ADVANCE SHEET – June 24, 2022

President's Letter

As an antidote to the expected tumult accompanying the Supreme Court's anticipated decisions on abortion, gun control, and aid to religious schools, we offer here an article by the late Professor Wallace Mendelsohn on the approach of Learned Hand, perhaps the greatest of American judges, W. Mendelsohn, Learned Hand: Patient Democrat, 76 Harvard L. Rev. 322. In a judicial career spanning half a century, Hand only twice declared laws to be unconstitutional: a discriminatory New York commercial law in *Baldwin v. Seelig* and the NRA Codes in *Schechter v. United States*, under the constraint of the Supreme Court's earlier Panama Refining decision. It is worth remembering that the anticipated abortion decision does not prohibit abortions but returns their regulation to the state legislatures; that the probable result of the New York gun control case turns less on the Second Amendment than on the unconfined discretion in the statute offending vagueness and nondelegation principles, and that American public school education will remain far more secularized than that in Britain, France and Germany.

In a similar vein, illustrating the more restrained attitude toward social issues of the British judiciary, we tender the recent decision of the Privy Council on a 'gay marriage' case arising in the Cayman Islands. The Privy Council has the same composition as the British Supreme Court, and hears cases from commonwealth countries where the Queen is the Head of State.

George W. Liebmann

Silence Is Golden – But Not Always

My son and his wife are currently on a two week vacation exploring New England. Like his father and Uncle Charles, my son approaches each trip as though he were on the precipice of a great battle where each action and contingency has to be planned for. One of my favorite pictures in our family album was taken on a vacation I took many years ago to Florida with my mother, brother and his wife. We are at Sea World. The picture captures my mother and sister-in-law Linda feeding dolphins while my brother is in the background examining a map of the park, undoubtedly plotting our next strategic move.

One of the places visited by my son was the home and grave of President Calvin Coolidge in Vermont. Coolidge is best known, at least by people who do not know him well, as "Silent Cal." Legend has it that once at a dinner party Coolidge was attending the person sitting next to him stated "I made a bet that I could get you to say three words" to which he responded "you lose."

There are very few silent anybody's today. Everyone has an opinion and the most important thing in the world is making sure each and every person out there knows what it is. Although editorialists and commentators undoubtedly go back as far as the printed word, and most likely even before that (how amazingly opinionated were those folks at Lascaux), for me the current state of affairs can be traced to the 1940's in Kansas City when Mr. Forest Gill came up with something called a "bumper sticker." I will not ask you about your grand-dog nor do I care what your opinion is about the geo-political situation in Freedonia or for that matter its leader Rufus T. Firefly.

The Internet has made things oh so much better. It serves as a means of broadly communicating what can loosely be termed thoughts, but the anonymity that is

frequently afforded enables their expression in the most hateful, racist and extreme manner possible. Yes I do in fact know that I am doing the very thing that I am complaining about: that is, expressing my opinion about everyone incessantly expressing their opinions.

Expressions of opinion at the Library, and through its publications, however, are done in a neutral and even handed manner. In all ways we strive to be Switzerland. I know that sounds of vanilla, of white bread and mayonnaise, but we see our role as not being one of expressing our institutional beliefs, but of providing a place where all feel welcome in spite of whatever box on whatever form they might be checking. The Library, however, does believe that it has through its speaker series, film series and the *Advance Sheet*, something bordering on obligation, to advance thought and collegial discourse on issues, including those of a controversial nature. It has presented speakers and films that run the ideological gamut. We have received complaints about speakers we have hosted and films that we have shown. Although we are an institution that relies on member support, and do not go about seeking to alienate anyone, whenever we receive complaints about a presentation or article, I feel as though we are fulfilling our patriotic duty. It is our "I may not agree with what you say but I will defend to the death your right to say it" moment. (Voltaire who was speaking with regards to Claude Adrien Helvetius)

To argue that an institution or an individual is the worse for examining a complex issue, to hear various sundry opinions on it and then engage in civil discussion, can only result in the diminution and eventual elimination of thought itself. Would it be too controversial to say that the Library is against it?

The Library is in favor of the expression of opinions, as well of course, the acquisition of knowledge: specifically, legal knowledge. Cases, statutes, regulations, treatises, journal and law review articles, recent or quite old, access may be found at the Bar Library. Unless you want to cede an advantage to the learned counsel of the opposition, I would suggest a trip to the Bar Library where you will find information unavailable most other places. There is so much here that I suggest you plan on staying the day. If you do, bring your lunch. We have several refrigerators as well as a microwave and convection oven. There's no place like home, there's no place like the Bar Library. I strongly recommend for the material you will find and the savings you will achieve that you discover/rediscover it.

I look forward to seeing you soon.

Joe Bennett

Harvard Law Review
December, 1962
Wallace Mendelson[a]

LEARNED HAND: PATIENT DEMOCRAT

Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?

–Abraham Lincoln[d1]

One of the most fundamental social interests is that the law shall be uniform and impartial.... Therefore in the main there shall be adherence to precedent.

–Benjamin N. Cardozo[dd1]

THE constitutionally assigned function of the federal courts is to decide "cases" and "controversies"–to settle conflicts between litigants.[1] Only in this context and to this end are they authorized to act at all. The rest is incidental. It goes without saying that a "case" or "controversy" has at least two sides, each of which is entitled to impartial consideration in the light of established rules. When the law plainly upholds one side and no other, litigation, if it arises at all, is not apt to go beyond a trial court. Cases that go further often present a dilemma, both sides of which have considerable, or little, support in law or morals.

One reason for this difficulty is that law is handicapped by the limitations of human foresight. Lawmakers, like the rest of us, cannot anticipate all the combinations and permutations of circumstance. They do well to provide for the obvious and leave some

hints–inevitably vague and subject to differing interpretations–for the disposition of more difficult matters. Take, for example, Learned Hand's illustration–a collision between two motorcars: "There is no way of saying beforehand exactly what each driver should do or should not, until all the circumstances of the particular case are known. The law leaves this open with the vague command to each that he shall be careful. What being careful means, it does not try to say; it leaves that to the judge, who happens in this case to be a jury of twelve persons, untrained in the law."[2]

Holmes explained that "the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we [judges] can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men at random from the street."[3] In short, a jury's verdict "is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc ...."[4]

Like the legal standard of due care in the automobile collision case, such constitutional terms as "freedom of speech" and "due process of law" are not authoritatively explained, or self-explanatory. For Hand, this was not surprising:
[T]hese stately admonitions refuse to subject themselves to analysis. They are the precipitates of "old, unhappy, far-off things, and battles long ago," originally cast as universals to enlarge the scope of victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience.[5]

Just as vagueness in the law of negligence is left for resolution by juries, so in Hand's view, vagueness in the Constitution was to be resolved by legislatures (and/or executives). What Hand said of Holmes in this context is self-revealing: "His decisions are not to be read as indicating his own views on public matters, but they do indicate his settled belief that in such matters the judges cannot safely intervene, that the Constitution did not create a tricameral system, that a law which can get itself enacted is almost sure to have behind it a support which is not wholly unreasonable."[6] And so only the most unusual circumstances could justify judicial veto of a legislative act–or a jury verdict. Hand's standard for intervention was essentially the same in both cases. It came simply to this: if there was room for doubt, legislation–like a verdict–must stand, however mistaken it might seem to judges. Ambivalence in the law was the province of jury and legislature–the two authentic voices of the people. Judicial intervention was permissible only when a court was prepared to hold that *no* reasonable mind could have found as the legislature or jury did find.[7] In this (the orthodox) view, statute and verdict enjoy the same basic immunity from judicial interference, yet in extreme cases both are subject to a judicial check. As Hand put it with respect to constitutional issues:

If a court be really candid, it can only say: "We find that this measure will have this result; it will injure this group in such and such ways, and benefit that group in these other ways. We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses."[8]

In a democracy legislation is largely a matter of give-and-take–of striking a workable balance between conflicting social interests. Its essence is compromise–which is apt to find expression in terms that are more suggestive than exact, more calculated to avoid precise commitments than to embrace them. This, along with the imprecision of

language and the limitations of human foresight, is the judge's burden. But far more is involved than a matter of legal technique. The legislative way of life is a major ingredient of freedom under government.

Legislation is a process slow and cumbersome. It turns out a product–laws–that rarely are liked by everybody, and frequently little liked by anybody.... [W]hen seen from the shining cliffs of perfection the legislative process of compromise appears shoddy indeed. But when seen from some concentration camp of the only alternative way of life, the compromises of legislation appear but another name for what we call civilization and even revere as Christian forbearance.[9]

Let philosophy fret about ideal Justice. Politics is our substitute for civil war in a continuous struggle between different conceptions of right and wrong. It is far too wise to gamble for Utopia or nothing–to be fooled by its own romantic verbiage. Above all, it knows that among the myriad clashing social forces none is apt to be completely without vice or virtue. And so by give-and-take it seeks not final truth, but an acceptable balance of community interests. In this view the harmonizing and educational function of the process itself counts for more than any of its immediate legislative products. To override its pragmatic adjustments by moralistic fiats from the bench is to frustrate our chief instrument of social peace and political stability.

