WOMEN, THE FAMILY AND THE CONSTITUTIONAL PROTECTION OF PRIVACY

*Hon. Bertha Wilson**

May I say first of all that I am deeply honoured by your invitation to deliver the Third Muriel V. Roscoe Lecture and to be thus identified with her struggle for women's equality and the full participation of women in all sectors of society. We are very proud of our pioneers, the leadership they gave and the sacrifices they made on our behalf. We pay tribute this evening to a woman of rare intellect and of strong determination who devoted herself to a cause we all share.

When I delivered the Barbara Betcherman Lecture at Osgoode Hall Law School two years ago I suggested that the development of the law in some areas may have been influenced by the fact that it was made exclusively by men and reflected what were quint-essentially male values.

And when I spoke to the B'nai Brith Women of Canada earlier this year on the subject of family violence it occurred to me that the doctrine of family privacy might be one of such areas and I thought it would be useful, therefore, to see how that doctrine has impacted upon women and women's equality under the Constitution.

As you know, women's rights, thanks to the powerful influence exercised by thousands of Canadian women who lobbied fiercely and effectively to expand and strengthen the equality guarantees, appear to be fairly well protected in the *Canadian Charter of Rights and Freedoms*.[1] Not only is sex enumerated as a prohibited ground of discrimination in section 15[2] but affirmative action programs are expressly deemed not to be violations of equality rights.[3] Moreover, all *Charter*

---

* Scholar in Residence, Faculty of Law, Common Law Section, University of Ottawa. This article was delivered as the Third Muriel V. Roscoe Lecture at the McGill Centre for Research and Teaching on Women, Montreal, 14 November, 1991. It is a condensed version of a paper delivered at a conference on the Hong Kong Bill of Rights, Hong Kong, June, 1991.

[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[2] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[3] Section 15(2) provides:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

rights are stated to be equally guaranteed to men and women alike by section 28, a provision which, unlike the general equality guarantee, may not be overridden by legislative decree.[4]

However, women's rights in the family context have not yet come before the Supreme Court of Canada. There are probably three reasons for this.

The *Charter*, like other constitutional instruments, provides a check on the invasion of protected rights by the state but not on abuses committed by private persons.[5] Unless there is some state action involved the Constitution provides no assistance. In *RWDSU* v. *Dolphin Delivery Ltd*,[6] the Supreme Court of Canada held that orders issued by the Court in private law disputes between private citizens do not constitute state action. The implications of this decision for family law are clear. Family law statutes will, in general, not be susceptible to *Charter* attack since they typically do not evidence constitutional problems on their face. Instead, a great deal of discretion is vested in family court judges to do whatever is best having regard to a number of stipulated factors. If a difficulty of constitutional dimension should arise, it would stem not from the statute itself but from its application by the courts,[7] *i.e.* from a court order in a private dispute between private parties, the very thing exempted from judicial review by the ruling in *Dolphin Delivery*.

Apart from this rather technical difficulty there is a further problem related to the essential nature of familial disputes. Family law litigation is usually highly fact specific.[8] Since the Supreme Court only hears cases it considers to be of national importance[9], most family disputes fail this threshold test on the footing that the matter is of significance only to the parties concerned.

Finally, and most importantly, there is a widely held view that our legislatures have themselves taken account of the equality dimension of family law and have fashioned their statutory regimes to deal with these issues. Indeed, in the late 1970's legislatures across the country revised their family law statutes to provide for greater formal equality between

---

[4] Section 28 provides:
Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[5] Section 32(1) provides:
This Charter applies (a) to the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[6] [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery*].

[7] F. Steel & K. Gilson, *Equality Issues in Family Law: A Discussion Paper* [hereinafter Steel & Gilson] in K. Busby, L. Fainstein & H. Penner, eds, EQUALITY ISSUES IN FAMILY LAW: CONSIDERATIONS FOR TEST CASE LITIGATION (Winnipeg: Legal Research Institute, 1990) 21 at 52.

[8] *See Introductory Notes* in Busby, Fainstein & Penner, *ibid.* at 3.

