

THE PUBLIC/PRIVATE DISTINCTION AND THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

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Women do two thirds of the world's work Yet ... women earn no more than one tenth of the world's income and own less than one per cent of the world's property.¹

Why has gender not been an issue in international law? Although international lawyers have been forced to confront the challenge made to the traditional canons of international law by developing nations, the deeply gendered nature of their discipline has remained uncontroversial and unexplored. In this paper I argue that international law is built on paradigms which privilege a male perspective, one of which is a distinction between public and private spheres of life.² I first outline the theoretical basis of the public/private distinction and the feminist critique of the dichotomy. I then examine the operation of the public/private distinction in one particular area of international law: the right to development.

The Public/Private Distinction

The dichotomy between public and private activities and spheres is central to liberalism – the dominant political, and legal, philosophy of the West.³ Thus John Locke, one of the most influential architects of modern liberal thought, drew distinctions between reason and passion, knowledge and desire, mind and body. The first of each of these dualisms was associated with the public sphere of rationality, order and political authority; the latter with a private sphere of subjectivity and desire.⁴

How did the dichotomy between the public and private spheres become gendered? Women had no place in the public order and became associated with irrational desire. Locke viewed women as naturally inferior to men, a condition

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1 UN Doc E/CN.4/AC.39/1988/L.2 para 59.

2 See generally Charlesworth H, Chinkin C, and Wright S, "Feminist Approaches to International Law" (unpublished paper 1990).

3 For a historical account of the distinction in Western thought see Elshtain JB, *Public Man, Private Women* (1981).

4 Locke J, *Two Treatises of Government* (Laslett P (ed) 1965). See Elshtain JB, above n 2, pp 116–127.

which was the result of God's punishment of Eve by making her bear children.⁵ So although he regarded authority in the public, political sphere as based on consent, and natural differences irrelevant to the equality of men with one another, Locke could argue that the basis of men's authority over women in the private, familial sphere was nature.⁶ The work of John Stuart Mill two centuries later continued this tradition of applying different standards to the two spheres of life. In his work *On the Subjection of Women*,⁷ Mill argued strongly for equal rights for women in the public, political sphere. He nevertheless regarded a division of labour assigning women to the world of home and hearth as the most suitable and appropriate.⁸

The centrality of the public/private distinction in liberal thought continues today. And it is a dominant feature of the organisation of Western society. As Sandra Harding has said, the distinction "cannot be shucked off by mental hygiene and willpower alone."⁹ But the division into public and private spheres is not a simple, monolithic construct.

First, there is great debate among liberals as to where precisely the boundary between the two spheres lies. Secondly, as Carole Pateman has pointed out, notions of public and private are often used in quite different ways than those identified by Locke. Locke distinguished a private, domestic world from that of civil society, the world of politics and men. In modern liberalism the purely domestic sphere is ignored as an area of concern and "[t]he separation between private and public is ... re-established as a division *within* civil society itself, within the world of men."¹⁰ Thus references to a dichotomy between the public and private can refer to the distinction between politics and economic and social life or between state and society. The western legal classifications of public law, which concerns the state, and private law, which regulates relationships between individuals,¹¹ rest on precisely this type of public/private distinction. Unlike Locke's public/private scheme, here the private sphere, in which the pursuit of individual interests and enterprise takes place, is regarded as central.¹²

5 Locke J, above n 4, 209–210. See Clark LMG, "Women and Locke: Who owns the apples in the Garden of Eden?" in Clark LMG & Lange L (eds), *The Sexism of Social and Political Theory* (1979) pp 6, 17–18.

6 Locke J, above n 4, p 82.

7 Reprinted in Rossi A (ed), *Essays on Sex Equality* (1970) p 125.

8 See O'Donovan K, *Sexual Divisions in Law* (1985) pp 8–9.

9 Harding S, "The instability of the analytical categories of feminist theory" (1986) 11 *Signs* 646 quoted in Stevens M, "Why Gender Matters in Southeast Asian Politics" (1989) *Asian Stud Rev* 4, 5.

10 Pateman C, "Feminist Critiques of the Public/Private Dichotomy" in Benn SI & Gaus GF (eds), *Public and Private in Social Life* (1983) pp 281, 285.

