THE RELATIONSHIP BETWEEN WOMEN'S ACCESS TO JUSTICE AND DEVELOPMENT

Papua New Guinea: a case study

to link theory with reality

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INTRODUCTION

The range of human development in the world is vast and uneven, with astounding progress in some areas amidst stagnation and dismal decline in others. Balance and stability in the world will require the commitment of all nations, rich and poor, and a global development compact to extend the wealth of possibilities to all people.

Human Development Report 2003
Millennium Development Goals: A compact among nations to end human poverty

Law is not a distinct and isolated field of study but something that permeates life. Law and legal systems interconnect with all aspects of society – from economics and politics to freedoms, opportunities and personal well being. As law permeates the lives of all it also has the ability to help improve the lives of all. This interest in how law affects society, and in development issues generally, has led me to question the relationship between law and development, and more specifically, between access to justice and development. That is, what role does access to justice play in development?

Rather than looking at this question in the abstract, I will be using women's access to justice in Papua New Guinea (PNG) as a case study. I have chosen PNG as it is a developing nation located in the Pacific with a significant Pacific Island population, and thus has geopolitical and social relevance to New Zealand. Further, PNG is ranked 139th of 177 countries on the UN Human Development Index[1], the lowest of any Pacific Island country.

Through the case study, I aim to further two objectives. First, I intend to contribute to the existing body of law and development literature by bringing the different strands of literature regarding legal empowerment, the rule of law, access to justice and Sen's development theory together, in order to focus on one aspect of legal development specifically and its

[1] The HDI provides a composite measure of three dimensions of human development: living a long and healthy life, being educated and having a decent standard of living. The index is not in any sense a comprehensive measure of human development. It does not, for example, include important indicators such as respect for human rights, democracy and inequality. However it does provide a "broadened prism for viewing human progress and the complex relationship between income and well-being." See United Nations Development Programme, '*Human Development Report 2006: Beyond Scarcity: Power, poverty and the global water crisis*' (UNDP, 2006), 263.

direct relationship to development. Second, in doing so, I intend to provide a normative framework of access to justice and development that will allow the identification of gaps in the development agenda of a country. Note that it is not the purpose of this dissertation to recommend specific development initiatives for PNG. Without extensive on-the-ground research, it would be naïve to think that such assumptions could be made. Instead I have a broader goal of bringing the theoretical perspective to bear on practical development work. Given the importance of development issues today, it is important that real world work is grounded in good theory, and that conversely, theoretical perspectives have relevance in reality.

Part I is a normative analysis of the relationship between access to justice and development. Chapter One examines the meaning of "development" and the role that law plays in development. Chapter Two explores "access to justice"' and the importance of women's access to justice for development. Part II is a positive analysis – by subjecting PNG to my normative framework I identify gaps in the development agenda as relating to access to justice. In Chapter Three, I examine how PNG's legal framework fits into my model of access to justice. Chapter Four looks at the missing link in women's access to justice in PNG, examines the effect this is having on the development, and explores the how improving women's access to justice could aid in the development of PNG. Finally, the conclusion will sum up the arguments made in the dissertation.

PART I: NORMATIVE ANALYSIS

Chapter One:

Law and Development

Wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else.

Aristotle, *Nicomachean Ethics*, book 1, chapter 5.

1. INTRODUCTION

Theories of development are strongly influenced by world politics and economic and social theory. The perception of the role law plays in development shifts as global economic, political and social theory shifts. In order to understand "development" today, and to understand the role that law can play, it is necessary to trace the changing attitudes surrounding "Law and Development".

I will begin by looking at the traditional post-World War Two approach to development. Secondly, I will discuss the period 1970-1980, in which the "Law and Development" movement was in turmoil. I will then consider the third phase of development theory, the neoliberal "Washington Consensus" of the 1980s and 1990s, and the role that law played during this phase.

Next I will discuss Amartya Sen's[2] "capabilities approach" to development, in which development is "freedom". He argues that development policies should focus on enhancing people's capabilities, and rather than being focussed on the economy or institutions, development should be concerned with enhancing peoples' lives and freedoms. Freedom

[2] Amartya Sen received the Nobel Prize in Economic Science in 1998. His paradigm-altering foundation for understanding economic development in the twenty-first century has been instrumental in the world of development today. It has become the basis for the UN Human Development Index, the present way to assess a country's development. See Amartya Sen, *Development as Freedom* (1st ed, 1999)

should be both the objective of development initiatives and the principle means of development.[3] It is this approach to development that I will advocate through this paper.

