require justification. In *Hewitt v Rivers*[100], a decision of this Court relied upon by the Respondents, the aspirational quality of the Preamble was cited for recognizing, in a purposive way, that the Caymanian people would not have intended the Constitution to operate a meaningless disqualification upon an otherwise fully qualified candidate for election. That approach to construction is the antithesis to the way in which the Respondents seek to invoke the Preamble in this case.

[99] Above at [7]

[100] 2013 (2) CILR 262, at para 37 "...the interpretation of the Constitutional provisions at issue in this petition must seek to give effect to the real meaning of the provisions and where that meaning is not plain, to apply a purposive interpretation. In that sense, context will be most important, including as it reflects the aspirations of the Caymanian society which the Constitution embodies"

The justification analysis required as the result of the discriminatory treatment for which the Respondents contend, will be undertaken below.

175. As already mentioned, reliance was also placed by the Respondents on the negotiations with the United Kingdom Government for, and drafting history of, the Constitution. According to Sir Jeffrey Jowell[101], the records of the negotiations firmly support the contention that section 14(1) of the Bill of Rights was intended to confer the right to marry only on opposite-sex couples. I must therefore look at these records in some detail.

176. Sir Jeffrey Jowell submitted that the negotiations show that "*a specific compromise*" appears to have been reached among participants "*to ensure that no right to marry would be conferred on gays and lesbians*". And that this position was clearly reflected in the language of section 14(1), referring to the right "*of every unmarried man and unmarried woman*" to marry "*a person of the opposite sex*".

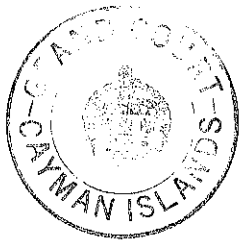
177. In this regard he cited what is described as the authoritative book written by the chairman of the Constitutional Negotiations and his colleague: Hendry and Dixon, *Overseas Territories Law*, 2nd Ed. 2018 at pages 165-167. These cited passages stand for the proposition that the 2009 Constitution has many different sources, that it sought to give proper effect in domestic law to the ECHR and ICCPR and that the most controversial provision for the Caribbean Overseas Territories was the right to marry "*not because these territories are opposed to the institution of marriage – quite the reverse- but because they are unanimously opposed to same-sex marriages and marriages involving a transsexual marrying a person who is of the birth sex of the transsexual*". Hendry and Dixon continue that in their view, the ECtHR has confirmed that Article 12 of the Convention does not

[101] Who was incidentally, himself the leading legal adviser to the Cayman Islands Government for the negotiations.

extend to same-sex marriage and that although the UK had legislated for same-sex marriage in 2013, its domestic legislation does not extend to any overseas territory. Hendry and Dixon write further that despite that interpretation of Article 12 by the ECtHR, the wording did not, in the view of some territories, "*provide a clear enough steer on this issue and therefore additional wording was agreed during the negotiations*" (referring to section 14(1) of the Cayman Constitution, at the top of page 167).

178. Notwithstanding this account of the process, one is prompted to wonder how it could have come about that "participants" in the process, none of whom were themselves apparently identified as homosexual, could have managed to "compromise" a matter of such importance to others who had no seat at the table[102].

179. But despite such concerns, Sir Jeffrey Jowell argued for reliance on the negotiation process which he said, like the *travaux preparatoires* of an international agreement, can be admissible for the purposes of interpreting the Constitution[103].



[102] Based on modern surveys, some 5% to 10% of the World's population identify as LGBT: www.quora.com. There are no empiric figures for the Cayman population but there is no reason to assume that it is not representative of the global situation.

[103] And citing *Coe and Others v The Governor and Others* CICA No 7 of 2014, where the Court of Appeal regarded the minutes of the Constitutional Negotiations to be relevant to the construction of section 19 of the Bill of Rights: per Rix JA at [77]: *"I suppose they are like the travaux preparatoires [of the negotiation process]"*
In *Fothergill v Monarch Airlines* [1981] A.C. 251, the House of Lords explained the basis upon which recourse may properly be had to *travaux preparatoires*, in these terms: *"It may be legitimate for English courts, when construing an Act of Parliament which gives effect to an international agreement, to make cautious use of the travaux preparatoires for the purpose of resolving any ambiguity in the treaty"* per Lord Fraser at p287 F; *"Their use in the interpretation of treaties should be cautious, but there may be cases where they can be profitably used. These cases should be rare, and only where two conditions are fulfilled: first, that the material involved is public and accessible; secondly, that it clearly indisputably points to a definite legislative intention"*, per Lord Wilberforce at p 278 A-B; *"In exercising its interpretative function of ascertaining what it was that the delegates to an international conference agreed upon by their majority vote in favour of the text of an international convention where that text is ambiguous , an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, it might well be under a constitutional obligation to do so"*, per Lord Diplock, at p287 E-F.

180. I am not persuaded that there is a proper basis here for reliance on the views expressed during the negotiation process for the purposes of construing these fundamentally important provisions of the Bill of Rights.

181. My first reason is that there is no evidence as to the proper representative status of the participants. Yet we see from the transcripts (extracted below), that certain very strident views appear to have held sway on the issue of the fundamental human rights of the homosexual population. In this context, I find the following advice from Bennion on Statutory Interpretation to be especially helpful[104] *"(in having regard to the enacting history) the Court is expected to bear in mind that law (even statutory law) is, from the time of its creation, subject to a continuous process of development. This means that the intention of the historical legislator may not indefinitely continue to carry interpretative weight (or at least the same weight). A fortiori, this applies to the underlying intentions of bodies other than Parliament (such as committees of inquiry), upon whose proposals the Act is based".*

182. Secondly, unlike in the case of accredited diplomatic or other official delegates to international treaty negotiations, there is no evidence presented to explain why the delegates should be regarded as having expressed the democratic will of the people of the Cayman Islands. And I note here that the fact that in a referendum it is reported[105] that more than sixty per cent of the voting population supported the Constitution as promulgated, is no proper guide to its interpretation either. That argument simply begs the question of the

[104] From Fifth Edition, section 244, p610.

[105] See Article by Vaughn Carter, Evaluating the Cayman Islands Bill of Rights, Freedoms and Responsibilities: More Evolution than Revolution (Texas A & M Law Review) 16 September 2017, Vol. 4 at p398.

meaning of the constitutional provisions the people thought they were supporting. It is that meaning which this Court is now called upon to construe.

183. Moreover, there are no obvious ambiguities in the wording of the text of the Bill of Rights to justify resort to what was said during the negotiations by different persons who happen to have been present at the different stages.

184. It cannot be right, for instance, to construe the wording of section 14 of the Bill of Rights as intended to exclude same-sex couples from the institution of marriage or to deny them the full protection of the Constitution in the exercise of the right to family life under section 9, where the plain meaning of the words do not clearly lead to that conclusion but on the basis of certain sectoral views which were expressed during the negotiation process.

185. What might have been relevant but which we do not have, are any records of any representations made to the UK Parliament as the result of the Negotiations, when the draft Constitutional Order was laid before Parliament for acceptance for presentation to Her Majesty in Council.

186. There is no evidence that any such representations included the views expressed during the negotiation process, such as the following relied upon by Sir Jeffrey Jowell now[106]:

"*First Round*

1. *In the First Round of the Negotiations held on 29 September 2008 to 2 October 2008, Pastor Al Ebanks (Chairman of the Cayman Ministers' Association) represented: "An important issue to the people of the Cayman Islands has been the whole issue of marriage and family. The people of the Cayman Islands have made clear that*

[106] As extracted by the Respondents from the minutes of the Negotiations.

we believe that marriage is between one man and one woman only, and we are pleased with the recent decision of our legislature to amend the Marriage Law. However, for all the reasons that we state in our document, we remain concerned that the judiciary should not be able to strike down laws enacted by our legislature"

Ms. Melanie McLaughlin (Representative of the Human Rights Committee) ("HRC") also represented (although it is not reported what, if anything, she said), *"With respect to the rights to be included in the Bill of Rights, the constitutional modernization proposals, such as the right to a fair trial, to privacy, to marriage between a man and a woman.."*

"Second round

2. *In the second round of the Negotiations held between 13 January 2009 and 16 January 2009, Pastor Ebanks reiterated three points that are "part of a non-negotiable framework" of his association, including that "We recognize the need to balance individual rights with corresponding societal responsibilities, and in particular we support the traditional ideal of marriage and the family. These positions have been stated very clearly by our Government. It has been stated very clearly by the Opposition, and in particular the Seventh Day Adventist, and we believe that the preservation of the values that are so important to us as a community must be maintained".*

At one point in the negotiations, Ms. McLaughlin indicated that the HRC was prepared to recommend language for the non-discrimination clause now contained in section 16: "(1) Everybody has a right not to be discriminated against. ... (3) Nothing in (1) requires the legal recognition of same-sex marriages or gender reassignments, such matters being in the discretion of Parliament."

4...

[I interpose here to note that no such provision as that adumbrated by the HRC here found its way into the Bill of Rights and so section 16 (to be considered in detail in the justification analysis below) must be construed as free of any such implication].

Third round

(iii) In the Third Round of the Negotiations held between 3 February 2009 and 5 February 2009, at one stage Pastor O'Connor asked what could be done to add qualifiers to the open-ended clause of non-discrimination (open-ended in the sense that the non-discrimination clause protects "...other status)", and the Chairman[107] replied inter alia that "Now marriage is so defined in this text without peradventure that marriage can only be between an unmarried man and an unmarried woman, it can't be anything else. So this doesn't make a difference" (at p 127 of Day 1).

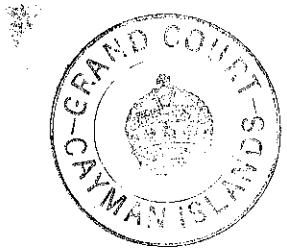
[I interpose again to underscore the significance of this last phrase of section 16 – "*...other status*" – which was proposed here by Pastor O'Connor to be eliminated but

[107] Mr. Ian Hendry, then senior legal advisor at the Foreign and Commonwealth Office which conducted the Negotiations on behalf of the United Kingdom Government.

with his proposal rejected by the Chairman (according of course, only to the Chairman's own views of how *"marriage is so defined in this text without peradventure that marriage can only be between an unmarried man and an unmarried woman")*. Pastor O'Connor was obviously concerned that access to the institution of marriage should not come to be allowed to same-sex couples by "inadvertence". This, it seems, was because their exclusion, on the ground of their sexual orientation, might later be found to be unjustifiably discriminatory. Whatever might have been the subjective views of the Chairman, the reality is that the phrase *"...other status"*, as it does in fact appear in the Bill of Rights, must now be given its proper meaning and effect in the context of the unavoidable justification analysis to be undertaken below].

6...

7. On Day 3 of the Third Round of the Negotiations, Ms. Sara Collins, while providing a summary of the HRC's position on whether there should be a free-standing right to equality and non-discrimination, represented (at p.16 of the Transcript of Day 3) as follows:



> *"It is helpful also to consider the background to this process, because we also have made compromises, and we made these compromises designed specifically to address, we hoped, the concerns of the churches associations, which were to ensure that no right to marry would be conferred on gays and lesbians and to ensure that no rights would be applied horizontally. For those reason, those matters are dealt with specifically and comprehensively in the constitution. Those concerns have*

been addressed. They do not remain and there is therefore no remaining concern to which anyone can point which suggests that this further compromise is necessary or reasonable. In fact, really, what we're left with once we've taken out the possibility for direct enforcement by the courts, which we've conceded, the possibility for horizontal application, which we've had to concede and the concession of stripping away of rights for gays and lesbians, which we will not concede but have to the certain limited extent in relation to the right to marry, we have a situation where we have not much more than we have by virtue of the right to petition individually to the European Court of Human Rights in any event..."

187. There are remarkable implications for the Court's acceptance of the foregoing sentiments as a guide to the construction of the Bill of Rights.

188. We see for instance, the purported intention to forever exclude the ability of the Courts to consider the very questions which are now at bar – the right of same-sex couples to marry or to found a family in the context of marriage. Thus, this Court is asked to hold that based upon the views of some of those involved more than 10 years ago, this Court is forever precluded from examining such issues regardless of how they might redound in the context of the very justification analysis required by the anti-discrimination provisions of section 16 of the Bill of Rights and regardless of how the views of society might have evolved or might evolve, over time. No lesser implication arises from the notion that those involved

"*have taken out the possibility for direct enforcement by the courts, which we have conceded, the possibility of horizontal application.*"

189. I unhesitatingly reject the notion that the Court should be so guided.

190. Nor will it suffice for the Respondents to assert simply, as in effect they do by reliance on the representations, that the preservation of marriage as a heterosexual institution is necessary to protect the Caymanian traditional concept of family, without explaining why the admission of homosexual couples to the institution would be harmful to that ideal.

191. This is the justification analysis which, by implication, I am asked by Sir Jeffrey Jowell to forego in deference to the statements of some of those present during the Negotiations presumably as it reflects the "margin of appreciation" afforded the Government and in deference to his syntactical analysis of the meaning of section 14(1).

