

Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms

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Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms

Abstract

A married woman must take her husband's domicile at common law. This rule exists in five of Canada's provinces. It is argued that the rule violates the right to equality. It is further argued that, notwithstanding the Supreme Court's decision in *Dolphin Delivery*, the Charter must apply to common law rules governing the relationship between husband and wife. Such rules impose a status on the parties. Therefore, a commitment to respect for the autonomous choice of individuals does not support the conclusion that the rules should be beyond constitutional review.

GENDER DISCRIMINATION IN THE COMMON LAW OF DOMICILE AND THE APPLICATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS^o

BY ANNALISE ACORN^{*}

A married woman must take her husband's domicile at common law. This rule exists in five of Canada's provinces. It is argued that the rule violates the right to equality. It is further argued that, notwithstanding the Supreme Court's decision in *Dolphin Delivery*, the *Charter* must apply to common law rules governing the relationship between husband and wife. Such rules impose a status on the parties. Therefore, a commitment to respect for the autonomous choice of individuals does not support the conclusion that the rules should be beyond constitutional review.

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I. INTRODUCTION

Under the common law rules of domicile, a married woman has no legal capacity to have a domicile separate from that of her husband.¹ Thus, a woman takes her husband's domicile upon marriage and retains it, whether or not she lives with her husband, and whether or not she has any independent connection with her husband's domicile.² Although the rule has been eroded by legislative reform,³ it still operates to define the domicile of married women in Nova Scotia, New Brunswick, Newfoundland, Saskatchewan, and Alberta.⁴

The concept of domicile figures prominently in the area of conflict of laws. Where an international element exists, it is often resolved by reference to the connecting factor of domicile.⁵ Thus, jurisdiction in nullity is taken on the basis of the domicile of the parties.⁶ Succession to movable property is governed by the law of

¹ *A.G. Alberta v. Cook*, [1926] A.C. 444 (P.C.) [hereinafter *Cook*].

² *Lord Advocate v. Jaffrey* (1920), [1921] 1 A.C. 146 (H.L.) [hereinafter *Jaffrey*].

³ For a detailed discussion of statutory reform in the area, see below, section III.

⁴ At the federal level, the concept of domicile no longer has great practical significance. However, even there, the rule of domicile of dependence has not been completely repealed. See below, section III.

⁵ J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) c. 8, part II; J.-G. Castel, *Canadian Conflict of Laws*, 2d ed. (Toronto: Butterworths, 1986) c. 3; J.H.C. Morris, *The Conflict of Laws*, 3d ed. (London: Stevens and Sons, 1984) c. 2.

⁶ *Re Capon*, [1965] 2 O.R. 83, 49 D.L.R. (2d) 675 (C.A.); *Solomon v. Walters* (1956), 18 W.W.R. 257 (B.C.S.C.); *Fleming v. Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90 (S.C.); *Stuart v. Stuart* (1983), 34 R.F.L. (2d) 104 (Ont. S.C.) [hereinafter *Stuart*]; *Davies v. Davies* (1985), 40 Alta L.R. (2d) 203 (Q.B.) [hereinafter *Davies*]. Note, however, that domicile is not the only basis for taking jurisdiction in nullity. The dual residence of the parties or the

the domicile of the testatrix.⁷ In the past, domicile was also the determinative factor in relation to jurisdiction in divorce.⁸

The purpose of this article is to examine the history of the concept of the domicile of dependence of married women and to identify the extent to which a married woman is still under an incapacity to acquire a domicile independent from that of her husband under Canadian law. From there, I shall go on to argue that the rule violates the equality provisions of the *Canadian Charter of Rights and Freedoms*⁹ and that it cannot be justified as a reasonable limit on the right to equality guaranteed by section 15 of the *Charter*.

A difficulty arises, however, in relation to the application of the *Charter* to this common law rule. In *R.W.D.S.U. v. Dolphin Delivery*,¹⁰ the Supreme Court of Canada decided that the common law, in so far as it relates to the relationships between individuals rather than the relationship between the individual and the state, is not subject to *Charter* scrutiny.¹¹ Thus, it was decided that section 2(b) of the *Charter* guaranteeing the right to freedom of expression did not apply to the question of whether the court could grant an injunction restraining picketing on the basis of the common law tort of inducement to breach of contract.

residence of the respondent have been recognized as a basis for taking jurisdiction. See *Ramsay-Fairfax v. Ramsay-Fairfax* (1955), [1956] P. 115, [1955] 3 All E.R. 695 (C.A.). But this is no consolation to the woman petitioning for a decree of nullity in the jurisdiction in which she is resident and *de facto* domiciled, if the husband respondent is not also resident there. Jurisdiction has also been taken on the basis of the wife's independent domicile or the place of the marriage, but only where the marriage is void, not voidable. *Ross Smith v. Ross Smith* (1962), [1963] A.C. 280, [1962] 1 All E.R. 344 (H.L.); *De Reneville v. De Reneville* (1947), [1948] P. 100, [1948] 1 All E.R. 56 (C.A.) [hereinafter *De Reneville*].

⁷ Castel, *supra*, note 5 at 462 n. 8; McLeod, *supra*, note 5 at 413-14, 416-32.

⁸ *LeMesurier v. LeMesurier*, [1895] A.C. 517 (P.C.) [hereinafter *LeMesurier*]. For further detail on the extent to which domicile is used as the connecting factor in the conflict of laws, see below, section IV.

⁹ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁰ [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.].

¹¹ *Ibid.* at 599.

The reasoning behind the decision was that this aspect of the common law dealt with private relations and did not involve sufficient government participation to activate the application of the *Charter*.¹² The decision is troublesome in a myriad of ways. It raises, however, a particularly interesting difficulty in the context of a *Charter* challenge to the gender discrimination embedded within the common law rules relating to domicile of married women.¹³ The question here is whether the courts would view the rules relating to domicile as part of the private law and, therefore, immune from *Charter* scrutiny.

I shall argue that this kind of common law rule cannot be considered to be part of the private realm of relations between individuals.¹⁴ The state is deeply involved in the legal construction of the marital relationship. It would be pure fiction to take the view that the common law rules denying full legal status to married women constitute a neutral legal framework which facilitates the autonomous construction of relationships between private parties. The state's interest and involvement in legally constituting the marital relationship is extensive. In creating rules which give lesser

¹² Section 32 of the *Charter* states that the *Charter* applies to the provincial and federal legislative bodies and their respective "governments." The word "government" was interpreted by the Supreme Court as referring to executive and administrative branches of the federal and provincial governments. *Ibid.* at 598.

¹³ For a critical comment on the *Dolphin Delivery* decision, see R. Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U.T. Fac. L. Rev. 248; P. Hogg, "*The Dolphin Delivery Case: The Application of the Charter to Private Action*" (1986-87) 51 Sask. L. Rev. 273; J.A. Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery Ltd.*" (1987) 19 Ottawa L. Rev. 413; G. Otis, "The *Charter*, Private Action and the Supreme Court" (1987) 19 Ottawa L. Rev. 71; B. Slattery, "The *Charter's* Relevance to Private Litigation: Does *Dolphin* Deliver?" (1986-87) 32 McGill L.J. 905; G.P. Crann, "How Far Does the *Charter* Reach? A Theoretical Review of the Section 32(1) Debate and Canada's Emerging 'Governmental Action' Doctrine" (1988-89) 47 U.T. Fac. L. Rev. 156; A.C. Hutchinson & A.J. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 U.T.L.J. 278.

¹⁴ For an interesting discussion of the extent to which the state is involved in shaping the institution of the family and the difficulties of applying the public/private distinction in the family law context, see F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; F. Olsen, "The Politics of Family Law" (1984) 2 Law and Inequality 1. See also M.J. Mossman & M. MacLean, "Family Law and Social Welfare: Toward a New Equality" (1986) 5 Can. J. Fam. L. 79.

status to women in marriage, the state is controlling and shaping the unequal character of the relationship between husbands and wives. Thus, the state is imposing through law a subordinate position on women in marriage. If the *Charter*, which guarantees equality before and under the law without discrimination on the basis of sex, is not legally effective in preventing even this most blatant kind of gender discrimination, then the protection against discrimination that it purports to afford is illusory.

Many advocates of gender equality have been sceptical about the efficacy of the *Charter* to further the aims of the Women's Movement.¹⁵ This scepticism generally arises out of a prediction that, although the *Charter* may be a useful tool in achieving formal gender equality, it will not be useful in eradicating the inequalities which arise out of the historically subordinated role that has been imposed upon women at a social and economic level. Formal legal equality will not cure the evil of the exclusion of women from full participation in the society; nor will it eradicate the psychological stronghold of the celebration of male dominance that is pervasive throughout our own culture and those cultures from which we draw historically.¹⁶

However, the picture of the efficacy of the *Charter* may be even bleaker than these commentators suggest. When we look at the possible impact of the decision in *Dolphin Delivery* on the courts' approach to the gender inequalities embedded within the common law of husband and wife, we may have to take an even more pessimistic view of the power of the *Charter* to eradicate even

¹⁵ See G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); K.A. Lahey, "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85) 20 N. Eng. L. Rev. 649; C. MacKinnon, "Making Sex Equality Real" in L. Smith, G. Coté-Harper & R. Elliot, eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986). For a discussion of the limitations of the proposed *Equal Rights Amendment* in the United States, see C. MacKinnon, "Not by Law Alone: From a Debate with Phyllis Schlafly" in *Feminism Unmodified* (Cambridge Mass.: Harvard University Press, 1987) 28.