Finally, I will explain the important role that law and legal development has to play in human development as a whole. I will introduce the view that legal development is not just about what the law is and what the formal judicial system can in theory enforce but that the law and legal development must actually enhance people's capabilities to effectively exercise their rights and entitlements, thus enhancing the freedom they enjoy.[4]

2. TRADITIONAL APPROACH: 1945-1970

2.1. Definition of development

Traditionally, development was conceived of in strictly economic terms. Economists and policy-makers in the post-World War Two era assumed that economies were national.[5] Therefore development meant the capacity of an under-developed state to generate and sustain an annual increase in its gross national product (GNP) at rates of 5-7% or more.[6] The productivity increases in the Industrial Revolution were seen as a model of development, thus development strategies usually focussed on rapid industrialisation and modernisation to imitate 'first-world' development, often at the expense of agriculture and rural development.[7] Implementing Keynesian economic theory, the basic economic model was one of a regulated market economy in which the state played an active role, through various forms of planning and industrial policy and state ownership of major industries and utilities.[8] Policy-makers therefore sought to utilise strategies that would fuel this economic growth, even at the expense of democratic reforms, as it was believed that economic growth

[3] This is a brief summary of the arguments in Sen's book. See Amartya Sen, *Development as Freedom*.
[4] Amartya Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?' (Paper presented at the World Bank Legal Conference, Washington, DC, 5 June 2000), 11.
[5] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (1st ed, 2006), 98.
[6] M. Todaro and S. Smith, *Economic Development* (8th ed, 2002), 15.
[7] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', 98; M. Todaro and S. Smith, *Economic Development*, 15.
[8] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (1st ed, 2006), 75.

would inevitably lead to democracy.[9] Further, social indicators such as improved literacy rates, and improved education, health and housing services were seen as supplementary to economic growth.[10]

2.2. Role of law in development under traditional approach

Under the traditional model of development, legal liberalism was the dominant theory. Law was seen as instrumental and purposive, a tool to remove traditional barriers to economic growth and to create the formal structures for macroeconomic control. It was seen as a means of accomplishing societal development rather than as "expressing commitments or purposes of its own to be respected and achieved".[11] As the primary focus in this era was economic growth, lawyers in the development realm focussed on law reform and stressed the importance of law as an instrument through which the state could shape the economy.[12] The emphasis on the economic role of law was not because of indifference to issues of human rights, democracy and social justice, but because it was believed that economic growth and a more effective legal system would foster such values.[13]

Development lawyers sought to transform the legal culture of developing countries, in order to focus efforts on economic law reform, through legal education. It was argued that training lawyers in developing countries to think less formally and more instrumentally could "initiate change that would narrow the gap between the present performance of the legal profession and its development possibilities."[14] Trubek draws a useful comparison between development policy-makers' emphasis on economic growth and legal education to foster and improve economic law reform. He explains that:

> Just as the development thinkers hoped (or pretended to hope) for spillover from economic growth to democracy, so the L&D [Law and Development] movement believed there would be spillover

[9] Maggi Carfield, 'Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index' (2005) 83 *Washington University Law Quarterly* 339, 2.
[10] M. Todaro and S. Smith, *Economic Development*, 15.
[11] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', 102.
[12] Ibid., 75.
[13] Ibid., 77.
[14] David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' [1974] 4 *Wisconsin Law Review* 1062, 1074-1078. See also David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 76-77.

> from an effective and instrumental orientation in economic law to "democracy values" like access to justice and protection for civil rights.[15]

Under the traditional approach to development, it was also assumed that there was a need to create modern rules and legal institutions, which meant some degree of transplanting more advanced western institutions into less developed countries.[16]

