Introduction

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Knowledge requires categorizations. In order to better understand the world around us, we arrange it in boxes that serve to highlight similarities and differences. The public–private distinction is one of those categorizations that has been used in almost all disciplines. It can be found in geography, history, sociology, psychology, ethics, political science, religious studies, public health, tourism, and information sciences.[1] The distinction between private and public also structures legal analysis. Both civil and common law are organized around the notions of public and private law. Public law is often understood as law that structures the interactions between the state and its citizens (administrative, constitutional, and criminal law), while private law regulates relations between private actors, persons, or corporations. In civil law, private law also includes the law of obligations and of persons; and in common law, one speaks of contracts, torts, and property. Indeed, the application of the *Canadian Charter of Rights and Freedoms* is premised on the existence of a distinction between private (in the sense of non-governmental) and public (governmental).[2]

Like many characterizations, the public–private distinction reveals certain aspects of reality while masking others at the same time. This series of essays is about reflecting on the questions that are both highlighted and hidden when we use the private-public distinction, in particular in the circulation of legal knowledge. The private-public divide is indeed rich terrain for an inquiry about the complex and malleable uses of legal characterizations because it conjures so many different meanings and images.

First, in its most common understanding, the public–private distinction opposes state and non-state actors in the sense of the *Charter* and the traditional legal regulation of public and private law. This state/non-state distinction may have symbolic appeal for governance, but it often masks the way in which non-governmental private actors require state intervention to enforce their contracts, torts, and private obligations. This state/non-state dichotomy is the framework typically associated with an analysis of

the disengagement of the state through privatization, contracting out, or simple abandonment, all of which have characterized Western neoliberal economies. For example, the provision of security for citizens has traditionally been associated with the state through its near-monopoly on the use of force and the array of police agents, army personnel, and other security forces under its command. Now that we are witnessing an enlarged role for private security firms in such areas as border control, the investigation of white collar crimes, and the patrolling of many large urban spaces, our understanding of what should be public and what should be private is being questioned. The state/non-state legal distinction is called into question when state and non-state actors are exposed to the same risks or when they are asked to perform similar tasks. Indeed, there is now a growing body of "governmentality" literature premised on the notions of the permeability of the public and private spheres and that governance is not monopolized by the state.[3]

The distinction between state and non-state also invites an opposition between public good and private property. In this understanding of the public–private divide, the public represents the collective, the commons, and the interests of all combined, whereas the private represents the individual, the owner of private property who acts in a self-interested way. We often associate the public good with the state, assuming that the state allows for the expression of collective interests, and we relegate the private in order to protect private property and individualistic pursuits. This simplistic dichotomy is constantly challenged in a world where the state can no longer meet the aspirations of its citizens for the public good, and where private and semi-private entities may be asked to perform selfless acts. For example, the private sector may be asked more and more to contribute to literacy programs or support schools. Although these actions may, in the long-term, benefit a private employer in ensuring access to qualified workers, the short-term gains for the private sector may not appear to be as certain.

We also use the public–private distinction in another sense, referring to what can broadly be thought of as "the home" and "the street." Feminists, in particular, have shown how much the legal protection of the "private" has hurt women who have been abused in the privacy of their homes – the private thus becoming a place that has contributed to victimization. As a legal characterization, it was immune to scrutiny. Susan B. Boyd, in her book on the public–private divide,[4] indicates that this insight may lead to other types of victimization: the private lives of Aboriginal women, for example, are "publicized" more than others since the way in which they raise their children is more often policed by the state through child protection services. The "private," it would seem, is more private for some groups than for others. Again, the public–private distinction in the sense of "place for

private activity" versus "location for public activity" highlights important differences in the expectations of privacy, but it also masks realities of abuse of power within the home and within society.