¹⁶ See I. Savage, "Systemic Discrimination and Section 15 of the *Charter*" (1985-86) 50 Sask. L. Rev. 141; N.C. Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" (1986) 10:2 Dalhousie L.J. 195; C. Boyle & S. Noonan, "Prostitution and Pornography: Beyond Formal Equality" (1986) 10:2 Dalhousie L.J. 225.

the legal enforcement of dominance of men over women. Perhaps we will find that even formal equality of legal status for women is not guaranteed by the most robust of our human rights protections.

II. HISTORY OF THE DOMICILE OF MARRIED WOMEN

A. *The Rule and Its Rhetoric*

There are few judicial expositions of the reasoning behind the rule that a married woman suffers a legal incapacity to acquire her own domicile. Indeed, some courts have expressly refused to comment upon the rationale behind the rule,¹⁷ though their fidelity to it has been unwavering.¹⁸ In *Jaffrey*,¹⁹ the House of Lords was concerned with the law applicable to the matter of succession to the movable property of a married woman.²⁰ The common law choice of law rule for succession to movable property is that it is governed by the law of the domicile of the testator or the testatrix at the time of his or her death.²¹ Thus, the court was faced with the task of determining the domicile of the deceased testatrix Isabella Mackinnon.

In 1878, she was married to Robert MacKinnon. The two lived together in Scotland for fifteen years. In 1886, Robert Mackinnon retired from his position in the navy and thereafter began drinking heavily and acquired "dissipated habits." In 1893, Isabella Mackinnon was no longer able to tolerate her husband's dissolute life style. Arrangements were made for him to leave Scotland to go and live in Australia. Isabella's mother paid the

¹⁷ See *infra*, note 26 and accompanying text.

¹⁸ An exception to the usual judicial adherence to the rule is found in the one page decision of McDonald J. of the Alberta Queen's Bench in *Davies*, *supra*, note 6. See also the accompanying annotation by N. Rafferty at 203.

¹⁹ *Supra*, note 2.

²⁰ *Ibid.*

²¹ See *supra*, note 7.

expenses of his relocation.²² By 1902, he had settled in Brisbane, Queensland and had entered into a bigamous marriage there. Isabella Mackinnon and Robert Mackinnon never spoke or communicated after his departure from Scotland in 1893. Isabella Mackinnon lived alone in Scotland for twenty-two years after his departure. She never went to Australia. She never saw Queensland. She died in Aberdeen in 1915.

The House of Lords was unanimous in its decision that she had died domiciled in Queensland. The twenty-two year separation coupled with the husband's bigamous marriage did not have the result of empowering Isabella Mackinnon to acquire a domicile of her own in Scotland where she had lived all her life. Once it was decided that Robert Mackinnon had acquired a new domicile of choice in Queensland, that domicile was automatically transmitted to her.

In holding that Isabella MacKinnon was domiciled in Queensland, the House of Lords did not directly discuss the policy reasons behind the rule that the wife's domicile remains the same as that of her husband irrespective of the true home of the wife. There is, however, some suggestion in the court's reasoning that the rule arises as a result of a wife's duty to live with her husband.²³ The court points out, however, that the existence of a set of circumstances sufficient to allow a court to absolve the wife of her obligation to live with her husband through the granting of a judicial separation does not, in absence of the actual order of the court, empower the woman to have her own domicile.²⁴ Thus, the underlying rationale behind the rule, as evidenced by the opinion of the court in *Jaffrey*, is that because a wife has a duty to live with her husband, the law will assume that she does live with her husband.²⁵ If for whatever reason she does not, the punishment for

²² *Jaffrey*, *supra*, note 2 at 147.

²³ *Ibid.* at 156.

²⁴ *Ibid.* at 155, 158-59. Note that the House of Lords allowed for the possibility that a woman with a judicial separation could establish her own domicile. *Ibid.* at 160. This possibility was extinguished by the decision in *Cook*, *supra*, note 1.

²⁵ Note, however, that Viscount Cave was of the view that the domicile of dependence arose, not only out of the duty to live with the husband, but also as a "consequence of the

failure in her duty will at least be that she retains a legal incapacity to establish her own domicile elsewhere. The fact that the separation is not her fault will not be sufficient to free her of the incapacities of marriage.

In *Jaffrey*, while suggestions for adopting this sort of conceptual foundation for the rule exist, the general tenor of the judgment is one of deference to established principle and humble reluctance to question it. Viscount Finlay, in defending the decision that Isabella Mackinnon was domiciled in Queensland, stated:

As to the existence of the rule, there is no doubt. It would be at once undesirable and mischievous to enter into an examination of the reasons on which the rule was based, and, if it should appear on inquiry after the death of one or both of the parties that these reasons might not apply in any particular case, to say that the rule should be treated as inapplicable.²⁶

Thus, the court adopted a formalistic approach to the application of the rule.²⁷ Perhaps hesitant to become too articulate about the subordination of women enforced by the rule, the court took up the pose of hands tied by precedent.²⁸

In *Warrender v. Warrender*,²⁹ the husband and wife had agreed to separate. The wife was born in England and spent most of her life there. The husband was domiciled in Scotland. The wife spent a few short periods of time in Scotland prior to the separation, but resided in England for the most part, even during the currency of the marriage. In deciding that the wife was domiciled in Scotland, the Court again seems to be relying on a wife's duty to live with the husband. Lord Brougham stated:

Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no

union between husband and wife brought about by the marriage tie." See *Jaffrey, supra*, note 2 at 158.

²⁶ *Ibid.* at 157.

²⁷ For a discussion of the meaning of formalism, see F. Schauer, "Formalism" (1988) 97 Yale L.J. 509.

²⁸ As I shall illustrate, however, the severity of the rule and the inflexibility of the courts' application of it increased dramatically in the first half of the twentieth century. See below, section II.B.

²⁹ (1835) II Clark & Fennelly 488, 6 E.R. 1239 (H.L.) [hereinafter *Warrender*].

notice of the fact, but must proceed upon its own conclusive presumption and hold her domiciled *where she ought to be*, and where, in all ordinary circumstances, she would be, — with her husband.³⁰

Again, we see the recurring theme that the wife will be seen by the law to be domiciled where she has a duty to be domiciled and not where she in fact is domiciled.

Text writers have on occasion ventured more eloquent expositions of the reasons supporting the doctrine. In 1901, Raleigh C. Minor, in his text on the conflict of laws, wrote:

It is a general principle of the common law, and one that is more or less inherent in all systems of jurisprudence, that a married woman merges her legal identity in her husband's, and solemnly yields her will to his. Hence, it results that the husband is bound to support her, has the control of her person, and is entitled to her services ... From this principle follows the general rule of law which fixes her domicil. It is established beyond dispute that a woman, upon marriage, immediately acquires the domicil of her husband, and that her domicil ordinarily changes with every alteration of his, regardless of the actual locality of her residence after the marriage ... This rule is founded ... on the above mentioned principle of identity and upon the duty she owes to submit her will to her husband's.³¹

The rhetoric of the rule, then, is primarily informed by the idea that the identity of the woman in marriage is subsumed under the identity of the man.³² The rule is also a symbolic reminder of the woman's duty to submit to the man and her subordinate position in relation to him.

B. *Developments in the Early Twentieth Century: Making the Rule More Severe*

In the nineteenth and early twentieth century, the rule fixing the domicile of dependence of married women was more flexible than it is now. These early formulations of the rule sometimes included an admission that, in a case where the actual situation of the parties was such that they were domiciled in different

³⁰ *Ibid.* at 524 (emphasis added).

³¹ R.C. Minor, *Conflict of Laws; or, Private International Law* (Boston: Little, Brown and Company, 1901) at 94-95.

³² See also W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 423-33.

jurisdictions, the woman could have an independent domicile.³³ Thus, the notion that a married woman is absolutely incapable in law of having her own separate domicile is the judicial invention of this century.

In *Chaisson v. Chaisson*,³⁴ the husband and wife initially lived in Prince Edward Island. After repeated acts of cruelty by the husband against the wife, the two separated. The husband went to New Brunswick and the wife went to Nova Scotia. The wife later petitioned for divorce in Nova Scotia and the husband was properly served with notice of the proceedings in New Brunswick. The Nova Scotia court took jurisdiction and granted the divorce, holding that the wife had acquired a domicile in Nova Scotia separate from that of her husband.

The court expressed some doubt about the legal foundation of their decision, but cited *Stevens v. Fisk*³⁵ as authority for the view that a woman could have a domicile of her own for the purposes of grounding jurisdiction for divorce. There, the Supreme Court of Canada had recognized a foreign decree of divorce granted in New York, where the New York Supreme Court had taken jurisdiction on the basis of the wife's independent domicile there. At the time that the New York Court took jurisdiction, the husband was domiciled in Quebec. The Court seemed to base its decision on the finding that under the law of New York a married woman had her own separate domicile for the purposes of bringing action against

³³ For examples of cases in which married women were seen to have their own independent domicile, see *Chaisson v. Chaisson* (1920), 53 D.L.R. 361 (N.S. Div. & Matr. Causes Ct) [hereinafter *Chaisson*] and *Payn v. Payn*, [1924] 3 W.W.R. 111 (Alta S.C.) [hereinafter *Payn*]. See also *Minor, supra*, note 31 at 95-103.