3. LAW AND DEVELOPMENT IN TURMOIL: 1970-1980

The 1970s was a period of rapidly changing global economic conditions,[17] and previous Keynesian ideas about macroeconomic management began to lose ground. Simultaneously, "Law and Development" scholars, such as Trubek and Gallanter[18] began to doubt the legal liberalist, instrumentalist approach of the previous generation.[19] Results had been mixed – although some economies had developed, many remained poor and inequalities were growing.[20] Even where there was change in the economic conditions in a developing country, along with more instrumental thinking and effective law-making, the hoped-for spillover into greater democracy and protection of individual rights did not occur.[21] The legal liberalism model assumed too much about the legal and social structures of developing countries and was thus "naïve and ethnocentric."[22] It assumed that state institutions were the primary locus of state control, whereas in much of the developing world the tribe, clan or local community was in fact much stronger than the nation state. It also assumed that courts were the central actors in social control and that they were relatively independent and autonomous from political, tribal, religious or class interests whereas this was not the case in many circumstances.[23] The legal liberalism model also took for granted that the legal ideals

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[15] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 77.
[16] Ibid., 77.
[17] For example, during this period the Vietnam War, the 1972 Arab oil shock and the American abandonment of the gold standard, among other things, led to deep worldwide recession and high inflation.
[18] Trubek and Gallanter are considered two of the founders of the "Law and Development" movement.
[19] For a detailed account of this, read David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States'.
[20] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' 110.
[21] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 79.
[22] Maggi Carfield, 'Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index', 3.
[23] David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', 1081.

and institutions from the more advanced western societies were transferable and the best way forward.[24]

However despite these growing concerns amongst legal scholars, this was not a period of significant change in thinking in development economics itself.[25] Trubek and Gallanter argue that development continued to be defined in economic terms, and economic development was seen as the most efficient means to achieve social or political change.[26] There was little interest in law and legal development from the drivers of development during this period.

4. THE WASHINGTON CONSENSUS: 1980s AND 1990s

4.1. Development during this period

In the 1980s and 1990s, the legal liberal model gave way to a new approach to development, termed the "Washington Consensus", following the rejection of Keynesian economics and the emergence of neoliberalism[27] as the dominant global economic theory. Neoliberal policies included a commitment to liberalisation, privatisation, deregulation and the promotion of macroeconomic stability through inflation control, tax reform and fiscal austerity.[28]

This significant shift in global economic thinking had a huge effect on world economics and world politics, [29] and therefore on the approach to both development and the role of law in

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[24] Maggi Carfield, 'Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index', 3. See also David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 78-80.

[25] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' 110.

[26] David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', 1086.

[27] 'Neoliberalism' is also known as 'classic liberalism' (as the word 'neoliberal' has become almost unusable nowadays due to negative connotations). Classic liberals emphasise freedoms from the state and economic freedoms. This form of liberalism is essentially that of John Stuart Mill and embraces economic, personal and civic freedoms. See Martin Wolf, *Why Globalization Works* (2005), 321 at fn 2.

[28] Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (1st ed, 2006), 209-210.

[29] For example, by the 1990s, major changes had occurred in the world economy and world politics. Industry had spread to the developing world, parts of Asia were booming, there was massive globalisation involving transnational companies, and there was rapid deregulation and liberalisation of capital markets around the

development. Firstly, in terms of development, there was recognition that although many developing countries had met their economic growth targets, the living standards for most people remained unchanged. This led to the widening of the definition of development from an economic growth approach to one encompassing major changes in social structures, popular attitudes, national institutions, reduction of inequalities and the eradication of poverty as well as the acceleration of economic growth.[30] For example, the World Bank, in its 1991 World Development Report asserted that:

> The challenge of development… is to improve the quality of life. Especially in the world's poor countries, a better quality of life generally calls for higher incomes – but it involves much more. It encompasses as ends in themselves better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom, and a richer cultural life.[31]

Secondly, in terms of the importance of law in development, a consensus developed that the "rule of law" was fundamental to economic development in a market-oriented global society; democracy and human rights protections.[32] However there was (and still is) no clear consensus on what the "rule of law" is: it was seen differently by those who were using it for economic development reasons, and those using it to advance human rights. This is discussed in more detail below.

4.2. Role of law in development under Washington Consensus

4.2.1. Economic development

Law, in the shape of law reform and established rules and institutions, played a significant role in development during the Washington Consensus era. In order to achieve the goals of a neoliberal global economic market, advocates recognised the necessity to create all the institutions of a market economy in developing countries and remove many of the

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world, significantly increasing the degree of world economic integration. The collapse of the Soviet Union helped legitimise the neoliberal economic policies advocated by the west. From David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 82.

[30] M. Todaro and S. Smith, *Economic Development*, 17.