Given then the nature of compromise, the secrecy of the future, and the clogs upon communication, the burden of judging is to decide "cases" and "controversies" as to which the meaning of the law is often less than obvious. Nor is there an objective, extralegal scale to weigh the conflicting interests that demand evaluation. In this impasse judgment entails discretion–or more crudely, lawmaking. But how can this be reconciled with the basic judicial function of settling disputes, as we insist, in accordance with a priori rules? Plainly both sides of this dilemma cannot be fully satisfied. Men must know what the law requires of them before they act, but society cannot risk stagnation in its judicial system. With respect to constitutional issues, as we have seen, Hand would leave the "interpretation" of the law largely to the politically responsible branches of government. But judicial review is only one means of judicial legislation. Statutory construction may be at least equally effective. Hand's solution is briefly put:

[P]rovided that the opportunity always exists to supplant [laws] ... when there is a new shift in political power, it is of critical consequence that they should be loyally enforced [by judges] until they are amended by the same process which made them. That is the presupposition on which the compromises were originally accepted; to disturb them by surreptitious, irresponsible [judicial] ... intervention imperils the possibility of any future settlements and pro tanto upsets the whole system. *Such laws need but one canon of interpretation, to understand what the real accord was*. The duty of ascertaining its meaning is difficult enough at best, and one certain way of missing it is by reading it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face. Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.[10]

This view–like the reasonable-basis test–reflects the wisdom of the ages.[11] Recognizing the need for judicial discretion, it confines the area of choice by an ancient and tested common law technique.[12] It treats the individual case as a minute continuation of the broad conflict that resulted in a legislative compromise. Accordingly it seeks decision not in the light of JUSTICE, but in the spirit of the legislative settlement–however slovenly and earthbound. In Hand's words, "If the judge ... is in doubt, he must stop, for he cannot tell that the conflicting interests in the

society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for that of the lawmaking assembly ... otherwise it would not be the common will which prevails, and to that extent the people would not govern."[13]

Some modern "realists" (particularly those not trained in the law) reject the old approach–discretion confined by a technique–as a delusion, if not outright fraud. They insist that "political choice is inevitable and inherent in judging, and that judges should make no false pretense of objectivity. Rather ... they should recognize that they are making policy, and ... should consciously exercise their judicial power to achieve social justice"[14]–as *they* see it. In this view, apparently, the constitutional function of settling disputes impartially is incidental, or subordinate, to a court's discretionary "lawmaking" role. Judicial detachment is a false ideal. The great judge is an "activist," a legislator who uses the law's inevitable ambiguities to promote justice.

Surely this view reflects an unavowed, perhaps unconscious, disenchantment with the democratic process. At least that is what we said not so long ago of the "rugged individualists" who went to court to get the whole loaf when they could get only half via the democratic give-and-take of legislative bargaining. Modern libertarians insist that they have a better case because their values are "fundamental." But that was precisely the argument of their property-minded, activist predecessors.[15] Indeed, even Mr. Justice Douglas recognizes that "security of property .... is one of the preferred rights ...."[16] No doubt as abstract propositions both views are sound: free expression and private property *are* basic, indispensable elements of American culture. The difficulty is not the validity of either concept, but its application in a concrete case. Most of the evil of the world, after all, is committed in the name of some glowing abstraction, some eternal–and blinding–verity. In some contexts private property is a mask for exploitation, an instrument of legalized robbery. Sometimes speech is the equivalent of force, as Holmes suggested in the famous theater metaphor. Sometimes it is simply out of place, as, for example, the political harangue that disturbs the quiet of a hospital. Few would insist that the evils of obscenity, slander, incitement, or mere verbal noise could never be great enough to outweigh the social benefits of unfettered speech. The trouble in cases involving "limitations" on such fundamentals as property and utterance is that they require "the appraisal and balancing of human values which there are no scales to weigh.... The difficulty here does not come from ignorance, but from absence of any standard, for values are incommensurable."[17] Despite some glowing constitutional language, no past or present member of the Supreme Court, and no responsible commentator, has ever suggested that any of the great constitutional "rights" or "freedoms" are unlimited.[18] It is not merely that conservatives differ with liberals as to where the limits lie. Even such staunch libertarians as Justices Black and Douglas are far from agreement on the scope of "personal freedom"[19]–just as such thorough conservatives as Justices Sutherland and McReynolds could disagree on the bounds of "private property" and "rugged individualism."[20] Indeed, even Mr. Justice Black has found the Bill of Rights so lacking in clarity that he has shifted his position on some of its most basic provisions.[21]

Nor is the difficulty of "interpretation" confined to those who carry the merciless burden of adjudication. Professors Chafee and Meiklejohn, the two great modern academic libertarians, are deeply divided on the meaning of free speech–though both agree that it is basic.[22] As John Marshall said long ago, our Constitution is "one of enumeration, and not of definition."[23] On most crucial issues it leaves room for doubt and disagreement among fairminded men.

What then is the Rule of Law, particularly in constitutional litigation? For Hand it entailed avoidance of pretense that the Constitution lays down unmistakable rules of decision for difficult cases. It meant that in the adaptive process which permits the old document to survive in a changing world, courts must play a secondary role lest society be confined by the limited outlook, the "can't helps,"[24] of a few "independent" judges. It meant that, when judicial intervention was unavoidable, decision should turn on fully disclosed, rational grounds within the accepted legal tradition–not on an emotional commitment to a "preferred" class of proprietarian, or libertarian, interests. It meant that successive decisions should be rationally coherent, that judges should respect their own precedents.[25] But coherence and respect did not require blindness to changing social needs:

A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time–at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery.[26]

To reconcile old values and new needs Hand–like all great judges–made changes in the law, but only within accepted presuppositions, only to vitalize existing rules. He did not invoke new major premises. Rather he built inductively with existing materials to provide continuity without rigidity, to preserve for the people alone power to make major shifts in social policy. He did not worship the past, but he knew that without respect for past commitments judicial law is lawless, *i.e., ad hoc* and retroactive, providing no standard by which men can order their affairs. After all, continuity is to judicial law what prospectivity is to legislation: the means by which men know their legal obligations before they act. For a healthy society, both stability and change are indispensable. Our separation of powers imposes major responsibility for the one upon courts; for the other upon legislatures. This was Hand's teaching. Plainly his is not the activists' understanding of the Rule of Law and the role of courts in American government. How differently some other judges see their function is suggested in Mr. Justice Douglas' comment on a recent book: "It makes a mockery of judges who insist that if they were not imprisoned by the law they could do justice."[27] This was precisely the context of Holmes' shocker, "I hate justice."[28] Or, as Holmes put it more moderately when the young Hand teasingly bade him to "do justice," "That is not my job. My job is to play the game according to the rules."[29]

Speaking of the great dissenters among the "nine old men," Hand observed:

[They] believed that democracy was a political contrivance by which the group conflicts inevitable in all society should find a relatively harmless outlet in the give and take of legislative compromise after the contending groups had had a chance to measure their relative strength; and through which the bitterest animosities might at least be assuaged .... They had no illusion that the outcome would necessarily be the best obtainable ... but the political stability of such a system, and the possible enlightenment which the battle itself might bring, were worth the price.[30]

Obviously Hand shared this view. He was as unpersuaded by the conservative activism of Justices Sutherland and McReynolds, as by the libertarian activism of Justices Black and Douglas. He could not "help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth [and fourteenth amendments] to learn that they constituted severer restrictions as to Liberty than Property .... [Hand could] see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong

protests, to [him] ... unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second."[31]

With the dominance of [the Holmes-Brandeis view as to "property rights" under the fourteenth amendment] ... it might seem that the conflict was over. But the end was not yet; for, the latent equivocation involved reappeared as the field of combat changed. ... [I]t began to seem as though, when "personal rights" were in issue, something akin to the discredited attitude ... of the old apostles of ... property, was regaining recognition. Just why property itself was not a "personal right" nobody took the time to explain ... but the fact remained that in the name of the Bill of Rights [including the Civil War amendments] the courts were upsetting statutes which were plainly compromises between conflicting interests, each of which had more than a merely plausible support in reason.[32]

Should judges exercise the "sovereign prerogative of choice" that this entails? (In Hand's view, as we have seen, the majestic vagueness of the Constitution leaves room for doubt and disagreement.) To what extent should the nonaccountable branch supervise, or second-guess, the accountable branches–and in doing so disturb the complex equations of a legislative settlement? Though he had less than bounding optimism with respect to popular assemblies, Hand's answer was clear: "[I]t certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve."[33] Freedom, after all, includes the freedom to make mistakes–to learn by the process of trial and error.