In the many images that it evokes, the private-public distinction assumes difference and gives meaning. Like many organizational concepts in our law, it has served both to protect certain interests and to ignore others. It has worked to organize our views about appropriate governance of different activities, different actors, and different places. It has not only regrouped obligations and contracts between individuals and contracts between individuals and corporations (private law), but it has also contrasted them to the interaction between the individual and the State (public law). Traditionally, administrative law, which is a part of public law, has integrated questions of access to social benefits with immigration status or labour protection, to name a few. The experience of a citizen dealing with a bank manager may not be different from his or her experience dealing with a tax auditor or a clerk in a local welfare office, but law has put these relationships into different boxes. Political scientists and philosophers may think that the "contract" model applies equally to the relationship between the state and its citizenry, but for some reason, up until now, law has preferred to distinguish between administrative law and the law of obligation or law of contracts. Law reform often requires that we question these traditional categorizations. Do they still make sense? Do they help us understand reality or do they impair our ability to respond to our aspirations for justice?

The goal of this series of essays is to illustrate various meanings and dimensions of the public–private divide through different case studies. What does the public–private distinction mean in a particular context? Who is empowered by it? Who is using it? What does it highlight and what does it hide? The seven authors have been asked to illustrate some of the changing ways in which the public–private divide is understood. All of them describe a complex reality behind the public–private articulation and reflect on the role of law in supporting, structuring, or challenging the distinction. The aim of this book is to stimulate a debate on the nature of the public–private distinction – not so much to propose a better understanding of it but rather to elicit new questions about law and its role in our society.

In the remainder of this introduction, I will begin by reflecting on the role of the public–private divide in structuring the legal environment for the personal, social, economic, and governance relationships that citizens have. This relationship approach is a way of reframing questions about law in society. I will reflect on how the seven authors have questioned the legal organization of relationships in their analyses. Finally, I will explore the lessons for law reform that emerge from an analysis of the private-public divide in relationships.

Relationships and the Public–Private Divide

When it was created in 1997,[5] the Law Commission of Canada was mandated to develop a multidisciplinary approach informed by an analysis of the context in which law is lived and applied.[6] The commission has developed analytical tools that encompass not only the static description of the law in the statute books and casebooks but also the dynamic forces that shape its day-to-day practice and reframing. Since law is experienced in the context of relationships between human beings, and not only as an aspect of an isolated legal personality, it is often enlightening to look at the impact of legal concepts on the different relationships that citizens have, including personal, social, economic, and governance relationships. I have chosen to use this approach in order to illustrate how a distinction that is as central to law as that of the private-public influences the way in which relationships are shaped and experienced.

The six essays that follow all identify ways in which relationships are structured by the public–private distinction. I will highlight briefly some of the findings of the different authors.

Personal Relationships

Much of Canadian law is based on assumptions about how people organize their private lives and how they relate to their partners, parents, children, and others that are close to them. These assumptions may not adequately or accurately reflect the reality of current relationships, and they often serve to maintain relationships of power and dependence as opposed to creating opportunities for change and the redefinition of relationships on a more equal basis. A stimulating example of this idea is given by **Lisa Philipps** in her essay "There's Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving." She studies the way in which personal relationships are shaped by the fact that they are deemed "private" in the sense of being "unpaid." Philipps shows how this private, at home, unpaid work supports a private interest that is exercised publicly, namely "paid" work. The essay forcefully argues that the productivity of workers is enhanced by the "private" support that they get at home. It goes on to suggest changes to laws to reduce gender inequality, to eliminate the divide between paid and unpaid work, to promote men's greater responsibility and involvement in unpaid work, to promote more choice in work, and to facilitate entry and exit from the market. The idea that private, unpaid work subsidizes public, paid work forces a rethinking of many legal assumptions about tax law, workers protection, and pension law.

