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**Sisterly Love: the Importance of Explicitly Assumed Commitment in the
Legal Recognition of Personal Relationships**

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Introduction

This is an article about personal relationships. By “personal relationship”, I loosely mean a relationship that is neither public nor for commercial gain. One’s reason for entering into (or at least sustaining) a personal relationship is in some sense for the good of the other person, not one’s own good. Moreover, the identity of the person with whom one has the relationship is central to one’s desire to maintain the relationship. For instance, a pastoral worker will maintain a relationship with another person genuinely out of a concern for the good of that person because she is concerned for the well-being of all persons within her charge. But this is not what I mean by a personal relationship. In a personal relationship, it is important to you that you are having the relationship with a particular person (the very person who is *your* wife, *your* boyfriend, *your* mother) and not with anyone else. The sorts of relationships that fall into this category would include brother-sister, parent-child, friend-friend, husband-wife, boyfriend-girlfriend, partner-partner, girlfriend-girlfriend, *etc.*

This article focuses on the manner in which the law interacts with personal relationships. Given the pervasiveness of both the law and personal relationships in society, it is unsurprising that there would be interaction between them. It seems to me that this interaction takes three forms. First, there are instances in which the law treats individuals differently as a response to a personal relationship of which they are (or have been) part. For instance,

resulting trusts in equity accord certain rights and obligations to individuals that differ according to the character of the personal relationships of which those individuals were a part. In this form of interaction, the relationship is a condition precedent to certain legal rights and obligations. But there is no legal recognition of the relationship as such: the focus is more on the respective situations of the individuals involved.

Second, there are situations in which the law recognises an existing relationship. For instance, in Irish constitutional law, the family based on marriage holds a special position. The law then accords particular legal consequences to this relationship (for instance in relation to choices about custody, health care and education), in much the same manner as described in the previous paragraph. There is thus an overlapping of the forms of interaction. Nevertheless, the two forms seem distinct. In this form, there is recognition of the relationship *per se*. Legal consequences are then attributed in the manner of the first form. In the first form, however, there was no recognition of the relationship *per se*.

Third, there are situations in which the law does not just recognise a relationship but partially constitutes that relationship. The most obvious example of this is marriage. Here the relationship is constituted partially through the utterance of words to which the law attributes significance and which are uttered on account of that significance. Confusingly, a large part of the justification for treating the utterances as significant is that the people involved knew that significance would be accorded to their words. The law treats these relationships as serious because it knows that people take them seriously. However, the law only knows that people take these relationships seriously because people enter into the relationship knowing how seriously the law will treat it. Although there is an element of circularity to this, it is not viciously circular. A social convention has developed whereby people know what public (and legal) importance will be attached to their words. Whether or not it was originally justified for the law to treat those relationships more seriously,

the law is now justified in making that decision.

It is for these reasons that we can say that the law partially constitutes the marriage relationship. This does not mean that marriage is a purely social or legal construct. Such a view incorrectly downplays the level of human agency involved. On the other hand, it is true to say that two people cannot get married on their own. Some element of public approval is necessary. My colleague, Dr Neville Cox, has taken a different view on this point:

I may, to put it glibly, declare that I am married to a tree in my back garden, and whereas people might quite correctly assume that I had certain emotional issues with which to grapple, nonetheless as far as I am concerned, I am married to my tree. I may mark this relationship with a ceremony (possibly a religious one) and a reception to which my friends are invited. Indeed if I can find a publication that will carry my message, I may announce details of this marriage - and more importantly, I can tell people that what has occurred *is* a marriage. And there is nothing that the state or the church or any other person can do to prevent me from announcing or more importantly *believing* the fact that I am married to my tree, according to my lights and in line with *my* private definition of the term "marriage." This definition - my definition - is my own business, and no one else has any rights over it no matter how ludicrous or laughable they regard it to be (and nor, frankly do I have any rights over their definition of the term "marriage" which, presumably, would exclude human-tree relationships). It is, quite simply a matter in which freedom of conscience reigns supreme.¹

There is indeed nothing to stop Dr Cox from claiming that he is married to a tree, in much the same way as there is nothing to stop him from claiming that he is a tree. However, for the reasons outlined in the previous paragraph, marriage is an institution in which public participation is necessary. One cannot have a purely private definition of marriage because some public participation

in the constitution of marriage is necessary. Without a political community that approves of and allows for tree-marriage, tree-marriage is not possible.

