Family Law and Human Equality

Canadian society is a caste system based on sex. The Women's Movement appreciates this fact but has not yet given top priority to generating articulate criticism of the root cause of invidious sexual discrimination in this country. That cause is the law of the family--a mediaeval straitjacket that is comprised of equal parts of legal fictions, economic injustices and scientifically untenable behavioural assumptions, and that shelters from criticism behind a facade of pious Victorian moral hypocrisy. In addition, family law rides the coattails of marriage as a sacred institution and the family as the basis for our culture and civilization. If marriage and the family are good things, then it is an easy step to the assumption that the law that defines marriage and the family must also be good.

It is not. The law of the family in general and the philosophy of that law in particular is, in 1975, an outrage to our collective humanity and the source of more human suffering and genuine pain than almost any other doctrine or ideology ever created by the mind of man--and the word "man" is used here, with complete accuracy, to indicate gender.

The catalogue of shortcomings of family law encompasses almost its entire body. To deal with basic premises, however, reform must concentrate on that part of the law dealing with family economics. It is here that we find the key to meaningful change. This is also the area where the Women's Movement has fallen significantly short of its potential as a catalyst for such change.

We are all familiar with the voice of women speaking out against Dick being shown as taller than Jane in the Grade Three Reader. This is the attack on the depiction of woman as a "weakness symbol." And the Women's Movement has been equally vocal on advertising, clothing and other phenomenon that portray woman as a "sex symbol." These, however, are but peripheral issues and serve only to dissipate the energies that should be focused on the law of marriage and the family that depicts woman as a "dependency symbol." Because we live in the realm of law, this symbol not only profoundly influences individual and community attitudes, but also, as the major term in the legal syllogism, clothes the distortions that follow from discrimination based on sex throughout family law with all the attractiveness of a logical arrangement. Reform of family law must not concern itself with whether or not the courts are proceeding from premises to conclusions without making mistakes. By this criterion, decisions such as Murdoch vs Murdoch are completely defensible. Rather we must concern ourselves with the question of whether Parliament and the provincial legislatures are giving the courts the right premises with which to work in the last quarter of the twentieth century.

by Edward Ryan

Such problems, whether they be with individual court decisions, school readers, advertisements or what have you, are just the froth that obscures from our vision the fact that marriage is the primary relationship between the sexes, and as such, is the primary source and primary justification for sexually-based discrimination in society. The marital relationship is so fundamental that every other aspect of our culture pales in comparison. Our economy and the power structure in the society are organized around the family and marriage. Whatever assumptions govern the family and marriage, also determine the shape of the community and the nation, and determine who has what opportunities, what rights and what responsibilities not only in the matrimonial home, but also in that large world that lies beyond it. Family law reform is not just one goal among many--it is the keystone of the arch of human equality.

One basic assumption of family law--perhaps the most destructive one of all--is that marriage is society's primary vehicle for meeting the economic needs of women. The law books contain instances of divorce judges who conduct a legal appraisal of a woman's chance of remarrying when they are deciding how much her ex-husband has to pay her. If she fits the current stereotype of female pulchritude, her needs are less because she has a good chance of remarriage. It is probable that few judges ever have the time or opportunity to look beyond the hard-headed practicality of this to the economic proposition that it stands for--that is, an acknowledgement that a woman is conventionally expected to get her share of the country's goods and services from a man as his dependent, rather than on her own, and that the economy, as well as the law of the family, is based on this arrangement. The message to women is loud and clear: devote your primary energies to attaching yourself to a man rather than developing your individual potential as a person.

What is equally destructive is the acknowledgement that it is a part of the philosophy of the law of the land that a woman's chances of getting her fair share depend upon her sexual attractiveness to those who have the monopoly on the economic technostructure. Imagine the cabinet shake-ups if a man's route to the top depended on his sex appeal! Which sex would be told that they spent too much time fussing over their hair if that were the case?

