

Bermuda and the Dilemma of Same-Sex Marriage

Written by Peter Clegg

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PETER CLEGG, FEB 18 2018

On 7th February the Governor of Bermuda, John Rankin, approved the Domestic Partnership Act, which banned same-sex marriage in the British Overseas Territory just months after it had been legalised through a local court ruling. The Act provides for domestic partnerships – for same-sex and opposite-sex couples. The legislation and the Governor's accent of it provoked a storm of controversy, as Bermuda became the first jurisdiction to remove the legal right to marriage after it had been granted.

The origins of the controversy began in 2013 when the Bermuda parliament made changes to the territory's Human Rights Act 1981. The Act had not been updated for some time, and the then governing One Bermuda Alliance felt that changes were needed to broaden the criteria for protection against discrimination, including in relation to sexual orientation. The amended Human Rights Act then became a powerful tool in furthering the rights of sex-couples in Bermuda – in relation to adoption, residency of non-Bermudians in a same-sex relationship, and then same-sex marriage. The Supreme Court of Bermuda made clear that the Human Rights Act had primacy over the Marriage Act 1944, which defined marriage as a "voluntary union for life of one man and one woman".

Two months after the Supreme Court ruling, the opposition Progressive Labor Party won a sweeping general election victory. The party wasted no time in putting together its challenge to the legal ruling; its preferred course being the introduction of new legislation – the Domestic Partnership Act.

Final legislative approval came in December 2017. The House of Assembly supported the Bill by 24 votes to 10; largely on party lines. While the Senate gave its support by an 8-3 vote. The next step was to gain the assent of the British Governor, which after some deliberation with the Foreign and Commonwealth Office was given.

A key question is whether the actions of Bermuda and the Governor were justified? Bermuda is in a particular and unusual situation, because it accepted marriage equality and now has gone back on that commitment. In other nearby British Overseas Territories there has been no commitment to same-sex marriage or indeed to civil partnerships; and indeed the independent English-speaking Caribbean has still a very conservative attitude to LGBTQ rights.

Further, the European Court of Human Rights, to which Bermuda is linked through Britain, has ruled that same-sex marriage is not a blanket right; rather national circumstances are a crucial determining factor. And of course Northern Ireland does not permit same-sex marriage.

So part of the problem for Bermuda is going back on an important and high-profile advance, and doing so very quickly. Expectations were raised and then dashed, even though with the Domestic Partnership Act Bermuda still remains quite advanced in its legislation.

As for the British government, it has been very reluctant to interfere directly in the legislative processes of its overseas territories, believing that as they have democratically elected governments their autonomy should be respected. There have been instances when the UK has legislated for the territories – the abolition of the death penalty for murder in 1990 and the decriminalisation of consensual private homosexual acts between adults in 2000 being cases in point, but they are extremely rare.

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Withholding assent is also uncommon, particularly in relation to Bermuda, which has the most autonomy of all of the overseas territories. Indeed, the UK has not intervened in Bermuda's legislative process since its constitution was introduced in 1968. However, there are provisions within the constitution for the UK to block legislation, particularly s 35 (2c):

... the Governor shall reserve for the signification of Her Majesty's pleasure any bill which appears to him, acting in his discretion — to be in any way repugnant to or inconsistent with the provisions of this Constitution

If the UK government had blocked the legislation on these grounds it would have been extremely controversial, but it could well have been done.

About the author:

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