[9] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

the spouses. Accordingly, many believe that our family law has been immunized from judicial review by itself embodying the concept of equality.[10] My own view, however, is that this state of affairs will not last much longer and I say this for two reasons. The first is strictly legal. In contradistinction to our American neighbours[11] the Supreme Court of Canada has held that it is not necessary to prove an intention to discriminate in order to establish a violation of the equality rights provision of the *Charter*. It is sufficient that a law have a discriminatory impact on a protected group.[12]

In addition to this legal development it is increasingly being recognized that the principle of formal equality, precisely the principle embodied in our family law, often works a disparate impact on women.[13] For example, in a landmark study conducted by Professor Lenore Weitzman it was demonstrated that the principle of similar treatment in the family law area had the effect of imposing on women a greatly reduced standard of living following divorce.[14]

Given these new developments, equality challenges under our family law will undoubtedly make their way to the Supreme Court in the near future. In fact, it seems that within the next year or so such issues as the constitutional equality dimensions of support orders will be explored.[15]

How will women as family members fare when these issues are raised under the *Charter*? In particular, will they benefit from the Supreme Court's expansive approach to the interpretation of the *Charter* as set out by Chief Justice Dickson in *R.* v. *Big M Drug Mart Ltd*?[16] You will recall that in that case the Chief Justice stated:

> [T]he proper approach to the definition of the rights and freedoms guaranteed by the *Charter* [is] a purposive one. The meaning of the right of freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the *purpose* of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.[17]

The Chief Justice then went on to stress that the interpretation should be "a generous rather than a legalistic one, aimed at fulfilling the purpose

---

[10] Steel & Gilson, *supra*, note 7 at 24.

[11] *See, e.g., Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976)

[12] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[13] *See* N. Duclos, *Breaking the Dependency Circle: The* Family Law Act *Reconsidered* (1987), 45 U. T. FAC. L. REV. 1.

[14] L.J. Weitzman, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (New York: The Free Press, 1985).

[15] *See, e.g., Moge* v. *Moge* (1990), 70 D.L.R. (4th) 236, 25 R.F.L. (3d) 396 (Man. C.A.), *leave to appeal granted* (December 7, 1990), No. 21979 (S.C.C.).

[16] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to S.C.R.].

[17] *Ibid.*, at 344.

of the guarantee and securing for individuals the full benefit of the *Charter*'s protection".[18]

In addition to advocating a purposive approach to the interpretation of *Charter* rights, the Supreme Court has also favoured a contextual approach. The right under review must be examined, not in the abstract, but in the factual context in which it is being applied. Constitutional guarantees must, in other words, be expounded in a way that is responsive to contemporary reality. I believe this is particularly important when it comes to the constitutional adjudication of women's rights within the family. Real lives, contemporary women's lives, must be regarded as primary in interpreting constitutional guarantees which impact directly or indirectly on women's equality.

What then is the contemporary reality for women in the family context?[19]

No one, of course, would dispute the fact that the family is foundational, that society is largely organized around the intimate relationships between human beings, and that this is a good thing. The family is often the location of caring and commitment. In the eloquent words of the United States Supreme Court:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[20]

In spite of not only the truth but the spiritual appeal of these sentiments, it is at the same time the reality that in Canada the family has been the location of much of women's subordination. For instance, much of women's experience of inequality, degradation and subjugation has been perpetrated by the institution of the family and by their loved ones behind closed doors.

It is also the reality that the organization of the division of labour along gender lines has contributed to women's precarious economic situation. While men worked outside the home for remuneration, women were responsible for running the household and for bearing and raising children. Women were not paid for this work. Their economic stability was linked, therefore, to the wage their husbands were able to bring home.

Upon marriage breakdown, a divorced or separated woman would largely be at the mercy of the state[21] or her estranged husband[22] in order

---

[18] *Ibid.*

[19] I should be careful to note that women's experiences in the family may not be the same across various cultures, and that therefore, my critique of the negative aspects of the family should be qualified.

[20] Griswold v. *Connecticut*, 381 U.S. 479 at 486, 85 S.Ct. 1678 at 1682 (1965).

[21] *See* K. Thompson-Harry, Book Review of TRANSITIONS: REPORT OF THE SOCIAL ASSISTANCE REVIEW COMMITTEE (1989-1990) 3 C.J.W.L. 673 at 679-80.

