

## Rethinking Conjuality as the Basis for Family Recognition: A Feminist Rewriting of the Judgment in *Burden v. United Kingdom*

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### Abstract

In *Burden v. UK*, elderly cohabiting sisters unsuccessfully challenged their exclusion from civil partnerships. They claimed this exclusion was a violation of the prohibition of discrimination (Article 14) and the right to peaceful enjoyment of property (Article 1 of Protocol 1) under the European Convention on Human Rights because the surviving sister would be liable to pay inheritance tax whereas a lesbian couple could avoid this liability by registering a civil partnership. The facts of the case and the judgments by both the Chamber and Grand Chamber of the European Court of Human Rights raise interesting questions about the extent to which it is justifiable to base legal protections on conjuality. In this paper, I will explore these questions and consider how the judgment could be rewritten from a feminist perspective.

### Key words

Conjuality; article 14; European Convention; discrimination; inheritance tax; civil partnership

### Resumen

En *Burden v. Reino Unido*, dos hermanas mayores que vivían juntas no consiguieron impugnar su exclusión de las uniones civiles. Argumentaban que esta exclusión suponía una violación de la prohibición de discriminación (artículo 14) y del derecho al disfrute de los bienes (artículo 1 del Protocolo 1) en virtud del Convenio Europeo de Derechos Humanos porque la hermana superviviente estaría obligada a pagar el impuesto de sucesiones, mientras que una pareja de lesbianas podría evitar esta obligación mediante el registro de una unión civil. Los hechos del caso y las sentencias tanto de la Sala como de la Gran Sala del Tribunal Europeo de Derechos Humanos plantean cuestiones interesantes sobre el grado en el que es justificable basar las protecciones jurídicas en la conyugalidad. En este artículo se analizan estas cuestiones y se considera cómo se podría reescribir la sentencia desde una perspectiva feminista.

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**Palabras clave**

Conyugalidad; artículo 14; Convenio Europeo; discriminación; impuesto de sucesiones; unión civil

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## 1. Introduction

The cases of *Burden v. United Kingdom*, heard in both the Chamber (2007) and the Grand Chamber (2008) of the European Court of Human Rights were brought by elderly sisters, neither of whom had married or had children and who had lived together all their lives, the last thirty years of which was in a four-bedroom house built on land inherited from their parents. It appears that they owned all their assets jointly and had each written a will leaving her share to the surviving sister. Their total assets exceeded the exemption threshold for inheritance tax and so the surviving sister would have to pay inheritance tax at 40% of any amount over that threshold. Their claim was that the survivor 'might have to sell the house in order to pay the tax' (*Burden and Burden v. United Kingdom* 2007, para. 11), though as I outline below this appears very unlikely given the value of their assets in addition to the home. They argued that the difference in treatment between them and spouses/civil partners constituted discrimination under Article 14 ECHR in conjunction with Article 1 of Protocol 1, the right to peaceful enjoyment of property. It is an argument that has received a considerable amount of sympathy, at least in principle, and particularly from those who had argued that the Civil Partnership Act 2004 should have been extended to siblings and other cohabiting family members in order to provide a tax avoidance mechanism for 'deserving' carers (see Barker 2014 for an overview of these arguments). However, others have made more progressive arguments for the principle of moving 'beyond conjuality' (Law Commission of Canada 2001; Polikoff 2008), some focusing on care rather than sex as the nexus of legally recognised and privileged relationships (Fineman 1995, 2004; Herring 2014). The question I ask in this paper, loosely following the methodology of the Feminist Judgments Project (FJP) (see Hunter *et al.* 2010), is how might a feminist judge approach, or reframe, this case?

I differ from the FJP in that I am writing a combination of commentary on the case and an alternative feminist judgment because in my view it is important to explain how I am 'reading' this case differently as a feminist judge as well as writing it differently. In this respect, the structure that this paper follows is similar to that of a separate project re-writing judgments from the European Court of Human Rights (Brems 2013), though this lacked the explicitly feminist approach of the FJP instead focusing on 'mainstreaming diversity' more broadly. Diversity was categorised under six headings: children; gender; religious minorities; sexual minorities; disability; and cultural minorities. As such, my analysis is different to that of Aeyal Gross who wrote an alternative judgment in *Burden* for the latter project (Gross 2013). For example, Gross writes under the 'sexual minorities' heading, focusing on the question of privileging conjuality as his central concern and finding the privileged economic status of the sisters to be immaterial (Gross 2013, p. 266). However, for my more socialist feminist approach, the privileging of conjuality and the wealth of the sisters are indivisible issues in this case.

I am also differing from the FJP's convention that judgments should be written as if at the same time as the original judgment, without reference to subsequent events and case law. The issue of recognising siblings for the purposes of spousal privileges was reopened during the debates on the Marriage (Same Sex Couples) Bill 2013, with prominent family lawyers, including Baroness Butler-Sloss, supporting Lady Deech's proposed amendment to the Bill to include in the subsequent review of civil partnerships (which was to be mandated by the Act) the question of whether those within the prohibited degrees of relationship and carers should be eligible to become civil partners (HL Comm. 24 June 2013: Column 528). In the press, Lady Deech referenced the *Burden* case and claimed that following same-sex marriage: 'My bet is that a discrimination case before the European Court of Human Rights would probably succeed because the Convention prohibits discrimination by birth...' (interviewed in Bingham 2013). Given the Grand Chamber's decision and reasoning in *Burden* 2008 this seems highly unlikely but in my view it is worth exploring whether there is a feminist argument that such a case

should succeed and how, if at all, a feminist judge might rule in such a case if it were brought today. Additionally, the recent UK general election results mean that a Conservative manifesto pledge to eliminate inheritance tax on estates worth up to £1 million and to exclude the family home from the calculation of those assets may well be implemented within the next five years, bringing some of the issues in this case once again to the forefront of political debate.

## 2. The European Court of Human Rights Judgments

It is striking that while the Chamber and Grand Chamber ultimately both ruled against the Burden sisters, they did so for very different reasons. With only a four to three majority, the Chamber also appeared to be more sympathetic to the sisters than the fifteen to two majority in the Grand Chamber. It is also worth noting that in the later case the UK judge, Sir Nicholas Bratza, expressed in a concurring opinion his preference for the reasoning of the majority in the Chamber, rather than that of the Grand Chamber (*Burden v. United Kingdom* 2008, para O-12)<sup>1</sup>.

The sisters claimed that they were discriminated against contrary to Article 14 in their right to property guaranteed by Article 1 of Protocol 1. Their claim was unanimously held to be admissible in the Chamber and likewise the UK government's preliminary objections on the same grounds of failing to exhaust domestic remedies and not (yet) being 'victims' of a violation of the Convention were unanimously dismissed in the Grand Chamber. I do not revisit these aspects of the judgment because I agree with the Courts' analyses on these points, focusing only on the substantive discrimination claim.

The submissions made by the UK government and the Burden sisters in the Chamber and Grand Chamber were virtually identical (as reported in the respective judgments) so I have summarised them only once and any minor differences are noted in the summaries.

### 2.1. The Government's submission

The UK Government denied that there was any discrimination because the sisters were not in an analogous situation to spouses or civil partners; while a couple chooses to become connected for the sisters it was an accident of birth. Furthermore, spouses and civil partners 'made a financial commitment to each other', including giving powers to the courts to divide their property on separation and make financial orders, which does not arise in a sibling relationship, and the 'special legal status' of marriage had been recognised by the Court in *Shackell v. United Kingdom* (2000, para 46).

If the court did consider the sisters to be analogous to spouses or civil partners, the Government argued that the difference in treatment between them was within the margin of appreciation, which is wide in relation to taxation and financial measures designed to promote marriage:

The policy underlying the inheritance tax concession given to married couples was to provide the survivor with a measure of financial security, and thus promote marriage... That objective would not be served by extending similar benefits to unmarried members of an existing family, such as siblings, whose relationship was already established by their consanguinity, and recognised by law. The difference in treatment thus pursued a legitimate aim. (*Shackell v. United Kingdom* 2000, para 47).

The Government also argued that it was proportionate, as the applicants had not 'undertaken any of the burdens and obligations' of marriage/civil partnership and that extending the tax exemption to siblings and other cohabiting family members would have considerable financial implications.

