

Burden v UK: 'dissin' lesbians or decentring marriage?

Brian Dempsey, Lecturer in Law, University of Dundee, reports the decisions in *Burden* and asks what lies behind the claim to recognition of sisterly love and the judicial reactions to those claims

The case of *Burden v UK* cannot be said to be the European Court of Human Rights' finest hour, producing, as it did, some highly emotive dissenting judgments and accusations that the court failed to answer the central question upon which the case turned. This article considered in detail the judgements and explores the implications for recognition of different family forms. Part 2 will appear in the March edition of SCOLAG.

The background

At the time of their application to the European Court of Human Rights (ECtHR), Sybil and Joyce Burden were both in their 80s and had lived together all their lives. Neither had married and the Court found that they had lived together "in a stable, committed and mutually supportive relationship". For the previous 31 years they had lived together in a house built on land inherited from their parents. The value of that house was between £425,000 and £550,000. The sisters also jointly owned other heritable property worth £325,000 giving them a total joint portfolio of between £750,000 and £875,000 and each had individual investments worth £150,000. Each sister was named as the beneficiary in the other's will.

So each sister had assets of between £525,000 and £587,500. The estate of the first sister to die would be subject to inheritance tax of, at most, £115,000 (0% of £0-£300,000 + 40% of (£587,500 - £300,000)). This 'worst case' tax bill could be settled out of the deceased sister's investments and so the survivor would end up with assets exceeding £1M, receiving a net sum of about £472,000 made up of the deceased's half of the jointly owned home, the deceased's half of the other heritable property and £35,000 in investments minus expenses.¹

Many newspaper reports stated that the sisters feared that the survivor would have to sell their home to pay the tax, which was clearly untrue.

The sisters were not happy with the prospect of paying tax on the estate of the first to die. From the mid 1970s they were reported as having written to the Chancellor every year complaining that, whereas married couples were exempt from paying inheritance tax on money inherited from the other spouse when one of them died, unmarried "couples" like themselves were not.²

The married couple exemption was extended to civil partners in 2005. This prompted the sisters to complain to the ECtHR that the United Kingdom Government was in violation of Article 1 of Protocol No.1 (peaceful enjoyment of possessions) of the European Convention on Human Rights (ECHR) when read with Article 14 (non-discrimination in convention rights) ECHR.³

Article 1 Protocol 1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived

of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 14 provides:

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Preliminaries

Three relatively interesting preliminary challenges were made to the admissibility of the applications, all of which the UK Government lost.

Victim Status

Article 34, ECHR, requires that an applicant must be "... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." The UK Government pointed out that, since neither sister had died, neither had been required to pay the tax in question. Further, at least one of the applicants, the one who died first, would never have to pay the inheritance tax demand and it was impossible to identify who might be the 'victim' as it was impossible to identify who would die first.

The Government concluded that "[t]he applicants could not, therefore, claim to be "victims" of any violation, and their complaint represented a challenge to the tax regime *in abstracto*, which the Court could not entertain"⁴ and sought to distinguish previous cases where the fear of being victim was held sufficient to ground an application, as *Norris v. Ireland*⁵ and *Inze v. Austria*.⁶

Both the Chamber and the Grand Chamber unanimously rejected this submission recalling that it is "open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation."⁷ In relation to the Burden sister's claim, the Grand Chamber

agree[d] with the Chamber that, given the applicants' age, the wills they have made and the value of the property each owns, the applicants have established that there is a real risk that, in the not too distant future, one

If we were lesbians we would have all the rights in the world. But we are sisters, and it seems we have no rights at all.

- Joyce Burden

of them will be required to pay substantial inheritance tax on the property inherited from her sister. In these circumstances, the applicants are directly affected by the legislation and can claim to be victims of the alleged discriminatory treatment.⁸

Delay

Before the Chamber, but not the Grand Chamber, the Government had also argued that, as the alleged discrimination had been introduced thirty years earlier by the Finance Act 1975, the application was inadmissible under the six-months rule.⁹ The applicants contended that the discrimination complained of was continuing so that the six-month rule did not apply and moreover that the discrimination was intensified by the coming into force of the Civil Partnership Act 2004 in December 2005.¹⁰ The full explanation of the Chamber's rejection of the consisted of -

"The Court repeats that it has found the applicants to be directly affected by a provision of domestic law, given the high probability that it will automatically apply to the survivor following the first sister's death. In these circumstances and since there is no domestic remedy which the applicants can be required to exhaust, the six-months time-limit does not apply."¹¹

Domestic remedies

Article 35(1) ECHR provides that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...". As the sisters had not sought to challenge the law in any English court, the Government attempted to have the sister's case ruled inadmissible for failure to exhaust available domestic remedies. In doing so it faced the tricky question of whether a mere declaration of incompatibility by an English court could count as an effective remedy. But in these particular circumstances, the Government was able to argue that, as neither sister had been subject to any tax demand, the best they could hope for from the ECtHR, should the Court find merit in their application, was a declaration that the UK legislation was a violation of their Convention rights. As this was precisely what was available in the English courts then surely the sister should be required to seek that remedy domestically before applying to the ECtHR?¹²

The Government conceded that "as a matter of pure law it was true, as the Court had found in *Hobbs*,¹³ that such a declaration was not binding on the parties and gave rise to a power for the Minister, rather than a duty, to amend the offending legislation" but "this was to ignore the practical reality that a declaration of incompatibility was highly likely to lead to legislative amendment" and pointed out that "there was not a single case where it had refused to remedy a declaration of incompatibility."¹⁴

The Grand Chamber was good enough to say it

"note[d] with satisfaction that in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision. However, given that there have to date been a relatively small number of such declarations that have become final, it agrees with the Chamber that it would be premature to hold that the procedure under s.4 of the Human Rights Act [declaration of incompatibility] provides an effective remedy to individuals complaining about domestic legislation."¹⁵