It is time to put that philosophy of the role of women behind us, as well as the particular rule in which it is embodied; the female dependency rule. So long as the law continues to give any support to the idea that in the primary relationship between men and women, women as a class, are to be supported for life and men, as a class, must support them, then women will continue to be excluded on the basis of their sex from meaningful opportunities (in the sense that men

have meaningful opportunities) in the social-political-economic techno-structure.

One reason for this is fairly obvious. The struggle for wealth and power in which all men engage is essentially a competition. A male competitor required by law to share the tangible fruits of his labours with his wife carries a handicap and will resist the idea of sharing the limited opportunities for advancement with those whom he knows are arbitrarily exempted from this burden by reason of sex. This is best summed up in the often heard argument: "Why should she get the job or the promotion when I'm the one responsible to support a family." This view is a subtle but real characteristic of most hiring and promotion practices and exists independently of those ordinary irrational fears or resentment of women colleagues that constitute pure sexual prejudice.

A second reason is less obvious, perhaps because it seems altogether too primitive to a fastidious culture the apparent major concerns of which are things like "ring around the collar" and the avoidance of "wax buildup" on kitchen floors--a side of human nature that we seldom care to acknowledge. This is the basic drive to mate and reproduce. In our society, the acceptable outlet for this, which is without doubt one of the primary factors influencing most human behaviour, is the institution of matrimony. The legal requirements affecting marriage therefore dictate the cultural manifestations of the need for sexual bonding. People will tend to behave in whatever way is necessary in order to obtain a mate. Given that the law makes the man the sole provider (which is an inherited phenomenon flowing from complex historic, religious and economic forces), it follows that the good provider has a greater chance of satisfying his need to marry. Even where the ability to marry is present in any event, so that absolute deprivation is not a primary factor, the economically powerful man has a greater selection of women from whom to choose a partner.

Women, on the other hand, are informed by our culture that being a good provider does not necessarily give them any advantage in seeking to marry, while cultivation of domestic or "feminine" virtues and sexual attractiveness does. Since they tend to be excluded from the economy, marriage itself becomes their entry into adult society, the primary vehicle for expression of their abilities and the way in which they should expect to meet their economic needs.

Dr. Karen Horney, referring to the "difference in cultural positions" of men and women, has explained this pattern as a result of the conditions under which women have lived.

> For centuries love has not only been women's special domain in life, but in fact has been the

> only or main gateway through which they could attain what they desired. While men grew up with the conviction that they had to achieve something in life if they wanted to get somewhere, women realized that through love, and through love alone, could they attain happiness, security and prestige.(1)

In other words, the expectations and requirements flowing from the traditional legal characteristics of marriage encourage at an early age a differentiation in life roles based on sex, although it has no rational connection with the physical distinctions between men and women, or with their abilities, intellectual potential or capacity to contribute to the society.

The two main results of this are, first, the "cultural mold," described by the Royal Commission on the Status of Women, that strives to program young women according to the pattern (or sexual stereotype) that the preceeding generation found to be an intrinsic part of success in finding a marriage partner; and second, the male demand for priority in educational institutions and the economy in general, a priority which is vital to the man who, because he is a man, must be able to fulfill the legal necessity of being able to support a family if he is to be an eligible marriage partner.

It may well be asked whether any amount of "consciousness raising" among women, or formal programmes for requiring that positions of influence, power or prestige in the economy be allocated on the basis of merit rather than continuing to be based on membership in the male sex as the primary qualification, have any chances for significant success until some fundamental legal changes occur in the basic relationship between the sexes--that is, the law of marriage. So long as sexual classifications are institutionalized in the letter and spirit of family law, we will continue to have institutionalized sexual discrimination across the spectrum of the entire society.

What is needed is a new legal arrangement that makes marriage a true partnership of legal equals. At the same time, the new law must be carefully framed so as to meet legitimate needs created by marriage without interfering with existing expectations, or with what people want. The Law Reform Commission of Canada has endeavoured to articulate such an arrangement in its Working Paper entitled Maintenance on Divorce.(2) That title is misleading since, when dealing with the maintenance relationship, we are really dealing with the basic legal bargain of marriage, and hence the ideas in the paper are of equal significance to provincial governments who have jurisdiction over marriage as they are to the Parliament of Canada which is responsible for divorce law.