When Hand had been on the bench for almost half a century, a colleague wrote of him that he "has, I think, never except once[34 –and then only because he felt bound by Supreme Court decisions–held unconstitutional any federal statute not dealing with procedure."[35] His statutory constructions tell the same story–"he did not use himself as a measure of value."[36] How tightly he kept his personal preferences in check when performing his judicial duties is seen again and again, but nowhere more vividly than in the contrast between his *Dennis* opinion[37] and this contemporaneous personal view:
Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where nonconformity ... is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose.... The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion.[38]

This private sentiment could easily have been made the nub of a decision in the *Dennis* case–but by what authority? Certainly not the historic purpose of the first amendment.[39] Certainly not judicial precedent.[40] Surely not on the ground that all reasonable men would necessarily reject the legislation in question. And so, as Mr. Justice Frankfurter said on review, Hand's opinion "fastidiously confined ... the rhetoric of precedents ... to the exact scope of what was decided by them."[41] In short, Hand obeyed the law–distinguishing between it and his own personal preferences. Plainly he was not what Professor Paul Freund calls a judicial opportunist using public office to promote his private libertarian bias.

Surely it is implicit in Hand's position that judges do not "legitimatize" a challenged measure by failing to find it unconstitutional; they merely find it not so clearly invalid as to justify judicial intervention. Thus *Dennis* does not absolve the people of their responsibility for the Smith Act. And more immediately important, it left a crucial problem of cold-war policy with the elected branches of government where, presumably, it belongs in a democratic system (absent a constitutional mandate that leaves no room for doubt).[42]

In such matters [of major policy] the odium of disappointing large numbers of persons must rest somewhere, and perhaps the most important question involved is at whose doors that odium shall lie. Shall the courts bear it, and can they while they keep an official irresponsibility to public opinion?[43]

Hand's answer was clear. Among other things it recognized that misplaced odium diverts criticism from the real culprits, dilutes responsibility, and thereby dulls the edge of the political process. Surely democracy were better served if the energy spent in criticizing the courts for not vetoing the Smith Act had been directed against Congress for enacting it–if the vituperation against the federal bench because of the right-to-counsel decisions[44] had been channelled more constructively against the "erring" states. (It is painful to speculate on how many college–and even law school–students are trained, however unwittingly, to think that in these and related cases the courts are the offenders; that the Constitution outlaws all that is unwise or unjust.)

To those who argue that courts can "light the way to a saner world,"[45] Hand's answer was short:

I should indeed be glad to believe it, and it may be that my failure hitherto to observe it is owing to some personal defect of vision; but at any rate judges have large areas left unoccupied by legislation within which to exercise this benign function. Besides, for a judge to serve as communal mentor appears to me a very dubious addition to his duties and one apt to interfere with their proper discharge.[46]

For Hand it was not merely that courts should not intrude upon the national political processes; he questioned whether in the long run they could do so successfully:

[Few] would deny that government must be the compromise of conflicting interests, as Hamilton supposed.... For any times that can count in human endeavor, we must be content with compromises in which the more powerful combination will prevail. The most we can hope is that if the maladjustment becomes too obvious, or the means too offensive to our conventions, the balance can be re-established without dissolution, a cost greater than almost any interests can justify. The method of Hamilton has had its way; so far as we can see must always have its way; in government, as in marriage ... the more insistent will prevails.

Liberty is so much latitude as the powerful choose to accord to the weak. So much perhaps must be admitted for abstract statement; anything short of it appears to lead to inconsistencies. At least no other formula has been devised which will answer. If a community decides that some conduct is prejudicial to itself, and so decides by numbers sufficient to impose its will upon dissenters, I know of no principle which can stay its hand. Perhaps indeed it is no more than a truism to say so ....[47]

The "nine old men" could attest to the truth of that observation (to say nothing of the *Dred Scott* fiasco and several other judicially self-inflicted wounds).

Of course, Hand recognized that in the short run courts can frustrate the political processes, but not without damage to the moral sanction on which their authority

ultimately rests:
The degree to which [a judge] ... will secure compliance with his commands depends in large measure upon how far the community believes him to be the mouthpiece of a public will, conceived as the resultant of many conflicting strains that have come, at least provisionally, to a consensus. This sanction disappears in so far as it is supposed permissible for him covertly to smuggle into his decisions his personal notions of what is desirable, however disinterested personally those may be. Compliance will then much more depend upon a resort to force, not a desirable expedient when it can be avoided.[48]

When liberals replaced conservatives on the bench after 1936, many (including some academicians) changed their minds about the function of courts. Not a few who had been dedicated supporters of the judiciary became its enemies; while old enemies became its friends. This suggests, of course, that something other than "neutral principles"[49] were decisive. (Surely it is pertinent to wonder how long today's academic activists would find judicial review a fitting handmaiden to democracy, if the bench were again ***335** to be dominated by Sanfords and Sutherlands.) Hand's view of the relative roles of statutes and decisions remained constant; he strove for detachment whatever the relative liberalism of courts and legislatures–whatever the nature of the interests at issue. Some insist that such efforts are futile–that no one can escape his own sense of justice. Yet, if neutrality is an illusion, if objectivity belongs only to the gods,
[W]e know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny–and, if we are competent observers, we will deny–that no one can be aware of the danger [of his bias] and in large measure provide against it.[50]

Hand's career on the bench, like Cardozo's and Holmes', is a monument to the truth of this insight.

Plainly, Learned Hand had absorbed what Morris Cohen called the great lesson of life: humility. His job, as he understood it, was to decide "cases" and "controversies," not to create a brave new world–the legislative function having been given to others. He could neither pretend nor convince himself–like a Field or a Murphy–that the Constitution was written in his image. He recognized that in virtually all crucial cases it leaves room for choice, and that in a democracy choice is the province of the political branches–*i.e.*, of the people striving "however blindly and inarticulately, toward their [own] conception of the Good Life."[51] Unlike the ardent activists, he found the main significance of the democratic process not in its immediate legislative product, but in the tension-relieving and educational role of the process itself. His hopeful skepticism was neither intolerant nor impatient with the groping efforts of the democratic way of life. Indeed, unlike some true believers, he was prepared to trust it even with fundamentals–whether proprietarian or libertarian.

Footnotes

a1 Professor of Government, University of Texas. A.B., University of Wisconsin, 1933; LL.B., Harvard, 1936; Ph.D., University of Wisconsin, 1940.
d1 First Inaugural Address, in 2 COMPLETE WORKS 7 (Nicolay & Hay eds. 1920).
dd1 THE NATURE OF THE JUDICIAL PROCESS 112 (1921).
1 U.S. CONST. art. III, § 2.
2 HAND, THE SPIRIT OF LIBERTY 105-06 (3d ed. Dilliard 1960).

3 HOLMES, Law in Science and Science in Law, in COLLECTED LEGAL PAPERS 210, 234 (1920).
4 United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).
5 HAND, op. cit. supra note 2, at 155, 163.
6 Id. at 28.
7 This, the orthodox approach, has been questioned on the bench only with respect to the so-called "preferred-place" freedoms.
8 HAND, op. cit. supra note 2, at 162.
9 T. SMITH, THE LEGISLATIVE WAY OF LIFE 91-92 (1940).
10 HAND, op. cit. supra note 2, at 156-57. (Emphasis added.)
11 See Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Exch. 1584).
12 As the great Mansfield put it in Rex v. Wilkes, 4 Burr. 2527, 2539, 98 Eng. Rep. 327, 334 (K.B. 1770): "[D]iscretion, when applied to a Court of Justice, means sound discretion .... governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular." (Emphasis added.)
13 HAND, op. cit. supra note 2, at 109.
14 BURNS & PELTASON, GOVERNMENT BY THE PEOPLE 541 (1957). The activist view is simply described, and not necessarily endorsed by the authors of this book.
15 See, e.g., the comment by Judge Orsdels in Children's Hosp. v. Adkins, 284 Fed. 613, 622 (D.C. Cir. 1922), aff'd, 261 U.S. 525 (1923): "[O]f the three fundamental principles which underlie government and for which government exists, the protection of life, liberty, and property, the chief of these is property ...." This, of course, reflects an old American tradition. See FREUND, ON UNDERSTANDING THE SUPREME COURT 14-22 (1949).
16 DOUGLAS, WE THE JUDGES 288-89 (1956).
17 HAND, op. cit. supra note 2, at 161.
18 Mr. Justice Black has insisted, though not from the bench, that within its "area" freedom of speech is absolute–but he recognizes that the "scope" of the "area" is not clear. Black, The Bill of Rights, 35 N.Y.U.L. REV. 865, 875 (1960). See Cohen, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U.L. REV. 549, 557-58 (1962).
19 See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (first amendment issue); McGowan v. Maryland, 366 U.S. 420 (1961); Reina v. United States, 364 U.S. 507 (1960); Barr v. Matteo, 360 U.S. 564 (1959); Zorach v. Clauson, 343 U.S. 306 (1952); Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Williams, 341 U.S. 70 (1951); Wolf v. Colorado, 338 U.S. 25 (1949); Frazier v. United States, 335 U.S. 497 (1948); Goesaert v. Cleary, 335 U.S. 464 (1948); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). In the Communist Party case, supra at 164, Mr. Justice Black rejects the "balancing" approach, but he joined in the Court's opinion in McGowan, supra, which Mr. Justice Douglas in dissent, 366 U.S. at 575, criticized because it used that approach.
20 See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Buck v. Kuykendall, 267 U.S. 307 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
21 See, e.g., West Virginia Board of Education v. Barnette, 319 U.S. 624, 643 (1943) (concurring opinion); Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (concurring opinion). See also Palko v. Connecticut, 302 U.S. 319 (1937). But cf. Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cohen, supra note 18, at 557. See also FREUND, ON UNDERSTANDING THE SUPREME COURT 29-35 (1949). As to the "balancing" approach, see note 19 supra.
22 Chafee, Book Review, 62 HARV. L. REV. 891 (1949). Even the two fountainheads of Anglo-American freedom–Milton's Areopagitica and Mill's essay On Liberty–are hopelessly at odds on the philosophic foundation (and hence the limits) of free speech.