Therefore, although "the principle that an applicant must first make use of the remedies provided by the national legal

system before applying to the international Court is an important aspect of the machinery of protection established by the Convention," and the Court was aware of its role as a subsidiary court,¹⁶ the application was admissible. In future it might be that, in cases other than where damages are sought for violation of Convention rights, applicants would be required to make use of the Human Rights Act in a domestic court, but that was not yet the case.¹⁷

The substantive point - the party's submissions

In the first place, the Government argued that as it was settled law that there was no right to *acquire* possessions under Article 1, Protocol 1 and, as each sister was entitled to change her will should she so choose, neither sister had a 'possession' but merely the hope of receiving a possession which was in the gift of her sister.¹⁸

If that was not accepted by the Court, the Government then argued that in any case there had been no discrimination contrary to Article 14 as the applicants were not in a comparable relationship to that of a marriage or a civil partnership:

"[t]he very essence of their relationship was different, because a married or Civil Partnership Act couple chose to become connected by a formal relationship, recognised by law, with a number of legal consequences; whereas for sisters, the relationship was an accident of birth. Secondly, the relationship between siblings was indissoluble, whereas that between married couples and civil partners might be broken. Thirdly, a married couple and civil partners made a financial commitment by entering into a formal relationship recognised by law and, if separated, the court could divide their property and order financial provision to be made by one partner to the other. No such financial commitment arose by virtue of the relationship between siblings."¹⁹

Further, if the applicants were in a relationship analogous to a married or civil partnered couple, then the difference in treatment was within the margin of appreciation enjoyed by the state to both regulate taxation and to promote marriage:

"[t]he 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. The purpose of the Civil Partnership Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and the inheritance tax concession for civil partners served the same legitimate aim as it did in relation to married couples. Given the development of society's attitudes, the same arguments justified the promotion of stable, committed same-sex relationships. 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."²⁰

"The difference in treatment was, moreover, proportionate, given that the applicants, as siblings, had not undertaken any of the burdens and obligations created by a legally recognised marriage or civil partnership. If the Government was to consider extending the inheritance tax concession to siblings, there would be no obvious reason not to extend it also to other cohabiting family members. Such a change would have considerable financial implications, given that the annual income from inheritance tax was approximately £2.8 billion."²¹

The applicants countered that their relationship was not limited to mere common parentage but 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. Their actions in so doing were just as much an expression of their respective self-determination and personal development as would have been the case had they been joined by marriage or a civil partnership.”²²

The reason they were not subject to the same legal responsibilities and rights as “other couples” was that they were excluded by legislation from entering a civil partnership on the grounds of consanguinity and so it was ‘circular’ for the Government to hold this fact against them.²³ No legitimate aim was served by excluding cohabiting adult siblings and the number of persons affected, and therefore the tax revenue at stake, would not be great as “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.”²⁴

The majority decisions

The Chamber

The Burden sisters came very close to securing what would have been a remarkable and highly controversial win in the Chamber. On the substantive issue the Chamber would find against the applicants by four to three.²⁵ The dissenting judgments of judges Bonello, Garlicki and Pavlovski are examined below.

The Chamber unanimously rejected the Government’s procedural challenges and also took the view that Article 1 Protocol 1 was applicable as it was highly probable that the property, which was existing property, would be subject to tax. By a four to three majority, however, it concluded that, even if the applicants were in an analogous position to married couples and civil partners (which question it left open), any difference in treatment was within the margin of appreciation allowed to the state and therefore not a breach of Article 14.

In reaching this outcome the majority recalled the court’s decision in *Shackell v UK*:²⁶

“that the difference of treatment for the purposes of the grant of social security benefits, between an unmarried applicant who had a long-term relationship with the deceased, and a widow in the same situation, was justified, marriage remaining an institution that was widely accepted as conferring a particular status on those who entered it. The Court decided in *Shackell*, therefore, that the promotion of marriage by way of the grant of limited benefits for surviving spouses could not be said to exceed the margin of appreciation afforded to the respondent State. In the present case, it accepts the Government’s submission that the inheritance tax exemption for married and civil partnership couples likewise pursues a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner. The Convention explicitly protects the right to marry

in Article 12, and the Court has held on many occasions that sexual orientation is a concept covered by Article 14 and that differences based on sexual orientation require particularly serious reasons by way of justification 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.”²⁷

The Grand Chamber

Perhaps encouraged by the dissent in the Chamber, the Burden sisters took the relatively unusual step of appealing to the Grand Chamber. There they lost rather more emphatically by 15 to 2.²⁸ The concurring judgement of judge Björgvinsson and the dissenting judgments of judges Zupancic and Borrego Borrego are examined below.

The Grand Chamber unanimously rejected the Government’s procedural challenges and also took the view that Article 1 Protocol 1 was applicable, as had the Chamber. However, the majority in the Grand Chamber then took a different tack than the Chamber, declaring that the question was not the margin of appreciation but the prior question of whether the sisters could compare their situation with married couples and civil partners.²⁹

The majority concluded that Article 1 protocol 1 was engaged by taxation and that Article 14 was applicable.³⁰ However,

for an issue to arise under Article 14 “there must be a difference in the treatment of persons in relevantly similar situations”. Further, that different treatment is discriminatory “if it has no objective and reasonable justification” but the “contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different

treatment, and this margin is usually wide when it comes to general measures of economic or social strategy”.³¹

Nevertheless, the majority said that one could not claim there was discrimination as the relationship the sisters enjoyed could not be compared to marriage or civil partnership – suspect discrimination in the Article 14 sense only arises when you treat people in like situations differently:

“the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom’s Civil Partnership Act. 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.”³²

Marriages, and now civil partnerships, are different to sibling relationships:

“marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Art.12 of the Convention and gives rise to social, personal and legal consequences. In *Shackell*, the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors’ benefits, since “marriage remains

*We are looked down upon for being single.
We just want to be treated as equal
citizens and given the rights we deserve.
We’ve saved the Government thousands by
caring for our elderly sick relatives till they
passed away and have never claimed a
penny apart from the pension.*
- Sybil Burden

an institution which is widely accepted as conferring a particular status on those who enter it".

"Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple now also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage."

"As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, 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. This view is unaffected by the fact that ... Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; states, in principle, remaining free to devise different rules in the field of taxation policy."³³

As the Burden sisters' relationship could not be compared to a marriage or a civil partnership then there was no discrimination and no violation of Article 1 of Protocol No.1 read with Article 14.

As will be seen when we consider the dissenting judgements (in part two of this article), the explanations given by the majority for their approach, such as they are, are open to a number of criticisms. The key concern is that saying the relationship between cohabiting sisters is different to marriage or civil partnership, and so you can legitimately treat these different people differently, does not address the question of whether it is justified to concentrate on the factors that differ rather than the factors which are similar.

Endnotes

1. It may be that the sister's investments and heritable are now worth rather less than they were in 2006 though that, of course, would reduce the tax liability and still would not require the sale of the family home. Even had the figures been otherwise, and there was insufficient property other than the family home, the tax liability could have been paid in instalments over ten years, s227, Inheritance Tax Act, 1984.
2. Ss 3, 3A and 4 of the Inheritance Tax Act 1984 provides for the charge while s18(1) gives the exemption.
3. The Chamber decision is reported as *Burden and Burden v United Kingdom*, Application No.13378/05, 12 December 2006, (2007) 44 E.H.R.R. 51, henceforth "Chamber" and the Grand Chamber decision is *Burden v United Kingdom*, Application No.13378/05, 29 April 2008, (2008) 47 E.H.R.R. 38, henceforth "Grand Chamber".
4. Grand Chamber, para 30
5. In *Norris v Ireland* (1991) 13 E.H.R.R. 186 the existence of criminal sanctions applied to consenting homosexual acts between consenting adults were held to seriously affect the applicant's private life even though he was not, himself, charged with any offence.
6. *Inze v Austria* (1988) 10 E.H.R.R. 394 concerned questions of inheritance rights in circumstances where the applicant's parent had already died.
7. Grand Chamber, para 34
8. Grand Chamber, para 35
9. Chamber, para 41. Article 35(1) provides that an application must be made "within a period of six months from the date on which the final decision [complained of] was taken".
10. Chamber, para 42
11. Chamber, para 43
12. Grand Chamber, para 37
13. *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54
14. Grand Chamber, para 38
15. Grand Chamber, para 41. "According to statistics provided by the Government and last updated on July 30, 2007, since the Human Rights Act came into force on October 2, 2000 there had been 24 declarations of incompatibility. Of these, six had been overturned on appeal and three remained subject to appeal in whole or in part. Of the 15 declarations which had become final, three related to provisions that had already been remedied by primary legislation at the time of the declaration; seven had been remedied by subsequent primary legislation; one had been remedied by a remedial order under s.10 of the Act; one was being remedied by primary legislation in the course of being implemented; one was the subject of public consultation; and two (relating to the same issue) would be the subject of remedial measures which the Government intended to lay before Parliament in the autumn of 2007. In one case, *A v Secretary of State for the Home Department* [2005] UKHL 71; [2005] 2 A.C. 68, the House of Lords made a declaration of incompatibility concerning s.23 of the Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State power to detain suspected international terrorists in certain circumstances. The Government responded immediately by repealing the offending provision by s.16 of the Prevention of Terrorism Act 2005.", Grand Chamber, para 24.
16. The Court "is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries", Grand Chamber, para 42.
17. Grand Chamber, paras 43 & 44
18. Grand Chamber, para 48
19. Grand Chamber, para 49. The Government cited *Lindsay v United Kingdom* (1987) 9 E.H.R.R. CD555 and *Shackell v United Kingdom*, App. No.45851/99, April 27, 2000 as showing the Court's recognition of the special legal status of parties to a marriage.
20. Grand Chamber, para 50
21. Grand Chamber, para 51
22. Grand Chamber, para 53
23. Grand Chamber, para 53
24. Grand Chamber, para 54
25. The majority was made up of the President, judge Casadevall of Andorra, along with judges Bratza (UK), Mijovic (Bosnia and Herzegovina) and Traja (Albania) while the minority consisted of Bonello (Malta), Garlicki (Poland) and Pavlovski (Moldova).
26. *Shackell v United Kingdom*, App. No.45851/99, April 27, 2000
27. Chamber, para 59
28. The majority consisted of the President, judge Costa of France along with judges Baka (Hungary), Berro-Lefèvre (Monaco), Bîrsan (Romania), Björgvinsson (Iceland), Bratza (UK), Kovler (Russian Federation), Myjer (Netherlands), Steiner (Austria), Tsatsa-Nikolovska (Macedonia), Tulkens (Belgium), Türmen (Turkey), Ugrekhelidze (Georgia), Vajic (Croatia), Ziemele (Latvia), while the minority consisted of judges Borrego Borrego (Spain) and Zupancic (Slovenia).
29. Only once you conclude that they are in a comparable situation need you consider whether any difference in treatment is objectionable.
30. Grand chamber, para 59
31. Grand Chamber, para 60
32. Grand Chamber, para 62
33. Grand Chamber, paras 63 - 65

SCOLAG

LEGAL JOURNAL

EXTRACT PAGES

Issue: 377

PUBLISHED: March 2008

PAGES: 58 - 63

TITLE: *Burden v UK: 'dissin' lesbians or decentring marriage? (Part 2)*

AUTHOR: Brian Dempsey

CITE AS: 2009 SCOLAG 58 - 63

SCOLAG is a Scottish charity dedicated to working for equal access to justice by explaining and improving the law and legal services. Please ensure any use of this extract material credits the authors and *SCOLAG Legal Journal*.

Your support is needed - advertise with us or subscribe and donate online at www.scolag.org

Burden v UK: 'dissin' lesbians or decentring marriage? (Part 2)

Brian Dempsey, Lecturer in Law, University of Dundee, concludes his examination of the Burden sisters' attempt to avoid paying inheritance tax

In Part 1 of this article we considered the background to the Burden sisters' attempt to avoid paying inheritance tax, the parties' submissions and the majority decisions in the Chamber and the Grand Chamber.¹ We now consider the dissenting judgments (and one concurring judgement) before moving on to a brief exploration of what the decisions mean for the status of lesbians and of marriage.