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<sup>1</sup> Henceforth, *Burden v. United Kingdom* (2008) will be cited as *Burden* (2008) and *Burden and Burden v. United Kingdom* (2007) will be cited as *Burden* (2007).

In the Grand Chamber, the governments of Belgium and the Republic of Ireland made third party submissions in support of the UK's position that a state was entitled to promote marriage through its tax system (Belgium) and that the sisters were not analogous to spouses or civil partners (Ireland).

### *2.2. The Burden sisters' submission*

The sisters argued that they were in an analogous situation to spouses and civil partners because they 'had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners' (*Burden* 2007, para 50). The power of the court to make financial and property orders at the end of a marriage does not mean that siblings are not in an analogous position to married couples for the purposes of inheritance tax, and in any case the sisters were prevented by law from entering into a civil partnership on the grounds of consanguinity. In the Grand Chamber, the sisters clarified in their submission that:

They had not raised a general complaint about their preclusion from entering into a civil partnership, because their concern was focussed upon inheritance tax discrimination and they would have entered into a civil partnership had that route been open to them. It was circular for the Government to hold against the applicants the very fact that they cannot enter into a civil partnership (*Burden* 2008, para 53).

They further argued that given that the stated purpose of the inheritance exemption was to promote stable and committed relationships, denying it to cohabiting adult siblings serves no legitimate aim: 'only a small minority of adult siblings were likely to share the type of relationship enjoyed by the applicants, involving prolonged mutual support, commitment and cohabitation' (*Burden* 2007, para 51). Extending the exemption to siblings and other cohabiting family members would 'serve the policy interest... [of] the promotion of stable, committed family relationships among adults' and thus excluding them did not serve a legitimate aim and was not proportionate (*Burden* 2007, para 52).

While they accepted that it was not for the Court to dictate potential remedies, the sisters noted that the proposed amendments to the Civil Partnership Bill, passed by the House of Lords but removed by the House of Commons, 'showed that it would be possible to construct a statutory scheme whereby two siblings or other close relations who had cohabited for a fixed number of years... could obtain certain fiscal rights or advantages' (*Burden* 2007, para 52). The sisters also claimed that given the recognition of the injustice caused in these cases during the passage of the Civil Partnership Bill through Parliament, the Government's reliance on the margin of appreciation was misplaced, and that the Government had failed to provide an estimate of the loss of financial revenue from extending the exemption. Finally, any lost revenue 'would have to be offset by the potential gains, for example, those flowing from an increased tendency, encouraged by the exemption, of close relations to care for disabled or elderly relatives, thus avoiding the need for state funded care' (*Burden* 2007, para 52).

### *2.3. The Chamber judgment*

The Chamber noted that, in line with the principle of subsidiarity, there is a wide margin of appreciation in the field of taxation, 'as is usual when it comes to general measures of economic or social strategy... [because t]he national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds' (*Burden* 2007, para 54). As such, the Court will generally only intervene in this area when the decision made at national

level is 'manifestly without reasonable foundation'<sup>2</sup> or discriminates between taxpayers contrary to Article 14.

It is not the case that all differences in treatment between those in similar situations will be discriminatory; rather, a difference in treatment is only discriminatory if 'it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised' (*Burden* 2007, para 55). The state also 'enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment' (*Burden* 2007, para 55).<sup>3</sup>

The Chamber must first decide whether the sisters are in a similar situation to spouses and civil partners. This would be an uphill battle for the sisters because the Court has previously held that despite increased acceptance of relationships outside of marriage, 'the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits' (*Burden* 2007, para 57; see *Shackell v. United Kingdom* 2000). The Chamber glossed over the question of whether the fact that those who are not within the prohibited degrees of relationship have a *choice* of whether or not to marry or become civil partners, whereas the sisters have no such choice, would make a difference to this line of case law by finding that 'even assuming that the applicants can be compared to such a couple, the difference in treatment is not inconsistent with Art.14' (*Burden* 2007, para 58).

The Chamber accepted the Government's submission that the inheritance tax exemption for spouses and civil partners pursues the legitimate aim of promoting stable, committed, relationships: 'The State cannot be criticised for pursuing, through its taxation system, policies designed to promote marriage; nor can it be criticised for making available the fiscal advantages attendant on marriage to committed homosexual couples' (*Burden* 2007, para 59).

Furthermore, bearing in mind both the legitimate policy aims of the exemption and the wide margin of appreciation in relation to taxation, it is inevitable that any taxation scheme will create 'marginal situations and individual cases of apparent hardship or injustice' but it is primarily for the state to determine how to strike the appropriate balance:

The legislature could have granted the inheritance tax concessions on a different basis: in particular it could have abandoned the concept of marriage or civil partnership as the determinative factor and extended the concession to siblings or other family members who lived together, and/or based the concession on such criteria as the period of cohabitation, the closeness of the blood relationship, the age of the parties or the like. However, the central question under the Convention is not whether different criteria could have been chosen for the grant of an inheritance tax exemption, but whether the scheme actually chosen by the legislature, to treat differently for tax purposes those who were married or who were parties to a civil partnership from other persons living together, even in a long-term settled relationship, exceeded any acceptable margin of appreciation. (*Burden* 2007, para 60).

Unfortunately, the Chamber does not consider in any detail whether or not siblings are similarly situated to spouses, this being generally the first question in a discrimination case. Instead, it glosses over this question and its focus turns quickly to the (usual) second question of justification. In this case, the UK did not exceed the margin of appreciation and the difference in treatment between siblings and spouses or civil partners would be reasonably and objectively justified, even if they were similarly situated. Therefore the Chamber concludes that there was no violation of Article 14, read in conjunction with Article 1 of Protocol 1.

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<sup>2</sup> Citing *James v. United Kingdom* (1986, para 46), amongst others.

<sup>3</sup> Citing *Stec v. United Kingdom* (2006, para 51).

### 2.3.1. Dissenting judgments of Judges Bonello and Garlicki and Judge Pavlovski

In their joint dissenting opinion, Judges Bonello and Garlicki are not convinced by the way in which the majority applied the margin of appreciation in this case. While they agree that there is a wide margin on tax, they suggest that once the sisters were able to demonstrate apparent hardship or injustice, the onus must shift back to the Government to show good reasons for the different treatment (*Burden 2007*, para O-11). The majority does not give 'a full explanation as to why and how such injustice can be justified' in this case and 'in the absence of such explanation, a problem of discriminatory treatment may arise, even outside the traditional arena of Convention rights' (*Burden 2007*, para O-12; citing *Stec v. United Kingdom 2006*, para 54-55).

They suggest that as long as the UK confined the exemption to spouses the policy could have been justified by reference to Article 12 (the right to marry and found a family) but that once it was extended to civil partners, 'the problem left the specific sphere of Article 12' and now has to 'satisfy general standards of reasonableness and non-arbitrariness resulting from Article 14' (*Burden 2007*, para O-12). In other words, now that same-sex couples, who are civil partners rather than spouses, have the tax exemption, the Government must be able to justify why 'it has been offered to some unions while continuing to be denied to others' (*Burden 2007*, para O-12).

Unlike the majority, Judges Bonello and Garlicki do distinguish between couples, who are free to choose marriage, and the sisters, who are not, and they emphasise the similarity between the sisters and spouses:

The situation of permanently cohabiting siblings is in many respects – emotional as well as economical – not entirely different from the situation of other unions, particularly as regards old or very old people. The bonds of mutual affection form the ethical basis for such unions and the bonds of mutual dependency form the social basis for them. It is very important to protect such unions, like any other union of two persons, from financial disaster resulting from the death of one of the partners (*Burden 2007*, para O-13).

Although they accept that the Government may 'establish a very high threshold' for sibling relationships to be recognised, they reject the idea that they can 'simply ignore that such unions also exist' (*Burden 2007*, para O-13).

They conclude by noting that the UK wants to collect its tax twice: on the death of the first sister, and again on the remains of the estate on the death of the second sister, which they find 'is scarcely compatible with Art.14 taken in conjunction with Art.1 of Protocol No. 1' and which 'may also raise problems under Art.8' if the surviving sister would be compelled to sell the home 'or otherwise sacrifice the lifestyle to which she has been accustomed' (*Burden 2007*, para O-14).

