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LAW, FAMILY AND ECONOMIC DEVELOPMENT

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This paper is concerned with the effect of legal systems on decisions that families make and how these decisions, in turn, affect social and economic development. The relational dynamics between law, family and economic development are conceptually and analytically complex. In many developing countries, customs, practices and tradition operate as a law, sometimes rendering rules and structures in the formal legal system ineffective. When this occurs, the conventions external to the formal legal system may be said to form a de facto legal system. As a result, an analysis of the effect of a legal system on decision-making must take into account the relationship between the de facto system and the formal legal system -- a relationship which is often poorly understood and documented. Second, since the empirical research on the relationship of laws (including those which affect the family/household unit) on economic development is virtually non-existent, it is not possible to draw definitive conclusions on the impact of laws at the micro or macroeconomic levels.¹

Notwithstanding these analytical and conceptual complexities, most development professionals know of cases where failure to take into account the role of the formal or de facto legal system has hampered attainment of development objectives -- and few will deny the need for an effective legal system which complements development strategies. It is therefore important to improve on the understanding of how to integrate issues of law into its examination of family and development. This paper attempts to shed light on how to examine the relationship between law, family and development by providing examples of how specific laws are likely to effect choices made by families/households and individuals in their roles as family/household members. Key areas of the law which create or influence rights and obligations within the family and transfers within the family are the focus of the discussion. Decisions related to productive investment, property and income, health and education will be discussed.

¹ A fairly large body of literature on law and development exists. Various schools of thought are represented, all of which hold that there is an important relationship between law and development; however, none of the work provides documented empirical evidence of the impact of specific laws on development. For a survey of the writings see Imani K. Ellis-Cheek, "The Contribution of Law to Economic Development: A Literature Survey", World Bank 1991.

A. Productive Investments

Laws and practices play an important role in determining the extent to which families can and will invest in productive enterprises.

- o Most men in Lesotho are employed as migrant workers in South African mines. They are away from home long periods and their wives are left to meet the subsistence needs of the household. Estimates show that women comprise 85 percent of the agricultural workforce and that at any given time, 40 percent of the male workforce lives in South Africa.² Women grow more food than men. However, their productive capacity is limited by the lack of credit to arrange for necessary inputs. Under marriage law in Lesotho, wives cannot apply for credit in their own names.³ In addition, since a wife does not have the legal capacity to contract, she cannot purchase equipment or hire labor needed by farm operations.⁴
- o In Egypt, it is common for men to migrate to Arab oil producing countries in search of wage employment. Typically, their wives remain at home to care for the household and operate the farm. Egyptian laws, on their face, give wives equal right with their husbands to apply for and receive credit.⁵ However, a recent survey revealed that it is rare for wives to apply for a loan or open a bank account.⁶ This low rate of participation is due in part to the requirement to understand complex loan procedures and to have access to guarantees for loans. It may be noted that such requirements hinder access to credit for small informal sector family businesses in general. These requirements therefore figure importantly in family decisions related to intensifying investments and entry into new businesses to increase family income.

² Jeanne Henn, "Women in the Rural Economy: Past, Present, and Future," in African Women South of the Sahara, London: Longman, 1986, p. 2.

³ FAO, The Legal Status of Rural Women, 1979, p.9.

⁴ Ibid.

⁵ Mona Zulficar, "Women in Development: A Legal Study", February 11, 1991, p. 78. (A study commissioned by the World Bank).

⁶ Ibid., p. 79.

- o India provides an example of how practices affect the operation of laws. Access to credit for both women and men in small businesses is a major problem. The Banking Regulation Act allows banks to lend with or without security.⁷ However, banks generally require land as security for medium and long-term loans.⁸ Poor families have limited ownership interests in land, and therefore do not generally seek bank loans. Although the banking law does not discriminate against women, practices may be inherently prejudicial as demonstrated by the following statement of a leading authority on India's banking law:

Minors, Lunatics and Married Women: As already stated contracts with minors and persons found of unsound mind are void. It is, therefore, clear that bankers should never accept guarantees of such persons. Although married Hindu women give valid guarantees, which will bind their separate property, such as stridhana, the banker is generally reluctant to accept their guarantees, because, the relations between the principal debtor and the guarantor may become strained, or with a view to evade liability a married woman may plead that, when she signed the contract, she was not a free agent and acted under the coercion of undue influence of her husband, particularly when he himself or a relative or a friend of his happens to be the principal debtor. As generally courts have a tender heart towards the fair sex, the above plea is likely to be successful, even though the evidence in support of the same may not be as convincing as is required in other cases. Consequently, a wife becoming surety for her husband, and expectant heir for his father or in such other cases where the plea of undue influence is likely to be put forward, are instances in which bankers should be particularly careful.⁹

- o In The Gambia, succession and traditional marriage laws

⁷ Gita Gopal, "India: Women, Law and Development", March 8, 1991, p. 27-28.

⁸ Ibid.

⁹ Tannan's Banking Law and Practice in India, 18th edition, 1989, as quoted in Gopal, p. 33.

combine to provide a disincentive for wives to invest. A woman's husband, rather than her children, is generally the heir to her property. Most rural women are involved in polygynous marriages. Consequently, the fruits of a wife's labor and her business can be passed on to another wife through the husband.¹⁰

B. Property and Income

Property (including income) relations internal to the family are important to understanding transfers within the family, patterns of negotiation, dependency and contracts formed within the family. Family laws and customs play a major role in determining the internal property relations.

- o Several legal reforms have been adopted in Colombia to improve the property rights of women within the family. Spouses have joint ownership of property and acquisitions and each has the independent right to administer, enjoy and dispose of certain property.¹¹ However, the influence of custom and tradition has slowed the internalization of these changes. For example: (1) the low value assigned to household work has kept women from exercising authority within the family, despite the fact that they have taken on financial responsibilities and earn income from outside sources; (2) generally a husband decides how the income of his working wife will be spent; and (3) women are expected to administer family consumption and manage the home -- they are not to compete with their husbands in income generating activities.¹²
- o Egyptian law (based on the Quran) gives women the right to inherit one-half the share of a male when both are the same degree of relation to the deceased. This "relative equality" is explained as follows:

...that under Shari'a law, it is the man who is responsible for supporting the woman financially whether as a father or a husband,

¹⁰ Jacqueline Moncreif, "Legal Constraints and Enhancements to Women's Participation in Horticultural Export Enterprises in Ghana and The Gambia", U. S. Agency for International Development (Draft Report).

¹¹ Maria Isabel Plata, "Columbia: Discrimination Against Women", *Journal of Family Law*, vol. 27, 1988-89, p. 83.

¹² Ibid.

or a brother or a relative. It is the man who carries all the economic responsibilities for his extended family and hence it is only fair that he gets a larger share of the estate. This is intended as a protective measure to women, assuming that women will never be required to support themselves or their families and that the man is capable of generating sufficient revenues to satisfy all the needs of his extended family, without the help of a wife...

...that such a sharing provision would help maintain the majority of the estate within the family of the deceased. This is based on the fact that the female when married becomes a member of her husband's family and that her heirs will probably be her children who carry the name of their father.¹³

The effect of these provisions is to concentrate authority and family decision-making in male members and develop a dependency relationship between male and female family members.

- o Since 1970, several pieces of legislation have been enacted in Kenya to improve married women's ownership rights in property. The married woman was given "...full propriety capacity" and the "...capacity to sue to protect her property, except against her husband" by adoption of the 1897 British Married Women's Property Act.¹⁴ Section 5(2) of the Law of Succession (1972) states that "...any female person, whether married or unmarried, has the same capacity to make a will as does a male person."¹⁵ The first law gives married women the right to hold property in their name, separate from their husbands -- a right essential to western concepts of ownership. And it gives them the right to protect their property, except against their husbands. The second law addresses another essential element of ownership -- the right to dispose of property. However, the exception in the Married Woman's Property Act raises the question whether the law substantively gives women "full property capacity" since the capacity to defend their rights to title, occupancy and management is restricted.

¹³ Zulficar, p. 57.