³⁴ *Chaisson, ibid.* Note that the case was decided on August 19, 1920, one month after *Jaffrey, supra*, note 2, which was decided on July 16, 1920. However, even had the Court been aware of the decision in *Jaffrey*, there was certainly a basis for distinguishing it since Isabella Mackinnon's participation in her husband's departure influenced the Court's insistence that she could not have the right to an independent domicile. By contrast, Mrs. Chaisson was painted purely as a passive victim of her husband's cruelty.

³⁵ (1885), Cam. S.C. 392.

her husband.³⁶ The fact that the marriage was contracted in New York was also relied on in support of the decision.

In *Payn v. Payn*,³⁷ the Alberta Supreme Court Trial Division similarly held that a woman deserted by her husband could acquire her own separate domicile. Thus, the Court proceeded to take jurisdiction in her petition for divorce, notwithstanding that the husband was admittedly domiciled in Montana.

The lenience in the application of the rule was soon brought to an abrupt halt. First, of course, there was the decision in *Jaffrey*.³⁸ However, the most ruthless and the most influential case in the Canadian context was *A.G. Alberta v. Cook*,³⁹ a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Alberta Appellate Division. Reata Cook and her husband were married in Ontario in 1913. They lived together for five years. In 1918, they moved to Alberta. Shortly thereafter, the husband left her and took up an itinerant lifestyle. In 1921, Reata Cook was able to serve her husband in Alberta with notice of a petition for a judicial separation. The Alberta Court granted the order.⁴⁰ Thereafter, the whereabouts of Mr. Cook became unknown. In 1922, Reata Cook petitioned the Alberta Court for a decree of divorce. At trial, her petition was denied for want of jurisdiction owing to the lack of proof that her husband was domiciled in Alberta. She appealed the decision to the Alberta Supreme Court Appellate Division, where the Court accepted jurisdiction on the basis of her independent domicile.

³⁶ *Ibid.* at 428. It is interesting to note that this is the same basis on which McDonald J. based his decision in *Davies*, *supra*, note 6. The established rule in conflicts of laws is that the question of domicile is determined under the *lex fori*. See *Re Annesley*, [1926] Ch. 692. Thus, both of these decisions have the same technical flaw, but are rare examples of fancy judicial footwork done in an attempt to bring about fair treatment of women before the court.

³⁷ *Supra*, note 33.

³⁸ *Supra*, note 2.

³⁹ *Supra*, note 1.

⁴⁰ The basis for jurisdiction to grant a judicial separation was residence. See *Armstrong v. Armstrong*, [1898] P. 178. Here, the Court found that both parties were at that time resident in Alberta. See *Cook*, *supra*, note 1 at 447.

In an act of extravagant malevolence, the Attorney-General for Alberta then intervened on behalf of the erstwhile husband, launching an appeal to the Judicial Committee of the Privy Council in England ostensibly because of the "general importance of the matter."⁴¹ The Privy Council declined to follow the more lenient precedents that had been set in both Canada and England⁴² and held that, even in the event of a judicial separation, the woman laboured under an incapacity to acquire a domicile independent from that of her husband.

Indeed, the judgment of the Privy Council left absolutely no room for any exception to the rule. Unless the marriage was terminated by death or divorce, the domicile of the wife would be that of the husband no matter what the actual situation of the parties was.⁴³ Once it was determined that a judicial separation was not sufficient to break the wife's incapacity to have her own domicile, the notion that the unity of domicile was corollary to the wife's duty to live with the husband was ousted. Since the judicial separation dissolved the wife's duty to live with the husband,⁴⁴ the continuation of the woman's incapacity to have a separate domicile must then have a basis other than that duty. Lord Merrivale stresses the idea that it is the notion of marital unity, not simply the wife's obligation to live with the husband, that is the foundation of

⁴¹ *Cook, supra*, note 1 at 448. I have scoured the records of the Attorney-General in Alberta's provincial archives in an attempt to get some information explaining his conduct. The only document I found referring to the case at all was a letter on Supreme Court of Alberta stationery from Frank Ford to the Attorney-General. Ford had represented the Attorney-General against Cook at the Privy Council and was asking for payment of a balance of \$500.00 still owing on his account. The letter was written on March 14, 1927. Ford had been appointed to the Alberta Supreme Court Trial Division on May 3, 1926.

⁴² See *supra*, note 33. Note also that in 1908 it was suggested by the English Court of Appeal, in *Ogden v. Ogden*, [1908] P. 46 at 82, that where the rule of domicile of dependence operated so as to deny any relief in an action for divorce to a wife actually domiciled in a country different from her husband, the court should view her as having an independent domicile. That suggestion was acted upon by the Probate Division in *Stathatos v. Stathatos* (1912), [1913] P. 46 and in *De Montaigu v. De Montaigu*, [1913] P. 154.

⁴³ *Cook, supra*, note 1 at 459ff.

⁴⁴ *Hyman v. Hyman*, [1929] A.C. 601 (H.L.); *Everett v. Everett*, [1919] P. 298 (C.A.).

the rule.⁴⁵ The effect of this was to close any gap that might have existed in cases of judicial separation or desertion by the husband, where the wife could not be seen to be in breach of a duty to live with the husband. From then on, there is virtually no discussion of the rationale behind the rule in the cases, but its strict application prevails.⁴⁶

In cases where the imputing of the husband's domicile to the wife might result in a civil advantage to the wife, the courts were less strict in their application of the rule. For example, in interpreting the *Immigration Act* of 1952,⁴⁷ the courts held that a married woman could not gain a Canadian domicile for the purposes of immigration by operation of law. In *B. and B. v. Deputy Registrar General of Vital Statistics*,⁴⁸ the husband had deserted the wife in Czechoslovakia to come to Alberta. The Court held that the husband's acquisition of a Canadian domicile did not have the legal effect of giving the same domicile to the wife. The Court relied upon the statutory definition of domicile as being contingent upon being "landed" in Canada as the source of the exception to the rule.⁴⁹

⁴⁵ *Cook, supra*, note 1 at 458, 460. Lord Merrivale quotes from Viscount Cave's judgment to that effect in *Jaffrey, supra*, note 2 at 157.

⁴⁶ *Breen v. Breen*, [1930] 1 W.W.R. 30 (Man. C.A.), decided shortly after *Cook, supra*, note 1, does make an attempt to mitigate the effect of the rule, holding that the burden of proof rests upon the deserter husband to show that he has established a new domicile of choice elsewhere. Where the husband is not present, the effect is that the husband is held to be domiciled in the jurisdiction in which he left his wife. Subsequent courts, however, did not take up this olive branch. The following are cases in which a deserted wife was held to be domiciled in the jurisdiction in which the husband had relocated: *Nelson v. Nelson* (1929), [1930] 3 D.L.R. 522 (Sask. C.A.) [hereinafter *Nelson*]; *Harris v. Harris*, [1930] 4 D.L.R. 736 at 737 (Sask. C.A.), where the husband had both deserted and entered into a bigamous marriage; *Jolly v. Jolly*, [1940] 2 D.L.R. 759 (B.C.C.A.); *Joyce v. Joyce*, [1943] 3 W.W.R. 283 (Sask. K.B.) at 284 and 285 [hereinafter *Joyce*] where the court, expressing some apparent dissatisfaction with the rule, says of the husband that he had "openly tossed her out of his life" and that "the young woman must pay bitterly for a hasty mistake"; *Yates v. Davies*, [1960] O.W.N. 201 (H.C.); and *Wilton v. Wilton*, [1946] O.R. 117 (H.C.). In the context of immigration, see *Re Carmichael*, [1942] 3 D.L.R. 519 (B.C.S.C.).

⁴⁷ R.S.C. 1952, c. 145, s. 3(a).

⁴⁸ (1960), 31 W.W.R. 41 (Alta S.C.).

⁴⁹ *Ibid.* at 43.

In general, then, we can see a tightening of the hold of the domicile of dependence in the late 1920s and thereafter. Exceptions to the rule were no longer created in response to the hardships the rule caused to women who were held to be domiciled in places totally foreign to them and who were thereby denied access to the courts. Rather, exception to the rule was allowed only where the rule might operate to the benefit of the woman.⁵⁰

III. CRITICISM AND LEGISLATIVE REFORM

Although the Canadian courts took an approach of passive deference to the rule of domicile of dependence, remarking only occasionally on the "unfortunate" consequences the rule had for married women,⁵¹ other courts engaged in more aggressive criticism of the rule. In *Gray v. Formosa*,⁵² Lord Denning, speaking of the "old" doctrine of the unity of husband and wife in the person of the husband, stated that in large measure the doctrine had been swept away by Parliament. However, he stated, "one relic which remains is the rule that a wife takes her husband's domicile; it is the last barbarous relic of a wife's servitude."⁵³ Notwithstanding his track record for sweeping away other relics of which he did not approve, Lord Denning then went on to say: "Yet sitting in this court we must observe it."⁵⁴

Partly as a result of the criticism of the rule and perhaps partly out of governmental self-interest, legislative reform of the

⁵⁰ Note that even in the context of immigration, where it was the wife who in fact had a separate domicile in Canada and the husband remained domiciled in Scotland, the courts held that the rule applied so as to impute the Scottish domicile to the wife living in Canada. See *Re Carmichael*, *supra*, note 46.

