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SYMPOSIUM ON INTERNATIONAL LAWS PUBLIC AND PRIVATE

GENDERING PUBLIC AND PRIVATE INTERNATIONAL LAW: TRANSVERSAL LEGAL HISTORIES OF THE STATE, MARKET, AND THE FAMILY THROUGH WOMEN'S PRIVATE PROPERTY RIGHTS

Miriam Bak McKenna and Matilda Arvidsson***

This essay takes up Karen Knop's challenge to reconstruct the oft-made distinction between private and public law by engaging private international law (PrIL) as a "lost side of international law."[1] To do so we interrogate the changing fortunes (literally) of women's private property rights in the long nineteenth century—a period characterized by the divestment and reinstatement of gendered rights in national law—focusing on the Nordics, Europe more broadly, and the Colonial world. Following Knop and other feminist legal scholars, and by engaging with questions of what Mariana Valverde calls "scale,"[2] we bring women's property rights in conversation with international law. In doing so, we point to sites of engagement where the politico-economic structures of international law are lived, negotiated, reconfigured, and made *real*.[3] We use scale to frame and inform our analysis bringing attention to how the "small" (micro) economics and politics of everyday life, women's labor, and gendered legal concerns, underpin and are an intrinsic part of the "large-scale" structures of international law. "All scales shifts," Mariana Valverde notes, meaning that such "processes . . . br[ing] certain phenomena into focus that had previously been blurred or pushed to the background."[4] Recovering matters of women's history and everyday life, which, as Knop has argued are often "hiding in plain sight," with a focus on women's property rights, brings to the fore the critical relationship between family/household, market, and the state, and the fundamental role international law has played in implementing a specific economic vision through the organization of gendered power relations.

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[1] Karen Knop, *Gender and the Lost Private Side of International Law, in* HISTORY, POLITICS, LAW: THINKING THROUGH THE INTERNATIONAL 357 (Annabel Brett, Martti Koskenniemi & Megan Donaldson eds., 2021).

[2] *See, e.g.*, Mariana Valverde, *The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks*, 14 UC IRVINE L. REV. 325 (2014).

[3] Karen Knop & Annelise Riles, *Space, Time and Historical Injustice: A Feminist Conflict of Laws Approach to the "Comfort Women" Agreement*, 102 CORNELL L. REV. 853 (2017); Roxana Banu, *A Relational Feminist Approach to Conflict of Laws*, 1 MICH. J. GENDER & L. 24 (2017).

[4] Valverde, *supra* note 2, at 329–30.

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A Question of Scale: Reinscribing the Domestic in the Private Side of International Law

As feminist scholars have long argued, the naturalization of the private/public divide disguises the fact that the private is political. There is no *polis* unless the *oikos* sustains and embodies its realization.[5] These dynamics become explicit in international law as seen through the lens of *scale*:[6] international economic law underpins the market that is built on and sustained by material conditions within the micro-social domain of the household (including labor exploitation and unpaid domestic labor).[7] Yet materialist feminist concerns with contractual models of family and intimate relations and their relationship to broader international economic structures are rarely the explicit focus of either mainstream international legal scholarship or feminist international legal critique.[8] A similar absence emerges within international law and political economy scholarship, which has sought to reconfigure the relationship between the market and the state.[9] For scholars such as Martti Koskenniemi, rights of property facilitating private enrichment abroad "began at home,"[10] but this "home" is understood as the domestic state and the domestic market, rather than the domicile.

In the absence of the domestic *scale* (in the sense of ordinary households), theorizing the political economy of international law fails to account for a wide array of material structures underpinning the global system of capital. As Knop emphasizes, the relative unity of public and private international law prior to the late nineteenth century calls into question the contemporary dichotomy between these spheres.[11] It also, we argue, points to international law's complicity in cleaving the household economy from the national economy. As Knop explains, questions of marriage, family, succession, and women's civil status frequently appeared in earlier international law treatises.[12] Gradually, however, these concerns became subsumed during the long nineteenth century by the formal demarcation of PrIL and Public International Law (PIL).[13] The "public"—the macro-economics of the *polis*—became celebrated as international law's space proper; the "private"—the *oikos*—became international law's gendered "non" space: a domestic matter with little international weight.[14] International law came to operate through mutual

[5] *See, e.g.*, Meg Luxton, More Than a Labour of Love: Three Generations of Women's Work in the Home (1980); Maria Mies, Patriarchy and Accumulation on a World Scale: Women in International Division of Labour (2022) [1986].