¹⁴ Eschel M. Rhodie, "Discrimination Against Women: A Global Survey of the Economic, Educational, Social and Political Status of Women", Jefferson, NC: Mcfarland and Co., 1989, p. 126.

¹⁵ Ibid.

Consider a hypothetical case of conversion of a wife's savings by her husband. The wife accumulated savings from her job as a primary school teacher. She deposited them in a local bank. Her husband knew that she was accumulating the money to invest in a basket-weaving business. The wife believed that by depositing her savings regularly, she would benefit from having an established relation with the bank when she launched her business. One day when the wife went to make a deposit, she was told that her husband had withdrawn the money and closed the account. The wife protested to her husband, but to no avail. Upon seeking advice she was told that she had no legal recourse. In effect, her husband could exercise domain over property in which she had "full proprietorship".

- o A husband's marital power over his wife is binding under both customary law and statutory law in Swaziland.¹⁶ In essence, the concept of the marital power gives the husband the right to control his wife's person and property.¹⁷ The following excerpt explains how this convention affects property relations in the family and exploitation of economic opportunities.

A woman married under civil law or customary law without a revocation of her husband's marital power must be represented in court proceedings by her husband. Any woman in a customary court must be represented by a male relative. This law affects woman's work (particularly self-employed women) in two ways: first, a married woman does not have the same access to legal protection for her business as a man would. Should she find herself in a position where she must bring legal action against another business, she must enlist the aid of her husband to do so. Any legal right she wishes to enforce requires the cooperation of her husband, therefore it is impossible to start a business independently. Second, other businesses may be reluctant to have dealings with a married woman knowing that in order to enforce their rights against her they must sue her husband, and that he may be absent or uncooperative. Again, a married woman therefore finds it difficult to enter the business world

¹⁶ Alice Armstrong and Ronald Thandabanty Nhlapo, Law and the Other Sex: The Legal Position of Women in Swaziland, Mbane: Webster Publishing House (no date), p. 29.

¹⁷ Ibid.

independently."¹⁸

C. Health

Decisions regarding health and medical treatment are generally made within the context of the family. Key issues center around maternal and child care, family planning and AIDS.

- o Swaziland provides an example of how laws governing maternity and childcare affect family decisions and the health of mother and child where the law does not require employers to pay a woman during her maternity leave:

Because maternity leave is unpaid in most industries, female employees are anxious to return to work as soon as possible after delivering the baby in order not to interrupt the flow of cash income. This effects women's health significantly, and defeats the purpose of the legislation [entitling women to maternity leave]. By going back to work too soon after confinement, a woman does not allow herself to recover fully from childbirth. Secondly, when she returns to work the employee must leave her child at home while she works and therefore must discontinue breast feeding. Studies have shown a statistical correlation between wage employment of mothers and early discontinuance of breastfeeding. Bottlefeeding is closely linked to nutritional and diarrhoeal diseases, which cause 2/3 of the infant deaths in Swaziland. Denied the natural immunities contained in mother's milk, and exposed to disease and germs in poor water sources and improperly prepared formulas, bottle-fed infants have seven times the number of illnesses that breast-fed infants have. Thirdly, unpaid maternity leave often requires expectant and newly-delivered mothers to exist during the important period before and after birth without sufficient funds to buy nutritional foods. The legislation seems to assume that an expectant mother necessarily has another source of income during this time -- presumably her husband. However, research

¹⁸ Ibid., p. 102.

indicates that as many as 62% of the mothers in peri-urban areas in Swaziland are single. The low wages of these women do not allow them to save money for use during maternity leave, and they have no other source of income.¹⁹