23 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).
24 Holmes' term for things so familiar to a man that he can't help accepting them as true.
25 In a eulogy to his colleague Judge Swan, Hand observed: “He will not overrule a precedent, unless he can be satisfied beyond peradventure that it was untenable when made; and not even then, if it has gathered around it the support of a substantial body of decisions based upon it.” HAND, op. cit. supra note 2, at 212.
26 Id. at 130.
27 N.Y. Times, Feb. 19, 1961, § 7 (Book Review), p. 3, col. 5.
28 Quoted in HAND, op. cit. supra note 2, at 306.
29 Id. at 307.
30 Id. at 204.
31 HAND, THE BILL OF RIGHTS 50-51 (1958).
32 HAND, op. cit. supra note 2, at 205-06.
33 HAND, THE BILL OF RIGHTS 73 (1958).
34 United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617, 624 (2d Cir.) (concurring opinion), rev'd in part, 295 U.S. 495 (1935).
35 Frank, Some Reflections on Judge Learned Hand, 24 U. CHI. L. REV. 666, 690 (1957). As to the distinction between substance and procedure in this context, see Brandeis' comment:
“One can never be sure of ends–political, social, economic. There must always be doubt and difference of opinion; one can be 51 per cent sure.” There is not the same margin of doubt as to means. Here “fundamentals do not change; centuries of thought have established standards....”
MASON, BRANDEIS: A FREE MAN'S LIFE 569 (Anniversary ed. 1956).
36 HAND, op. cit. supra note 2, at 132.
37 United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
38 HAND, op. cit. supra note 2, at 284.
39 See generally LEVY, LEGACY OF SUPPRESSION (1960). This book, I think, does not fully exploit the available evidence in support of the following thesis: the first amendment was not intended to abolish the Blackstonian precept that freedom of expression meant freedom from prior restraint, not from subsequent punishment. For example, see Cooley's statement that Blackstone's position “has been followed by American commentators of standard authority as embodying correctly the idea incorporated in the constitutional law of the country by the provisions in the American Bills of Rights.” CONSTITUTIONAL LIMITATIONS 602 (7th ed. 1903). In support of this proposition Cooley justifiably cites Kent, Story, and Rawle. Though Dean Levy does not think so, I believe Cooley himself endorsed the proposition in question. Compare LEVY, op. cit. supra at 2 & n.6 with COOLEY, op. cit. supra at 602-15. Later treatises acknowledging the restricted purpose of the first amendment include 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1186-1202 (1929), and Corwin, The Constitution of the United States, S. DOC. NO. 170, 82d Cong., 2d Sess. 769 (1953).
Chafee, Freedom of Speech in Wartime, 32 HARV. L. REV. 932 (1919) seems to be a main foundation for a broader view of the historic purpose of the first amendment. But cf. Chafee's later observations:
Especially significant is the contemporaneous evidence that the phrase “freedom of the press” was viewed against a background of familiar legal limitations which men of 1791 did not regard as objectionable, such as damage suits for libel ... [as well as] punishments for criminal libel and for contempt of court .... The truth is, I think, that the framers had no very clear idea as to what they meant by “the freedom of speech or of the press,” but we can say ... with reasonable assurance... [that] in thinking about it, they took for granted limitations which had been customarily applied in the day-to-day work of colonial courts. Book Review, 62 HARV. L. REV. 891, 897 (1949).

40 Despite many challenges no act of Congress has been held invalid on first amendment grounds.
41 Dennis v. United States, 341 U.S. 494, 527 (1951) (concurring opinion).
42 See Mendelson, Clandestine Speech and the First Amendment, 51 MICH. L. REV. 553 (1953).
43 HAND, op. cit. supra note 2, at 28.
44 Betts v. Brady, 316 U.S. 455 (1942), and its progeny.
45 HAND, THE BILL OF RIGHTS 70 (1958).
46 Id. at 70-71.
47 HAND, op. cit. supra note 2, at 71-72.
48 HAND, THE BILL OF RIGHTS 71-72 (1958).
49 See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
50 HAND, op. cit. supra note 2, at 218.
51 Ibid.

Hilary Term
[2022] UKPC 6
Privy Council Appeal No 0033 of 2020

JUDGMENT

Chantelle Day and another (Appellants) *v* The Governor of the Cayman Islands and another (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lady Arden
Lord Sales
Dame Victoria Sharp

JUDGMENT GIVEN ON
14 March 2022

Heard on 23 and 24 February 2021

Appellants
Edward Fitzgerald QC
Ben Tonner QC
Peter Laverack
(Instructed by Simons Muirhead & Burton LLP)

Respondents
Sir Jeffrey Jowell QC
Dinah Rose QC

Timothy Parker
Reshma Sharma
Celia Middleton
(Instructed by Attorney General's Chambers (Cayman Islands))

LORD SALES:

1. The appellants, Ms Chantelle Day and Ms Vickie Bodden Bush, are in a committed relationship and wish to enter into a same-sex marriage recognised in law in the Cayman Islands. When they applied for the appropriate licence at the Cayman Islands General Registry in April 2018 the Deputy Registrar refused to grant a licence on the grounds that section 2 of the Marriage Law (2010 Revision) ("the Marriage Law") defines marriage as "the union between a man and a woman as husband and wife". Ms Day and Ms Bush claim that the Bill of Rights, Freedoms and Responsibilities ("the Bill of Rights"), which forms Part 1 of the Cayman Islands Constitution ("the Constitution") set out in the **Cayman Islands Constitution Order 2009** ("the 2009 Order"), confers on them a constitutional right to legal recognition of such a marriage and that the Marriage Law should be read in such a way as to reflect that right. Their claim was successful in the Grand Court (Chief Justice Smellie), but an appeal by the Government of the Cayman Islands was allowed by the Court of Appeal (Sir John Goldring P, Field and Morrison JJA). The Court of Appeal held that, on its proper interpretation, the Bill of Rights does not confer a right on same-sex couples to marry and have their marriage recognised in law. Ms Day and Ms Bush now appeal to the Board.

2. It was common ground in the Court of Appeal and is common ground before the Board that under section 9(1) of the Bill of Rights (right to respect for family and private life) the Legislative Assembly of the Cayman Islands was required to provide the appellants with a legal status functionally equivalent to marriage, such as civil partnership. The Government and Legislative Assembly were in breach of this obligation, so the Court of Appeal made a declaration to that effect. The Government does not appeal against that declaration. This obligation has now been complied with, by the promulgation of the Civil Partnership Law 2020.

The introduction of the Constitution in 2009

3. The United Kingdom is responsible for the international relations of the Cayman Islands. Pursuant to article 56 of the European Convention on Human Rights ("the ECHR") the United Kingdom has declared that the ECHR shall apply in relation to the Cayman Islands. Accordingly, the United Kingdom is concerned to ensure that local law in the Cayman Islands should be compatible with the obligations of the United Kingdom under the ECHR in respect of the Cayman Islands. The Foreign and Commonwealth Office proposed the introduction of a new constitution for the Cayman Islands which would reflect the provisions of the ECHR and scheduled formal negotiations on that constitution with local representatives to commence on 29 September 2008.