Now I wrote above in terms of the partial, legal constitution of marriage, but perhaps it is more correct to focus on the public. Two people cannot marry without some form of public involvement, whether that involvement comes in the form of law, a social convention or God. It is possible for there to be overlapping and conflicting publics: thus a person may be married in the eyes of her religious community, but not in the eyes of the law. Different political communities can take different views as to whom they should allow marry. Although this suggests that there are competing conceptions of “marriage”, it remains linguistically appropriate to use the term “marriage” to cover the different conceptions. However, without some involvement of others, one cannot have a marriage at all - under any conception. It is linguistically inappropriate to use the word “marriage” for a purely private relationship. The crucial issue for any political community in this regard is - within its community - whom should it allow to enter into marriages.

Thus relationships that are partially constituted by the law or the State (*ie* involve an element of public approval) instantiate the third form of interaction between the law and personal relationships.² There is again an overlap with the other forms of interaction. The marriage, once constituted, is a relationship that is legally recognised *per se* in the manner of the second form. Certain consequences are accorded to that relationship in the manner of the first form. But again, there is something unique about this form because here the relationship is (at least in part) legally created.³

Traditionally, opposite-sex marriage has been the primary relationship that has been legally constituted by the State and recognised by the State *qua* relationship. In recent years, a significant social phenomenon has been the demand from those in same-sex relationships for them to be allowed partake in some legal constitution of their relationship. Sometimes the claim is for same-

sex marriage; sometimes the claim is for other forms of union. More recently, an issue that has come into sharper focus is the situation of personal but non-sexual relationships: often the law can impose hardships on such people, particularly as compared with how the law treats people in legally constituted relationships, such as marriage. For as long as traditional marriage was the only legally constituted relationship, the injustice suffered by people in personal but non-sexual relationships did not appear so stark. However, once the definition of marriage is extended (or claimed to be extendable) and once the claimed injustice suffered by those in same-sex relationships is taken to ground an argument for a form of legal recognition and constitution of same-sex relationships, then questions arise as to whether the State should allow the same for personal but non-sexual relationships. Or at least, a question arises as to whether the State should alter the consequences which it accords to some personal, non-sexual relationships in order to bring them in line with the consequences accorded to partially legally constituted relationships, such as marriage.

In *Burden v United Kingdom*,⁴ the European Court of Human Rights considered the ECHR rights of two English sisters who had lived together for their whole lives. The sisters argued that their Convention rights were breached by the discrimination in inheritance tax rules as between their situation and the situation of married couples or civil partners. The Court rejected this argument. This case, and the attendant academic and political commentary, brings into sharp focus the questions posed above. This article analyses the judgment of the Court with a view to exploring the issues that arise when the law interacts with interpersonal commitment.⁵

The *Burden* case: Factual and Legal Context

Facts

Under the UK Inheritance Tax Act 1984 (as amended), inheritance tax is charged at 40% on the value of a person's property, including his or her share of anything owned jointly, passing on his or her death and on lifetime transfers made within seven years of death. For the tax year 2007-2008, there was a nil rate threshold of £300,000. Section 18 of the 1984 Act provides that property passing from the deceased to his or her spouse is exempt from the charge. The UK Parliament passed the Civil Partnership Act 2004 to provide state recognition to same-sex relationships. In order to enter into a civil partnership, the two persons must be of the same sex, not already married or in a civil partnership, over the age of 16 and not within the prohibited degrees of relationship. For this reason, two sisters cannot become civil partners. This Act extends the same legal provisions that govern marital relationships to civil partnerships. Accordingly, same sex couples are also exempt from the inheritance tax charge.

The Misses Burden were unmarried sisters, born in 1918 and 1925. They lived together for all their lives, for the last 30 years in a house built on lands inherited from their parents. According to an expert valuation in January 2006, the house was worth £425,000, or £525,000 if sold with adjoining land. Each sister owned shares and other investments. Each made a will leaving all her property to the other. The value of their jointly-owned property had increased to the point that each sister's one-half share was worth more than the current exemption threshold for inheritance tax. Accordingly, the survivor might have to sell the house in order to pay tax.⁶ The Burdens challenged the legitimacy of this legislation in the European Court of Human Rights.