192. The Respondents have indeed, proffered no such justification. As shown above, the difference of treatment has been discussed by the Respondents only by reference to the different sexual orientation of the Petitioners. This the Respondents have done on the assumption it seems, that by its very nature, marriage between same-sex couples would be harmful to the ideal of the traditional Caymanian view of marriage.

193. This argument of the Respondents is plainly discriminatory as it would impose different treatment on the basis merely of the Petitioners' "different" sexual orientation.

194. That is not an acceptable basis upon which this Court might determine the issues enjoined before it under the Bill of Rights. The discussion must therefore continue by reference also to the other constitutional provisions invoked by the Petitioners. And ultimately, by an examination of whether the justification for the discrimination required by section 16 is established.

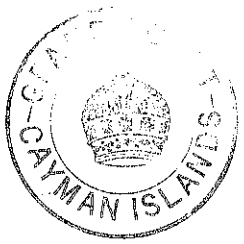
The right to private and family life and the right to found a family

195. Section 9(1) of the Bill of Rights provides as follows:

> "9. (1) *Government shall respect every person's private and family life, his or her home and his or her correspondence*".

196. Section 9(3) then prescribes the closed list of limitations upon those rights protected by section 9(1), in the following familiar terms:

> "*(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) In the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any other property in such a manner as to promote the public benefit;*
>
> (b) *For the purpose of protecting the rights and freedoms of other persons...*"



197. It will be seen that section 9(1) recognizes and protects four distinct rights: respect for private life, respect for family life, respect for the privacy and security of a person's home and respect for the privacy of a person's correspondence. The Petitioners rely on the first two of these four rights.

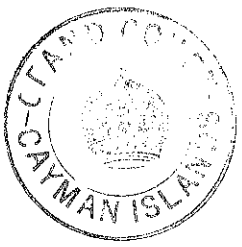
198. They say that section 9 of the Bill of Rights is violated due to the State's failure to fulfill its positive obligation to provide same-sex couples with access to an institution that recognizes their relationship and which provides them with the bundle of rights and

obligations available to opposite-sex couples. This is a failure to provide the bare minimum required by the Convention and hence by the Bill of Rights itself.

199. This bare minimum they say, could have been met by the State prior to these proceedings being brought either by its opening the institution of marriage to same-sex couples or by the creation of an equivalent institution, such as one modelled on civil partnerships in England and Wales.

200. As their primary position, the Petitioners submit that section 9 of the Bill of Rights is violated due to the State's failure to open the institution of marriage itself to same-sex couples. In this respect, the Petitioners invite the Court to have regard to and be persuaded by comparative case law[108], not only from the ECtHR[109] but from the United States Supreme Court[110], South Africa[111], Canada[112], Bermuda[113] and the Inter-American Court of Human Rights[114].

201. It is convenient to start therefore, by seeing what the European Court of Human Rights (the ECtHR) has had to say about the rights to private life and family life in relation to the issue of same-sex relationships.



[108] By reference to the approbation of this approach by the Privy Council in *Reyes v R, (above)* where (at [26]) in interpreting the Belize Constitution, Lord Bingham referred to the fact that decided cases from around the world gave valuable guidance on the proper approach to the Court's task of constitutional interpretation and referred to the importance of ensuring so far as possible that a constitution conforms to *"international standards of humanity and individual rights."*

[109] Which has not yet gone so far as to declare that the Convention imposes an obligation on member states to recognize same-sex marriages, only civil partnerships, vide *Oliari* below.)

[110] *Obergefell v Hodges 576 U.S. ___(2015)*

[111] *Fourie and Bonthuys* [2005] ZACC 19

[112] *Halpern* (above)

[113] *Godwin and DeRoche v Registrar General and others [2017] SG (Bda) 36 Civ (5 May 2017*

[114] *Inter-American Court's Advisory Opinion OC – 24/17, November 24, 2017, Series A No. 24*

202. The ECtHR, in the recent case of *Oliari*[115], held these rights, as similarly expressed in Article 8 of the Convention[116], to be multi-faceted, including the imposition of a positive obligation on the State to ensure effective respect and protection for them. And that this positive obligation required the Italian State, at minimum, to enact legislation that ensures the recognition and enables the enjoyment of the rights.

203. The Petitioners therefore submit that the case of *Oliari* provides a complete answer to the question as to whether section 9(1) of the Bill of Rights has been violated, as the case concerned Italy's lack of any institution available to same-sex couples, as is the case in the Cayman Islands today.

204. Indeed, the ECtHR readily accepted that the inability to formalize a same-sex relationship engages the right to private life and family life:[117]

> "103. *It is undisputed that the relationship of a same-sex couple, such as those of the applicants, falls within the notion of "private life" within the meaning of Art. 8. Similarly, the Court has already held that the relationship of a co-habiting same-sex couple living in a stable de facto partnership falls within notions of "family life". It follows that the facts of the present applications fall within the notion of "private life" as well as "family life" within the meaning of art. 8. Consequently, both art. 8 alone and art. 14*[118] *taken in conjunction with art. 8 of the Convention apply*."

205. Very significantly also, it must be noted that here the ECtHR also accepted that Art. 8 is engaged both as a standalone right and in conjunction with Art. 14 – the right to freedom from discrimination. By parity of reasoning, so therefore are section 9 and section 16 of the Bill of Rights to be read disjunctively as well as in conjunction with each other.

---

[115] *Oliari v Italy* (2017) 65 EHRR 26.

[116] Viz: *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

[117] At paragraph 103.

[118] The Prohibition of discrimination, in terms adopted in Section 16 of the Cayman Bill of Rights, to be explained below.

206. This carries the unavoidable and important implication, that in the exercise of the right to family life protected by section 9, one must be allowed to do so by the State, free from any form of unjustified discrimination prohibited by section 16.

207. In *Oliari*, the ECtHR went on to hold and declare that, even when considered as a standalone right, art. 8 was violated[119] :

> "*...the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfill their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions...There has accordingly been a violation of art. 8 of the Convention.*"

208. The "*margin of appreciation*" referenced by the ECtHR, is that which it affords a government of a member state to determine the manner and means by which it would bring its laws into conformity with the Convention.

209. Sir Jeffrey Jowell advocated for a similar margin of appreciation to be allowed the Cayman Government here (as represented by the Respondents), to legislate for the recognition and protection of same-sex unions, submitting , as already mentioned, that this is a matter for government, not the courts.

210. He developed this argument[120] by reference to what he described as a "central premise" of the decision in *Oliari*, which was that by the time of that decision (2015), a pan-European consensus had been formed in favour of formal legal recognition of same-sex unions: *Oliari* at [163] –[164]. That no such consensus had been formed about same-sex marriages and that the materiality of this can also be seen in the subsequent decision in *Orlandi*[121],

[119] At paragraphs 185 and 187.

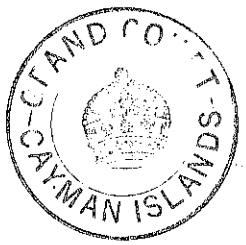
[120] At [143] –[150] of the Respondents' written submissions

[121] *Orlandi and Others v Italy* (App. Nos. 26431/12; 26742/12; 44057/12 and 60088/12) rep. at [2017] ECHR 26431/12.

where the question was whether the Italian authorities' refusal to register the marriages of a number of same-sex couples contracted abroad, was in breach of their rights under Articles 8, 12 and 14 of the Convention.

211. In refusing the claim for the right of recognition of their marriages contracted abroad (even while noting[122] that the Italian Government had since *Oliari*, provided for the legal protection of same-sex civil unions in Italy), the ECtHR said as follows:

> "204. *As to legal recognition of same-sex couples, the Court notes the movement that has continued to develop rapidly in Europe since the Court's judgment in Schalk and Kopf and continues to do so. Indeed at the time of the Oliari and Others judgment there was already a thin majority of CoE States (twenty-four out of forty –seven) that had already legislated in favour of such recognition and the relevant protection. The same rapid development had been identified globally, with particular reference to countries in the Americas and Australasia, showing the continuing international movement towards legal recognition...*
>
> *The same cannot be said about registration of same-sex marriages contracted abroad in respect of which there is no consensus in Europe. Apart from the member States of the Council of Europe where same-sex marriage is permitted, the comparative law information available to the Court (limited to twenty-seven countries where same-sex marriage was not, at the time, permitted) showed that only three of those twenty-seven other member States allowed such marriages to be registered, despite the absence (to date or at the relevant time) in their domestic law of same-sex marriage (see paragraph 113 above). Thus, this lack of consensus confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad."* [Emphasis added.]



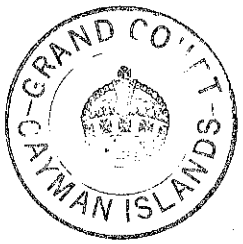
212. There is, submits Sir Jeffrey Jowell, no evidence of such a consensus forming in the Cayman Islands put forward by the Petitioners, nor any relevant change in local conditions identified. The Respondents therefore submit that the Legislature ought to be accorded significant latitude in determining the timing and specific form of legal measures for the

[122] At [193].

provision of legal recognition of same-sex couples. Furthermore, that the Petitioners ask the Court not only to declare in the abstract that the Law is deficient in some way, but positively and specifically to declare, as their alternative remedy, that they be allowed to enter into civil partnership. This alternative claim Sir Jeffrey Jowell submits, trespasses far into the margin of appreciation that must be accorded to the Legislature in this connection, reminding that the ECtHR in *Schalk and Kopf*[123] stated that:

> "108. *The Court starts with its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. Nevertheless, the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition".* [Emphasis added.]

213. Buttressed by this dictum, Sir Jeffrey Jowell concluded on this point in these terms:[124]



> *"Under this head of claim the (Petitioners) in substance invite the Court to dictate to the Legislature that it must introduce a civil partnership model, and that it must do so at this juncture. The Respondents submit that the Court ought to refuse the alternative declaratory relief sought, as both the timing and nature of any legal recognition for gay couples are matters within the margin of discretion to be accorded to the Legislature."*

214. In response, the Petitioners make the obvious point that those observations of the ECtHR in *Orlandi* were made against the background of Italy having already provided legal recognition for the civil union of same-sex couples. The earlier prolonged failure to do so was the matter for which the ECtHR had said in *Oliari*, it was no longer prepared to allow a margin of appreciation.

---

[123] Above at [108]

[124] At [150] of his written submissions

215. Further, that the putative "*margin of appreciation*" may not be relied upon by the Respondents here because the "*Member State*" to which it might be accorded is the United Kingdom itself and the United Kingdom has already expressed its recognition of same-sex unions both by legislation for civil partnerships and by legislation for recognition of same-sex marriage.

216. Moreover, the evidence reveals that the United Kingdom, through its representative the Governor, has called upon the local Legislature to legislate at least for the recognition of same-sex civil partnerships[125] but this has been to no avail.

217. What this then implies for the Respondents' argument, says Mr. Fitzgerald, is that even while the ECtHR and the United Kingdom itself has accepted that the inability of same-sex couples to formalize their relationships engages the rights to private life and family life protected both by the Convention and the Bill of Rights, the local Legislature should still be allowed the margin of appreciation as to whether at all and if so, how and when, it should provide at least that minimum level of protection.

218. It is plain to my mind that such a proposition invites this Court, not merely to exercise judicial restraint but to abdicate responsibility for the timely and due administration of justice, in the very real and pressing circumstances of the present case. That is not a proposition to which the Court might accede. The Bill of Rights requires the Court to determine questions of compliance with its provisions. It is just as well to note, however, that when doing so the Court is not engaging in a legislative process, nor is it to be seen as intruding on the legislative domain. Where a litigant establishes that rights protected by the Bill of Rights have been violated by the State, he or she will be entitled to an award of

[125] See https://caymannewsservice.com/2018/03/cayman-islands-governor-gay-rights/

relief and deference to the Legislature does not require that the violation be allowed to continue and even perhaps, to continue indefinitely. As expressly required by section 5 in the case of repugnancy, the Constitution mandates an immediate remedy of any violation by any existing law of the fundamental rights which it enshrines and protects.

219. While arguing for a declaration of breach as an alternative remedy, the Petitioners nonetheless argue forcefully that the ongoing failure to provide the bare minimum protection procedurally necessitates the remedy of marriage being granted by the Court. They say that the necessity of marriage can be seen from the nature of the breach itself because their rights to private life and family life will remain violated in the Cayman Islands until they are allowed to marry. The provision of another institution (which the Court itself can in any event not provide but may only implore the Legislature to provide) will not remedy the breach because only marriage can afford equality of recognition and treatment. The Court should therefore not abdicate its responsibility to provide a just remedy, to any notion of ongoing entitlement in the Legislature to postpone the recognition and realization of their fundamental rights.

220. It is in this regard especially, that the Petitioners also rely on comparative case law from other common law jurisdictions which, they submit, are more instructive than the pronouncements of the ECtHR in the context of this, a domestic challenge to legislation, rather than a challenge to a Convention State's failure to comply with its obligations under the Convention. While the decisions of the ECtHR are important because of the derivation of the Bill of Rights from the Convention, the ECtHR cases will identify but the bare minimum protections. In the domestic context, the requirements of the Bill of Rights are mandatory and must be given their full purposive effect.