Social Relationships

The public–private divide also affects communities in their relationships with one another. Vibrant and healthy communities are often associated

with healthier and happier citizens. Is there a role for law in supporting communities, helping to rebuild fragile ones, or inspiring people to build communities founded on principles of justice? At times, legal structures can actually undermine the development of communities or skew their priorities and evolution. In this context, we may witness, for example, how some communities are marginalized by the private-public divide: the homeless are excluded from public spaces because their appearance, behaviour, and the challenge they represent is unwelcome to the middle class. In their chapter, "Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities," **Damian Collins** and **Nicholas Blomley** examine the emergence of anti-panhandling bylaws in several Canadian cities. The authors argue that "liberal-legal categories are not autonomous, but can be crosscut by other understandings, ethics, and practices." In the case of panhandling, they demonstrate that bylaws are imbued with moral anxieties over poor people's money (that they spend it on alcohol, tobacco, and illegal drugs), notions about the appropriate use of public spaces, and historically rooted beliefs that have excluded homeless people and other marginalized groups from participating in public spaces.

In this regard, the authors argue that anti-panhandling bylaws intertwine notions of public and private, essentially informing the regulation of the seemingly private activity of panhandling with broader public values over the legitimate use of space. The relationships between the very poor and the rest of society are marked with claims of ownership of space: public space is middle class and should remain so, and thus, the homeless, who by definition have no private space, are left in limbo.

The scientific community is also subject to pressures from the structures of private and public legal ownership rules. In "Private Life: Biotechnology and the Public–Private Divide," **Nathan Brett** argues that the move toward the privatization of scientific inquiry is fundamentally opposed to core liberal democratic values of freedom of expression. He analyzes the bid by Harvard University to patent the "Onco mouse" and argues that this attempt is a "further step in the direction of a form of partiality that is fundamentally at odds with the spirit of free inquiry upon which liberal democracy depends." In this context, privatization means that something that was once held in common is now exclusive and partial. His chapter challenges the way in which the legal regime of intellectual property privatizes "life" in this context and makes it a profit-making commodity disconnected from the common good.

Finally, the Internet community can also be analyzed through the public–private lens. Is the Internet public or private space? Is it a place for an enhanced and enlarged public discourse or is it a place to shop and be bombarded by advertising? Will it lead to better public participation or better consumerism? Will it enhance community linkages or screen out messages from

other individuals? **Darin Barney** is dubious of the community-enhancing value of what is increasingly privatized Internet space. In his essay, "Invasions of Publicity: Digital Networks and the Privatization of the Public Sphere," he draws upon two accounts of the public sphere and its fate under modern conditions – Hannah Arendt's theorization of the ancient Greek *polis*[7] and Jürgen Habermas's account of the bourgeois public sphere[8] – in order to isolate some critical questions regarding the status of the democratic public sphere under the new regime of digital technology. He argues that contrary to popular imaginings about its inherently democratic character, the Internet is currently deployed in a context in which "politics has been eclipsed by economic activity in markets, rational-critical debate has been supplanted by consumer choice, and the public sphere understood as a site of citizenship remains conspicuous by its relative absence."

Economic Relationships

The private-public distinction can be seen to be at the core of our understanding of economic relationships. Indeed, one could argue that traditionally we have envisaged the roles of the private and the public in terms of the opposition between the economic and political worlds: the private sector generated the wealth and the public sector redistributed it (through taxation) or corrected its errors (through regulation). This equation, though, was obviously never that straightforward.

First, the intervention of the public sector in regulation always coexists with private sector efforts of self-regulation. Indeed, in "Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada," **Stepan Wood** speaks about the eclipse of the private-public distinction in governance of the environment. For him, the example of environmental management strategies demonstrates that environmental regulation is accomplished by an array of public and private authorities and institutions (for example, standardization bodies, environmental management systems (EMS) auditors and certifiers, corporate managers, customers, courts, and regulatory agencies). As he says, "distinctions between public and private, state and non-state, mandatory and voluntary, are not particularly helpful in understanding the significance of EMS standards. Rather, EMS standards demonstrate that the practices of government traverse the categories on which our understandings of law and politics are typically based."

However, there is no doubt that the public–private distinction continues to protect economic power. Indeed, economic advantages are often framed by the public–private divide. For example, the inability to receive a pay cheque for housework done in private has had a tremendous impact on the ability of women to feel economically secure. Generally, privatization means huge profits. This is certainly the case with respect to the categorization of

the Onco mouse as a private, "patentable" object, and, in his essay, Brett shows how the attempts by pharmaceutical companies to obtain biological patents on life forms (which would result in economic gain) are examples of how an object can move from the public to the private domain. Privatization is the key to capitalization and profit-making.