Preliminary legal issues

The UK Government argued that the applicants' complaint was prospective and hypothetical, as no liability to inheritance tax had yet accrued and might never accrue. The Court rejected this argument, concluding that the applicants could

claim to be directly affected by the impugned law, in the light of their advanced age and the very high probability that one would be liable to pay inheritance tax upon the death of the other. The UK Government also argued that the applicants had not exhausted domestic remedies as they had not sought a declaration of incompatibility in the UK courts under the Human Rights Act 1998. The Court also rejected this argument on the basis that the declaration of incompatibility was an ineffective remedy as it was dependent on the discretion of the executive whether to give effect to the declaration for the benefit of the parties to the case and more generally. The Court also rejected an alternative claim by the UK Government that the applicants had delayed in making their application, as they could have instituted their proceedings in 1975 (when the exemption for spouses was first introduced) or in 2004 when the Civil Partnership Act came into law. The Court reasoned that there was a continuing effect to the law and that the complaint was therefore admissible. Accordingly, the Court was required to consider the applicants' claim on its merits.

The Applicants' argument

The Applicants' case was first heard by the Fourth Section of the European Court of Human Rights - seven judges sat on the panel. The Applicants relied on Article 14 of the European Convention on Human Rights, read in conjunction with Article 1 of the First Protocol to the Convention. Article 14 is in the following terms:

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.

This non-discrimination provision cannot be invoked on its own, but can only be relied on in conjunction with another provision of the Convention. The applicants thus relied on their rights under Article 1 of the First Protocol:

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.

The Court held that, as the duty to pay tax on existing property falls within the scope of Article 1 of the First Protocol (albeit that such a duty could well be justified under the second paragraph), Article 14 was applicable. The case thus proceeded on a comparative basis. The question was not the general justice of restricting the applicants' property rights in this way, but rather the permissibility of treating the applicants, in the context of their property rights, differently from married couples and civil partners.

The majority view of the equality issue

The majority of the Court identified the generally deferential approach that it takes to reviewing national legislation (particularly tax legislation) and then set out a fairly standard approach to equality. It first made reference to the wide margin of appreciation that contracting states enjoy in the field of taxation. It is for national authorities to make the initial assessment, in the field of taxation, of the aims to be followed and the means to be used. A balance is required by the need to raise revenue and the need to reflect other social objectives. Because of their direct knowledge of their society and its needs,

the national authorities are better placed to make that assessment than is an international court.

The Court explained its approach to Article 14 in the following terms:

Article 14 safeguards individuals placed in similar positions from discrimination in the enjoyment of the rights and freedoms set out in the Convention and Protocols. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.⁷

The Court then noted the two contrasting accounts of the situation given by the applicants and the UK government. The applicants contended that they were in a similar or analogous position to cohabiting married and civil partnership couples for the purposes of inheritance tax. The UK government contested this on the basis that the applicants were connected by birth rather than by a decision to enter into a formal relationship recognised by law. (Of course, it was the law that precluded the Applicants', on account of their sister-sister relationship, from entering into any formal relationship recognised by law.)

The Court referred to previous case law to the effect that the situations of married and unmarried heterosexual cohabiting relationships were not analogous for the purposes of survivors' benefits. It also noted that, since 2004, a same-sex couple in the UK has the choice to enter into a legal relationship designed by Parliament to correspond almost exactly to marriage. The Court accepted that its earlier decisions were made in the different context of claimants who were in a position to enter into the relationship of marriage and thereby take on the "corpus of rights and obligations" involved in marriage.

The applicants in this case, however, were not in such a position as they were within the prohibited degrees of relationship and therefore could not become civil partners. However, the Court held that it could avoid determining the issue of whether the applicants were analogous to civil partners for the purposes of inheritance tax because - even if they were - the differential treatment was not inconsistent with Article 14.

The Court came to this conclusion on the basis that the discrimination pursued a legitimate aim. The Court had accepted in previous cases that contracting states could discriminate in order to promote marriage. The legislation in this case pursued 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.”⁸ The Court bolstered this conclusion by reference to the right to marry (in Article 12) and the special justification that is required for measures that discriminate on the basis of sexual orientation. The reasoning here seems to be that, given the objectionability of discriminations based on sexual orientation, states should be facilitated in acting to remove such discriminations.

Having identified this legitimate objective, the Court then questioned whether the means were proportionate to the aim pursued. In essence the question was whether it was objectively and reasonably justifiable to deny co-habiting siblings the inheritance tax exemption that is allowed to survivors of marriages and civil partnerships. At this point, the Court reverted to its reasoning on the margin of appreciation: the social policy aim was legitimate and the UK enjoyed a wide margin of appreciation. To be workable, a system of taxation had to use broad categorisations. The UK legislature could have abandoned the exemption altogether or it could have drawn the exemptions differently. But the measures actually chosen did not exceed the wide margin of appreciation afforded to the contracting states.