Judge Pavlovski dissents for a different reason. He finds that the majority 'failed to adduce any reason or argument' for finding that the UK did not exceed the margin of appreciation and that the difference in treatment was reasonable and justified (*Burden 2007*, para O-114) and as such he views their decision as unfair: 'I am firmly convinced that a judicial decision, which represents, by its very nature, the highest expression of justice, cannot be unfair' (*Burden 2007*, para O-113).

He bases his view of the unfairness of the decision on the sisters' emotional connection to the family home and land:

Had assets purchased by the applicants during their cohabitation been at stake, I would have had no difficulty in accepting the majority's approach and, moreover, I would have readily agreed that part of such shared assets, inherited by a surviving sibling, could and should be considered as taxable property. In the case before us, however, we are faced with a qualitatively different situation. The case concerns the applicants' family house, in which they have spent all their lives and which they



built on land inherited from their late parents. This house is not simply a piece of property – this house is something with which they have a special emotional bond: this house is their home. It strikes me as absolutely awful that, once one of the two sisters dies, the surviving sister's sufferings on account of her closest relative's death should be multiplied by the risk of losing her family home because she cannot afford to pay inheritance tax in respect of the deceased sister's share of it (*Burden* 2007, para O-I18- 9).

For this reason, he cannot agree with the majority decision and places their judgment in the category of legal, but unfair.

#### 2.4. *The Grand Chamber judgment*

Like the Chamber, the Grand Chamber finds that the complaint does fall within the ambit of Article 1 of Protocol 1 and that Article 14 is therefore engaged (*Burden* 2008, para 59). It reiterates the well established rule that in order for there to be discrimination under Article 14 there must be 'a difference in the treatment of persons in relevantly similar situations' and that difference 'has no objective and reasonable justification' (*Burden* 2008, para 60). It also notes that States enjoy a wide margin of appreciation 'in assessing whether and to what extent differences in otherwise similar situations justify a different treatment', in relation to economic or social strategy (para 60). While the Chamber focussed on the latter issues after glossing over the question of whether the sisters were in a relevant similar situation to spouses or civil partners, the Grand Chamber answers this first question in the negative and as a result does not find it necessary to continue on to consider whether differences were justified and within the margin of appreciation. This was criticised by the two dissenting judges and one concurring judge (discussed below).

The reason that the Grand Chamber found that the sisters were not in a relevantly similar situation to spouses and civil partners was that these relationships are 'qualitatively of a different nature':

The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members. The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship (*Burden* 2008, para 62).

They reiterated the 'special status' of marriage and the Court's previous judgment in *Shackell* that married and unmarried heterosexual couples are not analogous because of that special status (*Burden* 2008, para 63). They also extended this special status to civil partners because the legal consequences of this status, which are expressly and deliberately entered into by the couple, 'set these types of relationship apart from other forms of cohabitation' (*Burden* 2008, para 65). It is the existence of a public undertaking, not the length or supportive nature of the relationship, that is determinative: just as with unmarried cohabiting couples, 'the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple' (para 65). As such, the applicants cannot be compared to spouses or civil partners and there is therefore no violation of Article 14.

##### 2.4.1. Concurring opinions of Judge Bratza and Judge David Thor Bjorgvinsson

Judge Bratza wrote a concurring opinion only to say that while he agrees with the decision of the Grand Chamber he prefers the reasoning of the Chamber (*Burden* 2008, para O-I11). Though he does not elaborate on why that is, it is perhaps not surprising as he was a member of the Chamber's majority in this decision, sitting in both cases as the UK's judge on the Court.

Judge David Thor Bjorgvinsson also preferred different reasoning to the majority of the Grand Chamber, which was closer to that of the Chamber. However, unlike the Chamber he does not gloss over the issue of whether the sisters' relationship was analogous to spouses or civil partners. He rejects the reasoning of the majority in the Grand Chamber, which is 'to a large extent based on reference to the specific legal framework' of marriage/civil partnership that the sisters are prevented from accessing (*Burden* 2008, para O-II4). Because sisters cannot marry or get civilly partnered, the comparison between them and spouses or civil partners should be made based only on the 'substantive or material differences in the nature of the relationship as such' and not with references to the different legal frameworks available to spouses/civil partners and siblings (*Burden* 2008, para O-II5). In terms of these material differences, he finds that:

Despite important differences, mainly as concerns the sexual nature of the relationship between married couples and civil partner couples, when it comes to the decision to live together, closeness of the personal attachment and for most practical purposes of daily life and financial matters, the relationship between the applicants in this case has, in general and for the alleged purposes of the relevant inheritance tax exemptions in particular, more in common with the relationship between married or civil partner couples, than there are differences between them.... (*Burden* 2008, para O-II5).

As such, he finds that these sisters are in fact in a relationship analogous to spouses/civil partners. However, he goes on to agree with the reasoning of the Chamber in finding that the difference in treatment is objectively and reasonably justified. He additionally notes, in an indication of his likely view on a same-sex marriage case under Article 12, that every step taken to extend the rights of marriage, though positive 'as it may seem to be' from an equal rights point of view, potentially has consequences 'for the social structure of society, as well as legal consequences' in the respective countries:

It is precisely for this reason that it is not the role of this Court to take the initiative in this matter and impose upon the Member States a duty further to extend the applicability of these rules with no clear view of the consequences it may have in the different Member States (*Burden* 2008, para O-II7).

Instead, he concludes, this must be within the margin of appreciation for individual States to determine.

### *2.5. Dissenting judgments of Judge Zupancic and Judge Borrego Borrego*

Judge Zupancic dissents because he finds the reasoning of the majority to be 'logically inconsistent' (*Burden* 2008, para O-III1). The issue in the case is discrimination concerning the inheritance tax exemption. He first notes that discrimination in itself is not unlawful and is a necessary part of decision-making. It is only when that discrimination is on the basis of a 'suspect class' enumerated in Article 14 that it is 'in principle proscribed' (*Burden* 2008, para O-III5) and these suspect classes enjoy different levels of scrutiny. Some categories, such as race or national origin, call for 'the strictest scrutiny test' that requires a decision to be 'suitably tailored to serve a compelling state interest' (*Burden* 2008, para O-III7) while gender, for example, requires an intermediate test that the decision must be 'substantially related to a sufficiently important interest' (*Burden* 2008, para O-III7). The standard of scrutiny in this case, which deals with social and economic matters, is the 'mildest proportionality (reasonableness) test', which 'inquires whether the legislation at issue is rationally related to a legitimate government interest' (*Burden* 2008, para O-III8).

Despite the mildness of the scrutiny applied to this case, for Judge Zupancic the crucial issue appears to be that the tax exemption has now been extended beyond marriage to civil partners. While it was restricted to spouses, 'the cut-off criterion is clear' and the Government 'may reasonably maintain that the close relationship of a

couple provides sufficient reason for the tax exemption' (*Burden* 2008, para O-III12), but once it is extended to 'other modes of association' [i.e. same-sex couples through civil partnership], the distinction between the married and the unmarried is 'broken' and we may question whether the denial of the exemption to other forms of association is 'rationally related to a legitimate governmental interest' (*Burden* 2008, para O-III13):

I ask myself, at this point, why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question.... So what does the qualitative difference [between spouses/civil partners and siblings] come to? Is it having sex with one another that provides the rational relationship to a legitimate government interest? (*Burden* 2008, para O-III16).

He therefore concludes, referencing *Stec v. United Kingdom* (2006, para 53), that the state is not required to create extra-marital tax exemptions [for civil partners], but once it does, it should 'employ at least a minimum level of reasonableness while deciding not to apply the benefit to other groups of people in relationships of similar or closer proximity' (*Burden* 2008, para O-III19). The decision to exclude relationships of consanguinity is in his view 'simply arbitrary' (*Burden* 2008, para O-III20).

Judge Borrego Borrego dissents on the basis that the majority judgment 'does not deal with the problem raised by this case' (*Burden* 2008, para O-IV1), which he frames as being primarily about the question of the margin of appreciation (*Burden* 2008, para O-IV6). He suggests that the majority have grounded their judgment on undisputed facts [i.e. that the two differences between the sisters and civil partners are that the sisters have a relationship of consanguinity and civil partnership is a legally binding relationship] and that this 'is the best example there can be of a circular, or I might even say concentric, argument' (*Burden* 2008, para O-IV8).

