KERRY RITTICH*

Black Sites: Locating the Family and Family Law in Development†

While the family as an economic institution has traditionally been sidelined in development policy, development institutions like the World Bank now promote a range of legal and policy reforms that touch on the family and the household. This Article considers how interventions designed to expand formal markets and to encourage participation in markets and investments in human capital might provoke change within the family and the household. Although they aim to increase welfare by increasing measurable economic growth, such interventions have both constitutive effects on the household itself and significant effects on the bargaining power of household members both at home and at work, effects that can be illuminated by attention to the legal reforms themselves.

Taking as its starting point the family as an economic entity, this Article taxonomizes the wide range of laws that effectively regulates the family and the household, and highlights properties of legal rules, such as their impact on the bargaining power of different social groups, that tend to be ignored or suppressed in regulatory and governance debates in the field of development. Aided by that expanded taxonomy, it investigates the impact on the family and the household of legal and policy initiatives in four areas: gender equality, social protection through conditional cash transfers, labor market formalization, and land titling. Tracing the effects of regulatory interventions across the market/household divide or continuum indicates how such reforms may induce households to adapt in ways that undermine as well as further welfare and equality objectives. But attention to the continual interactions between the household and the market not yet in view within general measurements and analyses of the economy, also indicate how and where they might sometimes undermine economic growth objectives as well.

---

* Faculty of Law, University of Toronto. Thanks to Janet Halley and an anonymous reviewer for insightful comments and suggestions; to Susan Barker, Librarian at the Faculty of Law, University of Toronto; and Janani Shanmuganathan, JD candidate at the Faculty of Law, University of Toronto, for very helpful research and editorial assistance; and to the Social Sciences and Humanities Research Council of Canada for financial support. All errors remain mine.

† DOI 10.5131/ajcl.2010.0010.

I. INTRODUCTION

In the field of development, the family is traditionally the place carved out for the preservation and performance of culture and local particularity. Even where development is intended to be socially as well as economically transformative, the family has typically been placed at the periphery of development concerns, certainly beyond the purview of those whose mandate is economic modernization and reform. While there have always been development initiatives that touch the family, like population control measures, the place where regulatory and policy interventions are normally expected to stop is the threshold of the family home. The family is a complex institution, however, serving a range of economic and political as well as affective, moral, and cultural functions. Moreover, the border between the household and the wider economy is often uncertain rather than clear and fixed, particularly in societies where significant amounts of productive activity takes place outside of markets. Thus, the family could never be safely cabined from the wider concerns of development.

It has been clear for a while that many development projects have an impact on the family. Trade itself inevitably entails adjustment,[1] and as previously protected sectors are exposed to competition and existing modes of production are altered, social and cultural life is transformed as well.[2] Infrastructure projects like dams, too, often generate profound disruptions to households as well as to social and community life.[3] Structural adjustment policies[4] and other forms of conditional lending have proved to be similarly disruptive to both households and labor markets,[5] as are many of the legal and regulatory reforms introduced in developing and transitional states in the past two decades.[6] Such measures routinely pose economic challenges to both family members and the household as a whole. For example, family members may be forced in or out of the labor market[7] or may

1. Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

2. SARAH GAMMAGE ET AL., THE TRADE IMPACT REVIEW: FRAMEWORK FOR GENDER ASSESSMENTS OF TRADE AND INVESTMENT AGREEMENTS 36 (2002).

3. WORLD COMMISSION ON DAMS, *People and Large Dams: Social Performance, in* DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 102-03 (2000), http://www.dams.org/report/.

4. Sarah Babb, *The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates*, 31 ANN. REV. SOCIOL. 199 (2005). For an early and influential discussion, see ADJUSTMENT WITH A HUMAN FACE (Andrea Cornia, Richard Jolly & Frances Stewart eds., 1987).

5. *See* Diane Elson & Nilufer Catagay, *The Social Content of Macroeconomic Policies*, 28 WORLD DEV. 47 (2000).

6. KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002).

7. SALLY BADEN, THE IMPACT OF RECESSION AND ADJUSTMENT ON WOMEN'S WORK IN SELECTED DEVELOPING COUNTRIES, BRIDGE REPORT NO. 15, 19 (1993), http://www.

migrate to pursue new opportunities in cities and special economic zones at home or abroad.[8] Economic or fiscal crises, as well as the strategies and reforms introduced to manage them, may cost jobs and compel households to sharply curtail their consumption, while household members may step in to provide meals, health- and child-care, and poverty-relief functions to the broader community on an unpaid basis.[9] When all goes well, of course, development initiatives may have positive effects on the household. For example, household incomes may rise and household members may have access to new economic opportunities, goods, and services. Yet initiatives that empower and enrich some households often worsen the position of others, and greater inequality among households is a common result even of development ventures deemed a success.[10] The effects of development on individual family members typically vary as well, for example, as changed economic activity reallocates household labor and resources as between men and women.[11]

Development initiatives may not only change household activities but also alter the structure and even transform the ideology of the family. For example, household activities may disappear and reappear in the course of market-making reforms, as time and opportunity for subsistence production and self-provision are alternatively displaced by new economic activities or compelled because market alternatives have disappeared or become too expensive. The size and the composition of the household may change, as domestic workers are added or eliminated or family members are forced, or choose, to leave home in search of new sources of income. In the course of modernization and development as a whole, the family might come to be understood not as an institution that is indistinguishable from productive life but as a private, nuclear unit that is separate and apart from the wider sphere of the economy.[12] In short, in ways that range from the trivial to the far-reaching, development initiatives may transform the form and structure of the household, remake its activities and priorities, and reinvent the ethos that surrounds it as an institution.

---

bridge.ids.ac.uk/go/global-resources-database/browse-by-theme/aid/structural-adjustment&id=51918&type=document.

8. Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 NORDIC J. OF INT'L. L. 255 (2002).

9. Nahid Aslanbeigui & Gale Summerfield, *The Asian Crisis, Gender, and the International Financial Architecture*, 6 FEMINIST ECON. 81 (2000); BADEN, *supra* note 7, at 19.

10. *See* BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY (2005).

11. GAMMAGE ET AL., *supra* note 2, at 36.

12. JOAN SMITH & IMMANUEL WALLERSTEIN, *Households as an Institution of the World Economy, in* CREATING AND TRANSFORMING HOUSEHOLDS: THE CONSTRAINTS OF THE WORLD ECONOMY 1, 4 (Immanuel Wallerstein & Joan Smith eds., 1992).

Whatever constraints formerly operated to limit intervention in families in the past are now dissolving in any event. The family is no longer even formally or officially off limits; indeed, development policy has now moved closer and closer to its heart. The family itself is increasingly an object of direct policy intervention and legal reform, as household decisions and priorities, gender relations, and the behavior of individual family members, especially as they might affect market activity and broader rates of economic growth, come under intense scrutiny and interest.

The family as an object of development attention, a place where behavior and interactions within the intimate or private sphere emerge as significant to broader economic objectives, is explicit in initiatives such as the newly-popular conditional cash transfers to households[13] and efforts to encourage men to participate more in the care of family members.[14] Yet the importance of the family in and to contemporary development projects far exceeds such overtly "familial" initiatives and projects. Normative aspirations about the family and the household can be traced throughout development discourse and policy, from initiatives on gender equality[15] and social protection[16] to labor market formalization and land titling. Indeed, ideas about the household and the family—the obligation to adjust in the face of the "creative destruction"[17] wrought by markets, for example—are arguably implicit even in areas where they appear to be entirely irrelevant, such as trade and financial liberalization.

The significance of the family to development, then, is immense. Despite this, the family remains something of a black box in the discourse and policy of mainstream development institutions such as the World Bank. The pervasive conception of the family as private and as non-economic in its essence—and the correlative conflation of the economic with markets—often makes it difficult to locate the family within the domain of economic concerns. More often than not it is sidelined or simply missing in debates about economic growth; where it is considered, its integration into policy discourse remains partial and incomplete. To the extent that the household does come into view, it tends to be where it is perceived to impinge upon "real" pro-

13. *See infra* Part IV.B.

14. *See generally,* KATE BEDFORD, DEVELOPING PARTNERSHIPS; GENDER, SEXUALITY, AND THE REFORMED WORLD BANK (2009).