4. Shortly before the negotiations began, a proposal to change the law in relation to marriage to make it clear that it did not apply in relation to same-sex relationships was before the Legislative Assembly, on 5 September 2008. The Marriage (Amendment) Law 2008 was passed, to come into effect on 27 October 2008. The introduction to that Law stated that it was promulgated "to expressly provide that a marriage is a union between a man and a woman". It amended the Marriage Law (2007 Revision) by inserting into the definition section, section 2, the statement that "'marriage' means the union between a man and a woman as husband and wife". That definition has been

retained in the 2010 Revision of the Marriage Law.

5. The negotiations on the constitution between the United Kingdom Government and local representatives were chaired by Mr Ian Hendry of the Foreign and Commonwealth Office. The Cayman Islands delegation comprised the Governor, the Attorney General, five representatives of the elected government, four backbenchers of the governing party, five representatives of the official opposition, two church representatives, three members of the Chamber of Commerce and two members of the Cayman Islands Human Rights Committee. The ambit of the right to marry to be included in the Bill of Rights was the subject of debate in the negotiations. Various representatives of the Cayman Islands wished to have it made clear that the proposed right to marry should apply only to marriage between a man and a woman. The provision which became section 14 of the Bill of Rights was drafted to meet this concern. In the third and final round of negotiations, on 3 February 2009, Mr Hendry stated that the boundaries of the provision had been made clear in that "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". The transcript of the negotiations, from which this statement is taken, was not published. The draft constitution was approved to be put to a referendum.

6. On 20 May 2009 there was a referendum in the Cayman Islands in which 62% of those who voted approved the draft constitution. On 10 June 2009 the 2009 Order adopting the Constitution was promulgated by the Queen in Council. On 6 November 2009 it came into force, except for the Bill of Rights. That came into force later, on 6 November 2012.

The Constitution and the Bill of Rights

7. The Constitution is set out in Schedule 2 to the 2009 Order, entitled "The Constitution of the Cayman Islands". It includes a preamble which states, in material part:

"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 …

A country in which religion finds its expression in moral living and social justice.

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 ...

A community protective of traditional Caymanian heritage and the family unit ..."

8. Section 5 of the 2009 Order has the heading, "Existing laws". It provides:

"(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 the 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.

...

(3)In this section 'existing laws' means laws and instruments ... having effect as part of the law of the Cayman Islands immediately before the appointed day [6 November 2009]."

9. The Bill of Rights is headed "Guarantee of Rights, Freedoms and Responsibilities" and has a preamble as follows:

"Whereas all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law."

10. Section 1 of the Bill of Rights states:

"(1)This Bill of Rights ... is a cornerstone of democracy in the Cayman Islands.

(2)This part of the Constitution -

(a)recognises the distinct history, culture [and] Christian values ... of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;

(b)confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and

(c)does not affect ... rights against anyone other than the government ...

(3)In this Part 'government' shall include public officials (as defined in section 28) and the Legislature, but shall not include the courts (…)."

11. The Bill of Rights is based on the ECHR. The form and content of the rights contained in the Bill of Rights substantially follow the Convention rights. The appellants seek to rely on sections 9, 10, 14 and 16 of the Bill of Rights. Section 9 of the Bill of Rights ("Private and family life") corresponds with article 8 of the ECHR (right to respect for private and family life); section 10 ("Conscience and religion") corresponds with article 9 (freedom of thought, conscience and religion); section 14 ("Marriage") corresponds with article 12 (right to marry); and section 16 ("Non-discrimination") corresponds with article 14 (prohibition of discrimination).

12. Section 14 of the Bill of Rights, headed "Marriage", is the only provision in the Bill of Rights which refers specifically to marriage. This is the provision which is of most significance in the appeal. So far as relevant it states:

"(1)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.

(2)No person shall be compelled to marry without his or her free and full consent.

(3)Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law makes provision that is reasonably justifiable in a democratic society - (a) in the interests of public order, public morality or public

health; (b) for regulating, in the public interest, the procedures and modalities of marriage; or (c) for protecting the rights and freedoms of others.

..."

13. Although section 14 occupies the same position in the scheme of the Bill of Rights as article 12 in the scheme of the ECHR, the drafting of section 14 is more specific than article 12, which provides:

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

14. Section 9 of the Bill of Rights provides in relevant part as follows:

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

…

(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 [for various defined purposes]."

15. Article 8 of the ECHR provides:

"(1)Everyone has the right to respect for his private and family life, his home and his correspondence.

(2)There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. Section 10 of the Bill of Rights provides in relevant part as follows:

"(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 in private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship …

(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 [for various defined purposes]

…"

17. Article 9 of the ECHR provides:

"(1)Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in

worship, teaching, practice and observance.

(2)Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

18. Section 16 of the Bill of Rights provides in relevant part as follows:

"(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.

…

(7)Subsection (1) is without prejudice to any restriction on the rights and freedoms guaranteed by section 9, 10, 11, 12, 13 or 14 if that restriction would, in accordance with that section, be a restriction authorised for the purposes of that section on the ground that - (a) the provision by or under which it is imposed is reasonably required in the interests of a matter, or for the purpose, specified in that section; and (b) the provision and the restriction imposed under it are reasonably justifiable in a democratic society."

19. Article 14 of the ECHR provides:

"The enjoyment of the rights and freedoms set forth in this 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."

Factual background and the decisions of the Grand Court and Court of Appeal

20. Ms Day is a Caymanian, born and brought up in the Cayman Islands. Ms Bush is a dual citizen of the United Kingdom and Honduras, whose family has deep roots in the Cayman Islands. She has lived and worked in the Cayman Islands for long periods.

21. In 2013 the appellants formed a relationship and began living together as a couple in the Cayman Islands. Due to the absence of legal recognition available there for same-sex couples and the precarious nature of Ms Bush's immigration status, between September 2014 and August 2018 they moved away and lived together in Ireland and then the United Kingdom.

22. In 2016 the appellants began acting as de facto guardians for a young girl, A, by agreement with her mother. In June 2018 their application to adopt A was granted by a court in England. In September 2017 the appellants became engaged to be married. In 2018 they returned to the Cayman Islands with a view to residing there to raise A within their community of family and friends.

23. On 12 April 2018 the appellants applied at the General Registry for a special licence to marry as required under section 22 of the Marriage Law (2010 Revision). On 13 April 2018 the Deputy Registrar, who is the first respondent to this appeal, refused to grant the licence, on the grounds that the definition of marriage in the Marriage Law did not allow for same-sex marriage. At this time, Caymanian law did not include provision for civil partnerships.

24. On 19 June 2018 the appellants commenced judicial review proceedings in the Grand Court against the Governor of the Cayman Islands, the Deputy Registrar and the Attorney General (representing the Government), who is the second respondent to this appeal, in which they sought declarations that the Marriage Law infringed their rights under sections 9, 10, 14 and 16 of the Bill of Rights and a declaration that the Marriage Law should be interpreted so as to be in conformity with their constitutional rights. Their primary claim was that they had a right under the Constitution to marry and have their marriage recognised in law; in the alternative, they sought a declaration that provision should be made for them to be able to enter into a civil partnership. On 28 September 2018 Ms Day and Ms Bush also filed a constitutional petition pursuant to section 26 of the Bill of Rights relying on the same grounds of challenge and seeking similar relief.

25. The two sets of proceedings were heard together by the Chief Justice in the Grand Court. On 29 March 2019 the Chief Justice handed down a judgment in which he held that the fact that section 14(1) of the Bill of Rights enshrines the right to marry for opposite-sex couples does not exclude a similar right existing for same-sex couples under section 9 of the Bill of Rights as an aspect of the right to family and private life and under section 10 of the Bill of Rights as an aspect of the right to freedom of conscience and freedom to manifest their belief in marriage by being allowed to enter into that institution. Further, the refusal to license the marriage of the appellants constituted unjustified discriminatory treatment contrary to their rights under section 16 of the Bill of Rights. The Chief Justice invoked section 5 of the 2009 Order to bring the Marriage Law into conformity with the rights in sections 9, 10 and 16 of the Bill of Rights by amending the definition of "marriage" in section 2 of the Marriage Law so that it means "the union between two people as one another's spouses", and hence includes same-sex marriage, and by making consequential amendments to the marriage declaration set out in section 27 of the Marriage Law. The Chief Justice also indicated that the appellants were entitled to apply for damages for violation of their constitutional rights.