[22] *See* F.M. Steel, *The Role of the State in Enforcement of Maintenance* in E.D. Pask, K.M. Mahoney & C.A. Brown, eds, WOMEN, THE LAW AND THE ECONOMY (Toronto: Butterworths, 1985) 197 at 202.

to keep her financially afloat. Because of the role she played in the family she lacked the training and skills to be self-sufficient in the labour market.

In the present economic climate of North America a single wage is no longer adequate to support many families and women have had to find work in the public sphere to supplement their families' incomes. One would have thought that the influx of women into the paid employment sphere would have lessened women's dependence on their spouses or the state. Current indications are, however, to the contrary. Women are still primarily responsible for household and parental chores and these responsibilities "act as major constraints on women's ability to have careers, to work sufficient hours for pay, and to have adequate incomes."[23]

Women's inequality within the family is not exclusively due to the interrelationship between the organization of the family and the larger economic order. As I mentioned earlier, the real virtue of the family is that it provides a structure for building and nurturing caring relationships between individuals. Here too, however, the institution of the family has contributed to women's subordinated status. When women began to tell their stories about their experiences within the family a very different image of home life emerged from that propagated in law and literature. That a man's home is his castle,[24] long recognized as a truism, became a truism with a vengeance. It has been established that one out of every 10 women in Canada is battered at the hands of her male partner.[25] Conservative estimates tell us that one in four women will be sexually assaulted at some time in her life, and chances are high that the assailant will be an acquaintance or intimate.[26] The sexual abuse of children is also perpetrated, for the most part, not on the street but in their own homes by the very people in whom children do, and logically must, repose their trust.[27] One out of every four children in Canada is sexually abused.[28]

While I have presented the problems of family economics and family violence as distinct, it is important to make the point that these and other issues are actually interrelated. It is women's economic

---

[23] M. Gunderson & L. Muszynski, WOMEN AND LABOUR MARKET POVERTY (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 30.

[24] *See* L.M.G. Clark, *Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service, and Criminal Justice Concerns* (1989-1990) 3 C.J.W.L. 420 at 425.

[25] L. MacLeod, WIFE BATTERING IN CANADA: THE VICIOUS CIRCLE (Canada: Minister of Supply and Services, 1980) at 21.

[26] Solicitor General of Canada, CANADIAN URBAN VICTIMIZATION SURVEY: REPORTED AND UNREPORTED CRIMES (Ottawa: Solicitor General of Canada, 1984) at 10.

[27] Only 15 to 18% of assailants are strangers: *see* A. Mitchell, *Child Sexual Assault* in C. Guberman & M. Wolfe, eds, NO SAFE PLACE: VIOLENCE AGAINST WOMEN AND CHILDREN (Toronto: The Women's Press, 1985) 87 at 88 [hereinafter NO SAFE PLACE].

[28] M. Wolfe & C. Guberman, *Introduction* in NO SAFE PLACE, *ibid.* at 9.

vulnerability, for example, which usually prevents them from leaving violent relationships.[29]

What do we learn, then, when we ask ourselves what it is like to experience life as a woman? The main thing we learn, I believe, is that, for women, the distinction between public and private life is completely unreal. As I have pointed out, issues of family violence are tied in with issues of economics. A wife's status in the community depends on her husband's status in the community and this in turn depends on his economic standing. Given this, it makes very good sense to conceptualize "family law" as cutting across several doctrinal boundaries, from family legislation proper to labour law, income tax law and criminal law. Indeed, the Supreme Court's experience with women's issues outside the constitutional context has brought this point forcefully home.

For example, a few years ago the Court was called upon in a trilogy of cases to determine the binding effect of domestic contracts.[30] The Court held that these agreements entered into between former spouses should, in general, not be interfered with by the courts, the encouragement to the parties to settle their own marital disputes being the overriding consideration. Only in the event that one of the parties suffered a material change in circumstances causally connected to the marriage should the settlement agreement be disturbed by the court and its terms varied.

The trilogy was roundly criticized.[31] The critics pointed out that, depending on how broadly or narrowly the "causal connection" test was construed, the result could be very detrimental to women. Professor Martha Bailey[32] pointed out that women's role in the family as homemakers, child-bearers and child-raisers gave rise to a concomitant lack of recognized job skills and remunerated labour experience in the marketplace. The Court, she said, placed far too much responsibility on women to be economically self-sufficient in the event of marriage breakdown.