15. WORLD BANK, ENGENDERING DEVELOPMENT: THROUGH RIGHTS, RESOURCES AND VOICE (2003).

16. See, for example, ROBERT HOLZMANN, LYNNE SHERBURNE-BENZ & EMIL TESLIUC, SOCIAL RISK MANAGEMENT: THE WORLD BANK'S APPROACH TO SOCIAL PROTECTION IN A GLOBALIZING WORLD (2003), http://siteresources.worldbank.org/SOCIALPROTECTION/Publications/20847129/SRMWBApproachtoSP.pdf; WORLD BANK, WORLD DEVELOPMENT REPORT 2000-01: ATTACKING POVERTY (2001).

17. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1947).

ductive activity, which in development parlance is understood to be market activity.

Whether outcomes are good, bad, or both, there is little systematic attention to what actually goes on inside of households in the process of development. This is, at minimum, because the household *itself* is not examined as a site of economic valuable activity and labor; because the effects of policy and regulatory reforms on household structure and the activities of its members are neither theorized nor routinely tracked in any systematic way; and because the feedback effects—both actual and potential—of changes to the family and household on the nature and level of market activities are either not traced at all, or are traced in partial and incomplete ways. The result is not only that the significance of the family within development remains obscure. Because the household and family are themselves central sites of economic activity, much about the character and effects, and hence the desirability, of development initiatives *themselves* remains obscure as well. Put simply, the aggregate economic picture is quite different than the partial one with the household blacked out, and development initiatives may be much less functional, even on their own terms, than they appear once the family is brought back into view.

What makes this a subject of interest to legal scholars, and comparative legal scholars in particular, is that development itself can be understood as a legal project: in central rather than peripheral ways, it has become a governance project directed at legal and institutional reform; indeed good governance itself has become a measure of development.[18] The transnational diffusion of legal rules, institutions, and norms to promote both economic and social development has not only contributed to the massive revival of interest in law and development and comparative legal developments and legal transplants across the globe today;[19] legal and economic interventions designed by the inter-

18. WORLD BANK, DOING BUSINESS: MEASURING BUSINESS REGULATIONS, http://www.doingbusiness.org/ (describing the *Doing Business* project and outlining a range of topics and research publications); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591. For a discussion, see David M. Trubek & Alvaro Santos, *Introduction*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006); Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social, in* THE NEW Law and Economic Development: A Critical Appraisal 203 (David M. Trubek & Alvaro Santos eds., 2006).

19. For discussions of the role of law in development, see Ibrahim Shihata, *Law, Development and the Role of the World Bank, in* COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS (1997). For a classic discussion of the role of legal institutions in economic performance, see Douglass C. North, *A Transaction Cost Theory of Exchange, in* INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 27 (1990).

national economic and financial institutions are arguably the most important face of international law in the Global South.[20]

This Essay begins to chart the place of the family in development and to probe the hidden, obscure or simply black sites in the development picture where economic activity appears to just stop. It does not comprehensively analyze either the role of the family in development or the effects of development policy on the household or family. Instead, it discusses some of the main places that families and households emerge as subjects of interest in the contemporary development enterprise and attempts to tease out the forces and concerns behind this new interest. In so doing, it also suggests how and why a wide range of regulatory and policy interventions, whatever their other functions and purposes, might be thought of as "about" the family.

The major aims are to illuminate the web of interconnections that link the family and the household to other economic institutions; to reveal something about the legal mechanisms by which these connections are structured and through which they change; to trace the way in which legal and policy interventions to further development might affect flows of people, resources and power in and across households and markets; and to indicate the significance, for both families and for development itself, of what we neither know nor, most of the time, even investigate, about their effects on household and familial economic activity.

The essay advances three interlinked theses. The first is that the place of the family in development is best approached indirectly, via the institutions to which it is connected and the functions it is intended to serve in broader projects of economic and social development. Interventions directed at families that might seem puzzling or just idiosyncratic in isolation seem less so if they are seen as of a piece with decisions and ideas about other domains and institutions, like the market or the state. We might think of the space carved out for the family and the specific features and activities of the household that now attract attention, then, as a product of larger processes and concerns that animate the field of development.