⁵¹ See *Nelson*, *supra*, note 46 at 525; and see *Joyce*, *supra*, note 46 at 285 where Taylor J. comments upon the harshness of the rule, but ultimately casts the woman as the author of her own misfortune.

⁵² (1962), [1963] P. 259 (C.A.).

⁵³ *Ibid.* at 267.

⁵⁴ *Ibid.*

rule began to take place.⁵⁵ The first attempt at reform of the rule in Canada took place in New Brunswick. In 1906, the provincial legislature passed an amendment to the *Property of Married Women Act*,⁵⁶ providing that, where a woman would be entitled to a protection order as a result of her husband's cruelty, lunacy, imprisonment, drunkenness, desertion, or where the conduct of her husband constituted grounds for judicial separation or divorce, the woman would be deemed to have her own domicile for the purpose of bringing an action in the New Brunswick courts. In 1927, apparently as a result of the Privy Council decision in *Cook*,⁵⁷ Alberta also attempted some piecemeal reform of the rule. The Alberta legislature enacted what is now section 10(b) of the *Domestic Relations Act*.⁵⁸ It provides that, where a judgment of judicial separation has been granted, the wife is to be treated as a single woman for all purposes including the acquisition of a new domicile.

Governmental self-interest also argued in favour of change in the case of deserted women. Deserted wives who were denied access to the divorce court could become a threat to the public purse. In a society where women had few means of gaining financial security or even subsistence apart from marriage and hence male financial support,⁵⁹ a woman and her dependent children who were abandoned by the initial husband and incapable of acquiring a new one might well have only the resources of the state to fall back

⁵⁵ For further critical discussion of the rule, see McLeod, *supra*, note 5 at 154 n. 126. The rule has now been completely abolished in England by section 1(1) of the *Domicile and Matrimonial Proceedings Act* (U.K.), 1973, c. 45. It reads: "[T]he domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile."

⁵⁶ C.S.N.B. 1903, c. 78, s.20, as am. S.N.B. 1906, c. IX. Now *Married Women's Property Act*, R.S.N.B. 1973, C. M-4, s. 9(2).

⁵⁷ *Supra*, note 1.

⁵⁸ S.A. 1927, c. 5, s. 10(b), as am. R.S.A. 1980, c. D-37, s. 10(b).

⁵⁹ See C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 132; C. Hamilton, *Marriage as a Trade* (London: Women's Press, 1981) at 27.

on.⁶⁰ Perhaps to avoid this contingency, the state was prepared to grant some exceptions to the rule and allow for the possibility that a new husband would take over the responsibility of financial maintenance of the woman and her children.

Of course, the Alberta legislation did not do what it purported to do. The province has no power over divorce jurisdiction.⁶¹ Thus, in so far as the provision sought to allow a woman with a judicial separation to petition for a divorce in the courts of the jurisdiction where she herself was domiciled, it was *ultra vires*. The legislation did, however, have the effect of giving a woman with a judicial separation her own independent domicile for the purposes of succession to movable property. The legislation might also operate in the field of jurisdiction in nullity of a voidable marriage. However, the courts might take the view that the granting of a judicial separation was an affirmation of the existence of the marriage and therefore precluded the granting of a decree of nullity.⁶²

At the federal level, action was initially taken to address the narrow case of a deserted wife whose husband had abandoned his domicile in the jurisdiction where the couple had lived. *The Divorce Jurisdiction Act*⁶³ was passed in 1930. It was directed precisely to

⁶⁰ Indeed, it was often the case that married women in particular were placed at a legal disadvantage in the labour market on the theory that their income was an improper and unfair supplement to the income of the primary breadwinner – the husband. See Pateman, *ibid.* at 139.

⁶¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North American Act, 1867*). Section 91(26) lists the power over marriage and divorce as an area of exclusive federal jurisdiction.

⁶² See *Hillcox v. Morrow* (1986), 3 R.F.L. (3d) 45 (B.C.C.A.). See also the accompanying annotation by B. Ziff at 46.

⁶³ S.C. 1930, c. 15. Section 2 read: "A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court shall have jurisdiction to grant such divorce provided that immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced."

this class of "innocent" unmarried women.⁶⁴ The wife was allowed a separate domicile only for the purposes of petition for divorce and only where she had been deserted for two or more years. Furthermore, her independent domicile could only be recognized if it had been that of her husband prior to his desertion. Thus, as was the case in *Cook*,⁶⁵ if the wife was abandoned by her husband in a jurisdiction in which her husband had never been domiciled, the legislation was of no help to her. Similarly, the legislation was of no use in a petition for nullity of a voidable marriage or succession to movable property, these being provincial matters.

In 1968, Parliament enacted the *Divorce Act*⁶⁶ which changed the rules relating to domicile and jurisdiction in divorce significantly. First, domicile in a particular province was no longer required to establish jurisdiction in divorce. A Canadian domicile was sufficient.⁶⁷ Second, the *Divorce Act* provided that, for the purposes of a petition for divorce,⁶⁸ the domicile of a married woman was to be determined "*as if she were unmarried* and, if she is a minor, as if she had attained her majority."⁶⁹ Thus, the provision essentially abolished the domicile of dependence for the purpose of determining jurisdiction in divorce. The language of the enactment, however, is troublesome. It seems to impose a fiction upon the court: the wording suggests that one must pretend that the woman is unmarried. The conclusion that a married woman, as a married woman, has her own independent existence is still

⁶⁴ See *Welsh v. Bagnall*, [1944] O.R. 526 (H.C.).

⁶⁵ *Supra*, note 1 at 448.

⁶⁶ S.C. 1967-8, c. 24, s. 6(1).

⁶⁷ *Ibid.* s. 5(1)(a). This eliminated the problem of having to go to a province other than the one in which the petitioner was resident in order to obtain a divorce where a Canadian domicile was established.

⁶⁸ Note also that it has been argued that the 1968 reform only applied to the petition for divorce. Therefore, for other purposes covered under the *Act*, such as corollary relief, the woman retained the domicile of dependence. See C. Davies, *Family Law in Canada*, 4th ed. (Toronto: Carswell, 1984) at 560 n. 7, citing D. Mendes Da Costa, *Studies in Canadian Family Law* (Toronto: Butterworths, 1972) at 923.

⁶⁹ *Supra*, note 66 (emphasis added).

avoided.⁷⁰ Nevertheless, the practical effect was to allow the woman to petition for divorce on the basis of her own domicile. It did not include any of the restrictions in the earlier *Divorce Jurisdiction Act*⁷¹ relating to desertion or the husband's domicile prior to the desertion.

In 1978, the Ontario legislature abolished the domicile of dependence by enacting section 65(3)(c) of the *Family Law Reform Act* which provided that "the same rules shall be applied to determine the domicile of a married woman as for a married man."⁷² In 1986, that provision was supplemented with section 64 of the *Family Law Act*⁷³ which reads:

(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(3) The purpose of subsections (1) and (2) is to make the same law apply and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

In Prince Edward Island, legislation substantially identical to section 65 of the Ontario *Family Law Reform Act* was enacted in 1978.⁷⁴ In Manitoba, *The Domicile and Habitual Residence Act* expressly abolishes the domicile of dependence of married women:

The common law rules respecting domicile, including, without limiting the generality of the foregoing, ... (b) the rule of law whereby a married woman has the domicile of her husband; are no longer law in Manitoba.⁷⁵

⁷⁰ This wording is retained by section 22(2) of the *Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3.

⁷¹ *Supra*, note 63.

⁷² S.O. 1978, c. 2, s. 65(3)(c), as am. R.S.O. 1980, c. 152, s. 65(3)(c). The name of the Act was changed to the *Dower and Miscellaneous Abolition Act* by section 71(4) of the *Family Law Act*, S.O. 1986, c. 4.

⁷³ S.O. 1986, c. 4.

⁷⁴ *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 60(3)(c), as am. R.S.P.E.I. 1988, c. F-3, s. 54(3)(c).

⁷⁵ S.M. 1982-83-84, c. 80, s. 3, as am. R.S.M. 1987, c. D-96, s. 3.

In British Columbia, section 4 of the *Family Relations Act*⁷⁶ may be interpreted as having abolished the common law rule. The section reads:

4(1) No woman is under a legal disability in respect to a matter under this Act by reason only that she is a married or unmarried woman.

Of course, the provision only purports to cover matters within the purview of the *Act* and, thus, would not operate in the area of succession. However, in 1985, a general clean-up of law in force in British Columbia that was thought to violate the Canadian *Charter*⁷⁷ led to the enactment of the *Charter of Rights Amendment Act*.⁷⁸ It included a provision that amended the *Law and Equity Act*⁷⁹ by adding section 55 which is substantially identical to what were then section 65 of the Ontario *Family Law Reform Act*⁸⁰ and section 60 of the Prince Edward Island *Family Law Reform Act*.⁸¹

Thus, in the provinces of Ontario,⁸² Prince Edward Island, Manitoba, and British Columbia, the doctrine of the domicile of dependence of married women has been legislatively abolished for all matters coming within section 92 of the *Constitution Act, 1982*.⁸³

⁷⁶ R.S.B.C. 1979, c. 121, s. 4.