11 See Tay A & Kamenka E, "Public Law – Private Law" in Benn SI & Gaus GF, above n 10, pp 67, 82–83.

12 Pateman C, above n 10, p 285.

Another function of the dichotomy in liberal jurisprudence is to demarcate areas appropriate for legal regulation from those which come within the sphere of personal autonomy. A well known passage from the 1957 Wolfenden Committee's Report on Homosexual Offences and Prostitution illustrates this well: "... there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business."¹³

The Feminist Critique of the Public/Private Distinction

Challenging the separation and opposition of the public and private domains, in the original Lockean sense, in liberal theory and practice is regarded by many western feminists as a crucial aspect of their project.¹⁴ Liberalism asserts that it pays equal concern and respect to all individuals and because of this lays claim to the qualities of objectivity, abstractness and neutrality. As described by liberal theorists, the distinction between public and private realms operates generally and neutrally with respect to individuals. However, in Western society women are relegated to the private sphere of home, hearth and family. The public sphere of workplace, law, economics, politics, intellectual and cultural life is regarded as the province of men. This phenomenon is explained as a matter of nature (Locke), convenience (Mill) or individual choice.

The feminist response to these claims is that the public/private distinction in fact operates both to obscure and legitimate men's domination of women. Feminists link the western identification of women with the domestic sphere with the separation of production from the household and the "privatisation" of the family in the Eighteenth Century together with the growth of capitalism and deeply held beliefs about gender.¹⁵ The public/private dichotomy is gendered: it is a "metaphor for the social patterning of gender, a description of sociological practice, and a category grounded in experience."¹⁶ It is also a normative distinction, for greater significance and power attaches to the public, male world. The assignment of women to the domestic sphere entrenches their inequality with men, for women are regarded as dependent on men for subsistence. Moreover the privacy of domestic life makes women's concerns invisible and ensures the preservation of the status quo.

Feminist legal scholars have only recently begun to examine the significance of the public/private distinction in law. It is deeply embedded in western legal structures and the vocabulary of the distinction is built into the language of the law itself. Law lays claim to rationality, neutrality and authority, qualities associated with the public sphere, and is defined in opposition to supposed

13 (1957) para 61. See O'Donovan K, above n 8, pp 8–9.

14 See eg Garmanikow E & Purvis J, "Introduction" in Garmanikow E et al (eds), *The Public and the Private* (1983) pp 1, 3; Pateman C, above n 10, p 281.

15 Pateman C, above n 10, p 286.

16 Garmanikow E & Purvis J, above n 14, p 5.

characteristics of women and the private sphere, feeling, subjectivity and emotion.¹⁷

The distinction between public and private law is familiar to all western lawyers. The feminist concern however is with the public/private dichotomy in law in two different senses: the way that the law has been used to exclude women from the public sphere – from professions, from the marketplace, from the vote;¹⁸ and a more basic form of the dichotomy, between what is considered the business of law and what is left unregulated. Analyzing the distinction in this latter sense can be particularly useful in the area of international law.

In her book *Sexual Divisions in Law*, Katharine O'Donovan defines the private realm in the same way as some modern liberal philosophers: the area of life into which the law will not intrude, which is "not the law's business."¹⁹ Because there is a large coincidence of the legally unregulated areas of social, economic and moral life and issues such as the family, home and sexuality, which are associated with women, O'Donovan argues that the legal translation of the public/private distinction plays a major role in the modern subordination of women. She goes further than the liberal notion of privacy, however, by recognising a distinction between "areas of privacy that are unrecognised and invisible [e.g. lesbianism] and those that are specifically delimited as private [e.g. homosexuality (at least in some jurisdictions)]."²⁰ This notion of the private, then, includes all unregulated activities whether legally designated as private or not. The law is both central to concepts of public and private and crucial in constructing the distinction between them.²¹

Why is lack of regulation of particular areas of social life significant for women? Some feminist jurists argue that "law's absence devalues women and their functions: women are simply not important enough to merit legal regulation."²² But it is important also to recognise that a deliberate policy of non-intervention²³ by the state does not signify non-control or neutrality.²⁴ Thus lack of regulation of rape in marriage supports and legitimates the power of husbands over wives. Further, regulation of areas such as employment, taxation,

17 See Olsen F, "Feminism and Critical Legal Theory: An American Perspective" (1990) 18 *Int J of the Sociology of Law* 199, 201.