Instead, like Judge Zupancic, he relies on the decision in *Stec* that a State is not required by Article 1 of Protocol 1 to give social security benefits, but if it does decide to do so, it must do it in a manner that is compatible with Article 14. The majority have 'disregarded' this Grand Chamber precedent in their judgment (*Burden* 2008, para O-IV10) and have declined to give an answer to the question of whether declining to extend the tax exemption to the sisters after they have done so for same-sex civil partners 'is a measure proportionate to the legitimate aim pursued' (*Burden* 2008, para O-IV9). He concludes, rather emotively, that: 'The fact that the Grand Chamber did not give a reply to the applicants, two elderly ladies, fills me with shame, because they deserved a different approach' (*Burden* 2008, para O-IV11).

### 3. Commentaries and critiques

Drawing from the judgments and the existing commentaries and critiques, the issues raised by this case can be framed in a number of ways, which I explore in this section before suggesting a feminist re-framing of the issues at stake, which takes more account of the broader social and political context in which this case is situated.

These cases can be read very differently depending on one's perspective. For the claimants, the central issue is an unfair tax system, which privileges couples (though the extension of this to same-sex couples in particular through the Civil Partnership Act 2004 appeared to be the impetus for this case) whilst penalising cohabiting and mutually dependent siblings who cannot claim the same tax exemptions despite arguably similar circumstances to spouses, other than the sexual nature of the relationship. Interestingly the language used by the sisters is similar to that of advocates for same-sex marriage:

We are looked down upon for being single. We just want to be treated as equal citizens and given the rights we deserve (Sybil Burden, interviewed in Bale 2006, p. 11).

"We just want to be treated the same as lesbians and homosexuals" says Sybil. "If we pay the same taxes, then we should have the same rights," adds Joy. (Sybil and Joyce Burden, interviewed in Robert Hardman 2006, p. 36).

For others, the facts of the case are read in the context of their mirroring a 'hypothetical' scenario used to try to derail the passage of the Civil Partnership Bill in 2004 and thereby to seek to undermine the recognition of same-sex relationships, known as the 'spinster sisters' wrecking amendment, proposed by Baroness O'Cathain and Lord Tebbit (for further details on this see Barker 2014, 2015). As a result, the focus for these commentators is on praising the resistance of this homophobic agenda and the extension of the 'special status' of marriage to civil partnerships (see for example, *European Human Rights Law Review* 2008, p. 560). However, as some commentators noted, the extension of the inheritance tax exemption to same-sex couples through the Civil Partnership Act seemed to be a distraction in *Burden* case (see for example Baker 2008, p. 331), which was not really about civil partnerships at all: 'It was a case about tax; about spousal privilege (and the extension of that privilege to gays and lesbians who register their partnerships); and about old age and vulnerability' (Auchmuty 2009, p. 211). It is these themes that I pick up in my judgment.

While the commentaries generally reveal a certain amount of sympathy for the sisters, and some criticism of the Courts' reasoning in both cases, few argue that the ultimate finding of no violation in this case was incorrect. For example, Brian Sloan argued following the Chamber decision, that: 'This decision is as deferential as its result is tragic' (Sloan 2007, p. 114) He suggests that the inheritance tax system should be reformed to accommodate the situation of the Burden sisters, with a system oriented towards '*actual* economic interdependence' rather than formal relationship status able to produce fairer results, though this is 'likely to be considered unworkable in a system so dependent on categorisation' (Sloan 2007, p. 116, emphasis in original). However, he agrees with the Chamber's decision not to find the Civil Partnership Act's exclusion of siblings to be in violation of Article 14 and that extension of civil partnerships to siblings would have undermined the purpose of the 2004 Act. Instead, reform should, he suggests, 'be limited to the tax system' (Sloan 2007, p. 117). Similarly, the short commentary of the Chamber decision in the *European Human Rights Law Review* is sympathetic to the dissenting judgment of Judges Bonello and Garlicki in its dissatisfaction with the Court's 'over-reliance on the margin of appreciation as justification for the treatment of the applicants' (*European Human Rights Law Review* 2007, p. 202) and suggests that Parliament should address the situation that the Burden sisters found themselves in through separate legislation to the Civil Partnership Act.

The reasoning of the Grand Chamber fared even less well than that of the Chamber. Several commentators, including myself, found the rationale that sisters could not be analogous to spouses/civil partners because they are prohibited from entering a marriage/civil partnership by virtue of being sisters to be circular and unconvincing (see Baker 2008, p. 332, Sloan 2007, p. 485, Gross 2013, p. 278, Barker 2014, p. 66). The question of whether or not the sisters' relationship was sufficiently analogous to a spousal relationship should have been established based on the nature of their relationship, rather than the fact that they were excluded from spousal status. This type of reasoning, I would suggest, is indicative of a more general criticism of the European Court of Human Rights: that it is far too deferential to what it describes as the 'special status' of marriage. This is another theme that I pick up in my alternative judgment.

One commentator who argued that there should have been a violation found in this case is Aeyal Gross (2013), in the course of his alternative judgment in the case.

Though he draws on the work of a number of feminist scholars, he comes to this conclusion on the basis of a more liberal view that the Court should enforce respect for the diversity of relationship types (including those of single people as well as those in non-conjugal and polyamorous relationships) and dismisses concern expressed by some feminists (such as Graycar and Millbank 2007, see also Barker 2014) of the 'hijacking' of a potentially progressive recognition of non-conjugal relationships by conservatives for their own purposes:

The fact that conservative forces may want the same for their own reasons does not change my position that extending rights to various forms of relationships, and not discriminating against single persons, is a worthwhile project from the perspective of equality and diversity (Gross 2013, p. 287-288).

Gross appears to prefer a functional approach, and the basis of his alternative judgment is that the sisters' relationship was functionally similar to that of spouses/civil partners, but he is not particularly tied to this as his priority is the recognition of non-conjugal relationships: if the State could achieve this through expanding opt-in relationship recognition, effectively to any two people, this would appear to be an equally acceptable remedy for him in this case. Alternatively, the third option offered to the UK in his judgment is to remedy the discrimination by abolishing inheritance tax exemptions altogether. Each of these potential solutions would have radically different implications for UK taxation policy, and it may well be appropriate for the Strasbourg court to leave the question of which to choose to the UK government. However, Gross makes the finding of discrimination in this case based only on the functional similarities between the Burden sisters and spouses/civil partners. The next stage of the Article 14 test is whether the discrimination between those who are similarly situated can be objectively justified, (including whether it is within the UK's margin of appreciation). These issues are not considered in his judgment and the result is that it does not particularly challenge the notion of the special status of marriage any more than the Chamber or Grand Chamber did. It simply requires more (potentially an infinite number of) people to have access to it.

In contrast, Rosemary Auchmuty (2009) provides a feminist reading of the case, putting it in the context not only of the taxation of the sisters' relative wealth and the privileging of spouses at the expense of everyone else, but also old age and vulnerability. Noting that 'single women and old people ... have a long history of being overlooked and disregarded in the handing out of privileges', Auchmuty suggests that the way to resolve this case is, 'not to extend the definition of couples eligible to form a civil partnership, nor to abolish inheritance tax, but to *get rid of the spousal exemption*' (Auchmuty 2009, p. 216, emphasis in original). I would suggest that it is Auchmuty's feminist approach that led her in a different direction to the other commentators, who for the most part came to the opposite conclusion: that the exemption should be extended in some way but not through allowing siblings access to civil partnerships. Sharing this approach, I have come to a similar conclusion based not only a different reading of the relevant ECHR provisions, which I set out in my judgment, but also a different reading of the facts of this case and through taking into account the broader social, economic and political context in which the inheritance tax rules operate. I outline this below, along side a consideration of the arguments relating to conjuality and care, which have been made by several feminists as well as the commentators on this case.