Second, attention to the legal rules, institutions, and norms that govern families is one of the best ways to both capture and explain the change underway within families and households, the shifting fortunes of family members, and their possible significance to market activity, and thus to the development enterprise as a whole. However, to focus only on the law and policy that directly regulates the

20. For a discussion, see Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 NYU J. INT'L L. & POL. 243 (2000); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).

family not only generates an incomplete picture of the place of the family and the household in development; it may well also miss some of the most important mechanisms that now transform the family or household and influence the behavior of its members. This, I suggest, is because the family is effectively governed as much by the laws regulating economic activity and by policies directed at general economic objectives, such as inducing higher levels of labor market participation, increasing the economic value of market activity, and generating greater economic output as measured by indices like the Gross Domestic Product (GDP), as it is by legal rules and policies directed at the family or household per se.

Third, the manner in which the family is incorporated into development projects is a function of contemporary ideas about good governance in the development imaginary. To put it another way, not only are families and households of interest because they affect whether and how individuals participate in markets. The beliefs about what induces that participation and the strategies that are either on or off the table to encourage it are deeply informed by broader ideologies and practices that link legal rules and institutions to better and worse economic outcomes.

Part II situates the household in the economy and considers the family/household *as* an economic institution. Part III taxonomizes the law that regulates the family and the household and highlights properties of legal rules that tend to be ignored or suppressed in regulatory and governance debates in the field of development. Aided by that expanded taxonomy, Part IV discusses development and legal reform initiatives in four areas that touch on the household—gender equality, social protection, labor market formalization, and land titling—and describes how such initiatives might raise distributive concerns and produce unexpected, even perverse, as well as expected outcomes inside and outside the household. Part V revisits the place of the family of development in light of the taxonomy and the examples, and considers their import both for households and for the development enterprise itself.

II. THE ECONOMIC FAMILY

A. *The Family as an Economic Entity*

Economists, sociologists, feminists, and philosophers have long analyzed the economic functions of the family and observed that the household is a key site of production, reproduction, and welfare.[21] An

21. See, for example, MARGARET G. REID, ECONOMICS OF HOUSEHOLD PRODUCTION (1934); MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988); ANTONELLA PICCHIO, SOCIAL REPRODUCTION: THE POLITICAL ECONOMY OF THE LABOUR MARKET (1992), WILLIAM JAMES BOOTH, HOUSEHOLDS: ON THE MORAL ARCHITECTURE OF THE ECONOMY (1993).

enormous amount of economic activity goes on at home, and even where the resulting products and services are not traded, the household provides crucial inputs to goods and services that *do* circulate in the market. For related reasons, the household is also an important site of labor or work.[22] It has been estimated, for example, that if unpaid work, the vast majority of which occurs in and around the household, were included in national accounts, the average GDP would increase by around fifty percent and if capital inputs were included too, it would almost double.[23] The family is also a source of economic security and an important mechanism of resource redistribution. Not only is the family a pillar of the welfare regimes of industrialized societies;[24] the family and kinship networks remain the de facto source of economic security in much of the developing world. In addition, many of the preoccupations that are most central to the question of development—the nature and organization of productive activity, questions of welfare and economic security—are also pre-eminent concerns of families and households.

Nonetheless, in mainstream development analysis and policy, the family is not talked about as an economic institution. While household income may be important for the question of living standards or because of its effect on economic demand, the household itself is not imagined as an economically significant site of productive activity. As a result, in general household production is not valued for the purposes of determining aggregate levels of economic output.[25]

Despite the complexities involved in imputing a value to goods that have no market price,[26] the exclusion of household production from the economic calculus not only distorts the measurement of economic growth;[27] it inevitably skews the overall assessment of living standards:[28] there is no reason, for example, that the mere substitution of non-traded for traded production should, without more, count

---

22. Lourdes Benería, *The Enduring Debate over Unpaid Labour*, 138 INT'L LAB. REV. 287 (1999).

23. Duncan Ironmonger, *Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product*, 2 FEMINIST ECON. 37 (1996).

24. GØSTA ESPING-ANDERSON, SOCIAL FOUNDATIONS OF POST-INDUSTRIAL ECONOMIES 54 (1999); Kerry Rittich, *Equity or Efficiency: International Institutions and the Work/Family Nexus, in* LABOUR LAW, WORK AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES 43 (Joanne Conaghan & Kerry Rittich eds., 2005); Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. OF COMP. L. 953 (2010).

25. JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS, Part I (2009), http://www.stiglitz-sen-fitoussi.fr/en/index.htm; WARING, *supra* note 21.