18 See, eg, Polan D, "Toward a Theory of Law and Patriarchy" in Kairys D (ed), *The Politics of Law* (1982) pp 294, 298; Taub N & Schneider E, "Perspectives on Women's Subordination and the Role of Law" *ibid* 117, pp 118–120.

19 O'Donovan K, above n 8, p 3.

20 *Ibid* p 7.

21 *Ibid* p 7.

22 Taub N & Schneider E, above n 18, p 122.

23 Frances Olsen points out the incoherence of the term "intervention": particular activities can be characterised as intervention or non-intervention depending on the perspective taken. "The Myth of State Intervention in the Family" (1985) 18 *U of Mich J of L Reform* 835.

24 O'Donovan K, above n 8, p 7.

social security and crime have significant, if indirect, impact on the private sphere and reinforce a particular sort of family unit – a nuclear family in which there is a division of labour between men and women.²⁵ Lack of direct state intervention in the name of protection of privacy can thus disguise the inequality and domination exercised in the private sphere.²⁶

The Public/Private Distinction and International Law

Distinctions between spheres of public and private define the scope of international law. One such distinction is between public international law, the law governing the relations between nation states, and private international law, the rules about conflicts between national legal systems. Another is the distinction between matters of international (public) concern and matters "private" to states, considered within their domestic jurisdiction, and in which the international community has no recognised legal interest.²⁷ Yet another is the line drawn between law and other forms of private knowledge, such as morality.²⁸

Like national legal systems, international law is constructed within a "public" world, although national and international "public" spheres are often differently defined. International law operates in the most public of all public worlds, that of nation states. One consequence of this has been, until recently, the invisibility of individual or group concerns in international law. The development of human rights law in the second half of this century has altered one set of boundaries between public and private in international law to allow the law to address violations of designated individual and group rights. This development, however, has not challenged the much deeper public/private dichotomy based on gender.²⁹

The Right to Development

Many principles of international law rest on and reproduce a public/private distinction. I focus here on a particular principle of international law, the right to development, and argue that it is an example of how the international legal order privileges a male perspective and fails to accommodate the realities of women's lives. The problematic nature of current development practice for Third World women goes of course much deeper than the international legal formulation of

25 Ibid pp 14–15. See also Thornton M, "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 AJLS 5, 6.

26 See O'Donovan K, above n 8, p 12; Taub N & Schneider E, above n 18, pp 121–122; Thornton M, above n 25, p8.

27 Article 2 (7), United Nations Charter.

28 Eg, *South West Africa* cases, ICJ Rep 1966, p 6. Cf *Western Sahara* case, ICJ Rep 1975, p 12 at 69: "economics, sociology and human geography are not law" (Judge Gros sep op).

29 See Byrnes A, "A Feminist Analysis of International Human Rights Law" and Wright, S, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions", both in this volume.

the right to development. But the rhetoric of international law both reflects and reinforces a system that contributes to the subordination of women.

The right to development is of relatively recent legal formulation and its status in international law is controversial.³⁰ It was an important aspect of the New International Economic Order promoted, ultimately unsuccessfully, in the 1970s and 80s by Third World countries. The proponents of the right present it as both an individual and a collective right which responds to the phenomenon of global interdependence,³¹ while its critics argue that it is vague and unenforceable.³²

The 1986 United Nations Declaration on the Right to Development³³ describes the content of the right as the entitlement "to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."³⁴ Primary responsibility for the creation of conditions favourable to the right is placed on States:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.³⁵

The right is apparently designed to apply to all individuals within a State and is assumed to benefit men and women equally: the preamble of the UN Declaration twice refers to the Charter exhortation to promote and encourage respect for human rights for all without distinction of any kind such as race or sex. Moreover, Article 8 of the Declaration places an obligation on States to ensure equality of opportunity for all in access to basic resources and the fair distribution of income. It states that "effective measures should be undertaken to ensure that women have an active role in the development process." Such a specific reference to women in a generally applicable international formulation of rights is unusual and indicates an apparent sensitivity to issues of gender equality. Why, then, is the Declaration nevertheless unsatisfactory from a feminist perspective?

30 Alston P, "Making Space for New Human Rights: the Case of the Right to Development" (1988) 1 Harv Hum Rts YB 3; Rich R, "The Right to Development: A Right of Peoples" in Crawford J (ed), *The Rights of Peoples* (1988) p 39.