The minority judgments

Three members of the Court dissented. Judges Bonello and Garlicki delivered a joint dissenting judgment. They accepted that a wide margin of appreciation applied in relation to the review of tax legislation, but contended that where tax legislation was applied to create a situation of apparent hardship or injustice, the onus shifted to the government to show there were good reasons for their actions. If the UK had confined the exemption to married couples, that might have been justified under Article 12 of the Convention (right to marry). However, once it was decided to extend the categorisation to same-sex couples, the problem left the specific sphere of Article 12. Any further categorisation would have to satisfy general standards of reasonableness and non-arbitrariness. They emphasised that it was permissible for the State to restrict the tax exemption to those who entered the state-approved relationship. However, the State had to be able to justify why only some permanent unions of two persons should enjoy tax privileges.

Judges Bonello and Garlicki addressed the question of whether the applicants' relationship was analogous to a civil partnership in the following way:

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.

The national legislature may establish a very high threshold for such unions to be recognised under tax exemption laws; it 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.⁹

The dissenting judges concluded by pointing to the injustice of the State claiming its tax both when the first sister died and when the second sister died.

Judge Pavlovski also dissented, observing that the majority had failed to provide a reason for their conclusion, which was “legal, but unfair”. He reasoned:

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.

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.¹⁰

The judgment of the Grand Chamber

Article 43 of the European Convention on Human Rights allows a litigant to request a referral to the Grand Chamber of the Court. Five judges of the Chamber decide on whether to accept a referral according to whether the case “raises a serious question affecting the interpretation or application of the

Convention or the protocols thereto, or a serious issue of general importance.” It was accepted that this was the case here, and the Grand Chamber heard the Applicants’ case, delivering judgment on 29 April 2008. This essentially involved the rehearing of the case by 17 judges. A 15:2 majority of the Grand Chamber upheld the decision of the Fourth Section. The majority judgment referred to the same case law on the meaning of Article 14 and the margin of appreciation, but did directly address the question of whether the applicants’ relationship was analogous to a civil partnership or 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 co-habitation. 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 (see *Shackell*, cited above), the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. 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.

In conclusion, therefore, the Grand Chamber considers that the

applicants, as co-habiting sisters, cannot be compared for the purposes of Article 14 to a married or Civil Partnership Act couple. It follows that there has been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No.1.¹¹

Judges Bratzva and Björgvinsson both delivered concurring judgments. In essence, each of these judges preferred the reasoning of the majority of the Fourth Section. Judge Björgvinsson provided the more detailed account of why he preferred the reasoning of the Fourth Section. In his view, the fact that the applicants were legally precluded from marrying or entering into a civil partnership meant that it was impermissible to conclude that they were differently situated simply because they were neither married nor in a civil partnership. The Court ought to focus on the substance rather than the legal form of the relationship: looking at the substance, the relationship of the applicants was more similar than dissimilar to marriage and civil partnership. Accordingly, they were similarly situated and the difference in treatment had to be objectively justified. However, in this regard, Judge Björgvinsson adopted the reasoning of the majority of the Fourth Section: given the wide margin of appreciation afforded to the contracting states in matters of taxation, Article 14 had not been infringed.

Judges Zupančič and Borrego each delivered dissenting opinions. Judge Zupančič considered that it was difficult to see any legitimate reason for an inheritance tax in the first instance. However, he based his conclusions on Article 14, not property rights, grounds. He was prepared to accept an exception from inheritance tax for married couples; however, once an exception was made for some non-marital couples, the state had to employ a “minimum of reasonableness” in deciding not to apply the benefit to other groups of people in relationship of similar or closer proximity. In his view, making consanguinity a bar was wholly arbitrary and irrational. Judge Borrego somewhat similarly reasoned that the majority had failed to identify in what way the applicants’ relationship was different from a married couple or civil

partnership, simply reciting the uncontested fact that the applicants were neither married nor civilly partnered.

Academic reaction to the *Burden* decision

The *Burden* judgments have generated a reasonable amount of academic commentary. Much of this is not directly relevant to the concerns of the present article. However, two academics have advanced similar criticisms of the Grand Chamber's majority judgment that go to the root of the question of how the law ought to interact with personal relationships.