26. The Deputy Registrar and the Government appealed to the Court of Appeal of the Cayman Islands. The appeal was allowed. The court held that in the scheme of the Bill of Rights section 14 is the provision which governs the right to marriage as a lex specialis, or provision specifically focused on that issue; it does not cover same-sex marriage; and the general rights in sections 9, 10 and 16 could not be interpreted to include a right for people of the same sex to marry for which the lex specialis in section 14 did not provide. The court rejected the submission of Mr Edward Fitzgerald QC for the appellants that section 14(1) should be read merely as confirming a right of marriage for opposite-sex couples, which did not preclude the possibility of deriving from sections 9, 10 and 16 an equivalent right for same-sex couples to marry. The court followed the judgments of the European Court of Human Rights ("ECtHR") in the leading cases of *Schalk and Kopf v Austria* (2011) 53 EHRR 20 ("*Schalk and Kopf*") and *Hämäläinen v Finland* (2014) 37 BHRC 55, Grand Chamber ("*Hämäläinen*"), which held that in the scheme of the ECHR article 12 is the lex specialis provision governing the right to marry, that it does not create a right for same-sex couples to marry, and that in consequence articles 8 and 14 of the ECHR

(corresponding with sections 9 and 16 of the Bill of Rights, respectively) cannot be read as including such a right. This same reasoning applies in relation to section 10 of the Bill of Rights. Therefore, no question arose of amendment of the Marriage Law pursuant to section 5 of the 2009 Order. The Court of Appeal observed that their interpretation of the Bill of Rights did not prevent the Legislative Assembly from passing legislation to create a right for same-sex couples to marry, but there was nothing in the Bill of Rights which obliged it to do so.

27. As noted above, the Court of Appeal also held that, as was conceded by the Government, the failure of the Government and Legislative Assembly to provide for a regime of civil partnerships for same-sex partners, with functional equivalence to marriage, was in breach of the rights of the appellants under section 9 of the Bill of Rights (family and private life) and made a declaration accordingly. The Board notes that this matches the position under article 8 of the ECHR, as determined by the ECtHR in *Oliari v Italy* (2017) 65 EHRR 26. In view of the declaration made by the Court of Appeal, the Civil Partnership Law 2020 was passed. This law allows both opposite-sex and same-sex couples to enter into a civil partnership, and amends existing laws (other than the Marriage Law) so that civil partnership has equivalent effect to marriage. It is not necessary to say anything further about this.

The appeal to the Board

28. Ms Day and Ms Bush now appeal to the Board. The principal issue in the appeal is whether the Bill of Rights provides a right for the appellants to marry. If it does, a further issue arises as to whether the Chief Justice was right to amend the Marriage Law pursuant to section 5 of the 2009 Order.

29. Mr Fitzgerald, for the appellants, repeats the submissions made to the Court of Appeal and seeks to uphold the reasoning of the Chief Justice. Mr Fitzgerald accepts that section 14(1) of the Bill of Rights cannot be read to include a right to marry for same-sex couples, but submits that it does not prevent such a right from arising under other provisions of the Bill of Rights, namely sections 9, 10 and 16. The principal focus of his submissions was on sections 9 and 16. As with the British North America Act in relation to Canada, the Constitution is a "living tree capable of growth and expansion within its natural limits" and "subject to development through usage and convention": *Edwards v Attorney General for Canada* [1930] AC 124, 136. Accordingly, the interpretation of the rights it sets out is capable of changing in line with developing social standards. In accordance with established principle in relation to the interpretation of constitutional rights in the jurisprudence of the Board, the Bill of Rights should be given "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": *Minister of Home Affairs v Fisher* [1980] AC 319, 328. The right to respect for private and family life under section 9 includes the right to enter into same-sex relationships and have them recognised in law, as has been accepted in the jurisprudence of the ECtHR. There is no reason why this right should not extend to include a right to marry. Further, the right to freedom of conscience in section 10 includes the right to freedom of religious or conscientious belief and practice and to be free from restraint or coercion in the manifestation of such belief, and since the appellants have a conscientious belief in the institution of marriage and wish to marry their right under section 10 is engaged and there are no good grounds to justify interference with that right by the state refusing the right to marry for same-sex couples. In addition, by being denied the right to marry, the appellants are being treated in a discriminatory manner in respect of these rights of theirs without any justification, contrary to their right under section 16(1). In support of

this submission, Mr Fitzgerald relies on section 16(7) and maintains that the limitation in section 14(1) of the right to marry to opposite-sex couples is a "restriction" on the right to marry in that provision which is not "reasonably justifiable in a democratic society" under section 16(7)(b); hence it cannot be relied upon as an answer to the claim of the appellants based on their right under section 16(1) to be protected against discriminatory treatment.

30. Ms Dinah Rose QC, for the Government, relies on the reasons given by the Court of Appeal. She submits that, in providing for a specific right to marry under certain conditions, section 14(1) is a lex specialis which has the effect that no right to enter into same-sex marriage can be found to exist in any of the other provisions of the Bill of Rights. The other provisions are general in their terms and cannot be taken to displace or circumvent the way in which the drafters of the Constitution have specified the express right to marry as incorporated in the Bill of Rights. The Bill of Rights must be interpreted as a coherent whole. This means that the principle of interpretation encapsulated in the Latin maxims "lex specialis derogat legi generali" (the specific law prevails over the general) and "generalia specialibus non derogant" (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which is a principle of coherent interpretation of legal instruments of any character, is applicable. Section 14(1) is the specific provision in the Bill of Rights which deals with the right to marry; the right is defined in limited terms which do not cover same-sex couples; and that limitation cannot be circumvented by seeking to rely on other, general rights which do not address the topic of marriage directly. Mr Fitzgerald's attempt to rely on section 16(7) is misplaced: section 14(1) defines the right to marry, and the limits it specifies are limits to that right, not a "restriction authorised for the purpose of that section" within the meaning of section 16(7). Section 16(7) does not authorise a court to subject the scope of the right in section 14(1) to a test of justification. Ms Rose submitted that the interpretation of the Bill of Rights is clear without any need of recourse to the travaux préparatoires in the form of what had been said during the negotiation of the Constitution, but if necessary she relied on Mr Hendry's statement during the negotiations in support of her submissions. Also, should the issue arise, Ms Rose submitted that the Chief Justice had misapplied section 5 of the Constitution in amending the Marriage Law as he did.

31. The Board was referred to a range of international instruments and constitutions from around the world and a large number of authorities from various jurisdictions dealing with the topic of same-sex marriage. However, these were of limited assistance.

32. The Board's view is that the Court of Appeal was correct in its approach to the interpretation of the Bill of Rights and in the construction which it gave it. In the context of the Bill of Rights, section 14(1) is a lex specialis dealing with the right to marry. That right is confined to opposite-sex couples. Sections 9, 10 and 16 have to be interpreted in the light of that lex specialis, so none of them can be construed as including a right for a same-sex couple to marry.

Constitutional interpretation and the lex specialis principle

33. The issue for the Board is one of interpretation of the Bill of Rights which constitutes Part 1 of the Constitution of the Cayman Islands. The Bill of Rights is a specific legal instrument which falls to be interpreted in its particular context and as a coherent, internally consistent whole. The Court of Appeal referred to relevant authority and correctly directed itself regarding the principles of construction applicable in relation to the Constitution and the Bill of Rights.

34. In *Matadeen v Pointu* [1999] 1 AC 98 an issue arose regarding the interpretation of section 3 of the constitution of Mauritius. Lord Hoffmann, for the Board, addressed the subject of constitutional interpretation at p 108:

"Their Lordships consider that this fundamental question [sc regarding the relationship between the courts and the legislature of Mauritius] is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising 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 contract 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 AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma*, 1995 (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'"

Lord Hoffmann added (p 114):

"Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which section 3 must be construed …"

In the present case, the ECHR is a treaty which is applicable in relation to the Cayman Islands and which forms part of the background against which the Constitution was promulgated. However, as noted by the Court of Appeal and as appears below, the ECHR does not include a right for same-sex couples to marry, so the latter principle identified by Lord Hoffmann does not assist the appellants in this case.

35. In *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235, concerning the constitution of Belize, in another important statement, Lord Bingham of Cornhill said this at para 26:

"When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable

guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases, *Weems v United States* (1910) 217 US 349, 373, *Trop v Dulles* (1958) 356 US 86, 100-101, *Minister of Home Affairs v Fisher* [1980] AC 319, 328, *Union of Campement Site Owners and Lessees v Government of Mauritius* [1984] MR 100, 107, *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700-701, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 331, *S v Zuma* 1995 (2) SA 642, *S v Makwanyane* 1995 (3) SA 391 and *Matadeen v Pointu* [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As 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 it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101. …"

36. In relation to the interpretation of the Constitution of the Cayman Islands, the Board agrees with the approach stated by the Chief Justice in *Hewitt v Rivers* [2013] (2) CILR 262, para 37, as cited by the Court of Appeal:

"In summary, I consider that my approach to the interpretation of the Constitutional provisions at issue on 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, the context will be most important as it also reflects the aspirations of the Caymanian society which the Constitution embodies."

37. The "living tree" principle in the *Edwards* case and the principles in the *Fisher* case are important, but they are applicable in the context of the interpretation of constitutional instruments and are not freestanding. They are only capable of extending meaning in line with changing practices and understandings so far as the language used in the relevant constitutional provisions can reasonably be said to bear a particular meaning.