[6] Mariana Valverde, *Practices of Citizenship and Scales of Governance*, 13 New Crim. L. Rev. 216 (2010).

[7] *E.g.*, Miriam Bak McKenna & Maj Grasten, *Legal Borderlands in the Global Economy of Care*, 13 Transnat'l Legal Theory 131 (2022).

[8] For an overview of feminist approaches to international law, see Matilda Arvidsson & Maria Elander, *Theoretical and Methodological Approaches to Gender and International Law*, Oxford Bibl. (2022). Exceptions include: Prabha Kotiswaran, Dangerous Sex, Invisible Labor: Sex Work and the Law (2011); Kerry Rittich, Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform (2002); Miriam Bak McKenna, *Feminist Materialism and the Laws of Social Reproduction*, *in* Elgar Handbook on Law and Marxism (Paul O'Connell & Umut Ozsu eds., 2021).

[9] *See, e.g.*, B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 Eur. J. Int'l L. 57 (2010); James T. Gathii, War, Commerce, and International Law (2010).

[10] Martti Koskenniemi, To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1879 (2021); Doreen Lustig, Veiled Power: International Law and the Private Corporation 1886–1891 (2020).

[11] Knop, *supra* note 1, at 362.

[12] *Id.*, *citing* Martin Gallié & Maxine Visotsky-Charlebois, *Le droit des femmes tel qu'il a été enseigné par les Pères fondateurs du droit international public et leurs héritiers. Notes de lecture sur les ouvrages et les manuels du XVI^e au XXI^e siècle, in* Féminisme(s) et droit international: Études du réseau Olympe 195 (Emmanuelle Tourme Jouannet et al. eds., 2016).

[13] The founders of the Institut de Droit International treated public and private international law as united. *See* Martti Koskenniemi, *Expanding Histories of International Law*, 56 Am. J. Legal Hist. 104, 108 (2016). Contemporary PIL, especially the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), provides for women's rights to own and inherit property without discrimination. However, in practice, these questions are rarely dealt with through CEDAW, but instead as matters of PrIL.

[14] *See* Peter Malanczuk, Akehurst's Modern Introduction to International Law 72 (7th ed. 1997).

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recognition between states, reducing "the international" to commercial, diplomatic, and belligerent relations; this process cordoned off "the private-law relations that underlie and support those actions,"[15] making certain forms of power and sites of male privilege invisible.

Restructuring and rescaling the private/public distinction by adopting Knop's suggestion to treat PrIL as part of the international law conversation, therefore brings the multiple contingent social and economic relations reshaping and being shaped by the state and its transnational relations back into focus. It opens new lines of exploration, particularly for histories of international law, of the ways in which the political economy of international law is intimately linked to the gendering economic subordination of women's lives and economic power.[16]

Gender, Property, and the Transnational State

Narrating a history of women's property rights reveals a transnational legal history of "private" regulations of the domestic sphere and the relationship these histories and spheres have to interstate legal, economic, and political transformation. Although largely absent from international legal histories of sovereignty, beginning in the eighteenth century, gendered property rights, especially the regulation of the "marital economy," transformed European states and economies given the role of such laws in establishing the nuclear family home as a central economic sphere.[17] This change also paved the way for the accumulation of women's unpaid labor within the home.[18] As historians of the family Maria Ågren and Amy Erickson note, "most of the institutional framework of early modern economic life took the shape of marriage and inheritance laws." Indeed, states "explicitly acknowledged their dependence on the marital partnership" for strategic ends: from models for state building, to economic reform, to a metaphor for the state itself.[19] The mobilization of the nuclear family model and the role of women in the home, was also central to the imperial enterprise.[20] Intimate relations were central to grafting colonial laws onto societies with markedly different socioeconomic and juridical systems, embedding new conditions of private property ownership which reproduced the hierarchical structure of the sovereign state.[21]

Transnational legal arrangements related to cross-border marriage, succession, and contract forced states and individuals to confront national differences and frictions regarding the regulation of women's private property and were often catalysts for legal change. These encounters, Knop notes, "involved gender relations as defining of the European state's moral core for its own society."[22] PrIL questions regarding marital property rights, in particular

[15] Knop, *supra* note 1, at 362.