Dissenting in the Chamber

Judge Pavlovski

Judge Pavlovski of Moldova, in his dissent to the Chamber decision, adopted what he said was the "well-known opinion that all judicial decisions can, in theory, be split into four categories: (a) legal and fair; (b) illegal, but fair; (c) illegal and unfair; and (d) legal, but unfair" – the decision the majority had reached was, in his view, legal but unfair.² Moreover, Pavlovski accused the majority of "fail[ing] to adduce any reason or argument" for their statement that the UK had not exceeded its margin of appreciation and that the difference in treatment was reasonable and objectively justified.³ With respect, as we have seen, the majority did adduce *some* "reason or argument" when they referred to the case of *Shackell v UK*⁴ and stated that, in the present case, the court

"accepts the Government's submission that the inheritance tax exemption for married and civil partnership couples likewise pursues a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner. ... 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."⁵

Of course, Judge Pavlovski does have a point that the majority take for granted that promoting "stable, committed heterosexual and homosexual relationships" is a legitimate aim and do not explore whether promoting stable, committed sibling relationships might also be a legitimate aim. However, his own reasons for considering the difference in treatment to be unreasonable are unlikely to meet with universal approval. In his view "the decisive element in the case ... [was] the nature of the property belonging to the applicants, and their personal attitude to it".⁶ Had the property that was at risk of the tax liability been purchased during the sisters' cohabitation then there would be no problem with it being taxed on the first death. But here the situation was, Judge Pavlovski thought, qualitatively different:

"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."⁷

Several points can be made here. First the Burden sisters had not spent all their lives in that home but had spent the first fifty years of their lives in other property, the house having been built in about 1975. Secondly, it is unclear from the case reports whether the sisters had paid for the building of the house, making it something they had purchased during their cohabitation. Thirdly, Pavlovski does not justify his strongly asserted belief that inherited wealth should be privileged over wealth that has been earned by the efforts of the possessor and fourthly, as we have seen, the home was never going to be at risk.⁸

Judge Pavlovski's distress, based on his misapprehension that the family home was at risk, comes through in his judgment:

"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."

"I find such a situation fundamentally unfair and unjust. It is impossible for me to agree with the majority that, as a matter of principle, such treatment can be considered reasonable and objectively justified. I am firmly convinced that in modern society there is no "pressing need" to cause people all this additional suffering."⁹

Judges Bonello and Garlicki

Judges Bonello of Malta and Garlicki of Poland were less emotive in their own joint dissent in the Chamber. They were convinced that the "prospective imposition of "full" inheritance tax on the surviving sister violates Art.14 of the Convention taken in conjunction with Art.1 of Protocol No.1."¹⁰ In particular they took the view that while there must be a "wide margin of appreciation offered to the national authorities in tax matters" and that "any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of taxpayers" and even, possibly, that "with regard to tax matters, there may be some kind of presumption that the solutions adopted by the national legislature remain within this margin of appreciation" there came a point where the burden of proof might switch and the State would have to show that its actions were supported by "good reasons".¹¹ Like Judge Pavlovski they considered that the majority erred in their failure to explain why the actions of the UK, which might cause "apparent hardship or injustice", were justified.

For these two judges the need for justification became more pressing when the inheritance tax exemption was extended beyond marriage to civil partners but not to other cohabitants:

"As long as the United Kingdom confined the exemptions to married couples, such categorisation might have been justified under Art.12 of the Convention. However, once the UK legislature decided to extend the exemption to permanently cohabiting same-sex couples, the problem left the specific sphere of Art.12. Thus, any fur-

ther categorisation in the area of inheritance tax exemptions has to satisfy general standards of reasonableness and non-arbitrariness resulting from Art.14.¹²

The judges were at pains to clarify that they did not seek to “cast doubt upon the reasonableness of extending exemptions to those same-sex couples choosing to form a civil partnership and denying such exemption to mixed-sex couples preferring not to enter into any form of official union” but “once the legislature decides that a permanent union of two persons could or should enjoy tax privileges, it must be able to justify why such a possibility has been offered to some unions while continuing to be denied to others.”¹³

The Burden sisters were “deprived of the possibility of choice offered to other couples” as civil partnership was not open to those within the forbidden degrees of relationship.¹⁴ The emotional and financial situation of permanently cohabiting siblings such as the Burden sisters were:

“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.”¹⁵

The judges noted that the issue of cohabiting siblings had been raised during the progress of the Civil Partnership Act and, while it might have been correct to say that the 2004 Act was not the appropriate vehicle to address the issue of siblings, “it could not absolve the legislature from providing an equitable solution to the problem at a later stage.”¹⁶ The state:

“may establish a very high threshold for such unions to be recognised under tax exemption laws [and] may also provide for particular requirements to avoid fraud and abuse. But unless some compelling reasons can be shown, the legislature cannot simply ignore that such unions also exist.”¹⁷

The implications of these arguments are drawn out below.

Dissenting in the Grand Chamber

Judge Borrego Borrego

In the Grand Chamber, Judge Borrego Borrego of Spain damned the majority’s approach when, to his “great regret”, he concluded that “in my opinion the judgment does not deal with the problem raised by this case”.¹⁸ He noted that although the Chamber and even the UK Government itself had recognised that injustice was present:

“[t]hat circumstance is completely ignored in the Grand Chamber’s judgment. The question of the state’s margin of appreciation and its limits, which is at the heart of the case and was dealt with as such in the Chamber’s judgment, has completely disappeared from the Grand Chamber’s judgment.”¹⁹

In Borrego Borrego’s view the majority of the Grand Chamber merely asserted that the applicants’ relationship was different to that of civil partners because of the sisters’ consanguinity on the one hand and the legally binding nature of a civil partnership on the other. As the relationships are different the majority concluded that there was no discrimination;