[31] Ibid.

[32] A detailed description of this can be found in David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 84-86.

restrictions on markets in these economies. The dominant view of this era was that growth was best achieved if the state stayed out of the economy except to the extent that, through law, it provided the institutions needed for the functioning of the free market.[33] Thus "good governance" and the "rule of law", in its procedural sense, were seen as necessary for development. The rule of law thus constituted of procedures that would guarantee property rights, enforce contracts, and protect against arbitrary use of government power and excessive regulation.[34] The rule of law was considered essential for long term development because it provided security for foreign and direct investment, property and contract rights, international trade, and other vehicles for enhancing economic growth.[35] Institution-building was thus the prime focus of development, as it was believed that strong legal institutions would guarantee the rule of law, thus fostering economic development. Economic development agencies, such as the World Bank and the International Monetary Fund (IMF), recognised the desirability of an independent judiciary, efficiently functioning courts, and effective access to justice.[36]

4.2.2. Democracy and the need for human rights protections

As discussed above, during the immediate post-war period development scholars and policy-makers hoped that economic growth and the subsequent cultural transformation would lead to democracy and the protection of human rights. However, by the 1970s it had become apparent that this spillover effect would not occur, and that human rights had to be pursued as an independent goal.[37] In this period, the international community made strong progress in specifying human rights norms and creating the institutional machinery to enforce these internationally.[38] By the 1980s and 1990s it was recognised that international protections were insufficient without strong domestic protection. Thus the human rights movement began to look at domestic institutions, the creation of constitutional guarantees, judicial

[33] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 85.
[34] Ibid.
[35] Stephen Golub, 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative' (Working Paper Number 41, Carnegie Endowment for International Peace, 2003), 7.
[36] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 85.
[37] Ibid., 84.
[38] Ibid. For example, the two seminal human rights documents: the *International Convenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR") and the *International Covenant on Economic, Social and Political Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976.

review, and greater judicial independence.[39] Ideas about the construction of the rule of law widened to mean substantive protection of rights. "Access to justice" was recognised as a component because national laws protecting human rights and institutions to enforce them were in themselves not sufficient; they must be accessible to all both formally and functionally, to result in effective justice.[40]

5. PARADIGM SHIFT: "DEVELOPMENT AS FREEDOM"

5.1. Critique of the Washington Consensus

As the twentieth century came to an end, the neoliberal approach to development faced a variety of criticisms. Firstly, many developing and transition countries that had adopted these policies experienced severe economic crises.[41] Critics argued that neoliberal policy-makers did not pay enough attention to local institutions or conditions or the timing of reforms. Secondly, many criticised the continued focus on economic growth and poverty alleviation[42], despite the widened conception of "development" that had evolved. It was considered by some that the neoliberal reforms had more to do with the interests of international actors in debt recovery, market access, and the protection of investments than with the economic growth of the developing countries to which they were applied.[43] Further, although much was stressed about the law's role in making the economy more efficient, little was said about distribution of resources.[44] As regards the rule of law, neoliberal policy-makers were criticised for attempting to implant a single model on the world, working legal institutions needing to be rooted in diverse historical, cultural and social contexts.[45]

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[39] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 84.
[40] R. Daniels and M. Trebilcock, 'The Political Economy of Rule of Law Reform' (2004) 26(1) *Michigan Journal of International Law* 99, 111.
[41] For example severe economic emergencies experienced by a number of Latin American countries, the Asian financial crisis, and problems in Russia. See David M. Trubek and Alvaro Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (1st ed, 2006), 6.
[42] David M. Trubek and Alvaro Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice', 6.
[43] Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social', 206.
[44] David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 89.
[45] Ibid., 87.