In *Brooks* v. *Canada Safeway Ltd*[33] the question was whether a private employer discriminated against its women employees by providing, pursuant to a group insurance plan, sick leave and accident benefits for all employees but no benefits for pregnant employees. In finding that the non-availability of pregnancy benefits violated prohibi-

---

[29] D.R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases* (1984) 2 LAW AND INEQUALITY 493 at 502.

[30] *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801, 38 D.L.R. (4th) 641; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857, 38 D.L.R. (4th) 699; *Caron* v. *Caron*, [1987] 1 S.C.R. 892, 38 D.L.R. (4th) 735.

[31] *See, e.g.*, D.G. Duff, *The Supreme Court and the New Family Law: Working Through the* Pelech *Trilogy* (1988) 46 U. T. FAC. L. REV. 542; N. Bala, *Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal Is a Deal'* (1988) QUEEN'S L.J. 1; M. Bailey, *Case Comment on* Pelech, Caron, *and* Richardson (1989-1990) 3 C.J.W.L. 615.

[32] Bailey, *ibid.* at 633.

[33] [1989] 1 S.C.R. 1219, 59 [D.L.R.] (4th) 321.

tions against sex discrimination in the relevant human rights legislation, the Supreme Court acknowledged that, while procreation is a benefit to society as a whole, the economic and social burden and costs of it were impermissibly placed exclusively on the shoulders of women by the employer's plan. It was acknowledged, therefore, that it was a matter of sex discrimination to deny women benefits for the vital task that they are expected to perform.

In *Tremblay* v. *Daigle*,[34] the estranged boyfriend of Chantal Daigle secured an injunction to prevent her from obtaining an abortion. The two had lived together for a short time. Mr Tremblay had pressured Ms Daigle to stop using contraceptive measures and, shortly after she became pregnant, began to physically abuse her. As a result of the deterioration in their relationship Ms Daigle decided not to carry the foetus to term. She did not wish to continue the abusive relationship with Mr Tremblay and could not foresee being able to care adequately for the child on her own. The Supreme Court of Canada held that the foetus was not a "human person" enjoying a right to life within the meaning of the Quebec *Charter of Human Rights and Freedoms*[35] or the Quebec Civil Code[36] and refused to uphold the injunction. It was accepted that no woman should be literally forced to reproduce. In the words of the Court:

> No court in Quebec or elsewhere has ever accepted the argument that a father's interest in a foetus which he helped to create could support a right [to] veto a woman's decisions in respect of the foetus she is carrying.[37]

Finally, mention should be made of *R.* v. *Lavallee*[38] which concerned the application of the self-defence provision of Canada's *Criminal Code*[39] to an abused woman who killed her batterer by shooting him in the back of the head as he was leaving their bedroom after threatening her life. Angelique Lavallee was charged with murder. She sought at her trial to adduce expert testimony to show that as a battered woman she would have believed that danger to her life was imminent and that her actions were therefore taken in self-defence. The trial judge admitted evidence of what was described as "battered women's syndrome" and the jury acquitted her. The Court of Appeal, however, held that such evidence should not have been admitted and ordered a new trial. On

---

[34] [1989] R.J.Q. 1980 (C.S.) (interlocutory injunction granted), *aff'd* [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609 (C.A.), *rev'd* [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to S.C.R.].

[35] R.S.Q. c. C-12, Part I, Ch. 1, s. 1 reads "Every Human Being Has a Right to Life and to Personal Security, Inviolability and Freedom."

[36] Art. 18 *C.C.Q.*

[37] *Daigle*, *supra*, note 34 at 572.

[38] (1988), 52 MAN. R. (2d) 274, 44 C.C.C. (3d) 113 (C.A.), *rev'd* [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

[39] R.S.C. 1985, c. C-46, s. 34.

appeal to the Supreme Court of Canada, the Court affirmed the decision of the trial judge.

The law of self-defence was critically examined to expose its elements as reflecting and embodying male experience with violence and hence male evaluations of appropriate responses to violence. Expert evidence of the experience of battered women put a new complexion on self-defence from the perspective of a battered woman. Angelique Lavallee was acquitted when the social reality of wife battering and its documented effects on women victims was not only taken into account but was incorporated into the legal concept of self-defence.