It is also interesting to note how the institutions that aim at ensuring economic security for the weakest – for example, unions – have been structured by the private-public divide. The union is a place that often speaks with one public voice in order to fulfill its mandate to adequately represent its members. Any dissenting voices are expressed in private. In "The Emergence of Parallel Identity-Based Associations in Collective Bargaining Relations," **Christian Brunelle** explores how the recent emergence of identity associations are "public" expressions of the dissenters' voices and how their very existence challenges the monopoly of union representation and its role in society.

In his essay, Brunelle describes the relationships that exist between workers with respect to age conflicts. He refers to a particular development in Québec labour practices that shocked many. Recently, concessions made by unions were seen to prejudice younger workers and have led to the emergence of new associations that advocate for younger workers. The author argues that this intergenerational conflict challenges unions to better reflect diversity within their ranks because younger workers are moving outside the unions to fight for equality. They are leaving the "private" world of the union to move into a "public" space to challenge the power dynamic. Brunelle also identifies certain legal shifts, namely the identity associations that have emerged because of unsatisfactory aspects of the private space (for example, the silencing of dissent within unions). These associations now constitute new actors that play the legal game – they sue the traditional unions in front of the Human Rights Commission, seeking to effect change from the outside.

Again, the legal divide between private and public is sometimes unclear and confused. Unions, once "private entities" in the sense of being sheltered from public scrutiny, now have to remodel themselves in a more publicly acceptable way. It is no longer adequate to simply advocate for the position of the majority of their members (a private ordering). They must also develop an agenda that is seen to be fair publicly and accepting of a social responsibility to ensure justice between generations (a public-interest position).

Finally, there is no doubt that the space for economic transactions is controlled by the public–private divide. Collins and Blomley suggest that there is "considerable irony in the contemporary criminalization of panhandling." On the one hand, we live in a neoliberal state that emphasizes minimal state interference in private financial transactions. Yet, on the other hand,

cities increasingly regulate the act of begging for money, which "closely resembles an economic or 'market' activity of the sort that has occupied the heart of the private realm within much liberal thought."

Governance Relationships

Two governance issues emerge from the essays. First, there is a concern that "private" or privatized space is synonymous with depoliticized space. It is a place where political issues are submerged. The market is devoid of concerns over justice; decisions are rational only in the context of maximizing profit. Essentially, the market is arguably non-equal and non-just. It is also a space that is for the most part devoid of political content, where issues are presented in the absence of social context. Such ideas are "technicalized" as Wood suggests; environmental protection is only a matter of consumer preference and is no longer a societal issue.[9] Barney also suggests that private space depoliticizes exchanges: opposition is screened and one is sitting in front of a computer, not having to interact with differing or opposing points of view.[10] Brunelle raises this issue as well when he recounts that young workers had to go outside, into public space, in order to make the point of their unfair treatment. To a certain extent, Brett makes a similar point. He explains that private space is partial, it accepts that like cases can be treated differently, for example, that nepotism can exist in recruiting employees or that children in the same family can receive different levels of help.

Politicized spaces ("public spaces," as these authors call them), on the other hand, are about managing claims of unfairness and entitlement. To be in the public domain requires a recognition of the other as well as a discussion regarding the allocation of power and the making of choices. Collins and Blomley bring an important nuance: several contradictory social forces confront each other in the public, politicized place. Some "others" are excluded, namely the marginal and the poor whose participation is unwanted and therefore removed from public viewing. They are the "too disturbing" others, which can be screened out.