26. STIGLITZ ET AL., *supra* note 25, at 88-91.

27. *Id.* at 30.

28. *Id.* at 35.

as an *increase* in economic activity,[29] still less as an increase in household welfare. It also obscures the distribution of costs and benefits of development initiatives both inside and outside the household.[30]

Although influential economic theories posit that resources are shared among all household members,[31] development policy analyses, in particular those attentive to gender relations, have begun to acknowledge that the distribution of resources within the household is partly a function of the bargaining power held by different household members.[32] Rather than the locus of undifferentiated altruism, the household is a place of conflict as well as cooperation,[33] a site of intense and complex bargaining.[34] Moreover, the amount of household labor performed and leisure enjoyed by different family members appear to be intimately related to their command over external resources.[35] This means, of course, that what goes on in the market—for example, whether women and men possess opportunities to work or transact in the market and what those opportunities look like—may change the structure of negotiations between husbands and wives, produce different investments in the health, fate, and even the presence of children, and alter family relations in myriad other ways. In short, external transformations in the market and the political sphere may generate significant changes in norms and practices within the household.

What remains is to extend and generalize these insights and to explain how such changes in bargaining power and household norms and activities might come about. The interactions between markets and households are, I suggest, pervasive rather than limited; moreover, influences operate in both directions and they may work indirectly as well as directly. This means that market processes have multiple circuits for transforming the household, and that changes within families and households might also spillover into the market in lots of ways. Moreover, all of these processes and transformations are *themselves* produced in part by legal reforms.

29. This "invariance" principle is discussed in STIGLITZ ET AL., *supra* note 25, at 30.

30. Diane Elson, *Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues*, 27 WORLD DEV. 611 (1999); RITTICH, *supra* note 6, at 173.

31. GARY BECKER, A TREATISE ON THE FAMILY (1981). For an analysis, see Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUMB. J. GENDER & L. 357 (2007).

32. WORLD BANK, *supra* note 15.

33. Amartya Sen, *Gender and Cooperative Conflict, in* PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 123 (Irene Tinker, ed.,1990).

34. Bina Agarwal, *'Bargaining' and Gender Relations Within and Beyond the Household,* 3 FEMINIST ECON. 1 (1997).

35. *Id.*

B. The Family as a Legal Entity

The family and the market are as much made as found. Begin with the family. Although the family is the most naturalized of social institutions,[36] the legal issues that have been central to the transformation of family law in last generation establish that it is nature of a distinctly plastic kind. For example, what is a family? Is it the nuclear family of the post-war social imaginary, the normative basis of everything from labor and employment law to welfare and social policy?[37] Must marriage be confined to persons of the opposite sex?[38] Whatever the legal answers to these questions—and they vary a great deal—they determine, in part, what the family *is* and what it does.

We can make a parallel set of observations about the market. "The market" is conventionally invoked as if it were simply a fact, or a force, of nature, and development policy is pervaded with assumptions that people have a natural propensity to "truck, barter, and exchange."[39] Yet the markets of post-industrial, globally integrated economies are complex creatures of law and policy, not only regulated by legal rules and institutions but dependent upon them in thoroughgoing ways for their very existence; thus, the *type* of market is as much in question as the presence of the market.

But if neither the family nor the market can be imagined as just "facts," what makes their joint interrogation compelling is the evidence that changes in families and markets are often linked. For example, the emergence of the idea of the household as a private, non-productive sphere historically tracks the rise of wage labor in the broader economy.[40] Efforts to scale back the degree of public assistance to families may run in tandem with changes to family law rules that place heavier burdens on family members to support each other or even change the very definition of who stands in a familial relationship.[41]

Thus, the relationship between the family and the market is to some degree mutually constitutive; changes to the nature and obligations of one sphere are very likely to reallocate labor, risk, resources,

36. Max Rheinstein, *The Family and the Law, in* IV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY 1-3 (1974).

37. ESPING-ANDERSON, *supra* note 24, at 54.

38. Halpern et al v. Attorney General of Canada, [2003] 65 O.R. 3d 161.

39. ADAM SMITH, AN INQUIRY INTO THE CAUSES OF THE WEALTH OF NATIONS (1776).

40. Nancy Folbre, *The Unproductive Housewife: Her Evolution in 19th Century Economic Thought,* 16 SIGNS 463 (1991); Janet Halley, *What is Family Law?*, YALE J. OF L. & HUMAN. (forthcoming); Reva Siegel, *Home as Work: The First Women's Rights Claims Concerning Household Labor*, 103 YALE L. J. 1073 (1994).