221. While I regard this argument as correct, I note my recognition here in any event, of the importance of considering comparative case law from around the world, especially the common law world, on the interpretation and application of the fundamental rights clauses. Indeed, this is as exhorted by the Privy Council per Lord Bingham in *Reyes v R*[126] and is in keeping with the historical fact that the Bill of Rights has its true genesis not originally in the European Convention but in the United Nations Universal Declaration of Human Rights of 1944, as Lord Wilberforce so eloquently recognized as long ago as *Fisher,* in 1986 (as quoted above). And, as Lord Mance stated in *Kennedy v The Charity Commission*[127]:

> "*46. Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic law... In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence...And in time of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law [(here the Constitution)], and it is certainly not to focus on the Convention rights, without surveying*

[126] Above.
[127] [2014] UKSC 20; [2015] AC 455 at [46]

the wider common law scene. As Toulson LJ also said in the Guardian News and Media case [2013] QB 618, para 88:

> *"The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition."*

222. The Petitioners rely, in this theme of universality, especially upon comparative case law from the United States Supreme Court, the Court of Appeal of Ontario and the Constitutional Court of South Africa. Each of these courts has recognized that denying same-sex couples access to the institution of marriage denies them respect for their private and family lives.

223. And while neither of these Courts expressly found a violation of those particular rights, already having made their determinations on the grounds of the right to freedom from discrimination or the right to equality of treatment, the fact that those rights (the equivalent to Section 9 of the Bill of Rights) were violated, is implicit in their respective judgments.

224. Indeed, from the judgments it can be seen that multiple, overlapping rights are engaged by the State's exclusion from the important societal institution of marriage on the basis of identity (sexual orientation). These rights, I emphasize for the sake of clarity, include the rights to private life and family life, "*premised on fundamental notions of human dignity, equality and freedom*".

225. In *Fourie and Bonthuys*,[128], the Constitutional Court of South Africa stated per Sachs J:

[128] Above at [48]

> "[48] *The way the words dignity, equality and privacy later came to be interpreted by this Court showed that they in fact turned out to be central to the way in which the exclusion of same-sex couples from marriage can be evaluated. In a long line of cases, most of which were concerned with persons unable to get married because of their sexual orientation, this Court highlighted the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom. It is these cases that must serve as the compass that guides analysis in the present matter, ...*"

226. In *Obergefell*[129] the United States Supreme Court reflected upon the complexities and interconnectedness of the rights in these terms:

> "...*Like choices concerning contraception, family relationships, procreation, and childbearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence, supra, at 574.*
>
> *Indeed, the Court has noted it would be contradictory "to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki, supra, at 386.*
>
> *Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether to marry and whom to marry is among life's momentous acts of self-definition." Goodridge, 440 Mass., at 322, 798 N.E. 2d, at 955".*

227. The right to found a family is also undeniably involved, whether regarded as a conjunctive right with the right to marry recognized by section 14(1) of the Bill of Rights or as an essential and necessary implication of the section 9 rights to respect for private and family life.

228. In this regard, the Petitioners say that section 14(1) addresses two separate rights: a right to marry and a right to found a family. The Respondents for their part, as already discussed, would read section 14(1) as recognizing a single conjunctive right such that, it must be

[129] *Obergefell v Hodges* 576 U.S (2015), at pp12 and 13, per Justice Kennedy (for the majority).

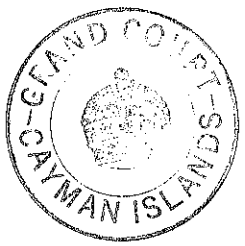
frankly stated, the State would have no obligation to recognize the right to found a family outside of the context of a heterosexual marriage.

229. The implications of such a construction as that contended by the Respondents, may not be endorsed by this Court given the realities of a pluralistic society in which many families are founded with children who are nurtured and cherished, outside of the context of marriage. The rights to private and family life of such families are no less entitled to respect and protection by the State than any others.

230. But this case is not about such families. This case is about the right of the Petitioners (and other same-sex adults) who wish to found a family within the context of marriage for all the well-established reasons why it might be beneficial to do so.

231. The Petitioners say that the denial by the State of their triangular relationship between themselves as a same-sex couple and their adopted child amounts to a violation of this right to found a family, whether it is to be regarded as recognized by section 14(1) or section 9 of the Bill of Rights. By "*triangular relationship*" it is meant that each of these three people must be legally recognized as being connected to the other two.

232. The First Petitioner explains in her Second Affidavit the effects on her daughter as follows (at [8] – [10]):



> *"...in spite of the fact that I am Caymanian, that A is my adopted daughter and that Vickie is A's mother, Cayman Islands Immigration only granted Vickie and A permission to enter for 30 days.*
>
> *... Unfortunately, in light of A's temporary immigration status, the [school] enrolment process was not without complications and, once more, required intervention from our attorneys. It is experiences such as these which exemplify the types of issues our family unit faces, and will continue to face, for so long as the Cayman Islands Government refuses to recognize our relationship and prevents us from getting married."*

233. This situation again manifests, I am compelled to note, a selective willingness on the part of the Respondents to invoke and adhere to principles of European Human Rights jurisprudence. For, as the ECtHR stated in *Wagner v Luxembourg*[130], once a foreign adoption has been completed, it must be recognized. The family unit in *Wagner* had been subjected to hindrances similar to those faced by the Petitioners and their daughter here, viz: the refusal of the immigration authorities to give full recognition and enforcement to a lawful adoption completed in another jurisdiction and so resulting in an adopted child being left in a "legal vacuum", her ties to her family of origin having been legally severed but her ties to her adopted parent(s) denied recognition and enforcement.

234. In *Wagner*, the legal barrier to recognition was that Luxembourg law did not recognize adoption by single parents. A violation of Article 8 of the Convention (right to family life), was found by the ECtHR. It held (at [132,133 and 136] that:

> "132. *The Court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family.*
>
> *133. Bearing in mind that the best interests of the child are paramount in such a case (see, mutatis mutandis, Maire, cited above, [77]), the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognize that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of persons concerned in order to apply the limits which Luxembourg law places on full adoption.*
>
> ...

[130] [2007] ECHR 76240/01

136. In light of the foregoing, the Court considers that there has been a violation of Article 8 of the Convention".

235. It is the Petitioners' case that the lack of same-sex marriage or legal recognition of same-sex partnerships is infringing on their right under section 9 of the Bill of Rights to found a family in the Cayman Islands, in the same way that an infringement of Article 8 was found by the ECtHR in *Wagner*.

236. This is an irresistible conclusion. The Respondents have provided no justification[131] for this infringement and have in fact in their written submissions, accepted that the Petitioners' family is entitled to protection under both limbs of Section 9[132].

237. In my view, whether this breach amounts to an infringement of section 14(1) or section 9 of the Bill of Rights, is irrelevant to the Petitioners' entitlement to relief. The same holds true whether the breach amounts to an infringement under section 16 (when read with sections 10 and 9) which enshrines the right to freedom from discriminatory treatment in the enjoyment of any right enshrined by the Bill of Rights.

238. It is to the subject of section 16 that I now turn, including as it is to be considered in relation to the "definition" in section 14(1) of "marriage"

Sections 16: Prohibition of discrimination and section 14(1): "definition" of marriage.

239. I begin by noting the central premise of the Petitioners' arguments here in relation to section 14(1). It is that section 14(1)'s guarantee to every unmarried man and woman of a right to marry someone of the opposite sex, does not preclude locating elsewhere in the Constitution, the Petitioners' right to marry. Otherwise, the section 14(1) definition would

[131] See the justification analysis below.
[132] See paragraph 66 of the Respondents' Skeleton Argument

be allowed to operate in a way that is unjustifiably discriminatory against them, on the basis only of their sexual orientation.

240. For the reasons which follow upon an examination of the full implications especially of the section 16 right to freedom from unjustifiable discrimination in the enjoyment of all rights enshrined by the Bill of Rights, I find this premise of the Petitioners' case to be well founded and requiring of recognition and enforcement under the Constitution.

241. The analysis begins with section 16 of the Bill of Rights.

242. Section 16(1) to (4) reads as follows:

> "*16. (1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*
>
> *(2) In this section, "discriminatory" means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.*
>
> *(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.* [Emphasis added.]
>
> *(4) Subsection (1) shall not apply to any law so far as that law makes provision –*
>
> ...
>
> *(c) For the application, in the case of persons of any such description of grounds as is mentioned in subsection (2) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description."*

243. I put to one side for the moment, the arguments based on this subsection (4) – the "*personal law*" point. I return below to deal with it in turn.

The tests under section 16 of the Bill of Rights

244. The Petitioners acknowledge that in order to succeed under section 16, they must satisfy the following tests:

a) first, there must be differential treatment on one or more ground of discrimination which is prohibited by the Bill of Rights as listed in section 16(2) above;

b) secondly, section 16 is engaged only in conjunction with the enjoyment of another right contained in the Bill of Rights. In other words there is no prohibition against discrimination which is not related to a right protected under the Bill of Rights; and

c) thirdly, it must be shown that the Respondents' asserted "justification" for the discrimination is neither objective nor reasonable, or that it is disproportionate in its aim of safeguarding a legitimate interest of the kind listed in section 16(3).

"other status"

245. The Petitioners submit and it is well established that "*other status*" as a basis for discrimination against a person is a prohibited ground of discrimination. And that it is well-established that the term "*other status*" incorporates into non-discrimination clauses an obligation not to discriminate on the ground of sexual orientation.

246. So, for example, the ECtHR in *Salgueiro da Silva Mouta v Portugal*[133] held that:

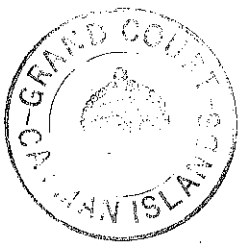
> *"...the Court can only conclude that there was a difference in treatment between the applicant and M's mother, which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention."*

[133] (2001) 31 EHRR 47 at [28] where the applicant, relying on Article 8 of the Convention (the right to respect for family life) in conjunction with Article 14 (the equivalent of section 16), successfully complained that the Lisbon Appeal Court had granted custody of his daughter to his former wife rather than to him purely because of his sexual orientation.

247. The Petitioners submit that they are in an analogous position to opposite-sex couples who wish to marry. The Respondents for their part, without explaining why, simply assert[134] that same-sex couples are not similarly situated (ie: not in an analogous position) for the purposes of marriage by virtue of the meaning of section 14(1) of the Bill of Rights and that therefore, there is no differential treatment on the ground of sexual orientation.

248. But it does appear as the Petitioners submit, that the Respondents' position, in seeking to deny the Petitioners access to the institution of marriage, is tantamount to asserting that either:

(i) homosexual relationships are lesser than heterosexual relationships so that they are not analogous. As to this, even while accepting that "*same-sex couples and married, opposite-sex couples are, for many (if not most purposes), properly regarded as being in an analogous situation*", the Respondents go on to argue that "*it does not follow that gay and straight , married couples are for all purposes similarly situated*[135]", or



(ii) The definition itself of marriage – as a union between a man and a woman - *per se* defeats the analogy.

249. I will examine each of these assertions now.

250. As to assertion (i), the Petitioners respond by reliance on the judgment of the House of Lords in *Ghaidan v Godin-Mendoza*[136] , a case which concerned discrimination against the surviving male partner of a deceased male and his right to succeed to the tenancy of their home which they had occupied together during a stable and permanent homosexual

[134] In the Respondents' List of Issues – response to Issue 7.
[135] See paragraphs 109- 116 Of their skeleton arguments
[136] [2004] UKHL 30; [2004] 2 AC 557

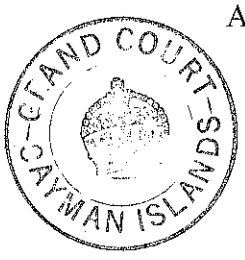
relationship. Baroness Hale, in a powerful judgment with which the other Law Lords agreed, held that the surviving partner was in an analogous position to the surviving partner of a heterosexual couple:

> "143. *It follows that a homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple's relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation. It requires an objective justification if it is to comply with article 14*".

For his part Lord Millett added the following perceptive comments:[137]

> "*I agree with all my noble and learned friends, whose speeches I have had the advantage of reading in draft, that such discriminatory treatment of homosexual couples is incompatible with their Convention rights and cannot be justified by any identifiable legitimate aim. I am, moreover, satisfied by the powerful and convincing speech of my noble and learned friend, Baroness Hale of Richmond, that for the reasons she gives such treatment is not only not compatible with the Convention but is unacceptable in a modern democratic society at the beginning of the 21st century. This is not to say that it was always, or even until fairly recently, unacceptable; but times change, and with them society's perceptions change also.*"

251. In the context of same-sex unions in *Schalk and Kopf v Austria*[138] *(a case heavily relied upon by the Respondents including as discussed above)* , the ECtHR held that same-sex couples were in a relevantly similar situation to opposite-sex couples as regards their need for legal recognition and protection of their relationship (even while reserving to the Austrian Government the margin of appreciation how that would be achieved):



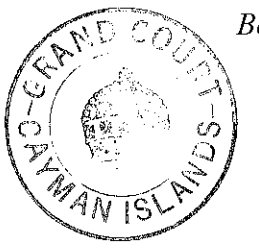
> "*…same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for* legal *recognition and protection of their relationship.*"

[137] At [55].
[138] (2011) 53 EHRR 20, at [99].