“[b]ut who has disputed the existence of a relation of consanguinity between two sisters or the legal status of a civil partnership? No one. These are two facts over

which there is no disagreement. Trying to ground a case on undisputed facts is the best example there can be of a circular, or I might even say concentric, argument.”²⁰

Borrego Borrego was certain that “all those who have taken an interest in the case” would agree with his own view, and that of the Chamber, that the question was “a very simple one: it is whether or not granting inheritance tax exemption to same-sex couples in a civil partnership but not to the applicant sisters, who are also a same-sex couple, is a measure proportionate to the legitimate aim pursued.”²¹ The failure of the majority to give a reply to this simple question was to ignore the precedent the court itself had set down in *Stec v UK*.²²

Judge Borrego Borrego was ashamed of the action of the Court and scornful:

“This judgment of the Grand Chamber will no doubt be described as politically correct. I consider nevertheless that it has not been rendered in accordance with Art.43 of the Convention, because the Grand Chamber, instead of trying to explain the difference in treatment for tax purposes between the two types of couple mentioned, preferred not to give reasons and restricted itself to a description of the facts, saying for example that two sisters are linked by consanguinity or that a civil partnership has legal consequences. 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. I would like to close by quoting Horace, who wrote in *Ars Poetica*, “*parturient montes, nascetur ridiculus mus*”.”²³



University of
Strathclyde
Glasgow

We’re World-Class. Are You?

In the recent official assessment of the quality of staff expertise (the RAE 2008), 60 percent of the Law School’s output was officially graded ‘world-class’ or ‘internationally excellent’ – in effect this ranks Strathclyde Law School as the seventh best Law School in the UK (out of 67) and top in Scotland. **This means students are being taught by among the very best legal experts in the UK.**

Students can choose from a diverse range of LLMs and research degrees, including the latest internationally focussed programmes* which offer a unique opportunity to undertake a real-world field dissertation within an international organisation.

• Construction Law • Criminology • Human Rights Law
• IT & Telecommunications Law • International Economic Law* • International Law and Sustainable Development*

Find out more by visiting our website or getting in touch with the department (Please quote: SCOLAG2/09).

W: www.law.strath.ac.uk
E: courses@law.strath.ac.uk
T: 0141 548 3738

The University of Strathclyde is a charitable body, registered in Scotland, number SC015263.



The place of useful learning

Judge Zupancic

In contrast to the bizarrely emotional dissent of Borrenge Borrenge, Judge Zupancic of Solvenia presented a carefully argued judgment which pointed to what he considered were flaws in the logic of the majority's decision though in fact he reached his decision on the same grounds as Borrenge Borrenge. Zupancic concluded that the majority judgment was based on the relationship between the sisters being one based on consanguinity but they failed to explain why this distinction between consanguinity and affinity (i.e. relation through marriage) was not at least a possible breach of Article 14:

"A priori, the state is not required to create a benefit, in this case extra-marital tax exemptions. If the state nevertheless does decide to extend the tax exemption to one extra-marital group, it should employ at least a minimum of reasonableness while deciding not to apply the benefit to other groups of people in relationship of similar or closer proximity. I believe making consanguinity an impediment is simply arbitrary.²⁴

Zupancic, it is submitted, gets right to the heart of the problem and presents it in a way that requires serious consideration. However, his claim that his decision was based on "reasons which have little to do with policy and values but have everything to do with formal logic" is, perhaps, a little less valid as he does seem to favour a move away from inheritance tax. His judgement is worth reporting at length as it deals with many of the issues we will consider below:

"It is difficult to maintain that there is anything inherently legitimate about taxing the transfer of wealth upon the death of an individual. For example, one might argue that the state adds insult to injury when taxing an estate left to the survivors of a close relationship. In this sense, one might imagine a scale of taxation that would be progressive in positive correlation with the relational distance between the deceased and the surviving relative. But this is just one aspect of inheritance taxation, an example perhaps of how inherently questionable the inheritance taxation is in principle. ..."

"If the Government has decided not to tax married couples, this is the starting-point for the suspicion of discrimination in our case. The Government may reasonably maintain that the close relationship of a couple provides sufficient reason for the tax exemption. Those who are not married, in other words, are then *a priori* not entitled for the tax exemption. The cut-off criterion is clear."

"However, when the Government decides to extend this privilege to other modes of association, this black and white distinction is broken and the door is open for reconsideration of the question whether the denial of the tax advantage to other modes of association is rationally related to a legitimate Government interest."

"The majority ... remarks: "[T]he relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. 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.""

"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.

"One could easily reverse the argument and say, for example, that the "consanguine" identical twins are far closer genetically and otherwise since in reality they are clones of one another, than anybody could ever be to anybody else. And yet if the Burden sisters were identical twins they would not be entitled to the same exemption, in counter-distinction to even the most ephemeral and fleeting relationship. So, what does the qualitative difference referred to by the majority come to? Is it having sex with one another that provides the rational relationship to a legitimate Government interest?"

"... the Grand Chamber then expresses the view that marriage confers a special status on those who enter into it. The analysis of [their view at paragraph 63] tends to show that the majority does not regard the arguments at [paragraph 62] as sufficiently persuasive, i.e. the majority feels that it must add, *ex abundante cautela* [from excessive caution], this "special nature" of marriage as a contract. If the contract is not explicit, the legal consequences do not flow from it. But this argument, too, is specious - even if we do not consider common law marriage as a historical phenomenon in which consensual cohabitation, even under canon law, confers all the rights and duties on the couple concerned. The further reference to different solutions in different Member States being irrelevant - since at least some of them consider cohabitation a factual question with legal consequences equivalent to an explicit marriage - makes it imperative for the majority to resort to the final rescue in saying:

"This view is unaffected by the fact that, as noted in paragraph 26 above, Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; States, in principle, remaining free to devise different rules in the field of taxation policy."