41. Brenda Cossman, *Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project, in* PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM 169 (Brenda Cossman & Judy Fudge eds., 2002).

and power in the other, and in so doing, differentiate the rewards of both household and market work for different groups. For example, legal mandates to provide either child care or parental leave to workers can be expected to affect the degree of care work that is performed in the home versus the market; so will provision by the state. But such decisions also typically reallocate the costs of care.[42] Indeed, the regulation and organization of care work may shift its very association with either the family or the market, private or public.[43]

III. The Family and Development and the Law of the Family

In Part I, I made the claim that the role of the family in development is best understood in relation to other institutions and objectives, and that the regulatory and governance projects that most profoundly affect the family or the household are not limited to those that target them directly. This has implications for how we comprehend the law of the family or household, whether domestic, comparative, transnational or international.

Some development initiatives seem so obviously connected to families or household activities and preoccupations that no conceptual rethinking is required to locate them as part of the law and policy of the family. Others seem tangential to or entirely remote from family or household concerns; nonetheless, it is plausible to think of some of them as part of family law. This is not merely because of their effects on households and families. Rather, it is because assumptions about the family—its roles and responsibilities in respect of welfare and economic security in particular—are part of the background against which these rules operate, and because changes to such rules may reconstitute the family and the household in both material and ideological ways.

In order to capture the myriad laws, policies, and norms that operate on the family and the full range of normative, regulatory, and institutional projects that bear on household and family forms, some scholars have developed the following system of classification of family law rules: Family Law I, II, III and IV.[44]

> Family law as conventionally understood in family law treatises and casebooks, that is, the laws, policies, norms, and institutions that directly regulate domestic and intimate

42. KERRY RITTICH, *The Gender of Restructuring*, *in* RECHARACTERIZING RESTRUCTURING, *supra* note 6, at 173.

43. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

44. *See* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

relations, such as conjugal, spousal, and parental relations, and other familial obligations (Family Law I);

Laws, policies, and institutional or governance projects that explicitly mention or incorporate the family, even though their subject matter or objective is not, in the first instance, the regulation of families; think, for example, of tax laws that differentiate between single and married or co-habiting persons (Family Law II);

Laws and policies that constitute or reconstitute the household or family; influence or determine household and family activities, preoccupations and responsibilities; or alter the allocation of resources and bargaining power among their members, even though they do not mention the family (Family Law III); and

Informal norms and plural or competing normativities, including gender, religious, cultural or customary business norms and practices, that directly or indirectly operate on the household or family and potentially mediate, intensify, moderate or otherwise alter[45] the impact of Family Laws I, II and III. We might think of these norms as Family Law IV, although where they are formally recognized as part of the law of the family, as is sometimes the case in plural legal systems,[46] they might loop back into Family Law I and II.

This expanded taxonomy has the collateral effect of highlighting a number of features that are relevant to analyzing the family and family law in development. One is that family law is a contingent and historical category; whether it comes into being as a discrete legal field is typically related to outside developments, political, economic, and cultural.[47] Notice also that the list of rules and norms that might have an impact on the activities of households or the distribution of resources among household members is not closed. We could contemplate, and in many instances document, such effects emanating from the following non-exhaustive list of legal rules, all of which have been the subject of reform proposals to promote development by the international financial institutions: labor and employment laws (household income level, numbers of household members who work outside the home); property, land, and zoning laws (nature of household economic activity, distribution of land, and capital between

45. This framework is adapted from DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997).

46. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y. REV. 869 (1988); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW, 38 (Tony Weir trans., 3d. ed., 1998).

47. *See* Halley, *supra* note 40; Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010); Rheinstein, *supra* note 36, at 7-8.

household members); debtor/creditor and bankruptcy laws (ability to remain in the family home); tax laws (decisions about household labor market participation); and trade law and investment laws (viability of traditional economic activities, including household subsistence activity).[48] But in specific contexts, there would certainly be others.[49] In addition, the wide variety of non-formal rules and conventions that operate on households and markets will complicate any assessments of the effects of formal rule changes; the likely result is that *the same* legal rules will generate different effects in different places and at different times.