31 Eg M'Baye K, "The Right to Development as a Human Right" (1972) 5 Rev des Droits de l'Homme 503.

32 Eg Donnelly J, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal W Int L J 473; Brownlie I, "The Rights of Peoples in Modern International Law" in Crawford J (ed), above n 30, p 1 at 14-15.

33 GA Res 41/128.

34 Article 1(1).

35 Article 2(3).

First, the acknowledgement of the need to involve women in the development process is only token in the context of the Declaration as a whole. Other provisions of the Declaration indicate that discrimination against women is not seen as a major obstacle to development, nor to the fair distribution of its benefits. For example, one aspect of the right to development is the obligation on States to take "resolute steps" to eliminate "massive and flagrant violations of the human rights of peoples and human beings." The examples given of such massive and flagrant violations include apartheid and race discrimination but do not include sex discrimination.³⁶ The lack of attention paid to inequality between men and women as an issue in development is a feature of influential writing on the topic³⁷ and of precursor resolutions to the Declaration on the Right to Development.³⁸ Although subsequent United Nations deliberations have given more regard to gender implications of the right to development,³⁹ these concerns are presented as quite discrete, soluble by the application of special protective measures, rather than as central to the issue of development.⁴⁰

A second, more fundamental, objection to the Declaration is that the model of development on which it is built exacerbates the inequality of Third World women. While the formulation of the right to development does not rest on a simple economic model of development, and includes within it a synthesis of all recognised human rights, redress of economic inequality is at its heart.⁴¹ An assumption of the international law of development is that underdevelopment is

36 Article 5.

37 Eg, Independent Commission on International Development Issues, North-South: A programme for survival (1990) (the "Brandt Report") pp 59-62.

38 Eg, Declaration on Social Progress and Development GA Res 2542 (1969); Declaration on the Establishment of a New International Economic Order GA Res 3201 (1974); Programme of Action on the Establishment of a New International Economic Order GA Res 3202 (1974); Charter of Economic Rights and Duties of States GA Res 3281 (1975).

39 Eg, Analytical compilation of comments and views on the implementation of the Declaration on the Right to Development prepared by the Secretary General UN Doc E/CN.4/AC.39/1988/L.2 paras 59-63; Report prepared by the Secretary General on the Global Consultation on the Realization of the Right to Development as a Human Right UN Doc E/CN.4/1990/9 paras 15, 42, 51, 52, 59.

40 The section of the Secretary General's report dealing with "Obstacles to the implementation of the right to development as a human right", for example, mentions failure to respect the right of peoples to self determination, racial discrimination, apartheid, foreign occupation, restrictions on transfers of technology and the consumption patterns of industrialised countries as serious barriers to the realisation of the right to development, but contains no reference to sex discrimination. Ibid paras 27-35. Compare the detail of Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 UN Doc A/Res/34/180.

41 See Bulajic M, *Principles of International Development Law* (1986) 49-50, 333; Turk D, "The Human Right to Development" in van Dijk P et al (eds), *Restructuring the International Economic Order* (1987) p85; Schachter O, "The Evolving International Law of Development" (1976) 15 Col J of Transnational L 1.

caused by a failure to meet the model of a capitalist economy. Development means industrialisation and westernisation.⁴²

Three major paradigms dominate theories of the causes of underdevelopment: shortages of capital, technology, skilled labor and entrepreneurship; exploitation of the wealth of developing nations by richer nations; and economic dependence of developing nations on developed nations.⁴³ Modernisation is assumed to have the same impact on women as on men. The domination of women by men within the family and in society generally does not enter the traditional development calculus: "development" as economic growth above all is not concerned with the lack of benefits or disadvantageous effects this growth may have on half of the society it purports to benefit.⁴⁴

Over the last twenty years, considerable research has been done on the role of women in Third World development.⁴⁵ This research has documented the crucial role of women in the economies of developing nations, particularly in agriculture. It has highlighted the significant inequality of women within Third World households.⁴⁶ It has also pointed to the often adverse impact of "development" on Third World women's lives. The international legal order, like many international and national development policies, has not taken this research into account in formulating the right to development. "Human persons" may be declared the central subject of development, but the practice of development has exacerbated women's inequality in developing countries.⁴⁷ How can this asymmetry in the effects of development on women and men be explained? One reason is that the theory and practice of development depends on a distinction between public and private spheres.