5.2. Emerging paradigm: Development as "freedom"

As a result of these critiques, the focus of development policy has increasingly come less from economics and more from political science, ethics, sociology, and law. In particular, all aspects of development, for example legal development (encompassing legal reform, human rights, the rule of law, and access to justice), social and economic welfare and political freedoms, have become substantive definitions of development. That is, we should promote these things not just as tools to facilitate development but as development objectives in themselves.[46]

One of the most influential works, instrumental in altering the foundations for understanding development, is Amartya Sen's *Development as Freedom*.[47] Sen argues that "economic growth cannot be sensibly treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy."[48] He explains how this focus on human freedoms contrasts with narrower views of development, such as GNP growth, a rise in personal incomes, industrialisation, technological advances, or social modernisation. Although these are all important means of expanding the freedoms that people enjoy, freedoms also depend on other aspects such as social and economic arrangements (for example, education and healthcare facilities) and political and civil rights.[49]

Sen argues that development policies should enhance people's "capabilities", as it is the ability to function that really matters.[50] For example, a person may possess a book, but this is of little use if he or she is illiteratee. Effectively, Sen is arguing that poverty or underdevelopment cannot be measured by income or even utility; what matters is not the

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[46] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', 156-157.
[47] Amartya Sen, *Development as Freedom*.
[48] Amartya Sen, quoted in M. Todaro and S. Smith, *Economic Development*, 17.
[49] Sen explains that "[d]evelopment requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers of people." Amartya Sen, *Development as Freedom*, 3-4.
[50] Amartya Sen, *Development as Freedom*, 40.

things a person has or the feeling these provide but what a person is, or can be, and does or can do.[51]

5.3. Role of law in Sen's conception of development

A central tenet of Sen's thesis is the interconnectedness of the various freedoms and the role they play in human development. It is not, for example, that political or social freedoms, such as political participation and dissent, or opportunities to receive basic healthcare education, are "conducive to development". Instead, in light of development as "freedom", these are *constituent components* of development.[52] It is misleading to talk about economic development, political development, social development and legal development as separate entities because "human development encompasses them all and they can be… only seen together, not in isolation from each other."[53]

Closely linked to the above, is Sen's view that various aspects of development must be considered both the principle means of other aspects of development and as development ends in themselves.[54] For example, increased social opportunities, such as the ability to live a healthy life, or gender equality, may lead to more effective participation in economic and political activities, thus contributing to both economic and democratic progress.[55]

These two main tenets of Sen's thesis help to explain the important role that law and legal development play in human development as a whole. The law is a vital part both in legal development as an end in itself, and as an influence in other aspects of development. Further, legal development may be contingent on certain social, economic or political characteristics or freedoms, demonstrating the interdependence of different aspects of

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[51] M. Todaro and S. Smith, *Economic Development*, 17. For more read Amartya Sen, *Development as Freedom*, Chapter One, The Perspective of Freedom.
[52] Amartya Sen, *Development as Freedom*, 5.
[53] Amartya Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?', 7.
[54] See Amartya Sen, *Development as Freedom* generally. See also Amartya Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?' generally.
[55] S Amartya Sen, *Development as Freedom*, 37-39.

development. Law is not just an instrument for new policy initiatives, nor simply a necessary precursor to markets, but is an integral part of the definition of development.[56]

Legal development, as an end in itself, is not just about what the law is and what the judicial system formally asserts. Legal development must enhance people's capability, that is, their freedom, to exercise their rights and entitlements. For example, just as it is now recognised that a country that has met its economic development goals is not highly developed if the living standards of its people have not improved[57], it seems disingenuous to say that the development process has gone well if fundamental human rights are being breached.[58]

Acknowledging the complementarity and interdependence between the law and other aspects of development is essential to understanding the role law can play in development. For example, improved legal rights for women can influence nearly every aspect of economic, political, social and legal development. It can, among other things, result in a reduction in child mortality, gender equity and increased political participation thus a more robust democracy. Conversely, improved rights for women also relies on social development, as these rights would be hollow if a woman could not effectively exercise them due to illiteracy or fears for her personal safety. Political development, such as the consolidation of democracy, requires legal provisions for elections, along with judicial protection of dissent. Equally, a free, vigorous and responsible media can be hugely influential in strengthening political liberties and human rights.[59]

The "rule of law" continues to be an important aspect of law and development. Despite the ambiguities and difficulties in defining what it is, I will attempt to explain what it includes for the purposes of my discussion.[60] I consider it to need specific substantive outcomes, not just procedure. It is a constraint on arbitrary government, and can be generally held to include

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[56] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', 157.
[57] Refer to "Wasington Consensus" in the previous section, in which there was recognition that although many developing countries had met their economic growth targets, the levels of living standards of the masses of people remained unchanged. This has led to the widening of the definition of development in the 1990s.
[58] Amartya Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?', 9.
[59] Ibid., 11, 19-21.
[60] Interestingly, in most literature that I have read that discusses the "rule of law", the rule of law is given a very vague, broad definition, or no definition at all. It is an extensively used, amorphous concept.