#### **4. A feminist reframing of Burden**

##### *4.1. Re-framing the facts of the case*

From a feminist perspective I would agree that it is difficult to justify privileging sexual relationships, particularly through tax exemptions, but I would not suggest that this therefore means that siblings ought to be similarly privileged in the tax system. The sisters appear to claim that they have been disadvantaged by the

increase in value of their home, which they had built on land inherited from their parents in 1965 at a cost of £7000. During the subsequent 40 years, the home and its 30 acres of farmland had increased in value to £550,000. It is noteworthy, though absent from both judgments, that each sister's share of the home would be below the inheritance tax threshold of £300,000 (in the tax year 2007/8 when the Grand Chamber case was heard, now increased) but for the fact that they also own other property so their total property holdings are worth £875,000 in addition to another £300,000 in investments and other assets. These sisters seem to be privileged enough already without additional tax advantages, particularly compared to the struggles faced by the younger generation who are widely reported to be giving up on the idea of home ownership as a result partly of the type of house price inflation that the Burden sisters have experienced and a resulting shortage of affordable housing.<sup>4</sup>

I would also question their assertion that they would be compelled to sell their home to pay the tax bill, made hesitantly in the judgments ('might have to'), but more definitively in the media reports of the case (see for example Bale 2006 and Hardman 2006). On the basis of the assets listed in the Chamber judgment, the home and surrounding land is worth £875,000 at the time of the hearing, with each sister owning an additional portfolio of investments and other property worth £150,000, taking the total value of each sister's estate to £587,500. The first £300,000 at that time (since increased to £325,000) would not be liable for inheritance tax, so the tax bill would be 40% of £287,500, or £115,000.<sup>5</sup> This could be easily paid by selling the deceased sister's additional portfolio of investments and property with £35,000 to spare.

The Burden case was framed in the Court and the media as being about a vulnerable pensioner who may lose her home when her sister dies. As a result it could be easy to lose sight of both the fact that these particular pensioners are very wealthy and in general the pattern of poverty in the UK has changed dramatically over the last twenty years, when 'pensioner poverty has fallen sharply, while child poverty has fallen slowly and unevenly and working-age poverty has risen, particularly in the last decade' (MacInnes *et al* 2014, p. 28). It is not horizontal transmission of wealth between siblings that should be the primary concern of tax policy but rather addressing poverty, which at the moment is statistically much more likely to impact the younger generation, with 34% of 16-19 year olds and 29% of 20-24 year olds in poverty in the UK, a 6 point increase from a decade earlier (MacInnes *et al* 2014, p. 28). It is not at all clear how this would be addressed by reducing or eliminating inheritance tax for the wealthiest few estates in recognition of care that has been provided, even where that care is inter-generational and at the expense of the carer's paid employment rather than the more mutual support and interdependence of the Burden sisters case.

#### 4.2. *The broader context: tax and welfare in the age of austerity*

We might also compare the surviving sister's dilemma of choosing between downsizing from a four-bedroom home to a smaller property or selling some of her other investments to pay the tax bill, to that of the poorest people in the UK who receive housing benefit and have recently had their benefits cut as part of the notorious 'bedroom tax', or under-occupancy penalty, which was introduced in April

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<sup>4</sup> See for example: Inman (2015). The rise of campaign group *Generation Rent*, which 'campaigns for professionally managed, secure, decent and affordable private rented homes in sustainable communities' is also indicative of the shift from home ownership to private renting: <[www.generationrent.org](http://www.generationrent.org)> [accessed 14 April 2015].

<sup>5</sup> There is some disagreement between commentators on the exact figure, possibly due to conflicting reports of the sisters' assets. For example, Dempsey (2009, p. 35) also estimates the tax liability at £115,000, whilst Auchmuty (2009, p. 212) calculates it at £191,000. The latter figure would also require the surviving sister to sell some of her investments but she could still comfortably meet the tax bill without it being necessary to sell the home, contrary to the media reports of the case.

2013 (Housing Benefit (Amendment) Regulations 2012). Under these regulations, housing benefit has been reduced by 14% for those who are deemed to have a 'spare' bedroom in their home, or by 25% for those who are deemed to have two or more spare bedrooms, despite a shortage of affordable smaller one-bedroom properties for people to transfer into. The tenants, often already living in poverty, then need to pay the additional cost, usually to a private landlord due to the shortage of public housing. The bedroom tax does not apply to those who are over 65 years old and there are exemptions for people with certain disabilities who require a room for overnight carers but there are multiple reports of disabled people having to pay this tax and not receiving help with it, despite local authorities being given a fund to make 'discretionary housing payments' to cover the difference in such cases.<sup>6</sup>

As noted in the judgment of one of the bedroom tax cases, 'The Coalition Government came to power in 2010 with a mandate to reduce the budget deficit. It has introduced a radical welfare reform scheme which is designed to control the cost of the social security budget'. (*R (on the application of MA and Others) v. Secretary of State for Work and Pensions* 2014, para 17) However, the 'mandate' (such as it existed for a coalition government rather than outright majority) to reduce the budget deficit, and the policy of encouraging people living in homes larger than they need to downsize during this housing crisis, appear to extend only to those below retirement age and claiming state welfare. The elderly and the (relatively) wealthy have had their existing privileges and tax regimes largely protected. As such, in contrast to the bedroom tax policy, and despite only the wealthiest 4.8% of estates being liable to pay any inheritance tax at all in 2013-14 (Office for Budget Responsibility 2014), the recently elected Conservative government have pledged to raise the exemption to £1 million, including an exemption for the family home (Conservatives 2015, p. 67), at the same time as decimating the welfare state, with a further £12 billion of cuts proposed after the pensioners' benefits, which comprise more than half of the total welfare spending, have been protected (Stewart *et al.* 2015). This means that these cuts must once again come from working-age benefits, which have already been hard-hit by austerity measures such as the benefit cap and bedroom tax, which were introduced during the last Parliament. The Conservatives also pledged to further reduce the benefit cap for working-age families from £26,000 to £23,000 'within the first few days' of a Conservative government (Saul 2015). It is indicative that the Conservative manifesto refers to welfare as 'wasteful spending' in the same group as tax evasion and avoidance (Saul 2015, p. 9) and identifies the causes of child poverty as: 'entrenched worklessness, family breakdown, problem debt, and drug and alcohol dependency' (Saul 2015, p. 28), rather than factors such as a minimum wage that is below the living wage, excessively high rents in the private rental sector combined with a scarcity of public housing, and insecure work.<sup>7</sup>

Inheritance tax is deeply unpopular, seen by some as a 'double taxation' since income and assets have already been taxed when they were initially received and as standing in the way of parents passing on the family assets to their children (see for example Thomson 2008). But I would suggest that with the UK's increasing gap between the rich and the rest it is a good example of wealth redistribution through taxation that should be extended and properly enforced rather than retracted. Although inheritance tax receipts were significantly less than income tax receipts at £3.1 billion and £152 billion respectively in 2012-13 (Matthews 2014), increasing

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<sup>6</sup> Cases where the bedroom tax has been challenged by people with disabilities include: *Burnip v. Birmingham City Council and Secretary of State for Work and Pensions, et al.* (2012), *R (on the application of MA and Others) v. Secretary of State for Work and Pensions* (2014), and *Rutherford v. Secretary of State for Work and Pensions and Pembrokeshire County Council* (2014).

<sup>7</sup> A recent report by the Joseph Rowntree Foundation (2014) found that as many people living in poverty are in working families as are in families where no one works, and that there has been a vast increase in insecure work over the last ten years, 'which means that getting a job does not necessarily mean getting out of poverty.'

the liability over the nil rate threshold to 100% would not only go a long way towards disrupting the transmission of wealth within families at the expense of the rest of the population but also, as pointed out in a *Forbes Magazine* article 'take money from the deceased and use it to supplement taxes paid by the living'.<sup>8</sup> Another alternative is that inheritance should be taxed in the same way as ordinary income, with no exemptions, so that 'all income, earned and unearned, from capital gain or sweat of brow, is taxed the same, whatever its source' (Toynbee 2014). This is an attractive proposition as it takes into account the situation of the recipient rather than the deceased because the tax paid is based on their total income (see Adam and Emmerson 2014). Therefore, the surviving Burden sister's tax liability would be in proportion to her annual income once the inheritance is taken into account. If her only income is a state pension she would pay significantly less tax than if she also has a private income through her additional assets.