Some feminist scholars have cautioned against universal explanations of the universally observed⁴⁸ domination of women by men. Particular cultural and

42 Bulajic M, above n 41, 42-46; de Waart P, "State Rights and Human Rights as Two Sides of One Principle of International Law" in de Waart P et al (eds), *International Law and Development* (1988); Kwakwa E, "Emerging International Development Law and Traditional International Law - Congruence or Cleavage?" (1987) 17 *Georgia J of Int and Comp L* 431.

43 Thomas P & Skeat H, "Gender in Third World Development Studies: An Overview of an Underview" (1990) 28 *Aust Geographical Stud* 5, 11. See also Henshall-Momsen J & Townsend J, *Geography of Gender in the Third World* (1987) p 16; Jacqueline J, "Women and Modernization Theory: A Decade of Feminist Criticism" (1982) 34 *World Politics* 267.

44 See generally Thomas P & Skeat H, above n 43.

45 The first major study was Boserup E, *Women's Role in Economic Development* (1970). For a valuable survey of this literature see Thomas P & Skeat H, above n 43.

46 Eg, Dreze J & Sen A, *Hunger and Public Action* (1989) Chapter 4.

47 Henshall-Momsen J & Townsend J, above n 43, p 15; United Nations, *World Survey on the Role of Women in Development* (1986) pp 19-20.

48 Henshall-Momsen J & Townsend J, above n 43, 28: "in the history and geography of humanity, women's subordination is omnipresent. ...The forms of subordination differ greatly, but, all over the world, women's work tends to be defined as of less value than men's and women tend to have far less access to all forms of social,

social contexts, they argue, must be taken into account and "universal" analytic categories such as the public/private distinction run the risk of simply being shorthand for biological explanations of women's subordination.⁴⁹ Maila Stivens, for example, points out that it is very difficult to specify what the private domain is in agrarian societies in South East Asia. She observes the complete gendering of all levels of social life right across the traditional public/private division and argues that we should expand our notion of politics rather than analyse all societies within the confines of a particular western construction of the public/private distinction.⁵⁰

The distinction remains a western one only if the content of each sphere is defined by western experience – if women are regarded as always opposed to men in the same ways in all contexts and societies, for example if women's social inferiority is universally attributed to their role in bearing and raising children.⁵¹ What is important to observe universally is that it is not the activity which characterises the public and the private, but rather the actor:⁵² that is, women's subordination to men is mediated through the public/private dichotomy. What is "public" in one society may well be "private" in another, but women's activities are consistently devalued by being construed as private.

In the context of the international law of development, the particular distinction between public and private observed in western societies still has explanatory force. The international law and practice of development allows the ideology and practical consequences of the distinction to be exported from the developed to the developing world. In this way the law functions in a manner parallel to that of colonial administrators whose "reforms" often weakened the position of women in colonial societies.⁵³

One implicit aspect of the international right to development is development assistance and aid. International and national efforts are to be aimed at eliminating "economic deprivation, hunger and disease in all parts of the world without discrimination" and international co-operation should be aimed, *inter alia*, at "maintenance of stable and sustained economic growth", increasing concessional assistance to developing countries, building world food security and

economic and political power." See also Rosaldo MZ, "Women, Culture and Society: a Theoretical Overview" in Rosaldo MZ & L. Lamphere (eds), *Women Culture and Society* (1974) p 19.

49 H. Moore, *Feminism and Anthropology* (1988) 25–30; H. Eisenstein, *Contemporary Feminist Thought* (1986) pp 20–6; Rosaldo MZ, "The use and abuse of anthropology: reflections on feminism and cross-cultural understanding" (1980) 5 *Signs* 389; Stivens M, above n 9, 4; Pateman C, above n 10.

50 Stivens M, above n 9, 7.

51 Imray L & Middleton A, "Public and Private: Marking the Boundaries" in Garmanikow E et al (eds), above n 14, pp 12, 13–14. Cf Rosaldo MZ, above n 48.