Given then this vulnerability of women in a man's world, has the legal doctrine of privacy served women in the family context well or ill? Certainly the family and the doctrine of privacy have for a very long time been connected in the social and legal imagination. Professor Frances Olsen, for example, has examined how the family and state non-intervention, on the one hand, and civil society and state regulation, on the other, are actually related in Western social thought.[40] While the marketplace was "decried for being selfish, debasing and exploitative",[41] family and home were seen as "safe repositories for the virtues and emotions that people believed were being banished from the world of commerce and industry."[42] The family was shrouded in privacy and thereby insulated from state intervention to keep it altruistic and pure and to prevent it from descending to the level of the marketplace. Protecting family privacy ensured that it would serve as a safe harbour from the male experience of the harshness of public life. This conception of the relationship between family and privacy is reflected as well in law. The inclusion of a specific guarantee of family privacy in the *Charter* was actually debated but ultimately defeated,[43] it (presumably) being thought unnecessary in light of the broad language included in other *Charter* guarantees, notably section 7. It has been suggested by some commentators[44] and accepted by some courts that section 7 does protect family privacy.[45] While the Supreme Court has not yet had an opportunity to consider this question directly, it has been commented in *obiter*[46] that family privacy does indeed fall within the phrase "life, liberty and security of the person" in section 7. Some constitutions and human rights instruments expressly extend protection to the family and do so through the vehicle of privacy, notably articles 8 and 12 of the *European Convention for the Protection of Human Rights and*

---

[40] F.E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform* (1983) 96 HARVARD L. REV. 1497 [hereinafter Olsen].

[41] *Ibid.* at 1500.

[42] *Ibid.* at 1499.

[43] *See* N. Bala & J. D. Redfearn, *Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights* (1983) 15 OTTAWA L. REV. 274 at 278-89.

[44] *Ibid.* at 282.

[45] *See* D.A.R. Thompson, *A Family Law Hitchhiker's Guide to the* Charter *Galaxy* (1988) 3 C.F.L.Q. 315 for a review of cases.

[46] *R.* v. *Jones*, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569.

Fundamental Freedoms[47] and articles 17 and 23 of the *International Covenant on Civil and Political Rights*.[48]

The public/private distinction has been the subject of some criticism by feminist scholars. As noted by Gillian Douglas, for example, the *travaux préparatoires* seem to indicate that Article 8 of the *European Convention* was actually designed to protect the private life of fathers and fathers alone. At the time of its enactment it was argued that "the father of a family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his home and if, every day, the state steals from him his soul, or the conscience of his children."[49]

Apart from protecting men's domestic lives from state intrusion it has been argued that family privacy was also designed for the preservation of male authority and superiority within the home. Professor Olsen summarizes this view as follows:

> The second component of the attack on the private nature of the family is the claim that, even if the state could be neutral vis-à-vis the family, it in fact is not. The theory of the private family, it is argued, is not consistently carried out. Instead, the assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives. By insisting that the family should not be subject to state regulation, men have been able to retain their excessive power.[50]

Professor MacKinnon has an even stronger denunciation of the doctrine of privacy. She sees it as the means by which women are segregated in private so that they can be oppressed by men one at a time without fear of outside interference.[51]

While one might take issue with such a wholesale denunciation of privacy doctrine, Professor MacKinnon is undoubtedly correct in her criticism of the insulation of the private sphere and its implications for women. The problem with privacy law has been its tendency to assume, not only that there exists a commonality of interest between family members notwithstanding the inequalities of power, status and independence that exist among them, but also, following from that, that the protection and promotion of the interests of family members can be safely reposed in the male head of the household.

The reality is, however, that in North American culture the interests of family members have often diverged or conflicted, to put it mildly. In cases involving physical and sexual abuse in the home, the protection of the family from state intervention may actually work to reinforce unrestrained patriarchal authority and leave women and children with

---

[47] 4 November 1950, Europe T.S. No. 5.

[48] Annex to G.A. Res. 2200 (XXI) (16 December 1966).

[49] G. Douglas, *The Family and the State Under the European Convention on Human Rights* (1988) 2 INTERN. J. OF LAW AND THE FAMILY 76 at 78.

[50] Olsen, *supra*, note 40 at 1510.