⁷⁷ For a discussion of the process of legislative reform in Saskatchewan in response to section 15 of the *Charter*, see S.M. Shrofel, "Equality Rights and Law Reform in Saskatchewan: An Assessment of the Charter Compliance Process" (1985-86) 1 C.J.W.L. 108.

⁷⁸ S.B.C. 1985, c. 68, s. 80.

⁷⁹ R.S.B.C. 1979, c. 224.

⁸⁰ *Supra*, note 72.

⁸¹ *Supra*, note 74.

⁸² See, however, *Stuart, supra*, note 6.

⁸³ Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. Again, the provincial abolition will not affect any matters coming within the jurisdiction of Parliament.

IV. LASTING EFFECTS OF THE DOCTRINE

A. *The Federal Powers*

Within the federal sphere, the notion of domicile is no longer important. For the purposes of divorce, the concept of domicile no longer plays a role in the determination of jurisdiction. Jurisdiction is now determined by section 3(1) of the *Divorce Act*,⁸⁴ which requires only that "either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding."⁸⁵

There is one area in which the notion of domicile of dependence could possibly still play a role in Canadian divorce law: it is in the recognition of a foreign divorce granted on the basis of the wife's domicile prior to the legislative reform allowing the Canadian courts to take jurisdiction in such a case.⁸⁶ Section 22(2) of the *Divorce Act*⁸⁷ provides that a foreign decree granted after 1968 on the jurisdictional basis of the wife's independent domicile shall be recognized in Canada. An interesting question here is the position of the Canadian law where the foreign court took jurisdiction on the basis of a period of residence of the wife of less than twelve months and did not enquire into the domicile of the wife. If the wife were *de facto* domiciled in the jurisdiction, though only resident there for a period of 3 months, for example, it is unclear whether our courts would recognize the foreign decree granted expressly on the basis of the three month residence. The general principles of recognition, however, would seem to indicate that the relevant inquiry is into the factual connection of the

⁸⁴ *Supra*, note 66.

⁸⁵ Thus, the juridical unit of concern is once again the province; however, residence, not domicile, determines jurisdiction.

⁸⁶ So in the case of a wife deserted prior to 1930 and in the case of a wife not deserted prior to 1968. See *The Divorce Act*, *supra*, note 66, section 6(2). See also *Indyka v. Indyka* (1967), [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.) [hereinafter *Indyka*]; *Bevington v. Hewison*, (1974) 16 R.F.L. 44 (Ont. H.C.); *Powell v. Cockburn* (1976), [1977] 2 S.C.R. 218.

⁸⁷ *Supra*, note 66.

petitioner to the foreign court and not the ostensible basis on which the court took jurisdiction.⁸⁸

The only other federal areas in which the concept of domicile played a role were citizenship and immigration, and there, again, the concept has been eliminated by statute.⁸⁹ Thus, although at the federal level the common law of the domicile of dependence was never completely formally abolished, the concept of domicile itself has become all but obsolete.

B. *The Provincial Powers*

Apart from the exceptions in New Brunswick and Alberta,⁹⁰ five of the ten provinces retain the common law rule of domicile of dependence. The range of issues affected by the concept of domicile in provincial areas of power is broader than it is in the federal realm.⁹¹

The first area in which the concept of the domicile of dependence continues to have an effect is that of nullity. The courts have held that, where a marriage is voidable and not void, the doctrine kicks in and the woman becomes incapable of acquiring her own domicile.⁹² This has practical consequences for an application for a decree of nullity, since jurisdiction in nullity is still dependent in part upon domicile.⁹³ Only where the alleged defect would render the marriage void will the wife be able to petition for a decree of nullity in a jurisdiction where she has her own

⁸⁸ *Robinson-Scott v. Robinson-Scott*, [1957] 3 All E.R. 473 (P.).

⁸⁹ See *Immigration Act*, S.C. 1976-77, c. 52, s. 128 and *Canadian Citizenship Act*, 1974-75-76, c. 108, s. 36. Both eliminate even a gender neutral concept of domicile.

⁹⁰ See *supra*, notes 56 and 58.

⁹¹ *The Constitution Act, 1867*, *supra*, note 61, s. 92.

⁹² *De Reneville*, *supra*, note 6.

⁹³ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641 (H.L.). Note, however, that domicile is not the only basis upon which jurisdiction will be taken in nullity. See, *supra*, note 6.

independent domicile.⁹⁴ The relevant juridical unit for the purposes of jurisdiction in nullity is the province.⁹⁵ Thus, for the purposes of obtaining an annulment, the woman who is *de facto* domiciled and resident in a different jurisdiction than her husband is in the same position as the wife attempting to obtain a divorce prior to the legislative reforms in that area.

Indeed, even in Ontario, where the rule of domicile of dependence has been abolished, the courts have held that the wife still takes the husband's domicile where the marriage is voidable. In 1983, five years after the enactment of the *Family Law Reform Act*,⁹⁶ the Ontario High Court of Justice held in *Stuart v. Stuart*⁹⁷ that the court's jurisdiction in an application for a decree of nullity was dependent upon the husband being domiciled in Ontario and that the wife's domicile was determined by the common law doctrine. The *Family Law Reform Act* was never mentioned in the decision.⁹⁸

By contrast, in *Davies v. Davies*,⁹⁹ the Alberta Queen's Bench Division held that a woman who was married in Ontario and whose husband was still domiciled in Ontario could petition the Alberta court for a decree of nullity of a voidable marriage on the basis of her own independent domicile in Alberta. McDonald J. based his decision on the existence of section 65(3)(c) of the Ontario *Family Law Reform Act*, holding that because the woman was capable of having her own independent domicile under Ontario law, the Alberta court would take jurisdiction in her case. Thus, we

⁹⁴ See *D. v. D.*, [1973] 3 O.R. 82, 36 D.L.R. (3rd) 17 (H.C.); *Re Capon*, *supra*, note 6.

⁹⁵ *D. v. D.*, *ibid.*

⁹⁶ *Supra*, note 72.

⁹⁷ *Supra*, note 6.

⁹⁸ The accompanying annotation by J. McLeod, *ibid.* at 105, suggests that perhaps the court was construing the legislative abolition of the rule as applying only to Ontario domestic law and not to Ontario rules of conflicts of laws. Given the nature of the judgment, ignorance or confusion are probably the better explanations. The reasoning in the case did not cause any injustice in the result, since the petitioner would appear to have also been domiciled in Ontario as a matter of fact.

⁹⁹ *Supra*, note 6.

can see some extent to which at least some judges are willing to attempt to avoid the strict application of the rule.¹⁰⁰

Another area in which the domicile of dependence still operates is in the recognition of foreign nullity decrees. The courts will not recognize an annulment of a voidable marriage that was granted where the foreign court took jurisdiction on the basis of the wife's independent domicile.¹⁰¹ There is, however, some Canadian case law to suggest that the courts will recognize a foreign decree of nullity where the foreign court took jurisdiction on the basis of a real and substantial connection.¹⁰² This would perhaps allow a foothold in arguing that the courts should recognize a foreign decree of nullity where the court took jurisdiction on the basis of the wife's independent domicile.¹⁰³

A further area in which the domicile of dependence operates is that of succession to movable property.¹⁰⁴ Intestate succession to

¹⁰⁰ Again, according to general principles of conflict of laws, the proper law upon which McDonald J. ought to have determined her domicile was the law of the forum which was Alberta. See *supra*, note 36.

¹⁰¹ See *Re Capon*, *supra*, note 6; *Kern v. Kern*, [1972] 3 All E.R. 207 (Fam.). There are, however, other basis of recognition of foreign decrees of nullity. See *supra*, note 6 and *Travers v. Holley and Holley*, [1953] P. 246, [1953] 2 All E.R. 794 (C.A.).

¹⁰² *Gwyn v. Mellen*, [1979] 6 W.W.R. 385 (B.C.C.A.).

¹⁰³ The real and substantial connection with the jurisdiction in *Gwyn v. Mellen* was the fact that the wife was resident there. Thus, *a fortiori* the domicile of the woman in the jurisdiction should be seen to be sufficient. However, note that in this case the marriage was void and not voidable, so that the rule did not come into play. See *supra*, note 6.