Baker is critical of the Grand Chamber's reasoning on the discrimination issue. He accuses the Court of using circular reasoning:

While this might be said to oversimplify the approach of the Grand Chamber, in effect its approach could be characterised by saying: the law imposes certain legal consequences arising from the conclusion of a marriage or a civil partnership (one of these consequences being the exemption from inheritance tax); the relationship between the sisters did not have these legal consequences, therefore it could not be the same as a marriage or a civil partnership. This seems somewhat circular.
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Sloan makes a similar criticism to Baker of the Grand Chamber's circular reasoning:

the circularity in the Grand Chamber's reasoning is readily apparent. It is illogical to exclude people from a certain status, thereby denying them rights, while justifying that denial on the basis that they did not take on the very status that they were prevented from obtaining in the first place.¹³

This critique is superficially attractive. The argument of Baker and Sloan is that

the Court essentially concluded that it was legitimate for the law to treat the applicants differently from those who are married or in civil partnerships simply because the applicants were neither married nor in a civil partnership. However, given that the Applicants were precluded by law from becoming civil partners, this could not count as a reason for justifying the difference in treatment. Applying that logic, according to the critique, the law's own decision to treat people differently would become its own justification. Such self-justification cannot be sufficient to withstand scrutiny under Article 14.

However, this critique of the Court's judgment suffers from a serious deficiency. The Applicants' claim was not that they should be entitled to enter a civil partnership with each other, but rather that, notwithstanding the fact that they were in neither a civil partnership nor marriage, they should receive the tax benefits that the Legislature had decided to accord to those relationships. Commenting on the Fourth Section judgment, Robert Rodes made the following prescient point:

[The Burdens] made what seems to me a strategic mistake in asking for the tax advantages of civil partnership without becoming civil partners rather than asking to become civil partners despite being related.¹⁴

The applicants having taken that approach, however, the existence of civil partnership became a background factor which can be used to assess the legitimacy in the difference of treatment. Therefore, the judgment of the Court was not viciously circular in the manner suggested by Sloan and Baker.

Nevertheless, it is questionable whether the Burdens' approach to the case was simply a "strategic mistake." Perhaps they just did not want to be civil partners. Gaffney-Rhys identifies some difficulties with allowing siblings to form civil partnerships. First, if civil partnership is parallel to marriage, family roles could be distorted by siblings and other family members becoming civil partners. This criticism seems overly definitional. If siblings were allowed to become civil partners, then presumably people would no longer see civil

partnership as equivalent to marriage. The following is a more cogent problem:

The dissolution of civil partnerships between close relatives would also be problematic. Section 44 of the Civil Partnership Act 2004 (like s 1(1) of the Matrimonial Causes Act 1973) provides that a partnership can only be dissolved if the relationship has broken down irretrievably. A woman who has formed a civil partnership with her elderly mother would have to prove that their relationship has broken down if she wanted to dissolve the partnership. She may wish to do this because she has met someone whom she wishes to marry. In such cases it would be extremely difficult to prove that the relationship between the mother and daughter has broken down irretrievably, particularly if the daughter wishes to continue to live with and care for her mother (see comments of Lord Goodhart, Liberal Democrat Spokesman for the Lord Chancellor's Department, Hansard, Lords Debate, cols 1373-1374 (24 June 2004)). In order to dissolve the partnership the daughter would have to move out of the home that she shares with her mother and obtain a dissolution order after 2 years' separation if her mother consents (s 44(5)(b)) or after 5 years' separation if she does not (s 44(5)(c)). Clearly, this would affect the care that the elderly mother receives and might jeopardise the relationship between the daughter and the person she wishes to marry. Alternatively, the daughter could cite the mother's behaviour as the reason for the breakdown of the relationship and obtain a dissolution order more quickly (s 44(5)(a)). However, such allegations could harm relations between the mother and daughter. Furthermore, it would be impossible to rely on the fact of behaviour if the daughter continued to live with her mother for more than 6 months after the last incident (s 45(1)(b)). The financial implications of dissolving a partnership between close relatives also need to be considered. Section 72 of the Civil Partnership Act 2004 provides that civil partners can apply for financial relief in the same way that spouses can under Part II of the Matrimonial Causes Act 1973. In the example above, the daughter could be required

to financially support her elderly mother if the partnership was dissolved. This potential state of affairs was described as 'ridiculous and inappropriate' by Angela Eagle in the House of Commons (Hansard, HC Deb, col 199 (12 October 2004)).¹⁵

It therefore seems quite likely that the reason why the Burdens did not seek to become civil partners was because they did not want to be civil partners, perhaps in part due to the web of rights and obligations that might accrue between them if they did become civil partners. If this is the case, it seems unlikely that the approach of the Burdens was a strategic mistake. Rather, it seems likely that there was something in the quality of civil partnership that seemed inappropriate to the character of their committed relationship. The web of rights and obligations that attached to civil partnership did not seem appropriate to their relationship.