"Needless to say, this final reference to margins of appreciation makes all other argumentation superfluous."²⁵

Concurring in the Grand Chamber

In his separate opinion concurring with the majority, Judge Björgvinsson attempts to give reasons for the view that the difference in treatment is justified. Although agreeing with the result, he considers that the reasoning of the majority is "flawed" in relation to the factors they take into account in comparing the situation of the Burden sisters to married couples or civil partners - arguing that the majority rely too much on the legal frameworks imposed on personal relationships rather than comparing the relationships themselves.

Since it is the legal definition of marriage and civil partnership that precludes the Burden sisters accessing the inheritance tax privilege Judge Björgvinsson stated:

"I believe that in these circumstances any comparison of the relationship between the applicants, on the one hand, and the relationship between married couples and civil partnership couples, on the other, should be made without specific reference to the different legal

framework applicable, and should focus only on the substantive or material differences in the nature of the relationship as such. 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 partnership couples, than there are differences between them. ... I am not convinced that the relationship between the applicants as cohabiting sisters cannot be compared with married or civil partner couples for the purposes of Art.14 of the Convention. On the contrary there is in this case a difference in treatment of persons in situations which are, as a matter of fact, to a large extent similar and analogous."²⁶

However, he agreed with the majority that the difference in treatment was reasonably and objectively justified²⁷ and that it was not for the Court to impose its views on fast-changing and complex social questions:

"... it should also be borne in mind that the institution of marriage is closely linked to the idea of the family, consisting of a man and a woman and their children, as one of the cornerstones of the social structure in the United Kingdom, as well as in the other Member States of the Council of Europe. On the basis of this assumption, a whole framework of legal rules, of both a private and public nature, has come into existence over a long period of time. These rules relate to the establishment of marriage and mutual rights and obligations between spouses in both personal and financial matters (including inheritance) and in relation to their children, if any, as well as with regard to taxes (including inheritance taxes), social security, and other matters. The applicability of such rules, or similar rules, in many of the Member States have gradually, step by step, and mostly upon the initiative of the legislature in the respective countries, been extended to cover relationships other than those traditionally falling under marriage in the formal legal sense, namely civil partnership couples (including individuals of the same sex), and thereby the legislator has responded to new social realities and changing moral and social values. However, it is important to have in mind that each and every step taken in this direction, positive as it may seem to be from the point of view of equal rights, potentially has important and far reaching consequences for the social structure of society, as well as legal consequences, i.e. for the social security and tax system 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 that it may have in the different Member States. In my view it must fall within the margin of appreciation of the respondent State to decide when and to what extent this will be done."²⁸

The Misses Burden may well have started a ball rolling in a direction they dislike intensely. Victoria Gillick could have warned them.

- Kenneth Norrie

Dissin lesbians?

A number of interesting issues arise in these two cases other than the obvious one of the quality of judgment displayed by the judges.

As we have seen, a number of the dissenting judgments assert that, had the inheritance tax exemption been limited to married couples, there could have been no claim of wrongful discrimination. This focus on the advent of recognition of civil partners is, of course, understandable given the special protection that marriage has by way of Article 12 of the ECHR. Moreover making the point that including civil partners in the inheritance tax exemption should lead to the requirement that the non-recognition of others be justified does not necessarily mean that the speaker is prejudiced against lesbians and gay men.²⁹ But there is at least an implied element of disparagement of the official acceptance of same-sex relations in some of the statements surrounding the case.

For example, after losing the case in the Chamber in 2006, Joyce Burden is quoted as saying "[i]f we were lesbians we would have all the rights in the world. But we are sisters, and it seems we have no rights at all."³⁰ It may come as a surprise to

anyone acquainted with any of the legal systems of the world to learn that siblings "have no rights at all" or that lesbians "have all the rights in the world".

The Burden sisters' case was viewed positively by the right-wing political lobby group, The Christian Institute (CI), which

has consistently opposed equality measures for lesbians and gay men. In a press release the CI noted that the claim for recognition of "couples" such as cohabiting siblings was a deliberate attempt to undermine the quality of recognition given to those same-sex relationships:

"Before the [Civil Partnership Bill] was passed it was argued by The Christian Institute and others that it ought to be extended to allow long-term cohabiting family members to register as civil partners, in the same way as same-sex couples. This would have made civil partnerships fairer and less like 'gay marriage'."³¹

This failed attempt to extend the civil partnership legislation to parties related within the forbidden degrees was referred to in both the Chamber and Grand Chamber decisions. At various points in the Parliamentary debate those supporting recognition of same-sex couples accepted that there was a case to answer in that people living in long-term supportive non-sexual relationships might lack appropriate recognition, but they insisted that a measure designed to provide recognition for same-sex intimate relationships was not the place to provide such recognition.³² The attempt to include siblings and others in the Civil Partnership Bill by way of an amendment in the House of Lords was, rightly, seen as an attack on attempts to treat same-sex couples with a similar degree of respect as mixed-sex couples.

It has been conceded that Borrenge Borrenge's criticism of the majority decision in the Grand Chamber is not entirely without merit. Further, it is a perfectly fair point that he, other dissenters and the applicants make that the Government conceded in 2004 that the issue of siblings and other people living together in non-sexual relationship required consideration and, further, that there has been a failure to give such consideration as Judges Bonello and Garlicki do in their Chamber dissent

above. However, commenting that “[t]his judgment of the Grand Chamber will no doubt be described as politically correct” as Borrenge Borrenge does, seems to add weight to the suspicion that sympathy for the Burden sisters’ case is not entirely divorced from a less than enthusiastic embracing of recognition of same-sex couples. Borrenge Borrenge says that the case will “no doubt be described as politically correct” but several searches on various on-line search engines indicate that the only person who has described the decision as “politically correct” is Borrenge Borrenge himself. While some criticism of examples of so-called “politically correct” restrictions on freedom of speech and such like are valid, the use of “politically correct” as a blunt pejorative term of abuse is more commonly associated with those who hold reactionary views who feel hard-done by that they cannot express and act upon their prejudices as they could in good old days of yore. The use of the phrase as a term of abuse from the bench should raise some concern.³³

Decentring Marriage?