¹⁰⁴ It could be argued that matrimonial property is a further area in which domicile of dependence still effectively operates, or at least, in which the common law choice of law rule embraces gender discrimination. Alberta, New Brunswick, Saskatchewan, and Newfoundland still retain the common law choice of law rules in respect of matrimonial property. The common law rule is that matrimonial property is governed by the law of the husband's domicile at the time of the marriage. See *Re Egerton's Will and Trust, Lloyd's Bank Ltd v. Egerton*, [1956-57] Ch. 593, [1956] 2 All E.R. 817. For a further discussion of the choice of law in issues of matrimonial property, see Castel, *supra*, note 5 at 314ff. and McLeod, *supra*, note 5 at 388-98. Another area of some concern might be the proper law of a contract. Domicile of the parties is one of the factors looked to in determining the legal system with which the contract has its most significant connection. See McLeod, *supra*, note 5 at 485. However, given that the notion of the proper law of the contract is primarily related to the intention of the parties and was embraced to avoid the rigidity of a fixed choice of law rule, it is unlikely that the courts would look to a technical and fictional rule of domicile to determine the proper law. See Morris, *supra*, note 5 at 265.

movables is governed by the domicile of the testatrix at the time of her death.¹⁰⁵ Similarly, capacity to make a will is governed by the law of the testatrix's domicile at the time of making of the will.¹⁰⁶ The intrinsic validity¹⁰⁷ and effect of the will are governed by the law of the domicile of the testatrix at her death.¹⁰⁸ The question of whether marriage revokes a will is also determined by the law of the domicile of the testatrix immediately after the marriage.¹⁰⁹ Of course, the domicile of a married testatrix, in the provinces referred to, is the domicile of her husband. In a situation where the wife is unaware of her husband's domicile, as would possibly be the case in a situation of desertion, it is impossible for her to have control over the disposition of her estate since she does not know which body of law she must refer to in planning her estate. Furthermore, the wife may find herself subject to estate taxes in the jurisdiction where her husband is domiciled at the time of her death.¹¹⁰

C. *The Symbolic Effect of the Rule*

Beyond the practical effect of the rule on women's access to justice, a further serious difficulty with the continuing existence of the rule is the symbolic effect that it has in moulding our understanding of the position of women in our society. The doctrine must be taught in our law schools as valid and subsisting law in Canada. It cannot be referred to in passing as an old and

Another area in which the concept of domicile operates is in relation to insurance. See *Insurance Act*, R.S.A. 1980, c. I-5, ss 273, 290, 379, and 381; *Insurance Act*, R.S.N.B. 1980, c. I-12, ss 166, 183, 216, and 218.

¹⁰⁵ McLeod, *supra*, note 5 at 413.

¹⁰⁶ *Ibid.* at 415.

¹⁰⁷ With respect to formal validity, a will is valid if it conforms to the formal requirements of any one of a number of jurisdictions. *Ibid.* at 419.

¹⁰⁸ *Ibid.* at 422. See also *Wills Act*, R.S.A. 1980, c. W-11, ss 40-42; *Wills Act*, R.S.N.B. 1973, c. W-9, ss 36-39; *Wills Act*, R.S.N. 1970, c. 401, as am. S.N. 1975-76, no. 23, ss 23-26; *Wills Act*, R.S.N.S., 1989, c. 505, ss 15-16; *Wills Act*, R.S.S. 1978, c. W-14, ss 36-38.

¹⁰⁹ *Ibid.* at 426.

¹¹⁰ As was the case in *Jaffrey*, *supra*, note 2.

evil rule that was happily done away with years ago. Rather, instructors must explain to their students that our law still embraces and enforces the subordination of women to men in marriage. Some may take time for criticism. But, at the end of the day, students walk out of class with notes that read: "Married woman incapable in law of having her own domicile. Takes her husband's domicile whether she lives with him or not." We may well ask what it does to these students' attitudes about gender equality to be told that the law today views a woman's existence as having been merged into her husband's in marriage. To what extent does the continued existence of this kind of doctrine shape the normative views of law students on the status of women in our society?

The rule is insulting to women. It is an affirmation of the legal enforcement of the subordination of women and a denial by the state of the existence of women as fully independent agents.

V. EQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. *Is There a Charter Violation?*

It seems obvious that the common law rule denying married women the legal capacity to have a domicile independent from that of their husbands is a violation of women's right to equality before and under the law. We do not even need to resort to more generous theories of equality which stress the accommodation of differences¹¹¹ to conclude that the common law rule imposes an inequality and discriminates on the ground of sex. Even the most formalistic of theories of equality would lead to the conclusion that a rule which holds that wives and not husbands are legally incapable of their own separate existence with respect to domicile is a discriminatory inequality under the law.

¹¹¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 169, 59 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.]; N.C. Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*" (1989) 35 McGill L.J. 207.

Indeed, even if we were to use the "similarly situated" test¹¹² to determine whether an inequality under the law exists here, we would still have to conclude that the rule contains an impermissible inequality. One cannot sensibly argue the position that married women and married men are not similarly situated. To do so, one would have to argue that sex is the basis of their dissimilarity. The wording of section 15 of the *Charter* itself would seem to preclude such an interpretation in so far as it demands equality without discrimination on the ground of sex.¹¹³ The ground of sex is disqualified by the section itself as a basis for coming to a determination that the classes of subjects that the law creates are not similarly situated. Thus, even on the most narrow definition of equality, the common law rule creates an inequality under the law.¹¹⁴

The rule is discriminatory in that it treats women less favourably than men.¹¹⁵ To hold that a woman may not petition for nullity in her own domicile, but must travel to the jurisdiction where her husband is domiciled in order to obtain access to the courts, when the husband seeking similar relief may always obtain access to the courts in the jurisdiction in which he is domiciled, is to impose a burden upon women that is not imposed upon men. To hold that

¹¹² *Andrews, ibid.* at 166.

¹¹³ Section 15(1) of the *Charter* reads: "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."

¹¹⁴ Even if one were to make an argument that the discrimination was on the basis of marital status and not gender, the recent opinions of the Supreme Court would indicate that this will not be a basis for sheltering discrimination. The sex-plus reasoning adopted by the American courts would seem to have found favour with the Canadian Courts in *Canada Safeway v. Brooks*, [1989] 1 S.C.R. 1219. Thus, where the discrimination is on the basis of being female plus being married, the courts will consider it to be discrimination on the basis of sex. The decision in *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 that pregnancy discrimination was not sex discrimination has been overruled. The only theory of equality which could possibly sustain the provision is that equality is achieved by treating all members of a class the same way. This reasoning completely nullifies any commitment to equality and was rejected by the Supreme Court of Canada before the enactment of the *Charter* in *R. v. Drybones* (1969), [1970] 2 S.C.R. 282.

¹¹⁵ For a discussion of the meaning of discrimination in section 15, see *Andrews, supra*, note 111 at 174. McIntyre J. identifies the imposition of burdens, obligations, or disadvantages on an individual or group as essential to the concept of discrimination. See also *R. v. Turpin*, [1989] 1 S.C.R. 1296, (1989) 96 N.R. 115.

the succession to a woman's movable property is governed, not by the legal system with which she is most familiar, but by the legal system with which her husband is most familiar, is to impose a disadvantage not imposed upon her husband. His affairs are governed, not by her domicile, but by his own. To hold that a wife's legal affairs may be governed by a legal system that she has no way even of ascertaining because she does not know of her husband's whereabouts is to treat women less favourably. None of this is controversial.

It seems equally implausible to argue that the rule could qualify as a demonstrably justifiable limit under section 1. Nevertheless, the exploration of the argument is interesting in that it allows us to identify what might be put forward as the "state interests" or "government objectives" that are advanced by the rule.¹¹⁶ The senses in which the state is interested in the continuation of the rule provide the key to understanding why the rule cannot be seen as a neutral framework for the ordering of private relationships.¹¹⁷

Some courts attempted to justify the rule, in the context of jurisdiction on divorce, saying that the single domicile rule was necessary in order to avoid the phenomenon of "limping" marriages.¹¹⁸ The reasoning was that, with respect to rules for jurisdiction and recognition of divorce, the best rule will be one which allows for only one jurisdiction in which any particular marriage may be dissolved. As long as we say that the husband's domicile is the only jurisdiction in which a divorce may be granted, we avoid the complication of a situation in which, for example, the husband has no grounds for divorce under the law of the jurisdiction in which he is domiciled and the wife does have grounds for a divorce in the jurisdiction in which she is domiciled. Were the husband to be denied a divorce in his domicile and the wife granted

¹¹⁶ See *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

¹¹⁷ It is ironic that in *Dolphin Delivery* there was both a decision that there was insufficient government involvement to bring the situation within the purview of the *Charter* and that the government interests advanced by the rule were sufficient to save the rule under section 1. See *supra*, note 10 at 588-92.

¹¹⁸ *LeMesurier*, *supra*, note 8 at 540-41.

a divorce in her domicile, the resulting situation would be that the marriage would be subsisting in one jurisdiction and dissolved in the other. There would be no way of resolving the question of which court had superior jurisdiction.

This rationale does not appear to include any inherent sex discrimination. In other words, the objective identified here is not discriminatory in and of itself. Indeed, from a purely conceptual point of view, the difficulties addressed would be as effectively overcome if the domicile of the married couple were defined as that of the wife rather than the husband. The key here is that there should be only one competent jurisdiction. As far as it goes, this rationale does make sense. Nevertheless, the inequality would probably not pass a proportionality test since it could be eliminated by a change in the rules relating to the recognition of foreign divorces. If each jurisdiction were to recognize a decree of divorce granted by the courts of the domicile of either party to the marriage, then it would no longer be a problem that both jurisdictions could dissolve the marriage. Thus, although the courts of the husband's domicile would not actually grant a divorce to the husband, they might nevertheless recognize the jurisdiction of the courts of the wife's domicile and, therefore, view the marriage as having been dissolved.