Inherent in the project of economic development premised on growth through integration into global markets is the fostering of exchange relationships among parties who have no pre-existing or continuing relationships, and who transact on an arms-length rather than personal or reputational basis. This is widely thought to require more formal and sophisticated rule structures than those adequate to organize local economic relations;[50] hence, the centrality of the rule of law and market institutions like property and contract rights to the development enterprise.[51]

The legal consciousness that informs this project might be described as divided: it exhibits both functionalist[52] and formalist tendencies.[53] On the one hand, reform proposals reflect a pragmatic sensibility and a technocratic concern with identifying legal "best practices" to advance security of possession, facilitate efficient transactions, and ensure participation in markets. On the other hand, they reflect a formalist or neo-formalist sensibility: property and contract rights and, more lately, human rights and anti-discrimination rights, may be described as simply definitional parts of development, markets, and rule of law respecting societies.[54] Missing from this

---

48. *See* WORLD BANK, *supra* note 18.

49. Max Rheinstein, too, noted that family law was distributed among other legal fields such as social security, welfare, housing, criminal law, procedure, taxation, protection of youth. *See* Rheinstein, *supra* note 36, at 4.

50. The classic formulation is found in North, *supra* note 19.

51. *See* David Kennedy, *The Rule of Law as a Strategy for Economic Development, in* THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 149 (2004); PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006).

52. The term functionalism is used in comparative law in ways that both parallel and diverge from its use here. *See* Ralf Michaels, *The Functional Method of Comparative Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

53. Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Governance and Development Debates*, 55 U. TORONTO L.J. 853 (2005). *See also* David Kennedy, *Challenging Expert Rule: The Politics of Global Governance,* 27 SYDNEY L. REV. 1 (2005); Duncan Kennedy, *Three Globalizations of Law and Legal Thought, in* THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 18, at 19.

54. *See* Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social, in* THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 18, at 203.

consciousness, however, is attention to *other* properties of legal rules that are relevant to the family. Whatever their effects on the ease and security of transactions, legal entitlements provide important chips in the bargaining over both family and market relations, and thus affect the status, balance of power, and exit options of the parties in marriage and employment.[55] Rules that strengthen the economic position of some actors often impose new obligations, burdens, risks or disabilities on others.[56] For example, reforms to enable entrepreneurial activity may heighten the exposure of workers to volatile market conditions and simultaneously reduce the resources available to the households. How legal rules are structured, therefore, can strengthen or weaken the position of different parties, powerfully influence the distribution of resources in the household as well as the market, and advance or impede the realization of a range of social and economic objectives.

IV. Reforming the Family for Development: Promoting Gender Equality, Reforming Social Protection, Formalizing Labor Markets, and Land Titling

There are, at minimum, three interrelated objectives within the mainstream development agenda that traverse the market/household divide. All have potentially large implications for how families and households order their priorities, orient their activities, deploy their personnel, and otherwise spend their time, energy, and resources. The first is a norm approaching universal market participation, accompanied by reduced "dependence" on the state.[57] The second, virtually definitional of market-centered development initiatives, is the promotion of higher value economic activity. The third, closely related to the first two, is fostering greater productivity and increased economic growth by encouraging investments in human capital.[58]

In order to understand how these objectives are translated into law and policy, it is useful to know that development institutions like the World Bank have adopted what might be described as a "convergentist" approach to the dilemmas of development.[59] That is,

55. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923).

56. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 Yale L.J. 16 (1913).

57. World Bank, World Development Report: Workers in an Integrating World (1995). *See also* OECD, Boosting Jobs and Incomes (2006).

58. Thomas Courchene, A State of Minds (2002); World Bank, World Development Report 2003: Sustainable Development in a Dynamic World: Transforming Institutions, Growth and Quality of Life (2003).