38. The Board regards it as trite law that the Constitution should be read as a coherent whole: see, eg, *Cooper v Director of Personnel Administration* [2006] UKPC 37; [2007] 1 WLR 101, para 21; *Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 AC 513, para 33. As Ms Rose submits, the approach to interpretation of an instrument which includes a provision which constitutes a lex specialis in relation to a particular subject matter is not a technical rule of treaty interpretation, as suggested by Mr Fitzgerald. Rather, like the maxim generalia specialibus non derogant, it is a consequence of the principle that an instrument should be interpreted as a coherent whole and "represents simple common sense and ordinary usage": see *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 627 per Lord Cooke of Thorndon; also see *Minister of Energy and Energy Affairs v Maharaj* **[2020] UKPC 13**, para 56.

39. The right to marry in section 14(1) of the Bill of Rights has been drafted in highly specific terms to make it clear that it is a right "freely to marry a person of the opposite sex …". Comparing section 14(1) with article 12 of the ECHR, which was the model for it, it is obvious that this language has been used to emphasise the limited ambit of the right and to ensure that it could not be read as capable of covering same-sex marriage. The reference to "traditional Christian values" in the preamble to the

Constitution and the reference to "the distinct history, culture [and] Christian values" in section 1(2)(a) of the Bill of Rights reinforce the point by referring to the cultural and religious values which led to this emphasis being given to opposite-sex marriage in section 14(1).

40. In the Board's judgment, it is clear that within the scheme of the Bill of Rights section 14(1) constitutes a lex specialis in relation to the right to marry. Therefore, the interpretation of the other general provisions in sections 9, 10 and 16, which do not stipulate for a right to marry, must take account of this and cannot be developed to circumvent the express limits on the right to marry in section 14(1). They cannot establish indirectly by implication a right to marry which is not directly set out in the relevant express provision in the Bill of Rights. Interpreting them in that way, as Mr Fitzgerald urges us to do, would have the effect of making the right in section 14(1) redundant, which would clearly be contrary to the intention of the drafters of the Bill of Rights.

41. Mr Fitzgerald's reliance on the "living tree" principle in the *Edwards* case is misplaced. In the Board's view, the drafting of section 14(1), in focusing the right to marry on opposite-sex couples, is so precise and specific that it is difficult to conceive of any development in the understanding in society of the concepts employed in the provision which could allow it to be interpreted as including a right for same-sex couples to marry. Mr Fitzgerald pointed out that the ECtHR in *Schalk and Kopf* (paras 54-63) recognised that the wording of article 12 might potentially lend itself to being interpreted so as not to exclude the marriage between two men or two women and that it was possible that social changes might lead to such an interpretation being adopted in future, but he accepted that the language of section 14(1) was more specific and that it ruled out that possibility. He sought to make this into a building block for his submissions, by arguing that this feature of section 14(1) meant that the other rights in sections 9, 10 and 16 should be interpreted more broadly so as to found a right to marry which could never be recognised under the precise drafting of section 14(1). The Board cannot accept this argument. For the reasons given above, sections 9, 10 and 16 cannot be given a different and more extensive interpretation pursuant to the "living tree" principle to include a right to same-sex marriage, since that would circumvent the intended effect of section 14(1) and thereby undermine the coherence of the Bill of Rights. Contrary to Mr Fitzgerald's contention, the highly specific terms in which section 14(1) is drafted reinforce the inference that it was intended to operate as a lex specialis which should not be by-passed by unduly generous interpretation of other, general provisions in the Bill of Rights.

42. Mr Fitzgerald points out that section 14(1) refers to the right to found a family and that the right to respect for private and family life is also covered by section 9(1). He submits that this indicates that section 14(1) was not intended to operate as a lex specialis so as to exclude the potential collateral effect of section 9 or the other provisions relied on by the appellants (sections 10 and 16) in relation to the subject matter falling within section 14(1).

43. The Board does not agree. Section 14(1) creates a right to marry for opposite-sex couples and, consequent on the exercise of that right, a right to found a family within marriage as so defined. This is separate from the distinct right in section 9(1), which would support the founding of a family outside marriage as so defined and protects family life generally, in all its manifestations. As explained above, and as the Court of Appeal held, section 14(1) is clearly a lex specialis so far as the right to marry is concerned.

44. The Board considers that the reasons given above, focusing on the interpretation of

the Constitution and the Bill of Rights as a self-contained legal instrument drafted in terms specifically chosen as appropriate for the Cayman Islands, are sufficient to determine the case in the Government's favour and to dismiss the appeal. However, the Board also finds support for its interpretation of the Constitution and the Bill of Rights in the case law of the ECtHR regarding the interpretation of the ECHR.

The jurisprudence of the European Court of Human Rights

45. *Schalk and Kopf* concerned a same-sex couple living in Austria, who complained that the Austrian Civil Code only recognised and made provision for marriage between "persons of the opposite sex". On their application to the ECtHR they submitted, first, that article 12 of the ECHR imposed an obligation on the state to grant them access to the institution of marriage; secondly, in the alternative, that article 14 in conjunction with article 8 imposed such an obligation; and thirdly, if they were unsuccessful in their first two submissions, that article 14 read with article 8 imposed an obligation on the state to provide an alternative form of legal recognition for same-sex relationships. By the time the ECtHR gave judgment, the third point had been covered by the introduction of legislation in Austria to allow for such recognition (the Registered Partnership Act 2010).

46. In its judgment, the ECtHR referred to its previous case law in which article 12 had been held to enshrine the traditional concept of marriage as being between a man and a woman. The ECtHR held that it did not impose an obligation on the state to grant a same-sex couple access to marriage (paras 54-64). The ECtHR then considered the submission that such an obligation arose by virtue of article 14 read with article 8. It held that the complaint related to the private life and family life of the applicants so that article 14 was applicable (paras 92-95). The applicants' argument (para 100) was that "they were discriminated against as a same-sex couple, firstly, in that they did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act". It is the first limb of this argument which is relevant for present purposes. The ECtHR dismissed this complaint for these reasons (para 101, omitting footnote):

"Insofar as the applicants appear to contend that, if not included in article 12, the right to marry might be derived from article 14 taken in conjunction with article 8, 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."

In other words, in the scheme of the ECHR, article 12 was the lex specialis dealing with the right to marry and the more general provisions in article 8 and article 14 had to be read and given effect in the light of that.

47. In *Hämäläinen* a man who was married to a woman underwent a gender change and, relying on articles 8, 12 and 14 of the ECHR, complained that national law did not include provision for continued recognition of their marriage as a same-sex couple, so that full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership. A chamber of the ECtHR dismissed her complaint, reiterating "that, according to the court's case law, article 12 of the convention did not impose an obligation on contracting states to grant same-sex couples access to marriage. Nor could article 8, a provision of more general purpose and scope, be interpreted as imposing such an obligation" (as summarised at para 38 of

the judgment of the Grand Chamber). The applicant appealed to the Grand Chamber. At para 96 the Grand Chamber stated:

"The court reiterates that article 12 of the convention is a lex specialis for the right to marry. It secures the fundamental right of a man and woman to many and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v United Kingdom* [1986] ECHR 9532/81 at para 49). While it is true that some contracting states have extended marriage to same-sex partners, article 12 cannot be construed as imposing an obligation on the contracting states to grant access to marriage to same-sex couples (see [*Schalk and Kopf*] at para 63)."

In relation to the applicant's complaint based on article 8, at para 70 the Grand Chamber noted that the practical effect of the applicant's argument that national law should allow her to preserve her existing marriage would be that two persons of the same sex could be married to each other. At para 71 the Grand Chamber said, "[t]he court reiterates its case law according to which article 8 of the convention cannot be interpreted as imposing an obligation on contracting states to grant same-sex couples access to marriage (see [*Schalk and Kopf*] at para 101)". The Grand Chamber also gave other reasons (paras 71-89) why there was no violation of article 8 in the particular circumstances of the case, having regard to the availability of a legally recognised civil partnership and an absence of consensus among states as to how to accommodate gender changes within existing marriages; but it expressed no disagreement with the view of the chamber in its judgment, summarised at para 38. It was not necessary for the Grand Chamber to explore the impact of article 12 being the lex specialis for the right to marry in the scheme of the ECHR upon article 14 because that provision was found not to be infringed for other reasons.

48. In a judgment of 2015, *Oliari v Italy* (2017) 65 EHRR 26, the ECtHR found Italy to be in breach of article 8 by reason of its failure to provide any form of legal recognition for same-sex couples, such as by way of a civil partnership regime. In the same judgment, the court rejected as manifestly ill-founded complaints that Italy was in breach of article 12 or in breach of article 14 in conjunction with article 12 by reason of the absence of recognition for same-sex marriage in its law. The court referred to *Schalk and Kopf* and *Hämäläinen* and at para 192 it reiterated that article 12 does not impose an obligation to grant same-sex couples access to marriage. At para 193 it said:

"Similarly, in *Schalk*, the Court held that 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. The Court considers that the same can be said of article 14 in conjunction with article 12."