252. And more recently, in the case of *R (Steinfeld and another) v Secretary of State for International Development*[139] the United Kingdom Supreme Court accepted that the analogy extends to the court's assessment of whether there is differential treatment in the very manner in which the State provides legal recognition of a couple's relationship. The case concerned the exclusion of opposite-sex couples from the institution of civil partnership, the secular construct of the Civil Partnership Act 2004, an exclusion which was held to be unjustifiably discriminatory. Per Lord Kerr at [19]:

> "19. *It is therefore now accepted that access to civil partnerships falls within the ambit of article 8; that there is a difference in treatment between same sex couples and different sex couples in relation to the availability of civil partnerships; that this difference in treatment is on the ground of sexual orientation, a* ground *falling within article 14; and that the appellants are in an analogous position to a same sex couple who wish to enter into a civil partnership. In these circumstances, the only basis on which the respondent can escape a finding that there has been an infringement of the appellants' article 14 rights is by showing that the unequal treatment is justified: Ghaidan v Godin- Mendoza [2004] 2 AC 557, par 130, per Baroness Hale of Richmond".*

253. If the analogy between heterosexual couples and homosexual couples holds true for civil partnerships, then it must hold true for marriage as well, say the Petitioners. This is a forceful argument, made no less so in the circumstances of this case by the Respondents' repeated reliance on ECtHR pronouncements, such as those to the following effect from *Boeckel v Germany*[140]:



> *"The contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment (see X at [98]; Schalk v Austria (2011) 53 E.H.R.R. 20 at [96]; and Burden v United Kingdom (2008) 47 E.H.R.R. 38 at [60]. The Court has also held that, where a state chooses to provide same-sex couples with an alternative means of recognition such as registered civil*

[139] [2018] UKSC 32; [2018] 3 WLR 415
[140] (2013) 57 EHRR SE3 51 at [28]- [31]

> *partnership, it enjoys a certain margin of appreciation as regards the exact status conferred (see Schalk at [108]; and Gas v France , (2014) 59 EHRR 22 ;(25951/07) 15 March 2012 at [66]. Given the special status which the act of marriage confers to those who enter it, the Court has held that art. 14 in conjunction with art. 8 of the Convention did not oblige the contracting states to grant same-sex couples equal rights as married couples in respect of second-parent adoption* (see X at [105] –[106])." [Emphasis added.]

254. I find that this dicta and the other similar pronouncements from the ECtHR relied upon by the Respondents[141] do not diminish the force of the Petitioners' plea for equality of treatment, for a number of reasons.

255. First, and again, the contextual significance of the "margin of appreciation." Here again, it is one afforded the Contracting States, not one to which, as a matter of the Cayman Islands constitutional relationship with the United Kingdom, the Cayman Islands Government can claim for itself.

256. Secondly, the margin is afforded only so long as a "*state chooses to provide same-sex couples with an alternative means of recognition such as registered civil partnership.*"(*Boekel v Germany*, above)

257. Thirdly, the argument therefore begs the question what would the ECtHR itself decide in the context of a petition by these Petitioners, where the United Kingdom, as the contracting state, already provides recognition by both the Civil Partnerships Act 2004 and the Same-Sex Marriage Act 2013. One might venture to think that the United Kingdom would not fare well for allowing *prima facie* discriminatory treatment within its own family of jurisdictions.

[141] *Schalk and Kopf v Austria* (above); *Gas and Bubois v France* (abovd) at [66]-[71]; *X v Austria* (2103) 57 EHRR 14 at [105]-[109]; *Lindsay v United Kingdom* (1986) 49 DR 181, 192; *Nylund v Findland* (Application No 27110/95, 29 June 1999; among others.

258. Fourthly, it must follow that to the extent the United Kingdom has itself forborne on the issue in deference to the local Legislature, that can only be with the intention that an acceptable form of protection for same-sex unions must be provided.

259. Fifthly, the matter therefore now comes before this Court for the issue to be decided in keeping, not with the Convention but with the Constitution, and in the ongoing absence of any form of protection.

260. As regards assertion (ii), that is: that the definition of marriage itself defeats the analogy- the Respondents admit that the issue of "different treatment", as they see it, is whether it is justified to limit the institution of marriage to its "*traditional form in the Cayman Islands- that is between a man and a woman. The analytically related question is whether, for the purposes of entry into the institution of marriage in the Cayman Islands, gay and straight couples are similarly treated*[142]."

261. In this regard, the Respondents rely upon the following dictum from *Matadeen v Pointu* per Lord Hoffman:[143]

> "*The reasons for not treating people uniformly often involve ... questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves*"

262. The Respondents then go on to submit that, in the present case, the aim pursued by the 2008 Amendment to the Law and section 14(1) of the Bill of Rights, is the protection and promotion of "*marriage*" or "*family*" in the traditional sense, as understood in the Cayman Islands. That there is high case authority for the proposition that this is a legitimate aim,

[142] Para 108 of the Respondents' skeleton submissions
[143] Above, at 109E-F

and can justify different treatment in relation to according married status: see *Karner v Austria*[144] where the ECtHR held that:

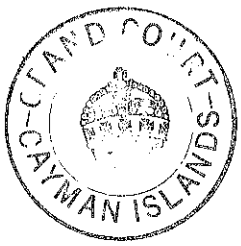
> *"The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see Mata Estevez v Spain (dec), no. 56501/00, ECHR 2001-VI, with further references".*

263. This say the Respondents, puts paid to the suggestion that this is somehow a forbidden or necessarily religious aim.

264. But the Petitioners point to the obvious tautology of this argument: as a discriminatory provision, the definition of marriage cannot itself be invoked to claim that there is no analogy between homosexual and heterosexual couples. The Petitioners here again aptly rely upon Baroness Hale's judgment in *Rodriquez, at [17]:*

> *"... If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different."*

265. As further support for their analogous position to heterosexual couples, the Petitioners also rely on the judgment of the Supreme Court of Bermuda in *Godwin and DeRoche* (above) – that which confirmed the right to same-sex marriage in that jurisdiction. In *Godwin and DeRoche* the Court was clear that the homosexual applicants' treatment was to be compared with a heterosexual couple who wished to marry, at [92]:



"*DISCRIMINATION: Whether the Applicants have been discriminated against on the basis of their sexual orientation.*

> *92. The common law definition of marriage excludes same-sex couples on one hand but includes heterosexual couples on the other. It appears on its face therefore that the exclusion denies the equal benefit of the marriage law to the Applicants.*"

[144] App No 40016/98, 24 July 2003) at [40]

266. From the foregoing, it is in my view, beyond argument that the Petitioners are in, and are to be treated as being in, a position analogous to heterosexual couples for the purposes of the analysis on whether they are excluded from the right to marry on discriminatory grounds.

267. That analysis, which can proceed in this case only in terms of the justification analysis in keeping with Section 16 (3) of the Bill of Rights, therefore becomes unavoidable. It may not be circumvented, as the Respondents submit, by reliance on dicta from the ECtHR which would leave the issue of justification to Contracting States as a matter to be resolved within the "margin of appreciation."

268. The starting point for the analysis is also clear. It is beyond argument- as the Registrar's letter of refusal of the licence to marry makes clear – that the Petitioners are treated differently from a heterosexual couple and are directly discriminated against on the ground of their sexual orientation.

269. As the United Kingdom Supreme Court declared in *Preddy and Hall v Bull*[145] when considering whether there had been unjustifiable discrimination against a homosexual couple by the refusal to honour their booking of a hotel room:

> *"They [the hoteliers] were applying a criterion that their legal relationship was not that of one man and one woman, in other words a criterion indistinguishable from sexual orientation."*

The requirement of section 16(3) of the Bill of Rights that the discrimination must be "felt in conjunction with the enjoyment of another right"

270. As already noted, the Petitioners accept that the discrimination they complain about must be felt in relation to a right which is protected under the Bill of Rights. For their part, the

[145] [2013] UKSC 73; [2013] 1 WLR 3741, per Baroness Hale at [30].

Respondents, through Sir Jeffrey Jowell, lay particular emphasis on this requirement. They argue that the Petitioners can claim no breach of section 16 on account of not being allowed to marry because the right to marry is not one which is guaranteed to them under section 14(1) of the Bill of Rights. Further, and again in this particular context, that as section 14(1) is the *lex specialis* on the subject, there can be no breach of the right to marry said to be located elsewhere in the Bill of Rights.

271. Here also, Sir Jeffrey Jowell placed particular reliance on the jurisprudence of the ECtHR, citing those cases (some already mentioned)[146] which held that it was within the margin of appreciation left to member states to decide not to open the institution of marriage to same-sex couples in circumstances where there was available another institution protective of their union. And that by parity of reasoning, it follows that the refusal to the Respondents of the licence to marry here based on the Law, was within the margin of appreciation and not discriminatory within the meaning of section 16, which is expressed in terms similar to Article 14 of the Convention.[147]

272. There is however, no true parity of reasoning where, as here in the Cayman Islands, there is no other institution available to same-sex couples for the protection of their relationships. As the cases already examined show, it was against the background of the availability of an alternative institution, that the ECtHR held that the respective Contracting States had not overstepped their "margin of appreciation" – that which, as I have already explained, may not be afforded by the Court to the Government here . Here, all depends on what the Bill of Rights requires.

[146] *Oliari,* (above) *Schalk and Kopf* (above) and *Chapin and Charpentier* (No 40183/07)

[147] Which reads in its entirety as follows: *"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without 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."*

273. In the circumstances of this case said Mr. Fitzgerald on behalf of the Petitioners, the exclusion of the Petitioners from the institution of marriage (and the bundle of legal benefits and responsibilities derived from it) is felt in conjunction with multiple rights protected by the Bill of Rights.

274. He too relied upon dicta from the ECtHR from the very same cases cited by Sir Jeffrey Jowell which, even while confirming that the discriminatory treatment must fall within the ambit of another right protected by the Convention, also confirms that that other right need not itself be breached. For example in *Schalk and Kopf,* the ECtHR described how Article 14 is engaged, at [89] :

> "*89. As the Court has consistently held, art 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of art. 14 does not presuppose a breach of those provisions- and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter*".

275. Accepting that this is the interpretation to be also applied to section 16 of the Bill of Rights, the Petitioners say that "*the facts at issue*" in this case show that they are unjustifiably discriminated against and that that discrimination is felt in conjunction with a number of distinct rights protected by the Bill of Rights:

a) section 9 (the rights to private life and family life)- that these rights are engaged for the reasons discussed above, when section 9 is pleaded as a standalone right;

b) section 10 (freedom of conscience) for the reasons examined above, when section 10 is pleaded as a standalone right;

c) section 11 (freedom of expression), due to the overlap in protection between this right and the right to privacy, and as the State prevents the Petitioners from expressing their commitment via a State-sanctioned institution;

d) section 13 (freedom of movement), due to the restrictions placed upon the Second Petitioner's and the Petitioners' daughter's rights to remain in the Cayman Islands due to lack of recognition of their relationship by the State;

e) section 14(1) (as it protects the right to found a family), for the reasons already discussed and to be discussed further below, when the section 14 right to found a family is pleaded as a disjunctive standalone right;

f) section 15 (freedom from interference with the peaceful enjoyment of property), due to them being denied the same recognition of conjugal rights to property as couples whom the State allows to marry; and

g) section 17 (protection of the child's right to family and parental care), due to the State not recognizing the triangular relationship between the Petitioners and their daughter.

276. It ought to come as no surprise said Mr. Fitzgerald, that the State's discrimination against the Petitioners is felt in conjunction with so many rights. The State confers on heterosexual couples a myriad of rights and obligations through the institution of marriage while the Petitioners are excluded from each and every one.

277. Nor is it accepted or to be assumed, Mr. Fitzgerald emphasized, that the provision of an alternative institution to marriage which does not afford the full extent of legal protections as does marriage, would itself remove the unjustified discrimination.