Dissin lesbians, while objectionable, is hardly intellectually engaging. What is far more interesting, and worthy of greater consideration, is the continued privileging of marriage and, by association, civil partnership over all other adult relationships. This is an especially pressing question when many marriages (and remarriages) end in divorce, when many parents committed to the upbringing of their children are not married to one another, when many people are now part of several “reconstituted” families in their lifetime, and when many people now live singly for a variety of reasons.

Even Judge Björgvinsson, when concurring with the majority decision in the Grand Chamber, makes clear his expectation that recognition of different family forms will continue to develop, albeit that that is a job for national legislatures rather than the Court. The majority’s assertion that sibling relationships are of a “qualitatively different nature to that between married couples and homosexual civil partners”³⁴ cries out for some further explanation.

Judge Zupancic is surely entitled to an answer to his question noted above - “why would consanguinity be any less important than the relationship between married and civil partners?” If traditional (conservative) notions of marriage are what the UK government is trying to promote then why extend recognition to civil partners? If the production of children is the “good” then why recognise married or civil partnered couples who do not have children? If the state is really going to claim that it is has an interest in promoting relations between people who engage in sexual activity with one another rather than companionate relationships then why is there no requirement on spouses or civil partners to have sex?³⁵ And if long-term, stable cohabiting relationships are the thing to be promoted then why are the benefits afforded to married couples and civil partners available immediately rather than after a probationary period and why are spouses and civil partners not required to cohabit? In this context, Sybil Burden’s complaint that she and her sister have saved the Government money is well made: “We are looked down upon for being single. We just want to be treated as equal citizens and given the rights we deserve. We’ve saved the Government thousands by caring for our elderly sick relatives till they passed away and have never claimed a penny apart from the pension.”³⁶

Of course the main advantage of using marriage and/or civil partnership in applying any policy is that a person’s status is reasonably easily established, but it does appear somewhat arbitrary. Requiring cohabitation, even for a day,

also seems arbitrary as persons can be in a close mutually supportive relationship without cohabiting, and, given the regressive Council Tax, will have paid more in taxation than they would had they cohabited. The requirement to have, or have had, sexual relations or the requirement for some degree of consanguineous relationship are equally arbitrary. Having said all that, and without minimizing the difficulties, some attempt could be made to establish what might be acceptable in recognizing those in unmarried and non-civil partnered adult relationships.³⁷

In a somewhat paradoxical way, therefore, in treating civil partnerships and marriage as essentially a single category, the majority decisions in *Burden* both embrace civil partnership and maintain the privileged position of marriage. This perhaps unexpected result has been highlighted by Kenneth Norrie who notes that far from being a radical measure with the power to undermine marriage:

“[i]n retrospect, the Civil Partnership Act 2004 might well come to be recognised as a fairly modest and fundamentally conservative piece of legislation. All it does is to impose upon same-sex couples the liabilities and grant to them the benefits previously imposed on and granted to married couples. The Act does not challenge marriage as an institution.”³⁸

Norrie notes that *Burden v UK* is the first case in which the ECtHR has considered same-sex registered partnerships and that it treats UK civil partnership “as being on a par with marriage.”³⁹ The Court’s “interesting collocation” of Art. 12 (right to marry) and 14 (non discrimination)⁴⁰ gives “at the very least a hint” that, given recent decisions in other jurisdictions “it will not be a particularly great step for the Court to hold that article 12 is, at least in principle, available to same-sex couples.”⁴¹ As Norrie points out, this is presumably not what the Burden sisters had in mind when they pressed their case.⁴²

Conclusion

This article has attempted to present and draw out some of the interesting aspects of the Burden sister’s claim and what the treatment of their claim tells us about marriage, civil partnership and other adult relations. While there is undoubtedly a lack of developed analysis in the judgments of the majority in both the Chamber and the Grand Chamber, it seems clear that those who take marriage and civil partnership as being so closely related they are almost (though not quite) the same thing came to the majority view and those who dissented were those who saw significant differences between marriage and civil partnership opening up the question of who else might legitimately be recognised.

Some lesbian, gay, bisexual and transgendered activists who fought for civil partnership may come to regret championing such conservative legislation, though of course many of the recent generation of LGBT activists *are* socially conservative and so presumably will welcome their being allowed a place at the table. This despite, or perhaps especially because, the inclusion of “domesticated” LGBT people who are essentially indistinguishable from married couples⁴³ reinforces the exclusion of others; after all who wants to access privileges that are then made available to everyone?

The decisions in *Burden v UK* set back attempts at modern, rational, equality-based laws and policies and continue the privileging of people in very particular forms of state-approved, state-regulated relationships. The questions raised by the less emotionally-stressed dissenters require answering at some point.