49. In *Orlandi v Italy*, Application Nos 26431/12, 26742/12, 44057/12 and 60088/12, ECtHR, judgment of 14 December 2017, the applicants complained of a violation of their rights arising from the absence of the possibility of registering a same-sex marriage contracted under the law of a foreign jurisdiction. The ECtHR referred to its judgment in *Oliari v Italy* and noted that Italy had introduced a civil partnership regime in 2016. The ECtHR held that the applicant's rights under article 8 had been breached on the same basis as in the *Oliari* case in the period until the introduction of the civil partnership regime, while at the same time reiterating (para 192) that contracting 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 [citing *Schalk and Kopf* and *Chapin and Charpentier v France*, Application No 40183/07, ECtHR, judgment of 9 June 2016, para 39]. The same holds for article 14

taken in conjunction with article 12 [citing *Oliari v Italy*, para 193]."

50. In light of the similarity between the scheme of the Bill of Rights and the scheme of the ECHR, the reasoning of the ECtHR in *Schalk and Kopf*, *Hämäläinen*, *Oliari v Italy* and *Orlandi v Italy* supports the Board's interpretation of the Bill of Rights in the present case.

Other jurisprudence

51. Mr Fitzgerald sought to rely on the judgment of the Northern Ireland Court of Appeal in *In re Close's Application for Judicial Review* [2020] NICA 20. The claimants in that case were same-sex couples who had entered into civil partnerships. They wished to enter into a civil marriage, but the relevant law in Northern Ireland did not provide for same-sex marriage. They complained that this constituted unlawful discrimination against them on the basis of their sexual orientation contrary to article 14 of the ECHR as given effect in domestic law by the UK Human Rights Act 1998. Their claim was dismissed at first instance. The Court of Appeal allowed their appeal, holding (para 58) that when judgment was given at first instance in August 2017 the absence of same-sex marriage in Northern Ireland discriminated unlawfully against same-sex couples, in that "a fair balance between tradition and personal rights had not been struck and that therefore the discrimination was not justified."

52. However, with respect to the Northern Ireland Court of Appeal, the Board does not find its reasoning persuasive. At paras 27-33 of its judgment it referred to *Schalk and Kopf* and noted (para 32) the effect of para 101 of the ECtHR's judgment in that case. At paras 34-36 the Court of Appeal referred to *Hämäläinen*, but did not include in its account of that case any reference to paras 71 and 96 of the Grand Chamber's judgment, as set out above. Unfortunately, at para 41 of its judgment the Court of Appeal summarised the effect of the Strasbourg jurisprudence inaccurately. It correctly noted that this jurisprudence showed that article 12 does not establish a right to same-sex marriage and also said, correctly, that "[a]rticle 8 cannot supply what article 12, the lex specialis, does not supply and cannot, therefore, provide a means of establishing a right to same sex marriage"; however, it lost sight of the fact that according to the ECtHR this same point applied in relation to article 14 read with article 8 and instead indicated that the question of violation of article 14 depended on the issue of justification and whether the law under challenge lay outside the margin of appreciation allowed to a state in the application of that provision. The remainder of the court's judgment dealt with that issue, arriving at the conclusion that the law was not justified. On a proper understanding of the Strasbourg case law, however, the effect of article 12 being the lex specialis in relation to marriage meant that no such question of justification arose under article 14. In the event, the court did not grant any relief, because by the time it gave judgment domestic legislation had been introduced to allow same-sex couples to marry. It may be for that reason that there was no appeal to the Supreme Court.

53. Mr Fitzgerald also relied on the decision of this court in *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1. In that case, the claimants were an opposite-sex couple who wished to be able to enter a civil partnership rather than marry, at a time when civil partnership was only available for same-sex couples. This court held that the omission to make civil partnership available to them was incompatible with their rights under article 14 of the ECHR taken in conjunction with article 8. The authority does not assist Mr Fitzgerald. It is not concerned with the right to marry and the interaction of articles 8, 12 and 14 of the ECHR. Article 14 was engaged because the civil partnership regime was agreed to fall within the ambit of article 8, as the Strasbourg case law indicated that it did. That is not

true of the right to marry, and as Lord Kerr of Tonaghmore pointed out (para 34) if article 8 had not been engaged "no need for justification would have arisen" under article 14.

54. The Board considers that the approach of the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights ("the ICCPR") in its views of 1999 in *Joslin v New Zealand*, Communication No 902/1999. UN Doc A/57/40 (2002) provides further support for its interpretation of the Bill of Rights. The ICCPR contains a specific right to marry in article 23(2) in these terms: "The right of men and women of marriageable age to marry and found a family shall be recognised". In the *Joslin* case the applicants claimed that the failure of domestic legislation to provide for same-sex marriage violated their rights under article 16 (right to recognition before the law), article 17 (right to privacy), article 23(1) (protection for the family) and article 26 (right to equality) of the ICCPR. The Human Rights Committee was of the view that the facts did not disclose a violation of the ICCPR. It treated article 23(2) as the lex specialis which governed the case and the applicants fell outside that provision. The Human Rights Committee said (para 8.2), "[g]iven the existence of a specific provision in the [ICCPR] on the right to marriage, any claim that this right has been violated must be considered in the light of this provision."

Section 16(7)(b) of the Bill of Rights

55. As regards Mr Fitzgerald's reliance on section 16(7)(b) of the Bill of Rights, it does not assist the appellants for the reasons given by Ms Rose. The language of section 14(1) constitutes the definition of the right it establishes and cannot be regarded as a "restriction" on that right for the purposes of section 16(7)(b). Section 16(7)(b) does not have the effect that the limits on the right in section 14(1) are made subject to a justification test. That would undermine the lex specialis status of section 14(1) which the drafters of the Bill of Rights obviously intended it should have.

Travaux préparatoires

56. The Court of Appeal reached its conclusion on the interpretation of the Bill of Rights without needing to refer to the transcript of Mr Hendry's statement in the third round of negotiations leading to the adoption of the Constitution. Similarly, the Board reaches its conclusion without reference to this material. In an appropriate case, reference to the travaux préparatoires for an instrument like the Constitution may be relevant. However, it is not appropriate in this case in view of the clarity and precision of the drafting of section 14(1).

57. Furthermore, the Constitution was adopted pursuant to a process involving a vote by the public to approve it in a referendum. It was the instrument as approved by the public in that referendum which was adopted as the Constitution. The public were entitled to understand that they were voting to approve the Constitution in the form in which it was presented to them, interpreted in the light of the context and circumstances in the public domain at that time. The transcript of Mr Hendry's comments was not available to the public when they voted to approve the Constitution, so the Board doubts whether in principle it could be said that his comments can properly qualify as an aid in interpreting it. As Lord Diplock said in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279, "[e]lementary justice or … the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible"; see also *R (Public & Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027

(Admin); [2010] ICR 1198, para 55 (Sales J) ("… it is fundamental that all materials which are relevant to the proper interpretation of such an instrument [an Act of Parliament] should be available to any person who wishes to inform himself about the meaning of that law") and *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622, para 39 (Lord Reed and Lord Thomas) ("In our view it would be wholly inconsistent with the transparent and open democratic process under which Parliament enacts legislation to take into account matters that have passed in private …"). That is so where a person has to find out the meaning of the law which is to be applied to him and it seems to the Board that similar points could be made with still more force where the public is given such an important role as in this case in approving prospectively the fundamental legal rules for the state as set out in a constitutional instrument. It might not be putting it too strongly to say that it would be "a confidence trick … and destructive of all legal certainty", to use the language of Lord Diplock at p 280, if, having invited approval of the Constitution by the public on one basis, the Government were able to refer to private materials which were not publicly available at that time and say that its interpretation is to be taken to be affected by them.

Section 5 of the 2009 Order

58. Since the Board will advise Her Majesty that this appeal should be dismissed and the judgment of the Court of Appeal upheld, it does not need to deal with any point regarding the meaning and effect of section 5 of the 2009 Order.

Constitutional rights and the Legislative Assembly

59. The Board takes this opportunity to reiterate the point made by the Court of Appeal, that the interpretation to be given to the Bill of Rights as explained in this judgment does not prevent the Legislative Assembly from introducing legislation to recognise same-sex marriage. The effect of the interpretation endorsed by the Board is that this is a matter for the choice of the Legislative Assembly rather than a right laid down in the Constitution.

Conclusion

60. For the reasons set out above, the Board will humbly advise Her Majesty that the appeal should be dismissed.