Yet it is the willingness to take on the web of rights and obligations that lies at the core of the State's justification in becoming involved in the committed relationship at all. That is, it is the willingness to constitute a relationship jointly and with the State, thus assuming significant rights and obligations, that justifies the State in playing a role in the constitution of that relationship. Accordingly, the Court was correct to conclude that the Burdens, as persons who were not prepared to undertake such a commitment, were not in an analogous situation to married couples or civil partners.

If one accepts that the Court was justified in concluding that the Burdens were not in an analogous situation to married couples or civil partners, one might still have concern about the differential tax treatment being meted out. Baker argues:

[O]ne may ask the question whether it is appropriate, in this day and age, to encourage marriage (or the registration of civil partnerships) through the tax system. Such encouragement must imply a better tax treatment for married couples and civil partners, with a corollary that

other persons who form a family or economic unit in a stable, committed and mutually supportive relationship will suffer a comparatively adverse treatment.

Here lies the fundamental disappointment in this judgment of the Grand Chamber. No doubt this judgment will be taken as confirming that governments may apply different tax rules to married couples (and to civil partners where the national legislation permits such relationships) by comparison with unmarried family units in otherwise identical circumstances. The result may be a perpetuation of tax provisions which seek to encourage marriage and a correlative disadvantage to those who enter into stable relationships without the rite of marriage. To that extent, this decision is disappointing.¹⁶

Many people might disagree with this comment. For present purposes, it suffices to note that it is based on a view about the appropriateness of promoting marriage which is stated but not defended. Put more sharply, the question is whether (and if so, to what extent), the State is allowed to accord different treatment to those inside and outside the relationships in which the State is involved, such as marriage.

Baker concludes by suggesting that the Court needs a more sophisticated account of equality:

There is much that is persuasive in the dissenting judgments. This case really required a proper discussion of the concept of discrimination. While it is correct to say that discrimination exists in the application of different rules to relevantly similar situations, this only carries the matter half way. In assessing what are relevantly similar situations, it must be an essential part of the process to identify the underlying rationale for the legislative rule under consideration. Only when one understands that rationale is it really possible to decide if the situations

are relevantly similar.

If, as the UK Government admitted, a policy underlying the inheritance tax exemption was to provide the survivor of a "couple" with a measure of financial security, then any two or more persons who form a "couple" should be regarded as objectively similar. Two situations would be comparable if they were both situations where it was appropriate to provide financial security to the survivor: that would include married couples, civil partners, but also unmarried couples, siblings forming a single family unit, or a parent and a child/carer who formed a single family unit.

This case could have afforded the Grand Chamber an opportunity to develop the concept of discrimination as a more rational and effective tool of analysis. Sadly, it focused on a more bland comparison of marriage (and registered civil partnerships) and unregistered/unregistrable relationships.¹⁷

In this equality analysis, Baker focuses on the purpose of the tax exemption for tax purposes. However, this perhaps misses the point of partially state constituted relationships, such as marriage and civil partnership. These relationships are fundamentally different from all other relationships. Most importantly, they carry with them a whole range of interpersonal, legal obligations which do not arise in respect of other relationships. Even in jurisdictions which allow for divorce, the practical dissolution of such relationships is always more difficult than the practical dissolution of other relationships. A wide range of legal obligations accrue once a legal relationship of this type is dissolved. There is a case to be made for allowing the state to treat the relationships which it partially constituted in a qualitatively different way from all other relationships. Thus, it is wrong for Baker to focus on the purpose of the tax exemption in tax planning terms. The purpose of the exemption is not simply to improve the financial situation, but is rather

recognition of the fundamental way in which marriage or civil partnership is special. That “specialness” of marriage and civil partnership legally justifies (but does not politically mandate) a wide range of discriminations as between these institutions and other relationships, even discriminations which do not - on their face - appear to serve a particular purpose.¹⁸