278. In *Vallianatos v Greece*[148], the ECtHR, (even while never having conducted a full justification analysis under Article 14 in conjunction with the plenitude of rights like those pleaded by the Petitioners here) did conduct a justification analysis with regards to whether the introduction of registered civil partnerships exclusively for opposite-sex couples, to exist alongside marriage which was also open only to opposite-sex couples, constituted a breach of Article 14 read with Article 8. The ECtHR concluded that the differential treatment between same-sex couples and opposite-sex couples was not justified, rejecting Greece's argument that there was no discrimination because it was open to same-sex couples to contract privately between themselves for the recognition of their rights:

> *"Greece was in an isolated position in terms of its refusal to legally recognize same-sex relationships compared to other Member States. The Government had failed to justify the exclusion of same-sex couples from the scope of the (Civil Union) Law and there had been a violation of art. 14 taken in conjunction with art. 8."*

279. In summary, the Petitioners invite this Court to reject the Respondents' argument for the allowance of a "*margin of appreciation*" as a basis for avoiding the obligation to provide analogous treatment, for the further following reasons:

- First, (as already mentioned) that there is no such thing as a "*margin of appreciation*" in the domestic courts of the Cayman Islands which are obliged to apply the local law, most importantly here, the Constitutional Bill of Rights. Rather, the concept represents a margin of difference by which Contracting States to the Convention adhere to their international obligations under the Convention. The concept arose from the case law of the ECtHR, starting with *Handyside v the United Kingdom.*[149] The point of distinction

[148] (2014) 59 EHRR 12

[149] (1979-80) 1 EHRR 737- in which the ECtHR held, inter alia, that the prosecution of the applicant and the seizure and destruction of obscene books possessed by him to be published for gain were not in breach of his Convention rights. That Article 10(2) left to Member States the "margin of appreciation" as to the interpretation and application

is that here the Court is not interpreting an international treaty; it is interpreting domestic rights in the Bill of Rights and the task for this Court is much better understood in terms of the justification test that is expressly set out at section 16(3) of the Bill of Rights.

- Secondly, there is no longer a "*margin of appreciation*" such as would admit of the notion that government would be free to determine not only when and how but also whether at all, an institution equivalent to marriage should be made available for same-sex couples. ECtHR case law has already established that such an institution must, at minimum, be established: see *Oliari* above and, as regards Austria's obligations, *Schalk and Kopf (*to be read with *Oliari*). In the Cayman Islands, unlike the situation in Italy, Austria and the United Kingdom itself, no institution has been provided.
- Thirdly, the "*margin of appreciation*" as to the manner and timing of implementation, belongs to the United Kingdom as the Contracting State. The Government of the United Kingdom has stated in terms that the appropriate institution is marriage. Prime Minister Theresa May stated as much in terms that cover the Cayman Islands:

> *"I want all British citizens to enjoy the fullest freedoms and protections. That includes equal marriage – because marriage should be for everyone, regardless of their sexuality."*[150]

Moreover, as already noted, the Governor's office here has called for the creation of an institution but so far, to no avail.

of domestic laws. However, the domestic "margin of appreciation" went hand in hand with "European supervision" and that such supervision concerned both the aim of the measure challenged and its "necessity" and it covered not only the basic legislation but also its application, even by an independent court.

[150] Pink News, May, Theresa "Exclusive: Theresa May writes for PinkNews on the 50th Anniversary of the Sexual Offences Act", 19 July 2017 (https://www.pinknews.co.uk/2017/07/19/exclusive-theresa-may-wrtes-in-pinknews-on-the-50th-aniversary-of-the-sexual-offences-act/)

280. Accordingly, as the Petitioners submit and I am compelled to accept, they are in a position analogous to opposite-sex couples in their need for protection and that the absence of such protection is felt in relation to the many rights to which they are entitled under the Bill of Rights. I am also satisfied that the Respondents may not rely on the ECtHR decisions in *Oliari, Schalk and Kopf* or in *Chapin and Charpentier (all above),* to exclude the Petitioners from the institution of marriage on the asserted basis that the Government has the purported margin of appreciation - to the relegation of the Court's adjudication process – over the admission of the Petitioners to the institution of marriage or over the introduction of an alternative institution.

The justification analysis

281. As already noted, the question whether the Respondents can justify the discriminatory treatment of the Petitioners therefore becomes unavoidable. Here especially, the case law from around the common law world is instructive. This is despite Sir Jeffrey Jowell's admonition that comparative case law is of limited applicability because none of the jurisdictions from which these cases come has a marriage clause in their Bills of Rights which operates, as section 14(1) is said to operate, to preclude access to the institution of marriage for same-sex couples.

282. The fundamental flaw in that argument as I see it, is that it completely overlooks the significance of the other provisions of the Bill of Rights upon which the Petitioners rely. Even in the absence of a provision which enshrines the right to marry (let alone one which could be seen as enshrining that right only for heterosexuals), we see that the Courts from around the common law world refuse to countenance discriminatory treatment in the enjoyment of rights, in the absence of clear justification.

283. To begin, it is important to note that, unlike Article 14 of the Convention, section 16 (3) of the Bill of Rights expressly prescribes conditions which must be met to justify discrimination. For the sake of convenience and reminder, the relevant provisions of section 16 of the Bill of Rights are set out at page 81 above.

284. The focus here is upon the first three subsections of section 16, the discussion on section 16(4) (c) will be taken up separately below.

285. I here record my indebtedness to counsel for the Petitioners in my adoption of their compelling analysis on section 16(3) following. It is just as well to note also that no counter-analysis based on section 16(3) was proffered by the Respondents.

286. The conditions of section 16(3) are similar but not the same as, conditions which have been attached to Article 14 of the Convention via the case law of the ECtHR and to Article 14 claims before the United Kingdom domestic courts under the Human Rights Act 1998 ("the HRA"). These conditions were originally and succinctly stated by the ECtHR in *Belgian Linguistic Case (No.2)*[151]:

> *"... A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."*

287. The English courts have broken down the justification test into four stages, recently re-stated in *Steinfeld and Keidan:*[152]

"(a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right;

(b) Are the measures which have been designed to meet it rationally connected to it;

[151] (1979-80) 1 EHRR 252, at [10].
[152] Above, at [41]

(c) Are they no more than necessary to accomplish it; and

(d) Do they strike a fair balance between the rights of the individual and the interests of the community?" [ie: as regards (c) and (d), are they proportional?]

288. The purpose of Article 14 (and hence Section 16) must also weigh heavily in the justification analysis.

289. Particularly helpful is Baroness Hale's explanation from *R (on the application of Clift) v Secretary of State for the Home Department:*[153]

> *"53. ...For example, in Rasmussen v Denmark (1984) 7 EHRR 371, paras 35 and 38, citing Van der Mussele v Belgium (1983) 6 EHRR 163, para 46 and Marckx v Belgium (1979) 2 EHRR 330, para 33, the court said this:*
>
> > *"Article 14 safeguards individuals who are "placed in analogous situations" against discriminatory differences of treatment... For the purposes of article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized"."*
>
> *"57. As Karen Reid explains, in A Practitioner's Guide to the European Convention on Human Rights 2nd Ed (2004), pp 261-2, "It thus aims to strike down the offensive singling out of an individual or members of a particular group on their personal attributes." This is reminiscent of the approach of the Canadian Supreme Court to the equal protection section of their own Charter of Rights and Freedoms, in Law v Canada (Minister of Employment and Immigration) [199] 1 SCR 497:*
>
> > *"It may be said that the purpose of section 15(1) [of the Charter] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all*

[153] [2006] UKHL 54; [2007] 1 AC 484, at [53] and [57].

persons enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern, respect and consideration.""

290. Yet, in its intent to eliminate discrimination, section 16 (3) goes even further than Article 14 of the Convention in that it prescribes a closed list of what is to regarded as a "*legitimate aim*", namely "*in the interests of defence, public safety, public order, public morality or public health.*" Whereas, under the Convention, there is more latitude for what can be a legitimate aim.[154]

291. The justification test under section 16(3) is not only more restrictive than that under Article 14 of the Convention, it is also more restrictive than that in independence constitutions of the Commonwealth Caribbean. For example, the general justification test in the Constitution of Trinidad and Tobago 1976 does not contain a closed list of legitimate aims, but rather, in section 13(1), the broader test of what is "*reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.*"

292. Similar language is used for other justification tests under the Bill of Rights[155] itself, giving a clear singular meaning and significance to the test under section 16(3). Clearly, the right to freedom from discrimination in the enjoyment of any of the rights enshrined by the Bill of Rights, is not a right which will be curtailed simply in deference to measures which may be "*reasonably necessary in a democratic society*". It must follow that the closed list of limitations allowed by section 16(3) must be strictly and purposively construed.

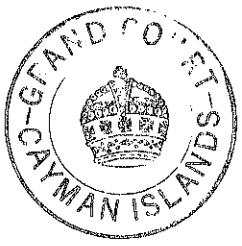
[154] For example, in *Steinfeld v Keidan*, (above) the legitimate aim articulated by the UK Government was "*the need to have time to assemble sufficient information to allow for a confident decision to be made about the future of civil partnerships*" at [42].

[155] See, for instance, sections 9(3), 10(6), 11(2), 12(2) and 13(2(a), where limitations on the respective rights are all premised in terms of what "*is reasonably justified in a democratic society*".

293. The Petitioners' proposed interpretation of section 16(3), with which I agree, is that it functions as follows:

a) The Respondents asserted justification for the discriminatory treatment of same-sex couples, must be in the interests of one of the aims in the closed list; viz: *defence, public safety, public order, public morality or public health.* If not within that list, the purported justification is invalid and, as such, the discrimination is unlawful and unconstitutional;

b) If the Respondents' justification does fall into one of the aims in the closed list, the justification must nonetheless in the meaning of section 16(3) be "*objective and reasonable*". This encompasses an analysis as to whether the means employed by the State are rationally connected to the legitimate aim, and



c) If the Respondents' justification is found to be objective and reasonable, there nonetheless must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

Legitimate Aim

294. I begin the analysis where it could perhaps also conclude: with the observation that none of the legitimate aims from the closed list of section 16(3) itself was cited by Sir Jeffrey Jowell as being relied upon by the Respondents. Instead, the Respondents' asserted justification is the aim of "*protecting the traditional Caymanian heritage in relation to marriage and the family unit*".

295. "Traditional Caymanian heritage" is not in the closed list of legitimate aims. In the List of Issues prepared for the hearing[156], the Respondents claim that this justification falls within

[156] Respondents' List of Issues, response to Issue 9

the legitimate aim of "public morality". But this was not developed in arguments by Sir Jeffrey Jowell and it is difficult to see how such a proposition could be justified, redolent as it itself would be, with imputations of prejudice. In order to invoke this as the legitimate aim, it would have been incumbent upon the Respondents to show how barring the Petitioners from the institution of marriage and from the constellation of benefits associated with the institution, is connected to public morality.

296. As the Petitioners submit and as I accept, the Respondents' asserted justification does not come within section 16(3) and it therefore collapses and fails at this first hurdle.

Objective and reasonable

297. Even were the Respondents able to establish a nexus with "*public morality*," they must nonetheless show that their justification is both "*objective and reasonable*". The Respondents having failed even to attempt to develop such an argument, the field was left to be occupied by anticipatory counter-arguments from the Petitioners. They made seven compelling points which I set out following.

298. First, "tradition" is too nebulous a concept to meet the standards of objectivity prescribed by section 16(3). This weakness can be seen in the Law itself, which in section 8, expressly allows Marriage Officers who are also ministers of religion, to refuse to solemnize a marriage that subjectively does not meet with their "*tradition*". The subjectivity which is built into the Law, is that which is itself, now in question.

299. Secondly, the Legislature acknowledged when debating the 2008 Amendment, that views on what should constitute a marriage are not objective. For example[157], the Honourable Alden McLaughlin said:

[157] See also the extracts from Hansards above at paragraphs to .

> *"The position I take is not based on my personal belief alone. I believe everyone is entitled to his own choice. But the standards, the values of a country must reflect what the people of the country in large part believe. Otherwise, the system cannot work."*[158]

300. The views of a majority cannot be an objective basis for denying the rights of a minority and there is, moreover, no evidence that could be regarded objectively as showing what that majority view is.

301. Thirdly, and in any event, the history of State-controlled marriage considered above evidences that there is no such thing as "traditional" marriage. What amounts to a legally contracted marriage has changed significantly with the passage of time as disenfranchised groups became enfranchised. In their purported protection of "traditional Caymanian heritage", the Respondents have opted for a solitary iteration of the institution. By the 2008 Amendment, the State targeted same-sex couples alone. They did not, for instance, codify the "*for life*" element of a "*traditional*" marriage, nor seek to maintain the centuries' old "*tradition*" abolished in *R v R*[159] that a man cannot be found guilty of raping his wife. The justification put forward by the Respondents is subjective and pinpointed with precision at LGBT people alone.