59. This term is borrowed from Janet Halley, Split Decisions: How and Why to Take a Break from Feminism (2006).

social and economic objectives are represented not as competing, conflicting or simply *different* development goals, but as linked, even coterminous, ones, all of which are compatible with fostering market-centered growth. While the first phase of market-centered economic development was widely decried for the neglect of the social,[60] social justice is now squarely on the agenda.[61] Development policy documents are threaded with references to the importance of human rights, empowering women and the poor, and encouraging the participation of communities and civil society, while legal and economic reforms such as labor market and land formalization are now typically defended in terms of economic growth *and* objectives like poverty alleviation and social inclusion.[62] At the same time, participation in markets has emerged as the principal means to advance the social and economic status of disenfranchised groups. But this means that families, households, and individual family members are subject to more discipline by the market and, paradoxically, sometimes to greater bureaucratic control as well.[63] It is this convergence of the social and the economic within development thinking, I suggest, that has served to bring the household into view as a productive (and potentially *more* productive) space, and that holds so much transformative potential for the family.

A. *Gender Equality*

Comparatists have noted the significance of gender equality norms to the transformation of family law in the last generation.[64] A similar normative shift has occurred in the field of development, but with a twist: gender equality has entered the development lexicon in a similarly pervasive way, but the effect has been less to transform mainstream development norms and practices than to alter the discourse around development and, to some extent, to reinvent the idea of gender equality itself.

Following protest that its projects and policy-based lending activities violated women's and human rights, the World Bank adopted a formal commitment to gender equality[65] and a distinctive market-

60. ADJUSTMENT WITH A HUMAN FACE, *supra* note 4; 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994).

61. Rittich, *supra* note 18.

62. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, MAKING THE LAW WORK FOR EVERYONE, VOLUME I: REPORT OF THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR (2008).

63. GUY STANDING, *Globalization: Eight Crises of Social Protection, in* GLOBAL TENSIONS: CHALLENGES AND OPPORTUNITIES IN THE WORLD ECONOMY 111 (Lourdes Benería & Savitri Bisnath eds., 2004).

64. Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends – and Vice Versa, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 52, at 1112.

65. See, for example, WORLD BANK, *supra* note 16.

centered way of pursuing it.[66] Drawing women out of the household and into the market through strategies like the now-ubiquitous micro-credit programs designed to boost the productivity of women's economic activities[67] and law reform to aid women entrepreneurs,[68] is the heart of the project. The basic claim, elaborated in *Engendering Development,*[69] is threefold: first, women benefit more than men do from the expansion of markets; second, increased market opportunities for women will induce parents to make greater educational investments in their daughters; and third, greater market participation by women will itself provoke a rebalancing of the gendered division of unpaid household labor that operates to women's detriment.[70] While general reforms to promote development are expected to do much of this transformative work, targeted legal changes to ensure equal rights for women are also part of the agenda.

The specific fields that are marked out for reform are family law, laws on gender-related violence, land rights, and rights to political participation.[71] Notice how much they touch on the household. A major concern is blatantly unequal rights between husbands and wives in respect of marriage, divorce, reproductive decisions, child custody, marital property, and inheritance, whether they are found in statutory or customary law (FL1 and FL2).[72] Addressing violence against women is important as well; this requires remedying narrow definitions of violence in criminal law and evidentiary requirements that frequently make it difficult if not impossible to secure convictions for assault. But also needed are restraining orders to protect women from violence inside their own homes (FL2).[73] Reform to land laws—as "heads of households," men are much more likely than women to have control over land (here FL2 and/or FL3 and FL4)[74]—as well as laws that grant formally unequal entitlements to men and women to vote or take up elected positions, even mandating reserved seats for women in representative political institutions, are also on the list (FL3).[75]

While most of these reforms stand to transform domestic relations either directly or indirectly, and some may transform women's status and opportunities in the market as well, one puzzle is why

66. WORLD BANK, *supra* note 15.

67. *See* Toni Williams, *Requiem for Microcredit: The Demise of a Romantic Ideal,* 19 BANK. AND FIN. L. REV. 145 (2004).

68. WORLD BANK, WOMEN, BUSINESS AND THE LAW 2010: MEASURING LEGAL GENDER PARITY FOR ENTREPRENEURS AND WORKERS IN 128 COUNTRIES (2010).

69. WORLD BANK, *supra* note 15.

70. *Id.* For a more detailed discussion, see Kerry Rittich, *Engendering Development/Marketing Equality,* 67 ALB. L. REV. 576 (2003).

71. WORLD BANK, *supra* note 15, at 115-24.

72. *Id.* at 117.

73. *Id.* at 119.

74. *Id.* at 120-23.

75. *Id.* at 123-24.