The second point that emerges from these essays is that governance is no longer the monopoly of public actors. Wood's essay is particularly significant in this respect. He notes how the role of government is no longer simply as the law maker, but that its influence is marked by "steering; self-discipline; knowledge production; reward; command; benchmarking; challenge; and borrowing." Governance occurs both inside and outside of public space. The corporation is the locus of environmental governance, in Wood's view. For Philipps, it is the locus of labour transformation, and she suggests that "in seeking solutions to social inequalities and problems through law reform, one must look at the responsibilities of market actors and their relationships with the public and the state, not just the relationships between the public and the state. We need to broaden the sense of social responsibility

and the range of solutions to corporations/the market/private actors." Unions are also a locus of governance. How they manage the challenge of minorities within their ranks cannot be organized by governments. It must come from within. This is the challenge that Brunelle sees for unions.

Ultimately, though, it is the citizenry who must change, since changes in governance occur through people thinking differently about an issue. All seven contributors invite the public to reflect critically on categorizations in our society. Barney warns against the myth of the Internet as a place for community expression, Brett cautions us against accepting the privatization of scientific endeavours, Wood wants greater public involvement in the discussion of environmental issues, Brunelle advocates new thinking within the workforce about intergenerational justice issues, Collins and Blomley challenge society into rethinking its approach toward the act of begging, and Philipps suggests that we must integrate unpaid work with paid work in people's attitudes and in their perceptions of the workday. Each of these seven authors present a complex and enriching view of how law and society manage the public–private divide. How can law reform respond to such a challenge?

Lessons for Law Reform

If the public–private distinction often obscures meaningful issues, is it necessary to organize our legal thinking in these terms? What does it mean for our understandings of governance and for the very enterprise of law reform? What are the lessons that one can draw from these essays in terms of law reform?

Three conclusions come to mind. First, any law reform initiative must question the claim that the private-public distinction has universal appeal. Reference to public and private as unambiguous notions is certainly not appropriate, and we must reflect on the role that this construction has played and continues to play in highlighting certain interests and obscuring others. We must speak about the functions of the distinction, its purpose and its use, as opposed to assuming its undeniable existence. This could lead to a review of the way in which the terms are used in case law, statutes, and legal education. It is not that the conceptualization *per se* is unhelpful but, rather, that it can prevent a realistic assessment of the role that it plays in reinforcing imbalances of power. It is often too easy to hide behind conceptualizations such as private and public, which are presented as being self-evident. A distinction is a means to better understand the world, and it should not become an end in itself. Law reform must therefore go beyond the classifications of private and public. The public–private divide may be blurring, but this does not make it irrelevant. The fact that the divide and, indeed, the very meaning of the terms are being redrawn, accentuated, distorted, or reformulated in almost all policy fields signifies that there are shifts in power

structures. Effective law reform requires an examination of these emerging fault lines.

Second, it must be remembered that, like all socio-legal constructs, the public–private divide is a concept that can be manipulated and that it does influence the power dynamics between people. The seven authors illustrate well how the labelling of a space as "private" serves to protect the power of certain groups. The private protects the generational advantage of older workers (Brunelle), excludes certain people from participating in activities (Collins and Blomley), commercializes public space such as the Internet (Barney), science (Brett), or the environment (Wood), and, to a certain extent, ensures the gendered structure of work (Philipps).

Third, law reform must speak to more than governments, and it must engage the public. Governance has different modes and different sites,[11] and recognizing this fact must influence the way in which law reform is carried out. Law reform was once primarily about legislative changes and the role of public administration. In that context, law reform certainly raises issues and contributes to the politicization of certain injustices. Even in its most traditional form, law reform is about "publicizing" (in its best sense) the inadequacies of law. To borrow from Wood's terms, the role of law reform should become one of creating space to "re-politicize" issues, to create space for those who want to resist, challenge, or redefine private standards, and to allow public issues to be framed in a manner that works toward greater justice, equality, human health, and ecological integrity. In other words, law reform should allow a multiplicity of sites to debate the appropriate values that ought to support human conduct.