Nevertheless, even under the existing inheritance tax regime, in this economic and social policy context it is difficult to have sympathy for the Burden sisters, whose total wealth places them in the top 4.8% of estates, which are eligible for inheritance tax.

#### 4.3. *Conjuality and care*

Despite this context, the question remains of whether there might nevertheless be reason to recognize interdependence between non-spouses, particularly as a way of addressing vulnerability within both the elderly population and their carers.<sup>9</sup> With an aging population needing care, and this care increasingly provided within the family or friendship network, is it really justifiable to continue to limit legal and economic privileges of marriage to spouses and civil partners? In other words, should the inheritance tax exemption remain, but based on demonstrating a relationship of care and dependency, rather than a spousal relationship? Some family lawyers have made arguments along these lines, though more broadly than just in relation to the inheritance tax claim at issue in this case.

Martha Fineman (1995, 2004) argues that the whole system of spousal privileges ought to be reoriented away from the sexual relationship between adults and towards the caretaker-dependent relationship. The prime example of this relationship is mother-child (using mothering as a synonym for care that can also include men who are primary carers) but it could also apply to someone looking after a disabled or elderly person. She notes that dependency is an inevitable fact of life and that those who perform the caretaking role themselves begin to suffer from derivative dependency because they in turn become dependent on support, whether financial because they are now unable to engage in paid labour, or otherwise. Hiding this derivative dependency within the marital family and sifting state resources and privileges through the sexual relationship of marriage instead of directly to the caretaking relationship that really requires these resources and privileges has served to stigmatise those who find themselves dependent on the state because they are engaged in caretaking labour outside of the marital family (i.e. single mothers) and is not the most effective way to distribute resources. As such, Fineman (1995) argues that marriage should be abolished and instead the state should focus its attention on encouraging and supporting these caretaking relationships.

Jonathan Herring (2014) draws on Fineman's work amongst others in making his argument that family law in the UK should be more focused on care, rather than sex. He argues that for each of the three functions of family law (as identified by John Eekelaar [1984]: namely protective, adjustive, and supportive), the existence of a sexual relationship is irrelevant. Instead a caring relationship is what creates

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<sup>8</sup> Though it should be noted that the article does go on to disagree with such a policy (Matthews 2014).

<sup>9</sup> For example, one of the ways in which people seek to avoid inheritance tax, by transferring assets to family while they are alive, can increase the vulnerability of elderly people.



the vulnerability that the law ought to address. Taking for example the protective function, Herring argues that abuse of the elderly demonstrates that it is 'the intimacy of the relationship, not its sexual nature, which is key to the wrong in domestic violence' (Herring 2014, p. 53). For this reason it is correct to focus domestic violence protections on intimate relationships rather than sexual ones. Similarly, family law attempts to protect vulnerable family members from financial exploitation. While the law typically only concerns itself with financial orders on divorce, Herring argues that while sexual relationships in themselves do not cause financial loss (i.e. where there is no parenting or care work within the relationship) 'care work is closely tied to financial inequality' (Herring 2014, p. 53). It is those who have taken primary responsibility for childcare who tend to suffer financial disadvantage. Similarly, in relation to the adjustive function of family law, he notes that it is necessary to make arrangements for children at the end of the relationship whether or not there was a sexual relationship between the parties. Finally, he argues that sex is not necessarily a good indicator of commitment or intimacy, so he questions whether sexual relationships are of such significance that they deserve the supportive function of family law. In contrast, caring relationships do benefit the state, particularly where the care would otherwise have to be provided by the state and as such it is caring relationships that should receive the support of the state (Herring 2014, p. 55).

Moving away from privileging sexual relationships through the marriage model is an attractive proposition, but my concern about both of these approaches is that by recognizing and privileging care, there becomes an expectation that care will be provided within the family and a resulting withdrawal of state services (see also Boyd 1997, p. 14, 1999, p. 377). There is also the important question of what happens when the recipient of care does not have the resources to adequately compensate the carer's financial disadvantage through property redistribution. It seems they would be in the same position as many wives find themselves on divorce: having to rely on state welfare and stigmatized as a result. While collective responsibility for care is hidden behind incentives for privatized responsibility, these rewards for care in the form of legal recognition and privileges render both the carer and the cared for vulnerable to changing family circumstances, even in families that initially did have sufficient resources. It should also not be assumed that legal recognition will result in financial benefits for all those in caretaking relationships: as Claire Young (2015, p. 134) has found in relation to the recognition of same-sex couples in Canada's tax laws, while some benefited from inclusion others, usually those least able to afford the additional cost, have actually acquired an increased tax burden.

It appears to serve the interests of the privatizing, neo-liberal state to expand legal recognition and privilege to carers. For example, focusing specifically on the issue of tax rather than the broader family law arguments made by Fineman and Herring, Claire Young argues that by recognizing spouses and common law partners in the Canadian tax system, the tax system plays an important role in the privatization of care, whether this care is actual care-giving or the economic support of family members (Young 2006, p. 22). She demonstrates the ways in which many of these tax breaks, including those focused on dependency, are 'inequitable and discriminate without good reason against those couples with low incomes and in favour of those with high incomes', as arguably would be the case with the expansion of the inheritance tax exemption sought by the Burden sisters, in addition to being poorly targeted and part of the neo-liberal privatization agenda (Young 2006, p. 17). Reliance on privatized responsibility is problematic because:

At a general level such privatization policies tend to diminish the role that the state plays in ensuring a fair level of income for all its citizens. The state is delegating its responsibility to the private sector, with virtually no strings attached. Encouraging the private family to fill the role previously taken by the state leaves gaps in the social security network, gaps which those without spouses or common law partners

often fall through. The result is often a retirement lived in poverty (Young 2006, p. 24).

Of course, as Herring (2014, p. 58) notes in response to my critique of reorienting legal recognition towards care (Barker 2014), the neoliberal state may nevertheless privatize responsibility without giving carers any resources such as tax breaks. However, a system of recognition *legitimizes* the rolling back of state support, providing a narrative that can be used to justify it and stigmatise those who cannot provide or financially support privatized care within the family in the same way, as Fineman notes, that single mothers have been subjected to this. The ring fencing of the very large proportion of the state welfare budget dedicated to pensioner benefits (even though they are mostly not means-tested, such as the winter fuel allowance and concessionary travel) in times of austerity and deep cuts elsewhere demonstrates how difficult it is for governments to make cuts that impact on this group of active voters. However, not all of those receiving care are in this group and their carers, who need the financial support of the state, will often not be either. If cuts are made to vital pensioner benefits related to care, such as carers' allowance, it is poorer pensioners and their carers who will find themselves financially disadvantaged, while those such as the Burden sisters benefit from the tax breaks of a privatized regime.<sup>10</sup>

On the basis of her analysis of the Canadian tax system, Claire Young argues in favour of enacting the recommendations of the Law Commission of Canada (LCC) (2001) and 'consider repealing many of the tax rules that take spousal status into account' (Young 2006, p. 29). The Burden case also serves to illustrate why the Law Commission of Canada methodology seems sensible in the UK context as well and as such this is the approach I will take in my alternative judgment. The LCC rejected any relationship-based approach to legal privileges as far as possible, focussing instead on the objective of the individual provision. This means that in the case of the Burden sisters, the question is not about how deserving or otherwise the sisters are of recognition but rather about what the objective of the inheritance tax exemption is and whether the sisters' relationship fulfils that objective-based criterion. The LCC methodology to be applied to each law involves asking the following four questions:

First, are the objectives of the law still legitimate? If the objectives of the law are no longer appropriate, the response may be to repeal or fundamentally revise a law rather than to adjust its use of relational terms. Second, if a law is pursuing a legitimate objective, are relationships relevant to the objective at hand? If relationships are not important, then the legislation should be redesigned to allocate the rights and responsibilities on an individual basis. Third, assuming that relationships are relevant, could the law allow individuals to decide which of their close personal relationships should be subject to the law? Fourth, if relationships do matter, and self-definition of relevant relationships is not a feasible option, is there a better way for the government to include relationships? (Law Commission of Canada 2001, p. 29-30).