52 Imray L & Middleton A, above n 51, p 16; Thomas P & Skeat H, above n 43, p 9. See also Moore H, above n 49, pp 54–9.

53 See Boserup E, above n 45; Moore H, above n 49, p 44.

resolving the debt burden.⁵⁴ Women and children are generally the primary victims of poverty and malnutrition.⁵⁵ Women, therefore, should have much to gain from an international right to development. Proponents of modernisation theories assert that the active intervention of developed nations through aid will have a positive effect on women in developing countries.⁵⁶ The generality and apparent universal applicability of the right to development as formulated in the UN Declaration is undermined, however, by the fundamentally androcentric nature of the international economic system and its reinforcement of the public/private distinction.

The distinction between the public and the private spheres of existence operates to make the work and needs of women invisible. Economic visibility depends on working in the public sphere and unpaid work in the home or community is categorised as "unproductive, unoccupied, and economically inactive."⁵⁷ Marilyn Waring has recently argued that this division, which is institutionalised in developed nations, has been exported to the developing world in part through the UN System of National Accounts (UNSNA) and operates as another tool of colonialism.⁵⁸ The invisibility of women's work thus retards *their* right to development.

The UNSNA, developed largely by Sir Richard Stone in the 1950's, allows States' financial position to be monitored, trends in national development to be tracked and one nation's economy to be compared with that of another. It will therefore influence the categorisation of nations as developed or developing and the style and magnitude of the required international aid. The UNSNA measures the value of all goods and services that actually enter the market and of other non-market production such as government services provided free of charge.⁵⁹ The UNSNA designates some activities as outside the "production boundary"

54 GA Res 41/133 (1986). See also Rich R, above n 30, pp 46-8; Schachter O, above n 41, 9-13.

55 See Dreze J & Sen A, above n 46, Ch 4; Waring M, *Counting for Nothing* (1988) p 34.

56 Many international aid programmes have a "Women in Development" [WID] component. These have been of limited success. Some at least have suffered from lack of institutional support and have remained outside the mainstream of development work. More importantly, WID projects have generally done little more than integrate women into a narrowly defined notion of development. They have not challenged the assumptions of the modernisation approach to development, particularly the sexual division of labour. New productive roles for women, which do not disrupt patterns of domestic labour, have been identified. As Elizabeth Reid commented at the Gender and International Law Conference, at which this paper was first presented, WID projects have assumed that women are unemployed or underemployed and ignore the economic value of women's unpaid labour. See also Parpart JL, "Introduction" in Parpart JL (ed), *Women and Development in Africa* (1989) pp 3, 4; Thomas P & Skeat H, above n 43, pp 11-3.

57 Dreze J & Sen A, above n 46, 57; Waring M, above n 55, 13.

58 Waring M, above n 55, 83.

59 Ibid 27.

and thus they are not measured. Economic reality is constructed by the UNSNA's "production boundaries" in such a way that reproduction, child care, domestic work and subsistence production are excluded from measurement of production and economic growth.⁶⁰ This view of women's work as non-work is nicely summed up in a report in 1985 by the UN Secretary General to the General Assembly on the "Overall Socioeconomic Perspective of the World Economy to the Year 2000". It said: "Women's productive and reproductive roles tend to be compatible in rural areas of low income countries, since family agriculture and cottage industries keep women close to the home, permitting flexibility in working conditions *and require low investment of the mother's time.*"⁶¹

The devaluation of "private" women's work is one explanation for the observation that "in general, the process of development appears to increase the burdens of Third World women".⁶² The effects of the assignment of the work of women to a different sphere than the work of men, and their consequent categorisation as "non-producers", are detrimental to women in developing countries in many ways and make a woman's right to development considerably less attainable than a man's.

The invisibility of women's work has, first of all, serious consequences in an immediate physical sense, in that the overwork of many women in developing countries reduces their life expectancy.⁶³ In many Third World countries women work a "double day" – as agricultural workers and as homemakers and mothers.⁶⁴ Moreover, women may not have equal claim to basic necessities of life. For example, Dreze and Sen have identified the significance of perceptions of relative economic contributions in the familial division of food, resources and health care in some Third World countries. They observe that "[i]n determining how the family benefits should be divided, importance seems to be attached ... to who is 'contributing' how much to the joint prosperity of the family. ... [In] the accounting of respective 'contributions', paid employment and outside 'gainful' activities seem to loom particularly large."⁶⁵

Secondly, the endorsement of the public/private distinction in international economic measurement excludes women from many aid programs because they are not considered workers, or because they are regarded as less productive than

60 Ibid 25. Many national measures omit unpaid family workers entirely from measurement of women in the labour force: Henshall-Momsen J & Townsend J, above n 43, 56.