In any event, the argument is moot because the jurisdictional reforms in the *Divorce Act*¹¹⁹ allow for the possibility that the courts of more than one jurisdiction may be competent to dissolve any particular marriage. Thus, although this objective might have been seen to be sufficiently weighty in the past, it is now obsolete. The legislature has already enacted rules of jurisdictional requirements which prefer the value of accessibility of divorce to the value of ensuring against limping marriages.¹²⁰ We must, therefore, look to other possible government objectives underlying the rule of domicile of dependence.

¹¹⁹ *Supra*, note 66.

¹²⁰ *Ibid.* Section 3(1) provides that the court may take jurisdiction where either the husband or the wife has been ordinarily resident in the jurisdiction for a period of at least one year immediately preceding the petition for divorce. The courts will recognize any divorce that was granted on the basis of a real and substantial connection. See *Indyka*, *supra*, note 86.

As we have seen, another government objective put forward by the courts is the enforcement of the wife's duty to live with the husband. The obligation arises out of the wife's duty to submit her will to her husband's. The objective of ensuring that the wife live with the husband is one which is part of a broader objective of subordinating the wife to the husband in marriage.

One might ask what interest the state has in ensuring a subordinate status for women in marriage. I would argue that the state's interest is at least two fold. First, the state is acting on behalf of an empowered male class who benefit as individuals from a law which disempowers their wives. The rule which incapacitated women benefited individual men directly. It ensured that their wives could not obtain matrimonial relief against them if they were to abandon them and leave for another jurisdiction. This, again, still applies in the context of nullity. Furthermore, it ensured for individual men that their wives could not structure their legal affairs according to a legal system with which the husband was unfamiliar. More generally, it gave individual men formal legal supremacy in marriage which could be used to secure emotional and psychological pre-eminence over their wives.

Second, the state is interested in pursuing the subordination of women because the state itself is benefitted by the continued shouldering of the responsibility for child care and domestic work by a class of unpaid women. Were the financial burden of those tasks not born by individual women, they would be a problem that would need to be addressed more directly by the state. If women as a class were to refuse to accept subordination in marriage and thus refuse to accept the task of child care and domestic labour, there would be a vast undertaking that would be left either to individual men or to the state. Thus, the state has a large stake in creating legal rules which affirm the right of the husband to the wife's services and thereby lessen the likelihood of that contingency.

Is the state interest in subordinating women in marriage sufficient to justify a discriminatory classification under section 1 of the *Charter*? I would argue that it is not. Indeed, it is clear that such a purported justification is discriminatory in itself. It could, therefore, never legitimately act as the foundation of a section 1

argument.¹²¹ The whole purpose of enshrining a commitment to equality in the *Charter* would be defeated if it were possible for the state to justify unequal treatment on prohibited grounds by reference to a discriminatory purpose.

For example, were this sort of argument permissible, we could conceive of a situation in which Canadian constitutional principles applied in the South African context could justify the system of apartheid. The unequal treatment of blacks could be justified on the basis of the state interest in supporting white supremacy. If an interest in discrimination *per se* is ever recognized as a justification for an inequality, then the right to equality becomes meaningless.¹²² Obviously, life will be better for some members of a society if others are systematically subordinated. However, the commitment to equality enshrined in the *Charter* precludes the pursuit of this sort of government objective. Thus, the inequality embodied in the rule of domicile of dependence cannot be justified as a reasonable limit in a free and democratic society.

B. *The Application of the Charter*

The decision in *Dolphin Delivery*¹²³ established that the *Charter* does not apply to the common law relating to the relationships between private individuals. The Court took pains to avoid the inference that the common law is completely beyond the purview of the *Charter*. Thus, in so far as the common law is public law, it is subject to the provisions of the *Charter*. However, in so far as it is private law, it is not.¹²⁴

¹²¹ For a discussion of the relationship between section 15 and section 1, see A. Brudner, "What are Reasonable Limits to Equality Rights?" (1986) 64 Can. B. Rev. 469.

¹²² For a discussion of the principle that the state has no legitimate interest of its own beyond furthering the interest of the common good, see J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 5.

¹²³ *Supra*, note 10.

¹²⁴ On this point, see *R. v. Spencer*, [1985] 2 S.C.R. 278, C.R. (3d) 65.

Dolphin Delivery has come under a great deal of criticism in a number of quarters.¹²⁵ Mr. Justice McIntyre, in a terse and dismissive judgment, seems quite undaunted by the seriousness and pervasiveness of the ramifications of the decision. Subsequent commentators have pointed out the unprincipled nature of the distinction drawn between private law codified by statute and private law existing as a matter of common law.¹²⁶ It seems senseless to hold that the *Charter* applies to the former and not to the latter.¹²⁷ It has also been persuasively argued that it is wrong to hold that a court order is not an act in which the government is involved.¹²⁸ Such an order, even if it is given by way of the enforcement of private law duties, prescribes certain action and imposes penalties for the failure to comply.¹²⁹ In making an order, the court invokes all of the coercive powers of the state.¹³⁰ Thus, court orders should come within the purview of the *Charter* as a result of section 32(1) which states that the *Charter* applies to the Parliament and the government of Canada as well as the provincial legislatures and their respective governments.

In my view, all of these arguments are sound. They suggest that *Dolphin Delivery* is extremely problematic and should be overruled. However, the case also warrants some analysis at a more specific level in the context of gender discrimination in the common

¹²⁵ See *supra*, note 13. For a critical comment on the public/private distinction prior to *Dolphin Delivery*, see D. Gibson, "Distinguishing the Governors from the Governed: The Meaning of Government Under Section 32(1) of the *Charter*" (1983) 13 Man. L.J. 505 and "The Charter of Rights and the Private Sector" (1982) 12 Man. L.J. 213.

¹²⁶ See Howse, *supra*, note 13 at 251-52. Howse points out that Quebec's codified system of rules has the arbitrary result that private law is subject to the *Charter* only in this one province.

¹²⁷ See *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.) [hereinafter *Blainey*].

¹²⁸ Howse, *supra*, note 13 at 251.

¹²⁹ P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 678 and Hogg, *supra*, note 13 at 274-76.

¹³⁰ Hogg, *supra*, note 13 at 275. Hogg quotes from *Shelly v. Kraemer*, (1948) 334 U.S. 1 at 19, wherein the United States Supreme Court said that the granting of a court order invokes the "full panoply of state power" and is therefore subject to the *Bill of Rights*, U.S. Const. amend. I-XV.

law of domicile and more generally the common law of husband and wife.¹³¹ Here, we encounter some unique problems in the application and interpretation of the *Dolphin Delivery* decision.

One might say that, on a proper reading of *Dolphin Delivery*, the common law of domicile does not fall within the scope of the application of the *Charter* because it is common law which relates to the relationship between private parties, i.e., husband and wife. The rule does not define or direct itself to the relationship between the state and the individual. Rather, it defines the relationship between two private individuals who have entered into the marital union as a matter of consent.

However, here we must examine the ideological basis on which the *Dolphin Delivery* decision was made. In the decision, much emphasis was placed on the arguments of Katherine Swinton.¹³² Swinton argues that the *Charter* deals with the relationship between the state and the individual, placing limits on the authority of the state over the individual.¹³³ Extending the purview of the *Charter* to private litigation, then, would broaden the scope of the application of the *Charter* to an arena in which it was never intended to apply and for which it is inappropriate. Thus, a strong public/private distinction is seen to be inherent in the very concept of the *Charter*. To think that the *Charter* is apt to regulate

¹³¹ See Brodsky & Day, *supra*, note 15 at 91. The authors note a further interesting point about the public/private distinction and its effects on women's equality. As more facilities, and the example they give is mental institutions, are privatized and taken out of government control, the scope of *Charter* protection for women will be constricted. For further discussion of the difficulties of the public/private distinction and the scope of section 15, see J. Freeman, "Justifying Exclusion: A Feminist Analysis of the Conflict between Equality and Association Rights" (1988-89) 47 U.T. Fac. L. Rev. 269; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; and H. Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" (1986) 10 Dalhousie L.J. 107.

¹³² K.E. Swinton, "Application of the *Canadian Charter of Rights and Freedoms* (ss 30, 31, and 32)" in W.S. Tarnopolsky & G.A. Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) c. 3.

¹³³ *Ibid.* at 44.

the relationships between individuals is to fundamentally misconceive its purpose.¹³⁴

To take this a step further and to address the guarantee of equality in section 15 specifically, it may be argued that the obligation on government to treat all individuals equally exists because of the particular position of government. Governments claim authority over all their subjects and therefore must be neutral between them.¹³⁵ Subjects, as between themselves, are not similarly linked by this relation of authority. Therefore, whereas government is not entitled to prefer its own, individuals are so entitled since they owe no *prima facie* obligation of neutrality to their fellows. It may be desirable to circumscribe the individual's right to prefer his or her own through the enactment of anti-discrimination legislation. But the obligation to treat others equally in private employment or the provision of services is derived from a set of values quite distinct from the values which inform the constitutional guarantee to equality before the law.¹³⁶

On this view, problems of private individuals acting in ways that deny their fellows the right to equal treatment without discrimination on the grounds of race, sex, *etc.*, should not be dealt with through an application of section 15. That provision is directed specifically to the obligation of a government to treat each subject equally arising out of the demand for equal obedience from each subject. The *Charter* limits the moral authority of the state and these limits exist precisely because the state is an authority. Thus, we can see how the *Charter* may be understood as the moral terms and conditions of the relationship of authority between the state and the individual.