However, this role of raising and politicizing issues and engaging the state in amending statutes is not sufficient. Law reform must also speak to a multitude of actors and to a plurality of normative orders, including unions, the scientific community, the enlightened corporation that supports the entire contribution of the worker, the corporation that has adopted environmental management standards, and the community of Internet users. It must move beyond governments and provoke other sectors to ask questions about justice.

These lessons create challenges for law reform. It must diversify its modes of intervention. The commonly used report to Parliament or legislature may no longer be sufficient, and, in the future, such reports will have to be accompanied by a strategy of speaking in the language of other actors. Consultations about the scope of the problem and the range of solutions, as well as about the means to speak to different actors, will now become an integral part of the work. Innovative strategies to engage and understand a wider range of institutional players will have to be devised.

Such innovation is necessary because changes, and particulary law reform advocating change, have to occur in the private, the public, and the

in-between areas where governance is exercised. This is not to denigrate the role that the public sector can assume. In the words of Philipps, "law, alone, cannot make fundamental changes to society's values, but it has the capacity to shape background assumptions, expectations, and values that influence voluntary behaviour." Law, the symbolic power of legislation and of commitment of public resources, is an important tool, but it is simply not sufficient.

In reaching out to different constituencies, law reform must also be wary of creating new classes of "experts" within the different normative orders. It must reflect on its tendency to consult primarily with the power brokers within institutions (both private and public) and with the most vocal voices on issues, and remain aware of its resulting loss of ability to reach sufficiently far into the general public. Ultimately, law reform does not occur if the citizens are indifferent or opposed to it. Law reform must engage the general public. Law reform should also seek to empower citizens to question concepts and power structures in whichever space they are in: the private, the public, and the in-between. Ultimately, law reform must contribute to the creation of a questioning and self-reflecting legal culture – one that moves beyond the law as icon and toward the law as a living and self-questioning entity.

Notes

1 The following references indicate the proliferation of the discourse on public–private in the most recent years (2000-1):
Geography: N. Blomley and G. Pratt, "Canada and the Political Geographies of Rights" (2001) 45 Canadian Geographer/Géographe Canadien 151-66.
History: M. Archangeli, "Negotiating the Public Sphere through Private Correspondence: A Woman's Letters of Liberty in Eighteenth-Century Germany" (2000) 53 German Life and Letters 435-49.
Sociology: J. Bailey, "Some Meanings of 'the Private' in Sociological Thought" (2000) 34 Sociology 381-401.
Psychology: J.M. Monteil and N. Michinov, "Effects of Context and Performance Feedback on Social Comparison Strategies among Low-Achievement Students: Experimental Studies" (2000) 19 Cahiers de Psychologie Cognitive 513-31; and J. Harden, "There's No Place Like Home: The Public/Private Distinction in Children's Theorizing of Risk and Safety" (2000) 7 Childhood 43-59.
Ethics: J. Fisher, S. Gunz, and J. McCutcheon, "Private/Public Interest and the Enforcement of a Code of Professional Conduct" (2001) 31 Journal of Business Ethics 191-207.
Political science: Barbara Arneil, "Women as Wives, Servants and Slaves: Rethinking the Public/Private Divide" (2001) 34 Canadian Journal of Political Science 29-54 at 29; and L.A. Crooms, "The Mythical, Magical 'Underclass': Constructing Poverty in Race and Gender, Making the Public Private and the Private Public" (2001) 5 Journal of Gender Race and Justice 87-130.
Religious studies: M.E. Henneau, "Private and Public Prayer: The Prayer Life of Nuns in Early Modern Liege" (2000) 217 Revue de l'Histoire des Religions 327-44 (translation).
Public health: D.S. Brennan, A. Gaughwin, and A.J. Spencer. "Differences in Dimensions of Satisfaction with Private and Public Dental Care among Children" (2000) 51(2) International Dental Journal 77-82.
Tourism: A. Marino, "The Tourist Sector: Public versus Private – The Italian and Spanish Experience" (2001) 22 Tourism Management 43-48.

Information sciences: S.J. Lukasik, "Protecting the Global Information Commons" (2000) 24 Telecommunications Policy 519-31.