It is at the first question that in my view the spousal inheritance tax exemption fails, due to many of the issues raised in this section. In applying this feminist perspective and reframing of the facts of the case in my alternative judgment I seek to demonstrate how this conclusion can be reached based on a different interpretation of the provisions of the Convention, specifically the prohibition of marital status discrimination under Article 14. There is plenty of scope for a feminist judge to make the point that the privileging of marriage under the Convention has meant that the principles of non-discrimination have been rendered entirely meaningless in the context of unjustified preferential treatment for spouses in national law. Redressing this does not mean simply expanding the categories of relationship to receive such privileged status but rather considering, as the LCC

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<sup>10</sup> See also Claire Young's (2015, p. 146) critique of expanding spousal tax breaks in Canada for similar reasons, i.e. that such measures tend to benefit those on higher incomes

suggests, the legitimacy of the objectives of each law and thereby dismantling the 'package' of legal privileges associated with marriage where there is no legitimate objective to the preferential treatment.

## 5. Feminist judgment

Burden v. United Kingdom. Application No. 13378/05 Before the European Court of Human Rights, Grand Chamber 1 May 2015

### 5.1. Partly dissenting and partly concurring opinion of Judge Barker

O-V1 The applicants' claim is that their exclusion from the spousal inheritance tax exemption under the Inheritance Tax Act 1984, s18(1), constitutes a violation of Article 14 in conjunction with Article 1 of Protocol 1 (A1P1). The majority judgment explains why the complaint falls within the ambit of A1P1 and I concur with that analysis. My dissent is in relation to their application of Article 14, though my ultimate conclusion on the facts of this case concurs with the majority.

Article 14 provides that:

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.

It is well established that 'other status' covers a range of personal characteristics, including marital status. (*Sahin v. Germany* 2003)

O-V2 As the majority correctly note, not every difference in treatment will constitute a violation of Article 14. The difference in treatment must first of all be between those who are in relevantly similar situations. (*DH v. Czech Republic* 2008, para 175) It is at this point that the majority consider the applicants to have failed because they can be distinguished from spouses/civil partners on the basis that 'the very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage [or civil partnership] is that it is forbidden to close family members' (*Burden v. United Kingdom* 2008, para 62). Furthermore, they find that marriage confers a special status, which gives rise to social, personal and legal consequences, and is protected under Article 12. Similarly, the 'legal consequences of civil partnership... which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation' (*Burden v. United Kingdom* 2008, para 65). As such, it is not the length and nature of the relationship that is determinative but rather the absence of a legally binding agreement between the applicants renders it 'fundamentally different' to that of spouses or civil partners (*Burden v. United Kingdom* 2008, para 65).

O-V3 In my view the majority have erred in their analysis on this point and have been led in that direction by erroneous case law on the 'special status' of marriage in previous decisions in which unmarried couples have been treated less favourably than married couples,<sup>11</sup> even when the law prevents them from marrying. (*Gas v. France* 2014) It is illogical and circular to distinguish a relationship between those who are legally prohibited from making the sort of legally binding public undertaking that spouses and civil partners make, on the basis that they have not done so. Indeed, making a distinction on this basis renders the prohibition of marital status discrimination under Article 14 completely ineffective in any case that seeks to compare the treatment of married and unmarried couples.

O-V4 There is, perhaps, an arguable case to be made that in a situation where a couple have chosen not to marry, despite it being available to them, that they have declined the various protections and privileges that spousal status brings and therefore any difference in treatment could be justified. However, a recent

<sup>11</sup> For example, *Shackell v. United Kingdom* (2000).

judgment from the Chamber (Third Section) suggests that even in this situation the Court's patience for such discrimination is declining:

Lastly, the Court cannot accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed. The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance. (*Munoz Diaz v. Spain* 2009, para 70).<sup>12</sup>

This is also not the set of facts under consideration in this case and in any event this would speak to the second part of the test, as a question of justification of differential treatment and proportionality rather than as an indication that they are not similarly situated to spouses for the purposes of the first part of the Article 14 test.

O-V5 In a situation such as this one, where siblings are not permitted to marry or become civil partners, or a situation where same-sex couples are not permitted to marry or become civil partners, such as in *Gas v. France* (2014), it is unjust to effectively punish them (by not providing them access to even the first stage of Article 14 protection) for the decision of the State to prevent them from undertaking a legally-binding agreement. This is not to suggest that the State must allow any type of relationship access to spousal status, nor is it to suggest that they cannot necessarily treat spouses differently to non-spouses, but these points need to be dealt with in the second and third stages of the Article 14 test. Therefore, for the first part of the Article 14 test we must consider the *substantive* aspects of the relationship, rather than the (absent) formalities.

O-V6 Perhaps the reason why this Court has turned to the legal form in the past is because the characteristics of spousal relationships are so difficult to determine, as they can be widely diverse between different relationships. However, some jurisdictions have recognized unmarried relationships for different purposes and in doing so have compiled general lists of characteristics that should be met in order to qualify. For example the Property (Relationships) Act 1984 of New South Wales, Australia, seeks evidence of a set of criteria that is clearly based on assumptions about marriage, such as: a long-term, cohabiting, sexual relationship; financial dependence or interdependence; mutual commitment to a shared life; and the reputation and public aspects of the relationship (s4(2)). However, none of these factors is required except cohabitation and 'a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case' (s4(3)).

O-V7 Whilst this Act is not binding on the UK or this Court, its existence demonstrates that it is not outside the ability of this Court to construct a similar list of spousal characteristics to test whether a non-marital relationship could be relevantly similar to spouses. If we compare the facts of the applicants' relationship to this list as an example, there are few potential difficulties in coming to the conclusion that they are in fact similarly situated to spouses/civil partners. There is little doubt that they have a long-term, cohabiting relationship, financial interdependence, and mutual commitment to a shared life. They do not meet the sexual relationship aspect and the 'reputation and public aspects of the relationship' are unlikely to be that they are in a spousal relationship but the question is what

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<sup>12</sup> However, it should be noted that this is a case of racial discrimination in the failure to recognize a traditional Roma marriage that had not been civilly registered, and it also differs from the facts of the present case in that the applicant had believed herself to be legally married and had been treated by the State as validly married for other purposes.

weight should be attached to these matters in the context of the inheritance tax exemption in question. Is the sexual nature of the relationship really the most important determining factor for a tax exemption? I would suggest not. Rather, the most weight should be placed on financial interdependence and, given the family home is claimed to be at stake in this case, cohabitation.

O-V8 According to the Government's submission, the purpose of the tax exemption for spouses is to 'provide the survivor with a measure of financial security, and thus promote marriage' [50]. Leaving aside the issue of promoting marriage, which I return to later, it is difficult to believe that this measure of financial security is really due only to those who are in a sexual relationship. Financial interdependence and sexual relations are quite separate issues. Though they are often found in the same relationship, the applicants provide an example of where the former can exist without the latter. It is also worth noting that, while civil partnerships were intended to provide a marriage-like relationship for same-sex couples and extend the tax exemption to them, they do not, technically, require sexual relations at any point during the relationship, as there is no mention of consummation in the Civil Partnership Act 2004. Similarly, it is incredibly rare that a marriage is nullified for non-consummation in the UK; in fact, non-consummation on its own is not a ground for nullity. Rather, there must have been an inability or willful refusal to consummate on the part of the respondent to a petition (Matrimonial Causes Act 1973, s.12(a) and (b)). Spouses may quite legitimately agree that it is not to be a sexual relationship without invalidating their lawful marriage. On this basis, rather less weight should be attached to the sexual nature of the relationship in any circumstances.

O-V9 It is worth noting that the applicants are not seeking access to marriage or civil partnership. They seek only a remedy to their tax liability, which in their view is discriminatory because others in similar relationships are exempt, namely spouses and civil partners. Though it was mentioned in their submission that they would have entered into a civil partnership had it been possible, I hope that on reflection the sisters would have realized that this marriage-like institution is not suitable for siblings, regardless of the length of their cohabitation or their financial interdependence, due to the legal structure imposed on the recognition of spousal relationships that are not necessarily relevant in the taxation context. The legal institutions of marriage and civil partnership are designed to recognize an exclusive relationship between two people, voluntarily entered into, and, although it is intended to be for life, there is a mechanism for the legal dissolution of this relationship. It may be that the applicants would be willing to forgo other potential spousal relationships after they had registered their civil partnership, but if one sister did subsequently form a romantic relationship she would have to demonstrate the 'irretrievable breakdown' of her relationship with her sister in order to marry or get a civil partnership with this partner. Similarly, if there had been a third surviving Burden sibling who also cohabited with the applicants, or if they were brother and sister rather than sisters, they would find themselves excluded once again, or in the former case facing a difficult decision about which two siblings would enter the civil partnership. The amendment to the Civil Partnership Bill that was introduced in the UK Parliament was merely a wrecking amendment and would not have been a workable solution to the problem of marital status discrimination in this case.