302. Fourthly, the corollary of promoting the "*traditional*" family (whatever that means) is the discouragement of homosexual relationships. This cannot be an objective or reasonable aim whether phrased in terms of "*public morality*" or otherwise. The means are not rationally connected with a legitimate aim. Baroness Hale held as much in *Rodriquez* [160] in

[158] Official Hansard Report, Friday 5 September 2008, p.335, 2nd Column.
[159] Above.
[160] Above – in which the Government of Gibraltar refused to record the same-sex partner of a long-term tenant of Government housing as joint tenant, in circumstances where registration was necessary to protect the family of the couple (including an adopted child) in the event one were to die and where registration would be allowed to a heterosexual couple; at paragraphs 25 to 28.

terms which neatly summarize the foregoing four points on which the Petitioners rely and show that the Courts have already reckoned with the self-same "*justification*" sought to be relied upon by the Respondents here:

> "*25. The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim.*
>
> *26. No-one doubts that the "protection of the family in the traditional sense" is capable of being a legitimate and weighty aim: see Karner v Austria (2003) 38 EHRR 528, para 40. Privileging marriage can of course have the legitimate aim of encouraging opposite sex couples to enter into the status which the State considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same sex couples. But, to paraphrase Buxton LJ in the Court of Appeal's decision in Ghaidan v Godin-Mendoza [202] EWCA Civ 1533, [2003] Ch 380, at par 21, it is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be saying to one another "let's get married because we will get this benefit and our gay friends won't".*
> *Moreover, as Baroness Hale said in the same case in the House of Lords*[161]
> *"The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to "everyone", including homosexuals, by article 8 since Dudgeon v United Kingdom (1981) 4 EHHR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships... Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern."*
>
> *The aim of discouraging homosexual relationships is equally impermissible under sections 7(1) and 14 of the Constitution of Gibraltar.*

[161] [2004] UKHL 30, [2004] 2 AC 557, at para 143.

27. *Of course, the policy does not privilege married couples above everyone else. It also privileges unmarried opposite sex couples who have a child in common. The aim is said to be to protect the children but, if so, it is difficult to understand why it is limited to couples with a child in common, and does not extend to other couples who have undertaken parental responsibility for minor children. The policy also extends to parents and adult children living with the tenant. The aim here must be to protect the family home. But if so, it is difficult to understand why it does not extend to protecting the homes of people whom we now recognize as being members of the same family: see Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27. In short, the suggested aims are incoherent and the means employed are not rationally connected to those aims.*

28. *In the Board's view, therefore, the discriminatory effect of the policy cannot be justified because it is not rationally related to a legitimate aim."*

303. Fifthly, if (as appears from the Hansards cited above) by invoking *"tradition"* or "*public morality*", the Respondents are really pursuing a particular religious or moral purpose, then their justification cannot be either objective or reasonable. The reason was fully articulated by Lord Justice Laws (see *McFarlane v Relate);* by the Bermuda Courts in *Ferguson* ; by the Canadian Supreme Court in *Re Big Mart* and by the South African Supreme Court in *Fourie v Bonthuys* (all above).

304. Sixthly, it is significant that the Cayman Islands is one of only five of the twenty distinct jurisdictions of the United Kingdom not to allow for some sort of same-sex union (along with the other four Caribbean Overseas Territories) and one of only six not to allow same-sex marriage (the Caribbean Overseas Territories and Northern Ireland). The vast majority of citizens of the United Kingdom may marry in their home jurisdiction regardless of their sexual orientation. The Cayman Islands being an outlier in that regard is significant when assessing whether the cited justification of "tradition" or "*public morality*" is reasonable.

In the words of the House of Lords in *Clift,* the status of same-sex couples in the Cayman Islands has become an "*indefensible anomaly*"[162].

305. It was not suggested by the Respondents that the Caribbean is somehow different from the rest of the United Kingdom, so that in this region alone a different "*heritage*" or "*traditional*" view of marriage exists, such as to justify the ongoing discrimination against same-sex unions. Any such suggestion would no doubt have been met by a response pointing to the multi-cultural diversity of the region, the fact that a similar history of marriage as a secular institution as in the Cayman Islands appertains throughout, the fact that as the High Court of Trinidad and Tobago recognized: "*single-parent families are becoming a norm which is unsettling for many traditionalists despite its reality*[163]" and the fact that homo-sexual relationships between consenting adults is no longer to be regarded as unlawful[164]. Finally in this respect, it is an anomalous contra-indication that in the Cayman Islands, a same-sex union solemnized abroad has been recognized for immigration purposes.[165]

306. Seventhly, and finally, the fact that Caymanian heritage and the family unit are mentioned in the Preamble to the Constitution. This issue is already addressed above but it is just as well to expand here by noting that mention in the Preamble does not elevate any aspiration to a legitimate aim over any other aspiration, let alone to a blanket justification that allows the State to breach rights of those who do not prescribe to the same view of "tradition".

[162] Above, at [38].

[163] *Jones v Attorney General of Trinidad and Tobago* (2018) claim No. CV2017-00720, in which the defendant Attorney-General sought unsuccessfully to justify laws which criminalized same-sex intimacy on the basis of *"Maintaining traditional family and values that represent society"*.

[164] Decriminalization in the British Overseas Territories was effected by Order-in -Council in 2001.

[165] See "Landmark decision as IAT rules in Raznovich's favour" by Reshma Ragoonath, The Cayman Reporter,(2016-07-25)

The Constitution of the Cayman Islands is secular. Multiple aspirations are affirmed, including tolerance and dignity. The Preamble does not limit the freedoms guaranteed by the substantive text.

Reasonable relationship of proportionality between the means employed and the aim sought to be realized.

307. If contrary to my foregoing conclusions, the Respondents had been able to meet the first two conditions in section 16(3) of the Bill of Rights, then I would have been required to carry out a proportionality exercise. This would include an assessment of the impact of the discrimination upon the Petitioners.

308. The State is denying the Petitioners access to an institution at the core of society, both in terms of their status within society as a stable committed union and in terms of tangible rights and obligations that they are being denied. They are denied these because of the identity of the person with whom they fell in love, by reference to sexuality or sexual orientation.

309. It is the Petitioners' case that this amounts to a "*violation of essential human dignity*", and denies them "*equal recognition at law as human beings*" (*Clift* above, at [57]), and is "*a crass, blunt, cruel and serious invasion of their dignity*" (per Baroness Hale in *Rodriquez* above, at [19], citing the Constitutional Court of South Africa in *Fourie and Bonthuys*). Thus, that this is exactly the kind of discrimination that section 16 of the Bill of Rights is intended to prevent.

310. The case law from the ECtHR itself makes it clear that differences based on sexual orientation require "*particularly serious reasons by way of justification*", as do differences based on race, sex and (arguably) religion; it will therefore only be in exceptional

circumstances that the State can justify treating a person or persons differently on grounds of their sexual orientation (*Gas v France*, above at [59]; *Oliari* above, at [143]).

311. As discussed above, it is no coincidence that the State-controlled institution of marriage has evolved to erase discrimination on each of the other protected characteristics. It might well be seen therefore as anomalous, that discrimination has not similarly been erased on the ground of sexual orientation in the Cayman Islands.

312. Further, it is no coincidence that judgments on same-sex marriage from other common law jurisdictions are abounding with references to dignity. It is no coincidence, too, that these judgments roundly reject "tradition" as a justification and, in doing so, refer back to past injustices such as segregation and apartheid that were once grounded in so-called "tradition".

313. In *Fourie and Bonthuys* (above), the Constitutional Court of South Africa cited its earlier judgment in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (the so-called Sodomy case)* (also above) to reiterate that integral to the Court's task was the protection of the dignity of the same-sex applicants (at [54]):

> *"[54]* ....
> *The message and impact are clear. Section 10 [the right to dignity] of the Constitution recognizes and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbian lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians".*

The judgment adds that *"protecting the traditional institution of marriage as recognized by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex partnership"*.

314. Likewise, the South African court's conclusion was framed in terms of dignity, at [78]:

> "[*78] Sections 9(1) and 9 (3) [the non-discrimination clause] cannot be read as merely protecting same-sex couples from punishment or stigmatization. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law... Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree."*

315. Nor did the Constitutional Court of South Africa shy away from comparisons with the indignity of race-based exclusions (at [74]):

> *"... the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights."*

316. Similarly, the conclusion of the United States Supreme Court in *Obergefell* (above) was also expressed in terms of dignity [at page 28]:

> "*No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that*

may endure even past death[166]*. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.*

The judgment of the Court of Appeals for the Sixth Circuit is reversed. It is so ordered".

317. The Supreme Court's judgment in *Obergefell* is replete with citations to its earlier judgment in *Loving v Virginia,* which declared to be unconstitutional States' bans on interracial marriage. For example, at page 13, Justice Kennedy held for the majority of the Court that:

> *"...There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. Loving, supra, at p12 ("(T)he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").*

318. And there are indeed, obvious parallels between the Respondents' purported justification here and the purported justification of the segregationists in *Loving*, as recorded by the U.S. Supreme Court in that 1967 judgment at p 1819:

> *"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."*

319. I agree, as the Petitioners contend, that the U.S Supreme Court and the Constitutional Court of South Africa, were entirely correct to compare race and sexual orientation in their justification analyses.

320. In doing so, they understood the discrimination and indignity faced by same-sex couples, just as society came to understand the indignity suffered by the persons of colour or African descent, by segregation or apartheid. The Petitioners seek to emphasize, correctly in my

[166] A reference to the fact that by the time the case came before the Court, partners of some of the applicants had died but the surviving partners nonetheless wished here to the dignity of their relationships recognized by the courts.

view, that the Respondents can no more justify exclusion from the institution of marriage on the ground that a couple are of the same sex, than exclusion could be justified on the ground that a couple are of different races. That this exclusion is disproportionate is evident alone from the indignity caused to the Petitioners (and their adopted child) by the denial of the status conferred by the institution of marriage.

321. In my view, no aim cited by the Respondents can weigh against that indignity.

322. Moreover, the means employed by the State here to uphold "tradition" go beyond the denial of status. The State, despite the entreaties of the Petitioners and others, has not provided an alternative institution for same-sex couples. The practical effects of the State's complete inaction to recognize same-sex unions must be considered when the Court assesses proportionality. The Petitioners are denied each and every of the plenitude of rights that flow from the State-sanctioned union of marriage.

323. The position of the Respondents here is not unlike that of the Attorney-General of Canada in the *Halpern* case (above) explained at [129]:

> *"The difficulty with the AGC's submission is its focus. It is not disputed that marriage has been a stabilizing and effective societal institution. The Couples are not seeking to abolish the institution of marriage: they are seeking access to it. Thus, the task of the AGC is not to show how marriage has benefited society as a whole, which we agree is self-evident, but to demonstrate that maintaining marriage as an exclusively heterosexual institution is rationally connected to the objectives of marriage, which in our view, is not self-evident".*

324. Furthermore, I accept that the effects on the Petitioners' daughter must also be considered. In *Obergefell,* the U.S. Supreme Court recognized the harm to children in denying their same-sex parents access to the institution of marriage, at page 15:

> *"By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in*

their daily lives." Windsor, supra, at _ (slip op., at 23).Marriage also affords the permanency and stability (which is) important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae 22-27"

Conclusions on the justification analysis.

325. While perhaps only an unintended consequence of its aim of maintaining marriage as the exclusive preserve of the heterosexual, the effect of the 2008 Amendment has been to impose indignity, inequality of treatment and inequality of legal status upon same-sex couples.

326. No justification has been established to sustain this severe form of discrimination.

327. The possible desires of the heterosexual majority to maintain a perceived tradition of marriage of its liking, or to impose dominant religious beliefs on the homosexual minority, cannot, as the extensive survey of the case law has shown, constitute valid justification.

328. All sorts of iniquities have existed in the name of tradition. Tradition alone cannot form a rational basis for a law, nor for the promotion and maintenance of a discriminatory legal system of rights. The "ancient lineage" of a discriminatory classification does not make it rational. Rather, the State must have an objectively rational basis for the "traditional" aim which it seeks to advance, in order to justify discrimination, apart from the tradition itself.

329. And assuming that privileging heterosexual marriage is important for the preservation of stable environments for procreation and child-rearing, the denial of the right to marry to same-sex couples does not logically advance that objective. Indeed, and to the contrary, opening the institution of marriage to them is likely to advance the objective as it is ultimately the encouragement of stable and secure family relationships that is the aim of the policy. The respect of which section 14(1) of the Bill of Rights speaks for the right of

heterosexual couples to marry, is in no sense diminished by allowing same-sex couples to marry. The institution of marriage has been undergoing evolutionary change for over 250 years, ever since the State took control of it. The Respondents must justify the present exclusion of same-sex couples, rather than attempt to fix the institution at a place that accords to their perception of a majoritarian view.

330. In sum, a system that refuses to grant same-sex couples access to marriage will encourage a difference in treatment that is directly based on sexual orientation. It is now well established that discrimination based on sexual orientation is prohibited by Article 14 of the Convention[167], and so, equally prohibited by section 16(3) of the Bill of Rights.

331. The Respondents have not and cannot justify the discrimination. Section 16(3) of the Bill of Rights has been violated.

The section 16(4) disapplication: personal law.