¹³⁴ Indeed, much of the *Charter* may be interpreted as defining a private sphere in which the government is not entitled to intrude. This is the gist of the reasoning of Madam Justice Wilson in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

¹³⁵ See R. Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974) at 33.

¹³⁶ For a discussion of the philosophical and moral justification for anti-discrimination legislation, see J. Gardner, "Liberals and Unlawful Discrimination" (1989) 9 *Oxford J. Leg. Stud.* 1.

Thus, Mr. Justice McIntyre is in agreement with Professors McLellan and Elman¹³⁷ who argue that it would be improper to allow the *Charter* to apply to the private sphere. To do so would result in the creation of a new tort system, wherein the infringement of a *Charter* right would become a new cause of action against other individuals.¹³⁸ The spectre of such a development is, indeed, unsettling and does argue for some kind of public/private distinction in the application of the *Charter*.¹³⁹ Thus, I would concede that it is, at some level, sensible to limit the application of the *Charter* to government action. However, I would argue that the lines, as they are drawn by McIntyre J., are unprincipled and leave out much government action that should come within the purview of the *Charter*.¹⁴⁰

The philosophy underlying Justice McIntyre's position may be further developed with reference to the law of contract. There, the public/private distinction is focused on the ideal of respect for individual autonomy. The reasoning is that voluntary choices of private parties should not necessarily be made to conform to the values of the *Charter*. The common law of contract is conceived of as a neutral framework within which individuals may create their own relations.¹⁴¹

¹³⁷ A. McLellan & B.P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1985-86) 24 Alta. L. Rev. 361.

¹³⁸ See *Dolphin Delivery*, *supra*, note 10 at 597.

¹³⁹ Indeed, with respect to the legal rights, such as the right to be free from unreasonable search and seizure or the right against self-incrimination, the right as it is conceived relates specifically to the relationship between the state and the individual. The reason these rights are seen as being of fundamental importance is that they contain the power of the state and guard against its becoming a totalitarian regime.

¹⁴⁰ Again, two of the main difficulties here are the extent to which the granting of a court order should be considered to be government action and the extent to which there is a principled distinction between rules of private law that exist as a result of statute and those that are judge-made. I will, however, leave these aside and proceed to the specific difficulty of viewing the common law rules governing the status of husband and wife as law relating to the relationships between individuals.

¹⁴¹ *Dolphin Delivery*, *supra*, note 10 itself dealt with the common law of tort. It was presumably conceived of as a neutral framework for the protection of legitimate interests from wrongful interference by others. The difficulty of characterizing the judicial determination of what counts as legitimate interests and what counts as wrongful interference as neutral is obvious. See R. Epstein, "A Theory of Strict Liability" (1973) 2 J. Leg. Stud. 151 and R.

However, whatever our view about the soundness of this position as it relates to contract law, the reasoning cannot be applied to the common law rule of domicile of dependence. It is the substance of the rule fixing the woman's domicile, and not the action of private individuals, that is the source of the inequality and the source of the alleged violation of the *Charter* right. One may accept the argument that there should be a private realm of decision-making which is not directly moulded by the values we enshrine in defining the relationship between the individual and the state. To do so, however, does not lead to the quite separate position that legal rules which themselves define and specify the character of relationships between private individuals should be beyond the purview of the *Charter*.

In the case of the domicile of dependence, the law imposes an inequality on the marital relationship. It goes beyond simply facilitating private arrangements and becomes actively involved in mandating the nature of the relationship between husband and wife. If the law requires that private relationships be unequal on the basis of sex, then it cannot be maintained that it is merely acting as a neutral support system for the realization of private ends.¹⁴² The fact that the state prescribes the character of the marital relationship makes the state a third party to the relationship and engages the state directly in a relationship with each of the private parties thereto. The state, in granting pre-eminence to men in the marital relationship, breaches the moral terms and conditions of its authority by failing to treat all subjects equally.

Thus, the distinction between marriage as a contract and marriage as a legal status emerges as the basis for the argument that the legally imposed status of parties to a marriage must conform to the *Charter*. This is so because the nature of one's legal status in marriage is defined as a matter of law and not as a matter of consent between the parties. Indeed, it is not competent to the parties to contract out of the rule of domicile of dependence. Even

Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law" (1981) 10 J. Leg. Stud. 187.

¹⁴² See Pateman, *supra*, note 59. She notes at 155 that "feminist writers have stressed the deficiencies of contract in which the parties cannot set the terms themselves." She states later at 158 that "no husband can divest himself of the power he obtains through marriage."

if the husband and wife were in agreement that the rule was discriminatory and did not want their relationship to be tainted by a gender biased ordering, they could not avoid this result.¹⁴³ Although some of the aspects of the relationship may be decided as between the parties, such as the distribution of property on divorce, other aspects of the relationship are simply set by the substance of the law.

None of this is to argue that the marital relationship would, as a matter of policy, be better if it existed as a purely consensual contractual order or that it would be generally more egalitarian if it did. Indeed, there are good arguments to suggest that, if it were left to individual consensual arrangements, the marital agreement would continue to be disproportionately more advantageous to the male partner, since men are generally in stronger negotiating positions than are women.¹⁴⁴ It is, however, to show that the marriage is not part of the private sphere and that the state's involvement in the marital relationship necessitates the application of the *Charter*.

Of course, one may point out that many contracts are now becoming more matters of status than matters of consensual ordering. For example, with reforms to labour law, the employer/employee relationship has begun to resemble the relationship between husband and wife. Its terms and conditions are set by law, rather than left to be agreed to by the parties. Like the law of husband and wife, the law of employment begins to circumscribe the scope of the parties choice to areas that could be described as "with whom and when."¹⁴⁵ Interestingly, however, the reforms to labour legislation exist as a result of statutory modification to the common law. Thus, on the reasoning in *Dolphin Delivery*, they would be subject to *Charter* review.¹⁴⁶ By contrast, the definition of the status of married women was undertaken by the courts.

¹⁴³ Warrender, *supra*, note 29.

¹⁴⁴ Pateman, *supra*, note 59 at 183.

¹⁴⁵ *Ibid.* at 166.

¹⁴⁶ See Blainey, *supra*, note 127.

This brings us to the question of whether there is any significant difference between law that is made by the legislatures and law that is made by the courts.¹⁴⁷ The court, in imposing a particular status on parties within the context of a private agreement, cannot maintain that it is not acting as an arm of the state and without governmental authority. The state sets many of the terms of the marriage agreement and also sets the conditions under which that agreement may be dissolved. Whether it acts through the arm of the legislature or the arm of the courts, its coercive power is invoked and its determinations are authoritative. It is difficult to respond to or argue against any argument that the court, in making legal rules, is not acting as part of the government. One can hardly imagine what form such an argument would take.

Section 52 of the *Constitution Act, 1982*¹⁴⁸ states that the *Constitution* is the supreme law of Canada and any law inconsistent therewith is void to the extent of the inconsistency. We then are faced with a judge-made rule of law that married women must take the domicile of their husbands because, as married women, they are incapable of having their own domicile. It would seem quite inconceivable to argue that the reason that the law is not subject to *Charter* review is that there was no government involvement in such a law. The argument would need to be based on some theoretical distinction between law emanating from the legislature and law emanating from the court. The shape of such an argument eludes me. It seems to have eluded Mr. Justice McIntyre, who made no attempt to explain such a distinction.

VI. CONCLUSION

The argument that the *Charter* should not apply in the private sphere of consensual voluntary ordering of relationships cannot be sustained in relation to rules which set the terms of private relationships. Parties do not choose to be viewed as

¹⁴⁷ Gibson, *supra*, note 125; D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183.

¹⁴⁸ *Supra*, note 83.

incapable of their own independent existence; rather, that status is imposed upon them as a matter of law. The only recourse that parties have to avoid that determination is to reject the legal institution of marriage altogether. Thus, the law is structured so that the benefits attached to the status of marriage are contingent upon the parties' willingness to accept the dominant and subordinate ordering of men over women imposed by the law.

Because the discrimination is imposed by law and not chosen by the parties, it must be seen as being subject to the provisions of the *Charter* to which all law in this country must conform. In undertaking to set the terms and conditions of the status of marriage, the courts concede the existence of a strong state interest and involvement in the definition of the family relationship. Once the state exercises its power to further the interests of men over the interests of women and to subordinate women as a class, it has acted in a manner which exceeds the moral limits imposed on the authority of the state by the *Charter*. It matters not whether that excess is undertaken by the state through the arm of the legislature or the state through the arm of the courts. In either case, it is a direct violation and repudiation of the commitment to honour the right to equality before and under the law without discrimination on the ground of sex.

Were the Supreme Court of Canada to come to any other conclusion, being faced with such a problem, the efficacy of the *Charter* to eradicate even the most glaring of inequalities in legal rules affecting women would be impugned. The cynicism relating to the usefulness of the *Charter* would be heightened in the extreme and the guarantee embodied in section 15 would be exposed as disingenuous to the point of being laughable.

Of course, the legislatures which retain the rule of domicile of dependence are not powerless. They could follow the examples of the provinces that have enacted reforms abolishing the rule. Indeed, it is deplorable that they have not already done so.