

PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM



EDITED BY
BRENDA COSSMAN AND JUDY FUDGE

Privatization, Law, and the Challenge to Feminism

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For Marlee Kline, 1960–2001

Feminist, scholar, activist, friend, and mother

Preface

This book began as a collaborative project involving researchers associated with the Institute for Feminist Legal Studies at Osgoode Hall Law School, York University. The goal of the project was to examine how the transition from the welfare to the neo-liberal state in Canada, which began in the early 1980s, affected women, influenced gender relations, and posed a challenge to feminist law reform strategies. Instead of simply documenting the effects of this shift, we wanted to develop a theoretical framework for understanding how the relations between the state, the market, and the family have been reconfigured in Canada and the related transformation in the male breadwinner model gender order.

Drawing upon insights from feminist political economy, Canadian welfare state literature, and legal theory, the eight original case studies collected in this volume examine the complex role of law in privatization projects across policy areas ranging from fiscal and labour policy through family, welfare, and immigration law to laws designed to regulate the provision of health services and new reproductive technologies and to prohibit child prostitution. These policy areas reflect the research interests of the scholars associated with the Institute of Feminist Legal Studies. Some of the case studies however, were commissioned because of the centrality of a specific policy area – such as immigration – to an understanding of the range of social processes and institutions involved in reproducing both the working population and social order. The book concludes by identifying the challenges privatization poses to feminism, evaluating the role of law in achieving substantive equality for women, and assessing the limitations of an equality analysis for evaluating the implications of law and public policy.

All intellectual work is a collective creation and this book is no excep-

tion. The collaboration extended beyond the book's two editors to the contributing authors, who helped to develop the theoretical framework and focus as well as to strengthen each other's chapters. We also benefited from the comments of dozens of researchers, activists, lawyers, and students who attended the various workshops, seminars, and conferences at which we presented earlier incarnations of the chapters that make up this book. We learned a great deal from the discussion of our research and ideas, and we are very grateful for this critical engagement.

It is difficult to coordinate and sustain a collaborative research project, especially in an era in which the emphasis is on individual achievement and competition. Thus, we appreciate the public support, both financial and institutional, that provided the infrastructure for our research. In particular, we owe a debt of gratitude to three public institutions: the Social Sciences and Humanities Research Council of Canada for funding the three-year research project, 'Privatization, the Law and Feminism,' from which this book emanated, and for providing an Aid to Scholarly Research Publication grant; to Osgoode Hall Law School for fostering an intellectual community committed to socio-legal research and for furnishing the material supports necessary for scholarly production; and to the Faculty of Law at the University of Toronto, for providing assistance in the final stages of the manuscript preparation and dissemination.

Since institutions are the creations of collective human endeavour, many people played a role in the production of this book. We cannot possibly name everyone here and have thus singled out those who have had a more direct hand in it. The role of our contributing authors is obvious; without them we would not have a book. Joanne Rappaport, with the Institute of Feminist Legal Studies at Osgoode, provided the hidden labour without which any scholarly work would be impossible. She organized workshops, seminars, and conferences, administered the grant, and provided cheerful and efficient assistance throughout the research project. The following people provided able research assistance: Gillian Calder, Nadia Chandra, Stephanie Edwards, Ruth Fletcher, Angela Green-Ingham, Jennifer Guy, Faith Holder, Christine Jenkins, Robert Kelman, Irit Kelman, Gordon Kerr, Freya Kodar, Jason Koskela, Robert Kreklewich, Sarah Loosemore, Munday McLaughlin, Caitlin Morrison, Chantal Morton, Catherine O'Sullivan, Brena Parnes, Karen Pearlston, Cherie Robertson, Vincenzo Rondinelli, Olga San Miguel, Wendy Sutton, Kerry Taylor, Theodora Theodonis, Albert Wallrap, Michael Weisman, and Brian Williams. Numerous librarians at Osgoode Hall Law School Library and the Bora Laskin Library at the University of Toronto

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One of the lessons of feminism is that public work is unsustainable without the private labour that goes into caring for individuals. Our friends and families not only encouraged our intellectual work, they provided the distractions necessary for keeping us human. Our final thanks go to the children of the contributing authors who, throughout the book's long gestation, demonstrated to us over and over again why privatization is a threat to, and not a solution for, social reproduction.

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PRIVATIZATION, LAW, AND THE CHALLENGE TO
FEMINISM

Introduction: Privatization, Law, and the Challenge to Feminism

JUDY FUDGE AND BRENDA COSSMAN

The tragic process of swedenizing Canada must come to a halt ... I am a Canadian and I want to be free, to the extent reasonably possible, of government intrusion and direction and regimentation and bureaucratic overkill ... It is absolutely clear that the private sector is and must continue to be the driving force in the economy ... The role and purpose of government policy will relate to how we can nurture and stimulate the Canadian private sector.