2 Section 32(1) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], makes it specifically applicable only to the Parliament and government of Canada and to the legislature and government of each province "in respect of all matters within the authority" of the respective legislative body. In *RWDSU* v. *Dolphin Delivery Ltd,* [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*], the Supreme Court of Canada decided that the *Charter* did not apply to a private action unconnected to "government." (See also *McKinney* v. *U. of Guelph,* [1990] 3 S.C.R. 229; *Stoffman* v. *Vancouver General Hospital,* [1990] 3 S.C.R. 483.) However, the Court considered that the common law should evolve in light of *Charter* values. Over time, courts have tested common law principles against the fundamental values expressed in the *Charter* (*Canadian Broadcasting Corp*. v. *Dagenais*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130) and have also focused on the functions of government (*Eldridge* v. *British Columbia (A.G.),* [1997] 3 S.C.R. 624). They have also challenged governmental inactions to deal with private wrongs (*Vriend* v. *Alberta,* [1998] 1 S.C.R. 493). While the private-public distinction is often said to be misleading in this context (see P. Hogg, *Constitutional Law of Canada*, 3rd edition (Carswell, 1992) at 849-50), it may be just as fluid as the notion of state or governments. For a discussion of the applicability of the distinction established in *Dolphin Delivery* in Québec civil law, see Danielle Pinard, *Les dix ans de la Charte canadienne des droits et libertés et le droit civil québécois: quelques réflexions* (1992) 24 Ottawa L. Rev. 193. For a discussion of the application of the notions in the healthcare field, see Martha Jackman, *The Application of the Canadian Charter in the Health Care Context* (2000) 9 Health L. Rev. 22, and in the education sector, see, among others, René Pépin, *La Charte canadienne des droits et libertés s'applique-t-elle à l'Université de Sherbrooke?* (1990) 20 R.D.U.S. Revue de droit de l'Université de Sherbrooke 433.

3 Nikolas Rose, "The Death of the Social? Re-Figuring the Territory of the Government" (1996) 25 Economy and Society 327-56; Mariana Valverde, Ron Levi, Clifford Shearing, Mary Condon, Pat O'Malley, *Democracy in Governance: A Socio-Legal Framework*, report prepared for the Law Commission of Canada (Ottawa: Law Commission of Canada, 1999); Pat O'Malley, "Risk and Responsibility," in A. Barry, T. Osborne, and N. Rose, eds., *Foucault and Political Reason* (London: UCL Press, 1996); Rose, Nikolas, and Mariana Valverde, "Governed by law?" (1998) 7(4) Social and Legal Studies 541-552; Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999); David Garland, "Governmentality and Crime Control: Foucault, Criminology, Sociology" (1997) 1(3) Theoretical Criminology 454.

4 Susan B. Boyd, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997).

5 *Act Respecting the Law Commission of Canada*, R.S.C., c. L-6.7.

6 Preamble to the *Act Respecting the Law Commission of Canada*, *supra* note 5.

7 Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

8 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Thomas Burger (Cambridge, MA: MIT Press, 1991).

9 Wood is concerned about the depolitization of the environmental discourse. For a similar argument on the role of expert management as a cause of depolitization in the context of world trade issues, see Kantola A. Leaving, "Public Places: Antipolitical and Antipublic Forces of the Transnational Economy" (2001) 8(1) Javnost – The Public 59-74.

10 For a similar discussion of the impact of the Internet on democratic society, see also Y. Baruch, "The Autistic Society" (2001) 38(3) Information Management 129-36.

11 The Law Commission of Canada has used this expression to describe its research on governance. It wanted to convey the idea of the multiplicity of ways in which governance occurs (regulation, taxation, ethics, etc.) and the multiplicity of places where it is experienced (in corporate structures, non-governmental organizations, schools, and churches). For a description of these ideas, see Roderick Macdonald, *Grotius, Gandhi and Governance*, which is available on the Law Commission of Canada's website: <http://www.lcc.gc.ca/en/pc/speeches/s290698> (accessed 30 November 2002).