[16] In contemporary settings the public/private relationship had been explored by post-colonial and third world feminist intersectional analyses across multiple localities, e.g., J. Oloka-Onyango & Sylvia Tamale, *"The Personal is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 Hum. Rts. Q. 691 (1995); Vasuki Nesiah, *Priorities of Feminist Legal Research: A Sketch, a Draft Agenda, a Hint of an Outline…*, 1 feminists@law 3 (2011).

[17] *E.g.*, Jack Goody, The Development of Family and Marriage in Europe (1986); Amy Louise Erickson, Women and Property in Early Modern England (1993); Leonore Davidoff & Catherine Hall, Family Fortunes: Men and Women in the English Middle Class 1780–1850 (1987).

[18] Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives*, 1 Ann. Rev. Sociology 381 (1989).

[19] *E.g.*, Amy Louise Erickson, *The Marital Economy in Comparative Perspective*, *in* The Marital Economy in Scandinavia and Britain 1400–1900 4 (Maria Ågren & Amy Louise Erickson eds., 2005).

[20] Families of a New World: Gender, Politics, and State Development in a Global Context 1 (Lynne Haney & Lisa Pollard eds., 2013).

[21] *See* Jean Comaroff & John L. Comaroff, 1 Of Revelation and Revolution 68 (1991).

[22] Knop, *supra* note 1, at 368.

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the division between common and individual property entitlements, arose frequently.[23] In Nordic countries, women were guaranteed substantial property rights, and marital property was divided between common property and individually inherited property. The husband was entitled to manage both his wife's part of the marital common property and her individually inherited property, even though he was not legally the owner. In contrast, the English doctrine of coverture automatically vested a wife's property in her husband, rendering her "civilly dead."[24] Calls for revision and reform of the English law were frequently linked to these national differences.[25] Writing in 1735, the anonymous author of *The Hardships of the English Laws in Relation to Wives* lamented the injustice of the English common law compared to other European countries:

> I have been informed by Persons of great Integrity, who have long resided in Portugal . . . that a Wife in Portugal if she brought never a Farthing, has Power to dispose of half her Husband's Estate by Will; whereas a Woman by our Law alienates all her own Property so entirely by Marriage, that if she brought an hundred thousand Pounds in Money, she cannot bequeath one single Penny.[26]

In the Nordics, foreign private law issues of marriage and marital property relations sparked efforts to unify the different national approaches in response to pressure from new transnational commercial forces.[27] A seemingly banal, yet crucial, example was the matter of whether a wife could "shield" her husband against creditors, creating new obstacles to interstate economic activity. Women's property rights enjoyed considerable attention in foreign private law relations, leading to new forms of contractual relations and regulation.[28] Reflecting on these eighteenth-century harmonizing efforts, Maria Ågren notes, "there is much to suggest that there was a common European system set up to protect women's economic interests and to restrict women as independent economic actors."[29]

As the nineteenth century progressed, issues of interstate women's marital property law relations became increasingly tied to the reinforcement of state sovereignty. Domestic and household relations became central to the protection of national values and traditions, evolving in parallel with novel ideals of privacy linked to notions of morality and respectability for women. PrIL cases frequently galvanized state resistance to foreign influence, particularly regarding progressive women's property rights—seen by many as a danger to the family structure in which women remained economically dependent on their husbands.[30] Reforms enhancing women's economic power—such as to the UK's *1882 Married Women's Property Act*—were often resisted by other common law jurisdictions. Despite rising rates of wife abandonment during the nineteenth century, leaving women without matrimonial support, Canadian courts and legislators refused to follow English precedents in order to preserve the patriarchal hierarchical of the Canadian family, which was "never viewed as a partnership of equals."[31]

[23] *E.g.*, Saul v. His Creditors, 5 Mart. (N.S.) 569 (La. 1827).

[24] Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. Libr. J. 459 (2002).

[25] Erickson, *supra* note 17, at 71.

[26] Anonymous, The Hardships of the English Laws in Relation to Wives 29–30 (1735). *See also* Rita J. Dashwood & Karen Lipsedge, *Women and Property in the Long Eighteenth Century*, J. Eighteenth-Century Stud. 335 (2021).

[27] Allan Phillip, *The Scandinavian Conventions on Private International Law*, 96 Recueil des Cours (1959).