O-V10 Marital status discrimination does not occur as a result of exclusion from the institution of marriage *per se*. It is well within a State's margin of appreciation to set the terms of who may marry, as acknowledged in the wording of Article 12, that 'men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right' (my emphasis). It is instead the legal and economic privileging of this spousal relationship over and above other similarly situated relationships for the purpose of promoting marriage above other family forms that results in what is in my view unlawful marital status

discrimination. As a result, the focus must be on the individual spousal privilege and whether or not there is a justification for continuing with this particular privilege and, if so, continuing to exclude similarly situated non-marital relationships from it. In this, I am assisted by the persuasive recommendations of the Law Commission of Canada's (2001) report, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*.

O-V11 Therefore, looking at the totality of the circumstances of the applicants' lives and the fact that they meet what are arguably the most significant indicators of a spousal relationship *in this context* of tax liability (that is, long-term cohabitation, mutual support and commitment to a shared life, and most importantly financial interdependence), I would conclude that they are sufficiently similarly situated, in a relevant way according to the context of the claim (being tax-related), to be analogous to spouses or civil partners.

O-V12 The next part of the Article 14 test is whether the difference in treatment is objectively and reasonably justified. In other words, it must pursue a legitimate aim and 'there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised'. (*Stec v. United Kingdom* 2006, para 51) While the majority in this Court did not find it necessary to go on to consider this, having already found that the applicants were not analogous to spouses, the Chamber did consider this part of the test. The claimants failed before the Chamber as it accepted the UK Government's submission that the inheritance tax exemption for spouses and civil partners pursues the legitimate aim of promoting stable, committed relationships: 'The State cannot be criticized for pursuing, through its taxation system, policies designed to promote marriage....' [59].

O-V13 However, I would answer the question of whether there is a legitimate aim in the negative. The UK Government's claim that the difference in treatment is designed to promote marriage is not compatible with the prohibition on marital status discrimination under Article 14. The promotion of marriage above other forms of family is also not justified by Article 12.

O-V14 There appears to be an assumption in the previous case law that because the right to marry is protected separately under Article 12 then it must follow that special legal privileges for those who are married are justifiable.<sup>13</sup> I disagree with this interpretation. Article 12 provides not only for a right to marry but also to found a family and States have been offered a wide margin of appreciation by virtue of the additional phrase 'according to national laws governing the exercise of this right'.<sup>14</sup>

States should not, by virtue of Article 12, impede the right to marry and found a family but this is not the same as a requirement to actively promote marriage above other forms of family. I would also suggest that it does not in itself give States *permission* to actively prefer the marital family to other forms of family in its laws and fiscal policies.

O-V15 Analogy on this point may be made to the protection for freedom of religion in Article 9. There is no suggestion that States must actively promote a religion, or give additional benefits to citizens who have religious beliefs over those given to those who do not. To do so would be contrary to the Convention as a fundamental aspect of Article 9 is the right to freedom from religion, the right to have no religious belief. (*Buscarini v. San Marino* 1999) Just as States should not prefer one religious organization or belief over other (or none) under Article 9, they also should not prefer one method of founding a family over another under Article 12.

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<sup>13</sup> See for example *Shackell v. United Kingdom* (2000); *Gas v. France* (2014).

<sup>14</sup> See for example the patience demonstrated by the Court in the line of cases brought by trans people seeking access to marriage prior to *Goodwin v. United Kingdom* (2002), and the cases brought by same-sex couples: *Rees v. United Kingdom* (1987), *Cossey v. United Kingdom* (1991); *Sheffield and Horsham v. United Kingdom* (1999), *Schalk and Kopf v. Austria* (2011).

Even if the majority in this Court would not go so far as to agree that there should also be freedom *from* marriage under Article 12, the prohibition of marital status discrimination under Article 14 at a minimum supports the proposition that spouses (and now civil partners) should not be treated more favourably than similarly situated unmarried adults who have formed families in other ways than through marriage, or who have not formed families at all.

O-V16 In a recent judgment the Supreme Court of Bermuda declined to follow our precedent in *Gas v. France* (2014) that same-sex couples (who were not permitted to marry at the time in France) could justifiably be treated the same as unmarried heterosexual couples because marriage confers a 'special status'. Hellman J was critical of our reasoning and unable to see any rational basis to justify prohibiting same-sex couples from adopting on the same terms as spouses. (*A and B v. Director of Child and Family Services and Attorney General* 2015) He found no justification for treating unmarried heterosexual and same-sex couples less favourably than spouses and I have to agree with this. This follows the UK Supreme Court finding in 2004 that:

Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being... such treatment is damaging to society as a whole. (*Ghaidan v. Godin-Mendoza* 2004, per Lady Hale, para 132)

Although these decisions are not binding on this Court they are highly persuasive as decisions from national superior courts interpreting the Convention in line with national law. Giving spouses a 'special status' above that of other forms of family and relationship treats everyone else as having less value than spouses and on that basis cannot be justified under the Convention. Having therefore concluded that promoting marriage is not a legitimate aim there is no need to consider whether it is proportionate.

O-V17 In theory the State could overcome this problem by extending the spousal privileges to other forms of family but this would almost inevitably shift the discrimination onto single people and, in the context of this case, have a disastrous impact on tax revenue. Therefore, the next question is whether the best way to remedy this marital status discrimination is to abolish the tax exemption altogether. The UK claims that the other purpose of the tax exemption is to provide financial security on the death of a spouse. As I have concluded that others, such as the applicants, could be similarly situated to spouses, and it must be the case that some people would be wealthy enough to continue to enjoy financial security on the death of their spouse despite paying inheritance tax, it would be more rational to distribute this particular privilege on the basis of financial need rather than marital status. In general, I would recommend that privileges associated with marriage should be abolished and where they are valuable for a purpose other than merely promoting marriage should be allocated on a different, non-discriminatory, basis, such as financial need rather than a preferred family status.

O-V18 The final part of the Article 14 test is whether the Government is within its margin of appreciation in treating the applicants less favourably than spouses or civil partners. There is a margin of appreciation for the state in 'assessing whether and to what extent differences in otherwise similar situations justify differences in treatment'. (*Stec v. United Kingdom* 2006, para 51) The margin of appreciation is wide in relation to taxation matters but this does not give the Government a complete exemption from abiding by Article 14 where they have created hardship or injustice. It is also wider where there is a lack of agreement between the laws of member states. On this issue, there has been a series of case law that has allowed governments to discriminate on the basis of marital status and I hope this judgment marks the beginning of the end for that line of reasoning. There is a wide margin of appreciation but states must now be on notice that it will no longer be acceptable to discriminate on the basis of marital status by privileging marriage

through the tax system and in other ways. The right to marry does not include a right to extra privileges or more advantageous treatment on the basis of that marriage because the state should not favour one form of family life over another.

O-V19 In the circumstances of this particular case, I find that these applicants have failed to demonstrate hardship sufficient to overcome the UK's margin of appreciation. Their assets, as reported to this Court, are more than adequate to cover their tax liability without them having to sell the family home and on that basis they will not suffer a particular hardship that suggests a tax exemption ought to be extended to them. However, this Court has been far too deferential to both the institution of marriage and the States' margin of appreciation in respect of marriage's supposed 'special status' at the expense of properly enforcing the non-discrimination provision of Article 14. There is no legitimate reason to give spouses privileges over and above other family forms but extending this privilege to siblings (particularly in this context where there is no evidence of significant financial hardship for the applicants) would merely exacerbate the problem. As such, I reluctantly concur with the majority's conclusion, albeit for different reasons, though I would strongly recommend that the UK considers ways to withdraw its existing spousal privileges and redistribute them (where necessary) on a more rational basis than merely promoting marriage.

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