The traditional common law philosophy of marriage is that it is a purchase by a man, in exchange for maintenance, of an exclusive right to the services, affection and sexuality of a woman. A woman is not expected in law to be other than a dependent and marriage is in fact a real economic goal for a woman--particularly in a society where things are organized so as to make it difficult for her to otherwise provide for herself.

Almost all other family law follows from the principle of purchase in the maintenance rule. The wife retains her unilateral right to her support so long as she behaves herself. If she commits adultery, she is cut off from further financial provision in most provinces, according to the common law tradition. This is an incredibly harsh penalty in a law that is based on the assumption that a woman is unable to support herself (which is the reason for the female dependency rule in the first place). She is also cut off if she leaves--she becomes the "deserter." To add insult to injury, the common law gave, and still gives in some provinces, a deserted husband the right to sue anyone who took in his wife (who was assumed to be destitute) enabling him to harry her from one protector to another even though he was no longer liable to maintain her himself.

The only comparable situation for a man would be if the law required him to be fired from his job or barred from his profession for marital misconduct, and then gave his wife the right to sue anyone who thereafter gave him employment.

Since sexual exclusiveness was the basis of the bargain, lapses from fidelity can, in many provinces, also cost a wife her dower rights, the right to contest her husband's will and the right to receive a full share of his estate if he dies intestate. Some provinces have the rule that the property of a wife who commits adultery (but not the property of an adulterous husband) can be taken from her and given to her children. The common law tradition contains everything but the scarlet letter.

There are, then, several interwoven themes: an economy that excludes women from full participation and which conveniently enables men to use economic power to attract women; marriage rules reinforcing sexual roles that give women access to wealth through men at the price of autonomy; and matrimonial fault rules that provide economic penalties as a means of control of female behaviour--particularly female sexuality--according to male interests and concepts of masculine honour. There is also the lurking threat that somehow marriage as a social institution will fall apart and Canada will go the way of Rome if these grotesque and archaic tribal concepts are significantly altered. And then there is the pretentious claim by some prominent

spiritual leaders that the rigid sexual roles and male-dominance and female-inferiority stereotypes of mid-nineteenth century England--which is when our present family law philosophy crystallized--were dictated by God in accordance with the natural law and that moral chaos and social collapse will follow if, in Billy Graham's words, women don't stick to "their God-given roles as mothers and homemakers."

Speaking as a lawyer with no spiritual pipeline to give any Divine weight to the analysis, I suggest that the present family legal arrangements are a pure man-made product of the economic imperatives, moral hypocrisy, cultural folklore, social expectations and differing educational opportunities for men and women as they existed in the mid-Victorian era. Legal rules embodying these Victorian concepts and serving these Victorian needs have been projected onto the present day as a result of the legal philosophy that has dominated our courts since the 1850s which directed the judges to withdraw from their historic role of legislative development of the law (leaving that to Parliament), and instead restricted them to the logical perfection of the law as they found it. Even with some judicial legislation, the radical social and economic changes of the twentieth century have far outrun the limited mandate judges have to depart from precedent. The ball is in the legislative court and an examination of the statute books shows that, legislatively speaking, the relationship between men and women in the legal structure of marriage is still an amalgam of feudal status concepts expanded by the matrimonial fault doctrines of the mediaeval ecclesiastical courts, all nicely brought up to date and tied together to fit into Victorian morality, economics and social certainties.

The objects of reform of the law of marriage and divorce are to remove from that law every specific example of sexual classification--all of which are inherently suspect and probably universally arbitrary--and to repudiate its legal tradition of invidious sexual discrimination. This is a direct attack on the idea that marriage is the financial preserve for women while the job market belongs to men. To do this it is necessary to repeal the female dependency rule in all provinces where it still exists; to repeal every rule that exists as a consequence of the female dependency rule (that is, all the financial disqualifications that the law places on women for marital misconduct); and finally, to abolish legislatively all common law precedents that are inconsistent with the new concept of legal equality between husbands and wives, or that incorporate sexual stereotypes about men's and women's roles as legal preconceptions having legal consequences.