[28] Maria Ågren, Domestic Secrets: Women and Property in Sweden 1600–1857 208 (2009).

[29] *Id.*

[30] Constance Backhouse, *Married Women's Property Law in Nineteenth-Century Canada*, 6 L. & Hist. Rev. 211 (1988).

[31] *Id.* at 242.

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States often foreclosed the possibility of foreign influence by legislating against the permissibility of foreign marriage for women.[32] PrIL disputes regarding marriage increasingly arose in the context of the expanding empire, leading to new PrIL doctrinal developments. In *Bethell v. Hildyard*,[33] concerning the validity of the marriage between an English citizen and a Rolong woman, the English Court of Chancery rejected an inheritance claim by the deceased's only daughter on the grounds of the illegitimacy of the marriage. The marriage, conducted in accordance with Rolong customary law, was "polygamous" and therefore invalid under English law. Writing some eight years later, Dicey used the case to illustrate that PrIL doctrine would only apply if the foreign law concerned emanated from a state that has "reached a similar stage of civilisation."[34] The standard of civilization in English PrIL emanating from *Bethell* remained in operation up until the publication of the sixth edition of Dicey's *Conflict of Laws* in 1949.[35]

The principle that the husband's *lex domicilii* governed cross-border marriages in PrIL, similarly severed the possibility of a wife "importing" her rights and status from another jurisdiction. This approach was codified in many national jurisdictions in the latter half of the nineteenth century. Thus, when the UK law of coverture was gradually liberalized, the passing of the UK Nationality Act, obliging women to take their husband's nationality on marriage, prevented any women's property rights and entitlements emanating from more liberal jurisdictions from being effectuated. Notwithstanding the hardships incurred by women, PrIL scholarship and practice were largely agnostic to the subsequent rise of the principle of (women's) "dependent nationality" across multiple jurisdictions. The principle rested, as Knop notes "on the conviction that a family should have the same nationality and on the patriarchal notion that the husband should determine that nationality."[36] The principle adversely affected not only marital property rights, but wider economic and social benefits, particularly for lower class women. Women faced deportation and even statelessness and the loss of civil rights linked to nationality. Yet, commentators stressed the necessity of the prevailing approach to matrimonial nationality for the functioning of the interstate system. In an early text on PrIL from 1923, Rend Foignet wrote, "It is in conformity with the spirit of marriage that spouses have the same nationality." As he argued, marriage between individuals of different nationalities would produce antagonisms not only in the home, but between states themselves.[37]

Concluding Remarks

This brief historical snapshot of women's property rights during the nineteenth century and their intersection with international law has sought to explore how a rescaling and reconfiguration of the private/public divide can generate new insights into the deeper structures of gender, capitalism, and international law. Reinscribing PrIL as part of international law's conversations reveals linkages between family, marriage, the market, and the state that are deeply implicated in trans/international governance, past and present, but which are often hidden from view.

[32] *E.g.*, Iber Ortayli, *Ottoman Family Law and the State in the Nineteenth Century*, *in* IBER ORTAYLI, STUDIES ON OTTOMAN TRANSFORMATION 149 (2010); Hanan Kholoussy, *The Private Affairs of Public Officials: Mixed Marriage and Diplomacy in Interwar and Post-Mubarak Egypt*, 54 DIE WELDT DES ISLAMS 483 (2014).

[33] Bethell v. Hildyard (1888) 38 Ch. D. 220 (Eng.).

[34] A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 29 (1896). *See also* Hyde v. Hyde and Woodmansee (1866) [LR] 1 P. & D. 130 (Eng.).

[35] DICEY'S CONFLICT OF LAWS (J.H.C Morris ed., 6th ed. 1949).

[36] Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 558 (2001).

[37] *Id.* at 559 (*quoting* Rend Foignet).

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The exercise of uncovering such connections is not simply a matter of academic curiosity—feminist or not. Rather, it is imperative if international law is to address "the various, overlapping forms of subjugation of women's lives,"[38] and the relationship international law has played in maintaining an international economic order that has often rendered invisible and devalued the role of intimate relations in the formal economy.

[38] Chandra Talpade Mohanty, *"Under Western Eyes" Revisited: Feminist Solidarity Through Anticapitalist Struggles*, 28 SIGNS 495, 515 (2003).

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