61 UN Doc. A/40/5198/23/1985 quoted in Waring M, above n 55, 177 (*italics added*).

62 Henshall-Momsen J & Townsend J, above n 43, p 16.

63 Waring M, above n 55, pp 144–145. See also Henshall-Momsen J & Townsend J, above n 43, pp 58–59.

64 Moore H, above n 49, p 43; Rathberger EM, "Women and Development: An Overview" in Parpart JL (ed), above n 56, pp 19, 21.

65 Dreze J & Sen A, above n 46, 52.

men.⁶⁶ If aid is provided to women, it is often to marginalise them: foreign aid may be available to women only in their guise as mothers⁶⁷ although at least since 1967 it has been recognised that women are responsible for as much as 80 per cent of food production in developing countries as well as most "domestic" work.⁶⁸ The non-recognition of women's significant role in agriculture and the lack of concern with the impact of development on women means that the potential of any right to development is jeopardised from the start. The recent lengthy evaluation by the World Bank of its twenty-one years in rural development simply noted that "lack of information and focus on women farmers as a sub-category of beneficiary groups has had serious consequences for achieving project goals."⁶⁹

Growing food crops is generally subsistence agricultural activity and is usually considered the task of women.⁷⁰ But because it is not seen as an activity contributing to the market economy, support from aid programs is minimal. For example in a World Bank Agriculture and Development Program in Sierra Leone, women were regarded as ineligible for financial and technical aid because their land holdings were too small.⁷¹ Priority given to export crops may also mean that local elites and transnational companies acquire significant land holdings, further reducing land available for women.⁷²

"Development" and cash crops may bring the illusion of prosperity but this is very often at the expense of the autonomy of women and a fall in overall nutritional and environmental standards. The report, *The State of the World's Women 1985* prepared for the UN World Conference on Women in Nairobi provides telling examples of the practical effect of the public/private distinction on women's lives in developing countries and the failure of development programs to take account of this. In the Ivory Coast food staple shortages arose from men claiming some of the best agricultural land for food crops where

66 Ruth Pfanner gives an example of an official Australian aid programme in the Pacific where supervision and training in beef cattle production was directed exclusively at men, ignoring Melanesian women's traditional role in animal husbandry. Pfanner R, "Australian Foreign Aid and Women in the Third World" in Grieve N & Burns B (eds), *Australian Women: New Feminist Perspectives* (1986) pp 305, 307.

67 A World Bank report on development projects it had sponsored acknowledged that it had supported women's projects almost exclusively in the areas of "health, hygiene, nutrition and infant care." World Bank, *World Bank Experience with Rural Development 1965-1986* (1987) 89. See generally Rogers B, *The Domestication of Women: Discrimination in Developing Societies* (1980).

68 Charlton S, *Women in Third World Development* (1984) 61.

69 Above n 67.

70 Columbo-Sacco D & Lopez-Morales G, *The Missing Half* (1975) p 11. Dixon R, "Land, Labour and the Sex Composition of the Agriculture Labour Force: An International Comparison" (1983) 14 *Development and Change* 347.

71 World Bank, above n 67, 89.

72 Thomas P & Skeat H, above n 43, 7.

women had been growing food.⁷³ And even investment in development aid for food production can be useless if given to men who are not involved in this work rather than to women who are. Thus the Nairobi Report notes that planners had aimed to make Gambia self-sufficient in rice by 1980. A disastrous 300 per cent increase in rice imports between 1966 and 1979 occurred because although women grew 84 per cent of Gambia's rice, agricultural advice and investment was only given to men.⁷⁴ Women may also be excluded from the benefits of development programs and innovations because information about them is disseminated through male communication networks.⁷⁵

A third consequence of the relegation of women's work to a private, unmeasured sphere is that women may not be seen as full bearers of a right to development on the assumption that they are supported by male household heads and that the low level of their economic activities is inevitable and appropriate.⁷⁶ This in turn may justify giving less priority to the education and training of women than is given to men. Thus ECOSOC reported in 1986 that in developing countries girls formed up to 75% of children who were not enrolled in primary education. It went on to observe that "[e]fforts to achieve equality of educational opportunity for women have been hampered by the need to make difficult choices among competing demands for limited and even declining resources."