If support rights are no longer to be determined by sex, then what should they be based on? The answer is that a legal

right to a financial claim on a spouse should be based on need. Marriage per se does not create a need and marriage per se therefore should not create a right to support from a spouse. The primary basis for needs that the law should recognize as giving an enforceable right to support should be the division of function in the marriage. There are three basic functions to be considered: financial provision, household management and child care. The law must abandon the idea that these are or ought to be divided along the lines of male breadwinner-female housekeeper, in favour of the view that these are equal responsibilities of both spouses.

A spouse who chooses to manage a household should be characterized in law as relieving the other from a shared responsibility so that the other may devote his or her full energies to making financial provision. The spouse who becomes a full-time paid employee so that the other can raise the children should be characterized in law as relieving the other from the shared responsibility for bringing in money. How the couple divides these functions should be no business of the law, which would abandon reliance on the stereotypes of male breadwinner and female dependent-housekeeper.

It is apparent that wherever there is a division of function, the spouse who does not have paid employment will have a need. This should be legally enforceable, just as the present support obligation is legally enforceable. But there will be one major difference. The new support obligation would have a rational basis. An employed spouse would be legally obliged to support a spouse who cared for children and managed the home not because the latter happened to be female but because there was a need created by the way in which the couple had arranged their lives. The law would abandon the preconception that men must be absent from the home in order to make financial provision for the family and leave it to the marketplace of human behaviour as to how people arrange their marriages in future. Whether a couple adopted the division of function that is now the dominant pattern, or reversed the pattern would be a result of the choice made by the spouses according to their abilities, religious beliefs, emotional needs, economic goals and cultural patterns. People could have freedom of choice without the coercion of legally-enforced sexual stereotypes, while still being assured that the law would provide for economic needs arising out of the shared experience in the marital partnership.

Under such a regime it would no longer be possible to characterize marriage as society's instrument for meeting the economic needs of women. The effect this would have on the education and attitudes of young people--particularly young women--would be profound. It

would strike at the heart of the male insistence on priority in educational institutions and the job market. A woman seeking employment would have the full support of the law in saying that her family financial responsibilities and obligations were precisely the same as those of a male candidate for the same job. The legal support would be removed from the practice of denying women advancement or an employer's investment in special training on the grounds that they will just get married and remove their skills from the market. They may or may not marry, and if they do, marriage per se will not put them in any different financial position than it puts a man.

Several reforms follow from this. First, in divorce, maintenance would be rehabilitative and not in the nature of a pension. It would provide for the needs of a spouse who had been off the job market and lost seniority and skills because he or she had been the household manager and the one who cared for children. This rehabilitative concept is vital, since it is aimed directly at the idea that all a woman has to do in the way of life preparation is ensure that she marries, after which she will be taken care of for life.

Maintenance amounts would be based on reasonable needs and not on "the style in which she was accustomed to be kept." This is again aimed at eliminating a legal concept of marriage as a substitute for individual achievement or as an alternative to seeking training and education for the station in life to which an individual aspires.

If maintenance is to be based on need, then, by definition, it can no longer be a quid pro quo exchanged for female sexual exclusiveness. It follows that matrimonial fault would no longer be a consideration in maintenance awards on divorce. The law's idea that one spouse or the other is "at fault" or "to blame" when a marriage breaks down is meaningless to behavioural scientists. To say that the whole interaction between a couple over the span of a marriage can be neatly polarized into legal categories of "guilt" and "innocence," and that guilt can be fitted into either cruelty or adultery, and that the legal process can ascertain guilt and innocence with any hope of accuracy is simply preposterous. To allow financial rights and obligations on divorce or after a marriage breakdown to follow from a determination that is so fraught with uncertainty would do no more than compound the human suffering that results from a legal philosophy that is so fundamentally deficient in the first place.