Sloan illustrates the broader questions that need to be addressed:

In a broader sense, modern Western society must confront the rationale for continuing to attach legal rights and responsibilities to formal partnerships rather than adopting a purely functional approach. This is especially important at a time when increasing numbers of people are choosing to live in long-term relationships, and to bring up children, outside those formal mechanisms. Should the institution of marriage, and its functional equivalent, be used to implement a particular vision of how people should arrange their personal lives and conduct sexual relationships, in which case these institutional forms will remain irrelevant to people like the Burdens? Alternatively, should they be a means of encouraging people to support and take responsibility for each other, irrespective of whether they are in a sexual relationship? If the support of stable personal relationships is a legitimate social aim, as the UK Government argued in this case, is not the Burden sisters' relationship exactly the sort of relationship that should be protected? These are vital policy questions that lawyers alone cannot answer.¹⁹

It is to these questions that I now hope to venture the beginning of some answers.

The basis for the State constitution of personal relationships

The fundamental question is why the State should be involved in the constitution of inter-personal relationships at all. This is a question which has

been approached from many directions. I suggest that a useful way of asking this question is to explore Rodes' strategic suggestion that the Burdens should have sought to be allowed to form civil partnerships. First, it is telling that there has been no independent social movement seeking such a step. As Greycar and Millbank observe:

What these debates reveal is the way in which the non-couple category has been co-opted by opponents of equality using formal equality rhetoric and false comparators (same-sex couples with same-sex non-couples) in order to position themselves as the ultimate equality seekers. While it is typical of opponents of same-sex relationship recognition to characterize any form of legal change as “social engineering” and as an “attack” on marriage, what is remarkable about this particular strategy is that it reconfigures same-sex relationship reforms as actually *worsening* rather than alleviating inequality and discrimination, through the construction of another (more) deserving and unrecognized group, the “domestic co-dependants.”

Despite there being no empirical evidence to demonstrate an unmet legal need for broadly based recognition of non-couple relationships, nor any form of political or social mobilizing by non-couples, this group has been constructed as a key figure of need and exclusion in the debates. In parliamentary debates across a variety of jurisdictions, this group has come to be represented as fantasy figures of asexual altruism.²⁰

Greycar and Millbank also note the political work that is done by a focus on the asserted claims of non-couple dependants. It analogises gay couples to the asexual non-couples. This resurrects the closet as a means of discrimination in a new form. Gay couples can have their relationships recognized by the law, provided that the law can regard those relationships as non-sexual.

We should be suspicious of the *Burden* scenario on account of the fact that the

sociological phenomenon of the focus on spinster sisters is odd, the fact that serious ideological work is being done by this focus, and the fact that the Burdens did not want to be civil partners. But this does not address the question of whether siblings such as the Burdens ought, in justice, to have the right to form civil partnerships. In particular, the question that the *Burden case* causes us to focus on is what distinguishes traditional marriage and (perhaps more acutely) same-sex intimate relationships from relationships between siblings such as the Burdens. In this regard, Baker considers that Judge Zupančič's question was penetrating:

Is it having sex with one another that provides the rational relationship to a legitimate governmental interest?

Judges Bonello and Garlicki in the Fourth Section spoke of the bonds of mutual affection forming the ethical basis and the bonds of mutual dependency the social basis for the relationship between cohabiting siblings. These are shared with same-sex partnerships; having sex is not. Surely the having sex is the only distinguishing factor?

For reasons that should by now be clear, I believe that something else is at play. It's not the having sex; it's the explicit assumption of commitment. Farley has spoken in the following terms of what happens when commitment is assumed:

The first thing we must do in exploring explicit, expressed commitment is to ask: "What takes place when we commit ourselves in this way?" ... What do any of us do whenever we make a commitment to one another, whenever we promise, whenever we ratify a covenant?

We can ask this question of our examples of posting bail and exchanging wedding rings. What is happening in each of these cases? In both, I am "giving my word" to do something in the future. But what can it mean to "give my word"? ...