[51] C.A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory* (1982) 7 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 515 at 540-41.

no meaningful protection. If part of what family privacy ensures is that "the state has no place in the bedrooms of the nation", then obviously the sanctity of the home has very little to offer women and children who are sexually abused by their husbands and fathers.

In my view, the question we face as adjudicators is not limited to whether privacy, as with any other constitutional guarantee, suffers from historical bias though that, of course, is a necessary part of the inquiry. We must take a further step and try to adapt doctrine, notwithstanding its historical roots, to contemporary reality and, in particular, ensure that it serves all the people, women and children as well as men. How can privacy be moulded to ensure that this will happen? Decisions under the *European Convention* are instructive.

That privacy ought not to be used to entrench male authority over women within the family has been accepted in principle in two decisions of the European Commission of Human Rights. In *Paton* v. *United Kingdom*,[52] Mr Paton appealed a decision of the English courts precluding him from preventing his wife from having an abortion to which she was entitled under English law. He alleged that his inability to veto his wife's decision amounted to a violation of his right to respect for family life under Article 8 of the *European Convention on Human Rights*. The Commission noted that, to the extent Mr Paton's article 8 rights were infringed, the interference was justified as being necessary for the protection of the rights of another person, namely his wife.

Similarly, in *Hendriks* v. *The Netherlands*,[53] the Commission rejected the article 8 claim of a father who was refused access to his child after divorce. The father was alleged to have been a sadist and to have acted violently towards his former wife. In the Commission's view the conflict between Mr Hendriks and his former wife was such that the health of the child would suffer and the decision of The Netherlands' court was affirmed.[54] The *Hendriks* decision established that male family rights could not be invoked to deprive women of their family rights. Mrs Hendriks' right to bring up her child free from abuse was affirmed.

In *Airey* v *Ireland*,[55] a woman who had been the victim of abusive treatment at the hands of her husband sought to obtain a legal separation but discovered that the cost was prohibitive. Under Irish law she was compelled to cohabit with her husband until such time as a legal separation was granted. She successfully complained to the European Court of Human Rights that her inability to free herself from her violent husband violated her right to family life. The Court agreed, holding that the state had a positive obligation to ensure that Mrs Airey could meaningfully pursue her right to family life.

---

[52] (1980), 3 E.H.R.R. 408 (Eur. Comm. H.R.).

[53] (1982), 5 E.H.R.R. 223 (Eur. Comm. H.R.).

[54] *See also Rasmussen* v. *Denmark* (1984), 7 E.H.R.R. 371 (Eur. Ct H.R.) (ser. A) where the European Court of Human Rights dismissed a claim that legislation establishing different time limits for men and women to challenge paternity violated Article 8.

[55] (1979), 2 E.H.R.R. 305 (Eur. Ct H.R.).

These and other cases show that the infusion of privacy law with women's reality has resulted in a different conception of privacy than that previously embodied in law. It is no longer accepted that we can use the notion of privacy to turn a blind eye to social injustice.

Canada's "living tree" approach[56] to constitutional adjudication has been vital in making the *Canadian Charter of Rights and Freedoms* an effective source of protection for minority groups. Without both a commitment to exploring seriously the condition of those for whom a constitution holds out the most promise, *i.e.* the disadvantaged and underprivileged in our society, and the courage to interpret and apply the constitutional document in the context of social reality, the value of a *Charter* to those it purports to protect will be *de minimus*.

The process of constitutional analysis in Canada has revealed startling socio-political facts of which account has had to be taken. The lessons learned have not been easy ones. We have learned, for example, that serious inequalities of power and resources exist within the family such that we can no longer regard the preservation of the family in its present state as an unqualified good. We have come to appreciate that these inequalities within the family derive in part from the way in which other social institutions operate and that framing constitutional questions and answers within existing doctrinal categories may not be adequate to the task of protecting the disadvantaged and underprivileged in our society. We have had to face the fact that making women's equality a reality, whether within the family or outside it, poses complex issues incapable of a simple doctrinal resolution.

---

[56] This phrase first appeared in *Edwards* v. *Canada*, [1929] A.C. 124 at 136, (*sub nom. Re Section 24 of the B.N.A. Act*) [1930] 1 D.L.R. 98 at 106 (P.C.), where Lord Sankey stated that the Canadian Constitution was "a living tree capable of growth and expansion within its natural limits".