332. As an alternative defence, the Respondents also seek to rely on section 16(4)(c) of the Bill of Rights which for convenience, I set out here again:

> *"(4) Subsection (1) shall not apply to any law so far as that law makes provision –*
>
> ...
>
> (c) *For the application, in the case of persons of any such description of grounds as is mentioned in subsection (2) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description".*

[167] See *Mouta v Portugal* (above)

333. The Respondents, in their written submissions, rely upon section 16(4)(c) for the proposition that it expressly removes from the ambit of the non-discrimination principle, laws governing marriage:

> *"Section 16(4) expressly states that section 16(1) shall not apply to any law that makes provision for the application in the case of persons of any such description of grounds as is mentioned in subsection (2) (or of persons connected with such persons), of the law with respect to (inter alia) marriage, divorce, or other like matters that is the personal law applicable to persons of that description. This expressly disapplies section 16(1) of the BOR in relation to the Marriage Law.*
>
> *For the avoidance of doubt, the question of civil partnerships falls within the "personal law applicable to persons of that description", and section 16(1) of the BOR is not therefore engaged by the non-provision of civil partnerships."*

334. This is a plainly bad argument for a number of reasons.

335. The first is its tautology: the entire reason for this action is the Respondents' claim that the Law does not apply to the Petitioners and it is the Respondents' steadfast position that it shall not apply to them. Yet, here the Respondents implicitly assert that the Law applies to the Petitioners but for the purpose only of disapplying the protections against discrimination, which would otherwise arise as the result of the Petitioners' exclusion from the operation of the Law.

336. The Respondents' proposition is also bad as a matter of construction and legal principle.

337. As the Petitioners submit and I accept, the term "*personal law*" as it appears in section 16(4), is meant to apply only to particular groups of persons within a jurisdiction. It is used in contra-distinction to "*territorial law*" (or the general law) which applies to everyone in the jurisdiction. Personal laws apply only to people with certain specified personal characteristics. In this regard, note that section 16(4)(c) reads: "*..law with respect to*

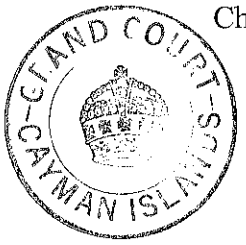
adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description" (emphasis added).

338. On the Respondents' construction, the words in emphasis would be entirely redundant, as all matters related to marriage, divorce, adoption etc, would be already removed from the purview of the Bill of Rights and the jurisdiction of the courts. This would be an extra-ordinary construction because it would allow the State to impose egregious forms of discrimination on the citizenry without constitutional redress, such as, for the sake of argument, banning interracial marriage, not recognizing non-Anglican weddings, or disallowing women from petitioning for divorce.

339. Thus, the section 16(4)(c) exemption is intelligible only if it is understood as excluding from constitutional challenge, laws which the State promulgate for the purpose of being applied and which individuals choose to apply to themselves as "*personal law*", governing their personal status.

340. Moreover, as a matter of construction, the category of laws exempted from the operation of section 16(1) is plainly qualified by the words in emphasis, which must be given meaning distinct from the category. The words in emphasis plainly qualify the category by identifying them as "personal law(s)" and it is to the meaning of that expression that we must look for the proper understanding of the exemption.

341. The practitioner's texts explain the well- established meaning. In *Dicey and Morris,* Chapter 17, which is devoted to "Marriage", the authors explain at Chapter 17-137:



> "***The personal law***. *Many Asian and African countries have a system under which each religious or ethnic community is governed by its own law in matters of personal status. In India, for example, Hindus are governed by Hindu law and Muslims by Islamic law. This means that, for a court in England, the process of ascertaining the personal law of a party to a marriage may involve two steps: first, his domicile must be determined;*

then, if he is domiciled in a country which adopts this system, the court must ascertain to which community he belongs."

Halsbury's Laws of England[168] *defines "**personal law**" as follows:-*

> *"the law governing personal status. This is determined by the law of the domicile. Where this refers the matter of personal status to the religious law of the person concerned, his personal law will depend upon his religion."*

342. Accordingly, the purpose of section 16(4)(c) is to prevent an individual from bringing a discrimination claim based on a characteristic of personal law that he or she has elected to be personally applicable.

343. Often but not always, the characteristic of a personal law is religion. For example, as we have seen, in India, different laws apply to people of different religions in areas such as marriage, adoption, burial and the like. So, if one is a Christian, then one agrees that the laws which govern one's marriage shall be those in the Christian Marriage legislation, and those laws will be different to such laws that apply to Muslims.

344. As noted in "*Slicing the American Pie: Federalism and Personal law*" by Jeffery A Redding at page 957[169]:

> *"For example, the Indian Penal Code applies throughout India to all India's citizens (with the exception of those in the disputed territories of Jammu and Kashmir). On the civil side of things, a great deal of commercial law applies to all Indian citizens' commercial dealings in the same way. However, with respect to a different domain of Indian civil law, family law, the Indian state often administers different family law codes to persons of different religious faiths. Thus, a Muslim woman who wishes to obtain divorce from her Muslim husband will use the provisions of the Dissolution of Muslim Marriages Act, while a Christian woman who wishes to obtain*

[168] Halsbury's Laws of England/conflict of laws (Volume 19 (2011))/5. Family Law/ (1) Marriage and Civil Partnership/(iii) Polygamous Marriages/517. Distinction between monogamous and polygamous marriage, footnote 5.

[169] N.Y.U. Journal of International Law and Politics: nyujilp.org.

divorce from her Christian husband will follow the Indian Divorce Act for Christians." (Emphasis added.)

345. Religious personal laws only impact persons who elect to be bound by them, because they have elected to follow the particular religion. Thus, only people who are Christians are impacted by Christian personal laws. One can of course change one's religion. When that happens, one's personal laws change to those of the new chosen religion (if any).

346. The Privy Council case of *Attorney General of Ceylon v Reid*[170] , which involved the personal law of Ceylon (as it was then known), illustrates the point. A Christian man married a Christian woman under Christian personal law (the Marriage Registration Ordinance of Ceylon). That marriage being Christian, required monogamy. He and his wife later separated but did not divorce. He then became a Muslim and took a second wife under Muslim personal law (the Muslim Marriage and Divorce Act), which permitted polygamy. However, because his first marriage was made under Christian personal law, he was tried and convicted for bigamy. The Privy Council quashed the conviction because:

> "*A Christian monogamous marriage contracted there did not prohibit for all time during the subsistence of that marriage a change of faith and personal law... He had an inherent right to change his religion and personal law and so to contract a valid polygamous marriage.*"

347. The meaning of personal law is that it applies to a person because he has elected to belong to a certain religion. No person who does not so elect, can be impacted by such personal law. Equally important, one can elect out of its application at any time. The key point here is that it is the individual who elects, not the State and certainly not a different religious group. It is a personal choice.

[170] [1965] AC 720.

348. Presumably, say the Petitioners, not even the Respondents would promote the absurdity that the Petitioners can choose their sexual orientation and therefore the ability to opt in and out of the operation of the Marriage Law[171].

349. Closer to home, the operation of personal law can also be seen in certain Jamaican legislation such as the Law relating to Muslim Marriages and their registration (No 53 of 1957) and the Law relating to Hindu Marriages and their registration (No 52 of 1957). And in Bermuda, such as the Bermuda (Muslim Marriage Act) 1984.

350. And so in Bermuda for example, if one elects to be a Muslim then (by virtue of Bermuda's equivalent of section 16(4) of the Constitution) one cannot object to, say, the Christian marriage sections of the Marriage Act 1944 on the basis of discriminatory grounds. In contrast however, Bermuda's Matrimonial Causes Act deals with all divorces since it is part of the general territorial law.

351. In *Ferguson*, at first instance, Kawaley CJ made clear[172] , that "*personal law*" refers to obligations voluntarily assumed as a result of one's personal choice. He then illustrated this by referring to groups who are defined by reference to their particular faith. It is very significant that the Attorney General of Bermuda, having raised it as a defence as have the Respondents here, abandoned reliance in the case on section 12 (4)(c) of Bermuda's Constitution, which is in identical terms to section 16(4)(c) of the Constitution of the Cayman Islands.

[171] Although it is to be noted *en passant*, that the Ministers' Association, in their "amicus brief" suggested that the Petitioners' status is "mutable", suggesting that sexual orientation is merely a matter of life style choice. This was a suggestion from which the Respondents, per Sir Jeffrey Jowell, quite properly said that "we distance ourselves." It was agreed that I could consider this "amicus relief" de *bone esse*, for what it might impart.

[172] Above at [103-105]

352. It should be noted that because religious personal laws vary according to the beliefs of the relevant religion, it is possible for one religion's personal law to be seen as advantageous over another, depending on the social context. See above in *Ceylon v Reid* for example, where a Muslim could have several wives whereas Christians could have only one. These differences in treatment between religions could therefore give rise to claims of religious discrimination. It is for this reason that some Constitutions, including Cayman's in section 16(4), contain carve-out provisions such that personal laws can apply, in the limited specified areas, without being deemed discriminatory. Thus, section 16(4) makes it possible for personal laws to operate in the Cayman Islands without being deemed discriminatory under section 16 (1).

353. To date no personal laws have been passed in the Cayman Islands but the Constitution in its wisdom provides for the eventuality of their introduction.

354. Finally, if the Cayman Islands Marriage Law were intended to be a personal law, I agree with the Petitioners that the impugned section 2 would not say "*marriage*" means "*the union between a man and a woman as husband and wife*". Rather, it would say something like "*Traditional Christian Marriage*" means "*the union between a man and a woman as husband and wife*" and it would bind only those persons who were "*Traditional Christians*" and no one else. The Marriage Law does not say this because it is territorial and it is secular. It applies to everyone regardless of their religious beliefs, including the Petitioners. Yet, it denies them access to marriage. In so doing, it falls to be and has been examined under the purview of section 16 (1) of the Constitution, with the results as discussed above.

Summary of conclusions

- The Petitioners have the rights to private and family life and are entitled to the State's manifestation of its respect for those rights by the provision of a legal institution which protects those rights. Those rights include the right to found a family, which, if not located within section 14(1) of the Bill of Rights as a right disjunctive from the right to marry which is also there enshrined, then in section 9 of the Bill of Rights as an essential aspect of the rights to private and family life.
- The fact that section 14(1) enshrines the right to marry for opposite- sex couples does not mean that the similar right is not to be located for same-sex couples in section 9, where the rights to private and family life are equally enshrined.
- No principle of constitutional construction allows for the preclusive and discriminatory reading of section 14(1) for which the Respondents contend. Rather, the Constitution and the Bill of Rights in particular, must be given a generous and purposive construction *"suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."*[173] The Respondents' contrary contention based on their highly technical construction would, in my view, promote the kind of *"austerity of tabulated legalism"* discountenanced a long time ago by the Privy Council in *Fisher.*[174]
- By its ongoing refusal to recognize and respect these rights of the Petitioners, the State has been and remains in violation of their rights under section 9 of the Bill of Rights.
- The passage of the 2008 Amendment to the Law with the aim of precluding same-sex couples from the institution of marriage and for the purpose of promoting a particular

[173] Per Lord Wilberforce from *Fisher* (above)
[174] Above

religious and "traditional" view of marriage above all others, was impermissible and has since the introduction of the Bill of Rights, placed the Law as an existing law, in violation of the Petitioners' rights (and of all those similarly placed) to freedom of conscience and freedom to manifest their belief in marriage, by being allowed to enter into the institution.

- These violations of the Petitioners' rights are imposed because of their sexual orientation and are therefore unconstitutional for being imposed on a basis prohibited by the Bill of Rights. The Law is therefore in violation of the Petitioners' rights to respect for their human dignity and to freedom from discrimination in the enjoyment of their rights under the Bill of Rights. The effect is felt by the Petitioners in relation to the rights under sections 9 and 10 of the Bill of Rights, as well as in relation to the several other rights which have been identified.
- The Respondents have established no justification for this discriminatory treatment on any basis allowed by section 16 of the Bill of Rights.

The remedies to which the Petitioners are entitled.

355. As already noted at the outset of this judgment, the Respondents accept that the Law as amended in 2008 to introduce the definition of marriage as "*the union between a man and a woman as husband and wife*" is an "*existing law*" for the purposes of section 5 of the Constitutional Order. The Respondents also accept that the application of section 5 (1) of the Constitutional Order is mandatory where there is unconstitutionality.[175]

356. The Respondents nonetheless submitted that, in the event of a finding of contravention of the Bill of Rights, this Court must first consider its obligation under section 25 of the Bill

[175] See Respondents' List of Issues, response to issue 11.

of Rights to read or construe the Law into conformity with the Bill of Rights. Further submissions were made in relation to section 23 of the Bill of Rights which will also be briefly mentioned[176]. Section 25 provides:

> "25. *In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part.*" [Emphasis added]

357. There are however, two obvious obstacles to this suggested approach. The first is constitutional and becomes apparent from section 25 itself. It is that where section 25 speaks of "*primary legislation*", the expression is defined by section 28 of the Bill of Rights as meaning legislation passed by the Legislature created by the 2009 Order itself, not legislation passed by the former Legislature established under the former Constitution. A measure passed by the former Legislature is an "*existing law*", as is the Law in issue here.

358. The second obstacle is that a finding of contravention as found here in relation to the Law, is not a matter of incompatibility merely because the Law is "*unclear or ambiguous*". On the contrary, the contravention of the Bill of Rights arises because of the clear and focused manner in which the discriminatory intent of the Law has been aimed at same-sex couples.