In other words, the education of women is seen as of little immediate economic return and dispensable in times of economic crisis. Women have no role in the public world and thus need no education or training. Moreover aid programs may often replicate sex stereotypes in training schemes, providing training in agriculture, mechanics, carpentry and business for men, while offering domestic training to women.⁷⁷ The reproduction of the public/private distinction in the international economic system thus reinforces patterns of unequal social relations between men and women by supporting the notion of a woman as the property of a man.

Fourthly, the distinction drawn between the public and private sphere means the benefits obtained from improvement or development of work methods may offer little relief to women. Women are routinely assigned the most tedious, time consuming and arduous tasks. Marilyn Waring cites a UN case study in Gambia which showed that women's working time in agriculture rose from nineteen to twenty hours when improved methods were introduced, while men's working time fell from eleven to nine hours.⁷⁸ Also, the premium placed on the growth of the market economy as a measure of development can mean that food availability is lessened as subsistence farmland is taken for cash crops and men

73 United Nations, *The State of the World's Women 1985* (1985) 8.

74 *Id.*

75 Thomas, P & Skeat, H, above n 43.

76 Waring, M, above n 55, 10.

77 Thomas P & Skeat H, above n 43, pp 8-9; Rathberger EM, above n 64, pp 22-23.

78 Waring M, above n 55, p 16. See also Rathberger EM, above n 64, p 22.

are paid an income.⁷⁹ Although the increased industrialisation of the Third World has meant greater employment opportunities for women, this has not increased their economic independence or social standing and has had little impact on women's equality. Women are found in the lowest paid and lowest status jobs without career paths and their working conditions are often discriminatory and insecure.⁸⁰ There is little difference in the position of women in developing nations with a socialist political order.⁸¹ The dominant model of development assumes that any type of paid employment is better than unpaid work⁸² and the potential for increased inequality for women and decline in their economic position is not taken into account.

Yet another consequence of women's invisibility as workers in the domestic sphere is that even when they do work in the public area, little attention is paid to their work conditions and possible exploitation. As Waring notes, "[s]ince housework is seen as a women's primary activity, and is not defined, anything else that she does is not work either, because it is secondary to housework."⁸³ Pervasive poverty is a widespread result of the invisibility of women's work. Households headed by women (1984 ILO figures for developing countries show that three out of ten households were headed by women) must combine income earning and home and family maintenance. Yet women in this position are less likely to be employed than their male counterparts and, if working, are likely to be less skilled and with a consequently reduced earning capacity.⁸⁴

Conclusion

The operation of the public/private distinction in international law is one reason why gender has not been an issue in international law: this discipline, as many others, has defined gender out of existence. Despite the claim of international law to abstract, general principles of universal applicability, it is in fact constructed on the silence of women. Newly emerging principles of international law continue this silence.

The controversy about the right to development among international lawyers has not extended to the skewed notion of development on which it is based. The international formulation of the right draws no distinction between the economic position of men and women. In using the neutral language of development and

79 See Marilyn Waring's account of the effects of commercial agriculture in Colombia. Waring M, above n 55, p 192.

80 Thomas P & Skeat H, above n 43, p 8; Parpart JL, above n 56, pp 5-6.

81 See Molyneux M, "Women's Emancipation under Socialism: A Model for the Third World?" (1982) 9 World Development 1019.

82 Thomas P & Skeat H, above n 42, p 11.

83 Waring M, above n 55, p 70. See also Bennholdt-Thomsen V, "Why Do Housewives Continue to be Created in the Third World, too?," in Mies M et al (eds), *Women: The Last Colony* (1988) p 159.

84 Waring M, above n 55, pp 189-190.

economics, it does not challenge the pervasive, and detrimental, assumption that women's work is of a lesser order than men's. The right thus rests on and reinforces a public/private distinction based on gender. The effect is not only to deny the fruits of development to Third World women, but also to exacerbate their already unequal position.

If the rhetoric of international law is currently part of the problem of development for Third World women, could it eventually contribute to changing inappropriate models of development so that the position of women is improved? While international law cannot work immediate social change, its symbolic and long term force is significant. The international legal structure needs to accommodate the reality that pursuit of narrowly defined economic growth can deliver increased inequality for half of the population of developing nations: in this sense at least the "private" sphere requires recognition in the international legal order.