Brian Mulroney

Privatization, along with globalization and restructuring, has become one of the defining terms of the end of the twentieth and the beginning of the twenty-first centuries.¹ While initially the term referred specifically to the sale of government assets to the private sector, best exemplified in England under Thatcher from 1979 through the 1980s, privatization has come to signify a tectonic shift in public policy. In the 1980s it became emblematic of the economic creed that the market was inevitably superior to politics as an allocative mechanism. In 1985, the Royal Commission on the Economic Union and Development Prospects (the Macdonald Commission), appointed to assess Canada's prospects in the global economy, confidently asserted the primacy of the market: 'the presumption must be in the great majority of cases, the market is the best available mechanism for resource allocation. The burden must be on those who propose intervention' (Canada 1985, 260). By the 1990s, privatization also came to signify a broader change in the political orientation of the liberal state, whose role and responsibilities in relation to the life chances of its citizens began to be reconfigured. Responsibility for individual welfare is less and less considered to be a matter of collective,

social, or public obligation and is increasingly regarded as a private individual or, at most, a family or charitable matter (Brodie 1994a).

As a general concept, privatization captures the process of transition from welfare state to neo-liberal state as the material base upon which the Keynesian compromise rested has been undermined (Sears 1999) and its mode of governance transformed (Rose 1994). The term was introduced into the Canadian political lexicon by the Conservative government led by Brian Mulroney and it came to represent a broad range of practices, including the sale of government assets, the transfer of government functions to the private sector (contracting out), and the restructuring of government activities to more closely emulate market norms. These practices were all rooted in the assumption that private provision for profit was inevitably more efficient than public service (Cameron 1997, 12). At the same time, governments across Canada attempted to reduce their responsibility for social welfare programs and, correspondingly, to increase the investment of public funds in the private sector to facilitate service delivery (Kline 1997, 332). A growing range of social problems were recast as individual or family failings. Privatization has come to represent a fundamental shift not only in government policy but also in the balance of public and private power, both globally and nationally. It also exemplifies the coincidence of social conservative and family values rhetoric and the neo-liberal goals of self-reliance in public policy.

Feminist theory provides important tools for appreciating and assessing the significance of the restructuring of the Canadian state and economy in the wake of privatization. Feminist scholars have demonstrated that it is crucial to incorporate gender into an analytic framework in order to appreciate the distinctive features of different nations' welfare states (Evans & Wekerle 1997; Lewis 1998; O'Connor 1993; Orloff 1993). Feminist economists have also insisted that the conception of the economy must be expanded to include those aspects of productive life, such as daily maintenance of young children and the household, that are not provided predominantly via the market (Elson 1994, 1998; Folbre 1994; MacDonald 1995). In Canada, feminists have begun to demonstrate not only that privatization has had different impacts on men and women (Luxton & Reiter 1997), but that it undermines the gender order that prevailed under Keynesianism (Bakker 1996a). Constructing a new gender order is a central challenge for the privatization project (Connell 1987).

In liberal societies, law is a crucial mechanism for mediating shifts in state power. The role of law is illustrated in the growth of international

law and the significance of international trade and finance treaties under globalization (Picciotto 1998). The enforcement of private property rights on a global level is a key objective of many international agreements and a central component of the World Bank's development strategy (McMichael 1999; Teeple 1995, 77; Tshuma 1999). Such rights are a fundamental achievement of liberal law, but they are always in conflict, to varying degrees, with democratic and human rights, another of liberal law's significant achievements. This tension in liberal capitalist societies is, to a large extent, mediated by legal institutions, since law plays a central role in legitimating power. Law is an important site for the production of discourses that play a powerful role in shaping human consciousness and behaviour. At the same time, its coercive force distinguishes it from other discourses.

Law plays an important role in the privatization project in both shaping and mediating various privatization strategies. Law has institutional and normative dimensions, which operate at a number of different levels. At the macro-level, international agreements have been used to liberate capital from the political constraints of the nation state. This body of international law has given rise to a host of international organizations (most notably the World Trade Organization) that exercise an adjudicative authority (Tshuma 2000). In the macro-economic realm of fiscal policy, provincial governments have sought to use their legislative powers to constrain their successors' ability to raise revenue through borrowing or taxation (Philipps 1996). Law is also important at the intermediate or meso-level, for it shapes the structure of significant institutions such as the labour market and family. At the micro-level, law is not only the preferred mechanism for resolving intractable disputes, it also constitutes the legal subject. The law provides a template for resolving broader social conflict by individualizing disputes. But law does not have only an instrumental value or effect; it has a broader normative import. Regardless of whether law is being used to repress or to foster specific institutional arrangements or social relations, it provides a justificatory framework, defining and redefining values such as equality, liberty, and the rule of law, for the invocation of state power (Cotterrell 1995).