- o In many societies, a woman's lack of personal autonomy -- control over her health status, her reproduction and her sexuality -- subjects her to high maternal mortality rates, genital mutilation and AIDS. For example, in Sahelian West African countries, a wife must have permission of her husband (and a minor daughter that of her father) to receive medical care including family planning services; many women, particularly in religious communities do not seek family planning services for fear of social stigmatization.²⁰ In some monogamous societies, such as those found in Mozambique... "women were [and still are] afraid to refuse their husbands for fear that they will be abandoned or will force their husbands into adultery."²¹
- o The AIDS epidemic has given rise to the requirement to enact new laws and legislation to protect the victims of AIDS and to retard the spread of the disease. In some cases scarce family resources are being sacrificed for ineffective medicines. In addition to burdening families and exhausting their savings, the promotion of unproven drugs hinders a country's prevention efforts.²² There is a need for laws to govern these pharmaceutical products.²³ Other laws which hold promise for addressing the AIDS epidemic include the following: (1) those which improve the status of women by giving them control over sexual and family matters; and (2) laws such as those in Uganda which protect young vulnerable girls from sex abuse and establishes strict laws punishing sex offenders.²⁴

¹⁹ Armstrong, p. 87.

²⁰ Abd-el Kader Boye, et. al., "Marriage Law and Practice in the Sahel", Studies in Family Planning, vol. 22, 1991, p. 347.

²¹ United Nations, Mozambique: Women, the Law and Agrarian Reform, 1980, p. 141.

²² Elizabeth Preble, "Women, Children and AIDS in Africa: An Impending Disaster", New York University Journal of International Law and Politics, Summer 1991, p. 969-970.

²³ Ibid.

²⁴ Ibid

- o Under law in the Ivory Coast, a father has the right to tax credits for a child, even when the child lives with the mother and receives no financial support from the father. This law creates an incentive for men to father children.

D. Education

A family's decisions on investments in education of its children will have particular implications for development objectives aimed at improving the human capital in a country. Studies have shown that education of girls, in particular, have important implications for population control, and the health and education of their children. Family and education laws and customs influence family practices and decisions regarding education.

- o Under the Egyptian constitution, education is compulsory for all through the first six years; education in state institutions is free from primary through university level.²⁵ These provisions should help reduce any gender distinctions in family decisions on education. However, statistics show that the number of females attending school is lower than that for males from primary through university.²⁶ This is due in large part to the following: (1) a minimum legal marriage age for girls of 16 (25% get married before 15) compared to a minimum age of 18 for boys (boys are also required to do military service before marriage) encourages girls to marry and terminate their education early; and (2) particularly in the rural areas daughters are not encouraged by their parent to continue their education beyond the primary level so that families can fully exploit the labor of girls.²⁷
- o In some cases, education laws will have a direct impact on family decisions to invest in the education of their children. For example, under the education act in Botswana, a student who becomes pregnant is suspended from school for one year after delivery -- after which she may enroll in a school other than the one she attended at the time of her pregnancy. The result is that in most cases a girl will terminate her education at pregnancy, since to return to school generally means she will have to relocate. Such a move could place a financial burden on the family and will deprive the family of her labor.

²⁵ Zulficar, p. 5.

²⁶ Ibid., p. 10.

²⁷ Ibid.

- o In Swaziland, a government practice requires written permission of a male before issuing a passport to a female.²⁸ The practice derives from a custom which considered long distance travel a serious decision which required "...consultation with the head of the household."²⁹ By requiring the cooperation of a male, the practice often presents a major obstacle to wives, daughters and sisters who have an opportunity for overseas training.³⁰

Conclusion

The examples cited above provide glimpses into how laws can affect family decision-making in areas key to the attainment of development objectives. Although the examples are far from comprehensive, it is possible to draw a few general conclusions about how to approach the issue of law, family and development. Laws appear to address the relationship of the family/household unit to the state (e.g., compulsory education law) or relations and roles within the family/household (e.g., property rights, personal autonomy). The former may be gender-neutral; however, the latter clearly tends to make distinctions along gender lines. Thus, gender will be an important variable in the analysis. Determining the effect of law requires analyzing a provision carefully within the context of a society, taking into consideration economic, cultural and political realities. Therefore, the analysis will tend to be particularistic, although commonalities may arise within and across societies. Cross-cultural comparisons may help illumine the issues. Finally, as pointed out earlier, understanding the interaction of law and custom is fundamental to the analysis.

²⁸ Armstrong, p. 102.

²⁹ Ibid.

³⁰ Ibid.