To give my word is to “place” a part of myself, or something that belongs to me, into another person’s “keeping.” It is to give the other person a claim over me, a claim to perform the action that I have committed myself to perform. When I “give my word,” I do not simply give it away. It is given not as gift (or paid like a fine), but as a pledge. It still belongs to me, but now it is held by the one to whom I have yielded it. It claims my faithfulness, my constancy, not just because I have spoken it to myself, but because it now calls to me from the other person who has received it.... What happens, then, when I make a commitment is that I enter a new form of relationship.²¹

It is the willingness explicitly to assume commitment that distinguishes same-sex couples from sibling-sibling relationships. There does not appear to be demand from siblings - not even from the Burdens - to have access to civil partnership itself. I venture that the reason why the Burdens did not seek to be allowed access to civil partnership was because they did not see the public expression of presumptively lifelong, exclusive commitment as appropriate to their situation. This is no criticism of them, nor of their evident care for each other. Rather, it is a comment on the sort of relationships which people would like to have legally constituted and, as a result, which the law has some reason to consider legally constituting.

What is formalised by the State in the relationships that it partially constitutes is commitment. The State throws its weight behind that commitment in a number of ways, most notably by (a) treating it as exclusive and (b) making it difficult (if not impossible) for the parties to escape from that commitment. The private commitment which the State underwrites is transformed by the knowledge that the State will be underwriting it. The public expression of that commitment - in the knowledge that the very public expression alters one’s legal situation - transforms that commitment into a different species from all other commitments which we explicitly undertake or unintentionally assume. We all have commitments to many people at many times. We care for one

another - for children, siblings, friends, neighbours, work colleagues, students, parents, *et al.* Without downplaying the worth and importance of these commitments, it is important to recognise that we do not think that all commitments should be raised to the level of a publicly stated and legally underwritten lifelong, exclusive commitment. Indeed, the other commitments cannot be elevated to that status, because logically there can only be one such exclusive relationship. It is on this basis that the State is justified in withholding the institution of marriage and civil partnership from siblings. Access to partially state constituted relationships, such as marriage, is susceptible to equality scrutiny - prohibitions on interracial marriage (of a particular type) have been successfully challenged on this basis; affinity prohibitions have been successfully challenged; in some jurisdictions, prohibitions on same-sex marriage have been successfully challenged. However, prohibitions on siblings accessing such relationships will not be successfully challenged - because the type of commitment which is both recognised and created in marriage is not a type of commitment that characterises sibling relationships.

Moreover, once the State is justified in not legally constituting certain relationships - leaving them entirely to the domain of entirely private relationships - the State is entitled to discriminate in how it treats those relationships vis-à-vis the legally constituted relationships. The purpose of those discriminations need not be justified on a case-by-case basis (Is this tax exemption relevant? Is this inheritance rule relevant? *Etc.*) Rather, the whole discriminatory “corpus of rights and obligations” is justified on the basis that express, legally underwritten commitment is a qualitatively different kind of commitment. Accordingly, not only would the European Court of Human Rights have been correct to conclude that the United Kingdom was entitled to exclude the Burdens from civil partnership; the Court was correct to conclude that the discrimination against the Burdens did not infringe Article 14.

Conclusion

One is left with a suspicion, however, that the Burdens - and those in sibling-sibling relationships generally - are bit players in a wider social debate. Those who view marriage as an institution that should be accessible to same-sex couples tend to view it as obvious - almost self-evident - that the Burdens were in a different situation. In contrast, those who view marriage as an institution that is intrinsically inappropriate for same-sex couple tend to view it as obvious - almost self-evident - that the Burdens have as great a claim of justice as those in same-sex relationships. In short, although the debate over the law's treatment of non-sexual, committed relationships is presented as separate from the debate over the law's treatment of same-sex relationships, there is an almost total overlap in the positions adopted by the protagonists in the two debates.

This article has attempted to offer a new perspective on the debate about non-sexual, committed relationships, hopefully in a manner which may prompt some people to reconsider their views on the related debate over the law's treatment of same-sex relationships. The law's treatment of non-sexual, committed relationships has often been lacking and there is a strong case to be made for some preferential treatment in tax and inheritance laws. Nevertheless, such relationships remain wholly different from same-sex, committed, sexual relationships. The crucial difference between the two is not the presence of a sexual relationship but rather the willingness explicitly to assume exclusive and presumptively lifelong commitment. We know that this is present in same-sex relationships, but have seen little to suggest that it exists in non-sexual, committed relationships. It is the willingness of those in same-sex relationships to have their relationship partially constituted by the law, with all the serious consequences which that entails, that justifies the law in partially constituting these relationships. The law's interest in doing so

presumably derives from the concern of a state, even a liberal state, to support its citizens in assuming the primary responsibility to care for each other.