In this introduction we develop three related arguments about privatization, feminism, and the law in order to provide a framework for the case studies provided in the body of the book. First, we argue that privatization signals a shift in state form from the Keynesian welfare state to a neo-liberal state. We develop a theoretical framework, drawing upon feminist work that focuses on the specific role of the state within a capi-

talist economy, and then we sketch how the Canadian state is involved in a process of restructuring its relations with its citizens. Second, we argue that this shift in state form not only has a distinctively gendered impact, but that it entails a restructuring of the gender order. We also explore the way in which the state's project of revitalizing a flagging gender order is fraught with contradictions. Finally, we argue that law plays a significant role in the restructuring of both the state and gender order. We end by situating the chapters in relation to our established framework.

I. Privatization

Our argument that the Canadian state is currently involved in a process of economic and political restructuring depends upon a particular understanding of the state's role in a distinctive and highly peculiar form of social organization: capitalist society (Fraser 1997a). We focus on two features that distinguish capitalist from other modes of production (Bartlett 1988, 164–5). The first is the tendency towards the separation of the site of procreation, daily and generational maintenance (the household) from productive relations (waged work). The second is the creation of a division of labour – based on the capitalist drive to increase profits.

The first tendency accounts for the distinctive role of the state in capitalist social relations. The daily and generational maintenance of the working population (social reproduction) is not directly organized by capitalists, but they are dependent upon this work being performed (Muszynski 1996; Picchio 1992; Seccombe 1992). Social reproduction is typically organized by families in households and, to varying degrees, by the state. While the household is linked to the process of production through the wage, both in influencing the cost of labour power and by providing access to the means of subsistence, it is not subject to the same logic as the production process (Acker 1988). This separation of production from reproduction gives rise to an essential contradiction in capitalist social formations: the conflict between the standard of living of the workers (which is always historical, moral, and institutional and not determined exclusively by the price mechanism of the market) and the drive for accumulation (the need to make profits) (McDowell 1991; Muszynski 1996; Picchio 1992). The state's role is crucial in mediating this contradiction (Picchio 1992; Ursel 1992). As Jane Jenson (1986, 14) put it, 'a common problem placed on the agenda of all capitalist states since the nineteenth century was the development of a healthy and disciplined labour force.'

The state's role in organizing social reproduction also involves stabilizing a specific gender order (Connell 1987). Social reproduction has predominantly been organized in households through normative families and kin relations, characterized by a gendered division of labour (Acker 1988; Secombe 1992). Gendering is a process in which social significance is attached to sexual difference which, in turn, 'structures organizations, affects social and political relationships, and becomes intrinsic to the construction of significant social categories and political identities' (Frader & Rose 1996, 22). To a critical albeit limited extent, especially in procreation, sexual differences are material. But while sexual differences are the ontological basis of gender discourses, gender is socially constructed (Barrett 1988; Creese 1999; Lerner 1997; Scott 1986) and sexual differences are thus primarily discursive practices (Butler 1990). In this respect gender is analogous to race; both are processes of social differentiation that attempt to legitimate inequalities in social power by naturalizing differences. Gender discourses naturalize sexual differences through family relations, sexuality, state institutions, and policies that organize procreation and maintain the population (Lerner 1997; Scott 1986). Every gender order encompasses a sexual division of labour and gender discourses that either support or contest that division. The order is stable to the extent that it has been institutionalized in certain key sites such as the family, the labour market, and state policies (Acker 1988; Connell 1987; Laslett & Brenner 1989; Walby 1997). For such institutionalization to occur, there must be some fit, however temporary, fragile, and incomplete, between the processes of reproduction and production.

This conceptualization of gender helps to explain the gender-saturated character of the second distinctive feature of capitalist relations of production: the fragmentation of the labour force along lines of differentiation by levels of skill or need. While there is nothing in the logic of the capitalist drive for increased productivity of labour that inevitably leads to a labour force divided by sex (or race), the drive to accumulate leads to the creation of a labour force divided along the lines in which the labour process is broken down (Barrett 1988; Muszynski 1996). The hierarchical organization of these divisions maximizes competition between workers over their entitlement to a specific level of wages.

Skill is a primary justification for different wage rates and employment conditions. However, skill is ideological to the extent that it ignores certain capacities and talents and is itself the outcome of struggles between capitalists and workers and among different groups of workers. Feminist