359. As regards a section 23 declaration of incompatibility, it will also be immediately apparent that because such a declaration can be made only in relation to "primary legislation" as

[176] It was also suggested by the Respondents that the Court should in the event of a finding of contravention, make a declaration of incompatibility, thus leaving the matter of remedy to the Legislature, per section 23 of the Bill of Rights:

"23.- (1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording the that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.

(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.

(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."

defined, the Court has no jurisdiction to make such a declaration in respect of the Law which is an "*existing law*" of the former Legislature.

360. This is not to say that the Court could not declare the Law to be incompatible with the Bill of Rights but rather, such a declaration would not be one for the purposes of section 23 which would have meant that any remedy of the incompatibility would have been a matter for the Legislature.

361. The result of the foregoing examination of the section 23 and 25 remedies is that they do not apply in circumstances like the present where an "*existing law*" is found to be in contravention of the Bill of Rights.

362. Accordingly, the matter falls to be dealt with under section 5(1) of the Order.[177] Section 5(1) is clear: existing laws shall be read and construed with such modifications etc., as may be necessary (emphasis added) to bring them into conformity with the Constitution (and to prevent avoidance pursuant to the Colonial Laws Validity Act 1865, due to repugnancy).

363. In urging the Court to exercise this power to modify the Law so as to bring it into conformity with the Bill of Rights, the Petitioners make the following points which are worth noting notwithstanding the mandatory nature of the duty imposed upon the Court.

364. They say that the Legislature could itself have opened marriage to same-sex couples (or passed legislation providing the bare minimum mandated by *Oliari*[178]). The Legislature chose not to do so. Consequent on this failure, it now falls to the judicial arm of government to apply section 5 of the Order to modify existing law. That is the constitutional settlement provided for by the Order. That is the power granted by the United Kingdom Parliament to enforce the Bill of Rights. It is also the power delegated to the Courts of the Overseas

[177] As set out above at [33].
[178] Above.

Territories to ensure that the United Kingdom is not in breach of its international obligations under the Convention (insofar as the Convention is reflected in the Bill of Rights). It is part of the check and balance that addresses past actions or current inactions of the local legislative or executive arms of government.

365. imilar provisions to section 5 of the Order exist in the constitutional arrangements of other British Overseas Territories[179] and former British territories which are now independent nations[180].

366. There is settled case law which confirms that in cases of repugnancy, the courts must apply section 5 to make "*such modifications, adaptations, qualifications and exceptions as may be necessary to bring (the Law) into conformity with the Constitution*".

367. I will mention but some of the leading cases here and note my appreciation for the industry of Counsel for the Petitioners in their fuller treatment of the subject.[181]

368. The existing laws provision similar to section 5, has been used across the Commonwealth of Nations where laws conflict with and are incompatible with the respective constitutions.

369. As the Privy Council observed in *Roodal v The State*[182] on appeal from the Court of Appeal of Trinidad and Tobago: "*Generalizing about the effect of such provisions in different contexts is to be avoided.*" An intense focus on the particular provisions of the Constitution

[179] Such as The Anguilla Constitution Order 1982, section 6; The Bermuda Constitution Order 1968, section 5; The (British) Virgin Islands Constitution Order 2007, section 115, The Montserrat Constitution Order 2010, section 117 and The Turks and Caicos islands Constitution Order 2011, section 5.

[180] Such as The Bahamas Independence Order 1973, section 4; The Constitution of Belize, section 134; The Saint Christopher and Nevis Constitution Order 1983, Schedule 2 section 2; The Saint Lucia Constitution Order 1978 and The Jamaica (Constitution) Order in Council 1962, section 4.

[181] At pp 72-76 (inclusive) of their skeleton arguments, citing *Browne v R* [2000] 1 AC 45 (PC); *DPP of Jamaica v Mollison* [2003] 2 UKPC 6; [2003] 2 AC 411; *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235; *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259; *Fox v R* [2002] UKPC 13; [2002] 2 AC 284; *Orozco v AG of Belize*, Supreme Court Cause 668 of 2010, judgment delivered 10 August 2016.

[182] [2003] UKPC 78

is therefore required but the way in which the existing laws provision has been applied in the past can be instructive.

370. An example is *DPP of Jamaica v Mollison* (above), where Mollison, a juvenile, was convicted of murder and sentenced to be detained at "*the Governor General's pleasure*" as was then permitted by the Juveniles Act 1951. The Court of Appeal declared the sentence to be unconstitutional because it infringed Mollison's fundamental right to a trial (including any sentence) by a fair and impartial court. This standard could not be met by the Governor General as head of the executive and who was therefore not a court. The Court of Appeal then applied section 4(1) of the Constitutional Order in effect to substitute "*court*" for "*Governor General*" and replaced Mollison's sentence with a sentence for life[183].

371. On appeal to the Privy Council, the Court of Appeal's decision to apply section 4(1) in that manner was upheld, for reasons explained per Lord Bingham as confirming the existence of the power, at [15] on page 425C:

> *"... section 4 recognizes that existing laws may be susceptible to constitutional challenge and accordingly confers power on the courts and Governor General (among others) to modify and adapt existing laws so as "to bring them into conformity with the provisions of this Order"*

372. The power to modify has been used in death penalty cases to modify sentences so that a life sentence could be imposed instead of a mandatory death sentence deemed

[183]The *Mollison* case was cited with approval by the Cayman Islands Court of Appeal in *Hydes v R* 2007 CILR 152, in similar circumstances of a challenge to a sentence of a youth offender under the Youth Justice Law to imprisonment "during Her Majesty's pleasure". However, in *Hydes,* there was not yet then the power under the former Constitution similar to section 4 of the Jamaican Constitution Order (or now in section 5(1)) to modify existing law to bring it into conformity nor a Bill of Rights provision which guaranteed the right to trial by a fair and impartial court. The Court nonetheless concluded that the sentence was in breach of the principles of separation of powers which underpin the Constitution and therefore resorted to its inherent jurisdiction to modify the sentence to one to be served "during the Court's pleasure" and so bring it into line with the Constitutional principles. It is plain from the reasoning of the Court that had the section 5(1) power then existed, it would have been applied.

unconstitutional, for being cruel and inhuman punishment. This happened for instance, in a trilogy of Caribbean cases in which the Privy Council handed down judgment on the same day: *Reyes v The Queen, R v Hughes and Fox v R* (all above).

373. The power to modify has been used by the Privy Council in cases other than on the death penalty. In *Kanda v Government of the Federation of Malaya* [1962] AC 322 (PC), it was used to modify existing law concerning who lawfully appoints police officers, from the "*Commissioner of Police*" (as stated in the existing law) to the "*Police Service Commission*" (to bring it into conformity with the Constitution). Lord Denning on behalf of the Privy Council, declared in respect of Malaya's equivalent to section 5 (1) of the Order:

> "*In a conflict of this kind between existing law and the Constitution, the Constitution must prevail*" (at p. 334).

374. In the context of discrimination on the ground of sexual orientation, the Supreme Court of Belize used its equivalent of section 5 of the Constitution Order to decriminalize same-sex sexual intimacy (See *Orozco* above). This was done by the Court reading into section 53 of the Belize Criminal Code the following words: "*This section shall not apply to consensual sexual acts between adults in private*" (at [99]), per Benjamin CJ.

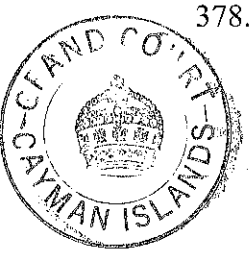
375. And, for the sake of completeness, the case law also explains that the power to modify is extensive and may be applied as required to bring existing law into conformity with the Constitution.

376. In this regard, the Petitioners relied on the following passage from the judgment of the Privy Council in *Mollison* per Lord Bingham (above at p 17), approving of a passage from Michael de la Bastide CJ in his judgment on behalf of the Court of Appeal of Trinidad and

Tobago in *Roodal v The State*[184] dealing with existing laws under the 1976 Constitution Act of that country:

> *"Having made this review of the authorities, we are now in a position to assess the purport and effect of section 5(1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being 'construed', the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by 'construing.' It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law. Mr. Daly's submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn back the clock."*

377. As the passage above from *Mollison* (citing *Roodal v The* State) shows, the power of modification under section 5(1) (as under similar Constitutional Orders throughout the Commonwealth) extends to making "*substantial amendment to laws, either by deleting parts of them or making additions to them to substitute new provisions for old*".



378. These considerable powers of modification are plainly wide enough to enable the amendments to the Law that are put forward as necessary on behalf of the Petitioners to bring the Law into conformity with the Bill of Rights and the Petitioners' rights as determined to be protected by it.

379. The definition of marriage in the Law as being between a man and a woman, while it is in conformity with section 14(1) of the Bill of Rights, is not in conformity with the rights of the Petitioners under section 9 of the Bill of Rights to private and family life and under section 10 to their right to freedom of conscience and freedom of expression of their belief

[184] (Above)

in the institution of marriage, by being allowed to marry. Nor, therefore, is the definition in conformity with the right to freedom from discrimination in the enjoyment of those other rights as mandated by section 16 of the Bill of Rights. The definition of marriage is therefore that provision of "existing law" which must, by the Court, be brought into conformity with those sections of the Bill of Rights.

380. As Lord Bingham declared on behalf of the Privy Council in *Roodal v the State* (above) in modifying the death penalty legislation of Trinidad and Tobago to bring it into conformity with the Constitution:

> "*The Constitution is the Supreme law... The Constitution itself has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament. Loyalty to the democratic legal order of the Constitution required the Privy Council to grapple with the question and to decide it*".

381. This Court is similarly bound not to allow the violation of the Petitioners' rights to continue without redress. The Constitution, in its mandatory requirement that the Law be brought into conformity, must prevail. The Petitioners and their daughter are entitled to the indignities to which they have been subjected being put to an immediate end by the Court.

382. At least three different ways of amending the section 2 definition of marriage have been proposed for bringing the Law into conformity with the Bill of Rights, but that which I think is most suitable, and supported by precedent (see *Godwin v DeRoche* above) and which I now therefore order, is as follows:

> *"marriage" means the union between two people as one another's spouses*".

383. It is declared that the Law is amended accordingly by the substitution of the foregoing for the existing definition of marriage in section 2 of the Law.

384. For the sake of completeness, counsel for the Petitioners also brought my attention to section 27 of the Law which prescribes the marriage declaration: *"... I A.B. do take (or have now taken) thee C.D. to be my lawful wife (or husband)"*

385. In keeping with the modification to section 2, this provision also needs to be modified. It can be appropriately modified (see again *Godwin v DeRoche*, above at [136] as precedent from Bermuda), by substituting for "*wife* (or *husband*)" the word "*spouse*". It is also so ordered and declared.

386. When, consequentially, one now reads the Law as a whole, the institution of marriage itself is maintained, the formalities are maintained, the requirements for consent are maintained, the requirements for objections are maintained and the procedures for solemnization are maintained. So too are the duties of the Registrars and the provisions for enforcing the Law. What has changed, to bring the Law into conformity with the Bill of Rights, is that the more limited definition contained in section 2 of the Law has been changed so as to cover unions between same-sex couples.

387. This process of modification in no way threatens the institution of marriage. Rather, as has been repeatedly emphasized by the courts of the United Kingdom[185], the United States[186], South Africa[187] and other jurisdictions, in fact the institution is strengthened[188].

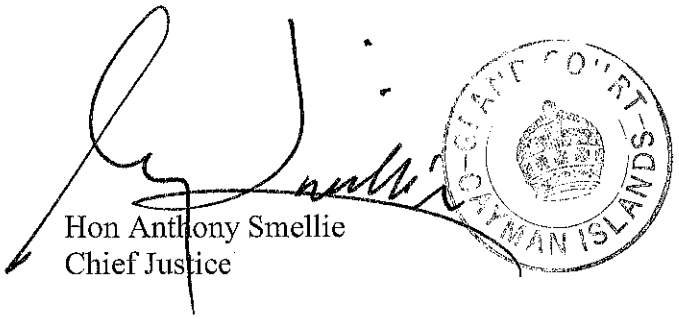
[185] See *Rodriquez* (above)
[186] See *Obergefell* (above)
[187] See *Fourie and Bounthys* (above)
[188] See for instance, *Rodriquez* (above) where Baroness Hale commented on the stabilizing effect of committed, secure same-sex partnership and *Obergefell* (above at p 7) where it was stated that changes to modernize marriage "have strengthened, not weakened, the institution of marriage".

388. And it is to be hoped, perhaps even more fervently, that our constitutional democracy will itself have been strengthened by the affirmation of the State's obligation to respect the fundamental rights and in so doing, to preserve that crucial balance between the different aspirations and ideals which might otherwise be at tension in society.

Costs

389. If the Petitioners seek an order for damages they should apply by way of summons. They are entitled to an order for their costs on the standard basis, to be taxed if not agreed.

390. It is so ordered.



Hon Anthony Smellie
Chief Justice

29 March 2019