The need to eliminate fault and subjective tests of conduct cannot be overemphasized. One provincial law reform commission recently suggested that maintenance obligations should be based on needs, means, abilities and so on, and that conduct should be one of many factors considered by the court. Presum-

ably the maintenance payable to a needy spouse would be reduced or eliminated on the basis of fault. If conduct is left on anybody's list, it will not only perpetuate the idea that the legal nature of marriage is still a purchase transaction of the behaviour of one spouse by the economic power of the other, but it will also be the gate through which is dragged seven hundred years of invidious sexual discrimination against women. The whole weight of legal precedent on fault is anti-female and punitive.

The Provincial Deserted Wives and Children's Maintenance Acts not only can but should be scrapped in favour of provincial marriage breakdown legislation, in which the courts give up the legal fiction of searching for desertion and other forms of matrimonial fault. Instead of asking who manoeuvered whom into leaving, or who is the discovered adulterous spouse, the courts should ask "which spouse, if either, has an economic need arising out of this broken marriage, and how long will it take the needy spouse to become self-sufficient?" Needless to say, this is precisely the same approach suggested for the Divorce Act by the Law Reform Commission of Canada.

It should be noted that more than one factor has been suggested by the Law Reform Commission as the basis for interspousal maintenance. The concern of this paper has been to explain the Commission's philosophy, which can most accurately or conveniently be understood by considering the concept of maintenance being based on needs arising out of the division of function in a marriage. Of equal weight, however, would be needs arising out of custodial arrangements made respecting children; the needs created by an express or tacit agreement that one spouse will maintain the other, and needs following from physical or mental disability or the inability to find work. Note that no concession is made to the idea that there is any need that follows from the fact of being female.

Maintenance on marriage breakdown would be rehabilitative, for the rational purpose of enabling a needy former spouse to become self-sufficient again, just as is required of every other unmarried person. If the need is permanent, however, maintenance could and would be permanent.

Fault should simply disappear from the maintenance equation. Needs caused by the dependency experience of a spouse during marriage, resulting from arrangements that have relieved the employed spouse from part of the shared responsibilities, are not magically reduced or eliminated by fault. Fault concepts affecting maintenance rights are, always have been and always will be as arbitrary as the law that presumes to be able to discover who caused the marriage breakdown. Apart from determining financial rights, fault concepts

serve mainly to give disenchanted spouses sticks to beat each other with, and as bargaining levers in disputes over property and children. It is beyond belief that we should seriously contemplate retaining the degrading doctrine of legal fault and the inhumane suffering that it causes for even one day longer than is needed to banish it forever from the halls of justice.

In another Working Paper,(3)the Federal Commission has pointed out the necessity for laws providing for equal property sharing on divorce, which, taken with the new maintenance concept, will ensure as far as the law is reasonably able, that the economically penalizing consequences of providing full-time care to children will be eliminated.

All of this is only a part of the job that must be done by the law on behalf of the Canadian family. These steps must be coupled with a massive effort by governments and the private sector to attack and root out sexual discrimination wherever it exists. And there is an absolute requirement for intergovernmental cooperation in family law reform of a nature and on a scale that is unprecedented in this country. The needs of the family unfortunately do not follow the neat division of legislative authority between parliament and provincial legislatures in Sections 91 and 92 of the British North America Act.

The last sentence of the Commission's Working Paper on Maintenance sums up the task that lies ahead:

> The removal of obstacles to the development of a new Canadian ethos of socio-legal equality for all married persons requires co-ordinated affirmative action by all governments and legislatures in Canada.(4)

NOTES

1. Karen Horney, The Neurotic Personality of Our Time (New York, 1937), pp. 139-40.
2. Law Reform Commission of Canada, Maintenance on Divorce, Working Paper No. 12 (Ottawa, 1975).
3. Law Reform Commission of Canada, Family Property, Working Paper No. 8 (Ottawa, 1975).
4. Law Reform Commission of Canada, Maintenance on Divorce, p. 40.