Endnotes

1. 2009 (Feb) SCOLAG 35-38
2. Pavlovski, Chamber, para O-II2. He promptly contradicted himself by stating "I am firmly convinced that a judicial decision, which represents, by its very nature, the highest expression of justice, cannot be unfair. Yet I have genuine difficulty in accepting the fairness of the judgment delivered in the case of Burden and Burden v United Kingdom." Chamber, para O-II3
3. Para O-II4
4. *Shackell v United Kingdom*, App. No.45851/99, April 27, 2000
5. Chamber, para 59
6. Chamber, para O-II7
7. Chamber, para O-II8
8. See discussion at p.35. In their application the sisters complained of having to pay tax and did not specifically claim that the survivor would have to sell the home. Due to some unaccountable error the sisters appear to have claimed before the Chamber that the home was worth £875,000 whereas in fact that was the total of their heritable property portfolio, in reality the home was valued at between £425,000 and £550,000.
9. Chamber, para O-II9 & O-III0
10. Chamber, para O-I1
11. Chamber, para O-I1
12. Chamber, para O-I2
13. Chamber, para O-I2
14. Chamber, para O-I3. *Shackell v United Kingdom* could, therefore, be distinguished as the applicant there had the choice to marry.
15. Chamber, para O-I3
16. Chamber, para O-I2
17. Chamber, para O-I3
18. Grand Chamber, para O-IV4
19. Grand Chamber, para O-IV5 - O-IV6
20. Grand Chamber, para O-IV8
21. Grand Chamber, para O-IV9
22. (2006) 43 EHRR 47
23. "the mountains will labour in childbirth and a silly little mouse will be born", O-IV11. His freedom to express his "shame" at being associated with the Court may have been influenced by the fact that his term of office was due to come to an end on the 31 October 2007. Earlier in the year, Borrenge Borrenge had been in a minority of one to his "regret" (cf his "great regret" in *Burden*) in the case of *Tysiac v Poland*, Application no. 5410/03, 20 March 2007, (2007) 45 E.H.R.R. 42. The majority in *Tysiac* concluded that the restrictions on access to therapeutic abortion in Poland, which resulted in foreseeable damage to the applicant's already damaged eyesight, was a breach of Article 8, respect for private and family life. Borrenge Borrenge did not label this "politically correct" but did accuse the Court of a "discreditable assessment with regard to the medical profession in Poland" and stated "the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention. I would never have thought that the Convention would go so far, and I find it frightening."
24. O-III19 - O-III20
25. Grand Chamber, para O-III10 - O-III17
26. Grand Chamber, para O-115
27. Grand Chamber, para O-116
28. Grand Chamber O-II7
29. See, eg, the passage from the dissenting judgment of Judges Bonello and Garlicki above at fn 16 & 17 where the issue is raised appropriately
30. See, eg, "Sisters Joyce and Sybil Burden lose legal appeal over death duties", *The Times*, April 30, 2008, <http://www.timesonline.co.uk/tol/news/uk/article3837715.ece>, accessed 23 Jan 2009. The sisters are also quoted as feeling persecuted - "We are still struggling to understand why two single sisters in their old age, whose only crime was to choose to stay single and look after their parents and two aunts to the end, should find themselves in such a position in the UK in the 21st century. We certainly do not regret our decision to look after our family for a single moment; we were glad to repay them for the happy, good, Christian upbringing they gave us." - see, eg, "Death and Taxes", *Tax Adviser*, June 2008 available at www.tax.org.uk/attach.pl/6920/8135/018-019_TA_0608_CoverStory.pdf, accessed 23 Jan 2009
31. www.christian.org.uk/news/20080429/elderly-sisters-told-they-cant-have-same-tax-rights-as-gays/
32. For example, Labour peer Lord Alli was quoted as saying "I have great sympathy with the noble Baroness, Lady O'Caithlin [the Conservative peer who proposed the amendment], when she talks about siblings who share a home or a carer who looks after a disabled relative. Indeed, she will readily acknowledge that I have put the case several times—at Second Reading and in Grand Committee—and I have pushed the Government very hard to look at this issue. There is an injustice here and it needs to be dealt with, but this is not the Bill in which to do it. This Bill is about same-sex couples whose relationships are completely different from those of siblings." Jacqui Smith, then Deputy Minister for Women and Equality, stated: "As I suggested on Second Reading, we received a clear endorsement of the purpose of the Bill—granting legal recognition to same-sex couples, ensuring that the many thousands of couples living together in long-term committed relationships will be able to ensure that those relationships are no longer invisible in the eyes of the law, with all the difficulties that that invisibility brings. We heard a widespread agreement from Members across almost all parties that the Civil Partnership Bill is not the place to deal with the concerns of relatives, not because those concerns are not important, but because the Bill is not the appropriate legislative base on which to deal with them." Both quoted at para 19 of the Chamber, and para 20 of the Grand Chamber decision.
33. For a highly amusing though discomfiting read see Arthur Austin's 1999 piece "The Top Ten Politically Correct Law Review Articles" 27 *Florida State University Law Review*, 233-279 available at <http://www.law.fsu.edu/Journals/lawreview/downloads/271/Aust.pdf>
34. See text at p. 37, fn 32, 2009 (Feb) SCOLAG
35. With due hesitation, I would disagree with Kenneth Norrie's view that the Burden sisters were seeking to replace conjugality with companionability; if conjugal is taken to mean "of or relating to marriage, matrimonial" (OED) then it does not include civil partnership relations and if conjugal is taken loosely to be a synonym for sexual activity then it is not required of spouses or civil partners - "The Misses Burden could not understand why gay couples should get something that they did not. Effectively (though they did not put their argument this way), they sought to have the whole of social welfare law, family law, revenue law, criminal law, evidence and property law restructured to preference companionability over conjugality." Kenneth McK Norrie (2008) "Inheritance tax, civil partnership and the rights of spinster sisters" 12 *Edin. L. R.* 438, 439
36. Quoted in "Spinster sisters challenge over gay tax rights", *Pink News*, 4 September 2006, www.pinknews.co.uk/news/articles/2005-2407.html, accessed 23 Jan 2009
37. It must be admitted that the half-hearted attempt at imposing responsibilities on cohabiting couples in ss25 to 29 of the Family Law (Scotland) Act 2006 and the failure to progress legislation on the matter in England and Wales does not fill one with hope that either UK legislature can tackle such questions effectively.
38. Norrie (2008) "Inheritance tax ..." p438
39. Norrie (2008) "Inheritance tax ..." p 441
40. "The Convention explicitly protects the right to marry in Article 12, and the Court has held on many occasions that sexual orientation is a concept covered by Article 14 and that differences based on sexual orientation require particularly serious reasons by way of justification.", Grand Chamber para 47
41. Norrie (2008) "Inheritance tax ..." p 442
42. "The Misses Burden may well have started a ball rolling in a direction they dislike intensely. Victoria Gillick could have warned them.", Norrie (2008) "Inheritance tax ..." p442. The reference to Gillick is to the notorious English House of Lords case in which Mrs Gillick sought to establish that her daughters could not be given contraceptive advice by medical staff without her knowledge. In fact the case, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112, clarified that children had a developing capacity and could indeed consent to treatment without their parent's knowledge in certain circumstances.
43. For which see Ruthann Robson's masterful *Lesbian (Out)Law; Survival Under the Rule of Law*, 1992, Firebrand Books