constitutional guarantees of certain rights,[61] an independent judiciary and efficiently functioning courts.[62] Furthermore, upholding Sen's approach to legal development, the rule of law is not just about what the law is and what it formally asserts. To uphold the rule of law, a legal system must consider people's substantive freedom to exercise their rights and entitlements. Legal institutions set up in accordance with the rule of law (set up under formal rules, which purport to protect rights) cannot merely exist in a country. These institutions must also be accessible to all – formally and functionally.[63] Further, having rights on paper, and the mere existence of a remedy, is not enough. Thus the rule of law propounds that a legal system ought to be judged according to *whether it enables people's capability to exercise their rights.*[64]

5.4. Effect on international development agencies

Following Sen's landmark work, international aid agencies such as the IMF, the World Bank, and domestic international development agencies such as AusAID and NZAID, have started to define development even more widely, to promote a broader set of human freedoms along with the capacities to realise them.[65] According to Rittich this has signalled "a shift in the direction of a more humane, responsive, and mature concept of development. Imagining development as freedom also helped to explain the elevation of human rights and the rule of law to the status of development ends or objectives."[66]

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[61] Note, however, that the rule of law does not actually say what the substance of these rights are.
[62] This vague definition (more what rule of law includes, rather than what it is) comes from David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present and Future', 85.
[63] R. Daniels and M. Trebilcock, 'The Political Economy of Rule of Law Reform' (2004) 26(1) *Michigan Journal of International Law* 99, 111.
[64] Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (1st ed, 2006), 265.
[65] Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social', 207.
[66] Ibid. For example, the World Bank is currently in a "comprehensive development" phase, launched by the Comprehensive Development Framework (CDF). This strategy has sought to reconceptualise development by going beyond macroeconomic or financial concerns to focus on structural, social and human concerns. Freedom from poverty has been introduced as a central aim. See Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', 268.

6. CONCLUSION

The role of law and legal development has grown in importance as the global political economy has changed and the conception of development has widened. During the post-war era, when Keynesian economic theory was dominant, the focus of development was economic growth. Law was seen purely as an instrument through which the state could shape the economy. In the 1980s and 1990s, when neoliberalism became the dominant political economic theory, the approach to development widened to encompass major changes in social structures, national institutions, reduction of inequalities and the eradication of poverty. Law and the "rule of law" played a significant role in development, in the form of law reform necessary for institution building and increasing human rights protections.

However more recently a new paradigm has emerged, in which development should be equated with "freedom". Development policies have to be more concerned with enhancing people's capabilities, and their ability to function, in order to be effective. Law and legal development is a vital part of the development process, both as an end in itself and as instrumental in its indirect contribution to other aspects of development. Acknowledging this is essential to understanding the role that law can play in development.

Chapter Two:

Access to Justice and Development

1. INTRODUCTION

Access to justice, as an aspect of legal development, is an important component of development and a development objective in its own right. This chapter will explore this interdependent relationship through a consideration of the relationship between women's access to justice and development.

First, I will define "justice" and "access to justice" for the purposes of this discussion. Second, I will discuss the interrelated elements of "access to justice" in order to ascertain what reforms development initiatives should target in order to improve access to justice for women. Third, I will discuss the importance of access to justice using the case of improved access to justice for women.

2. DEFINING "JUSTICE"

There are infinite theories and definitions of justice, with no one answer. Whilst the main theories of justice are beyond the scope of this study, I will make some initial observations for the benefit of this discussion.

Justice can be concerned with distribution. This encompasses economic and social (and within social, gender) justice. The issues raised here concern the distribution of wealth, resources, reward and respect in society. How is this distribution to be properly defined? Should distribution be based on merit, social status, need or fairness? Who says what is "just" or "fair"? Where does justice come from?

In the context of this dissertation, I will be concerned with *legal* justice, that is, justice within the context of the law. This raises various issues, such as: what is the proper response to wrongdoing? What is an effective remedy for a wrong and how can this be realised? How

can a legal system ensure the effective realisation of rights? What is a "fair" outcome? It must be acknowledged that issues of distributive justice may be interrelated with legal justice. For example, gender equity (arguably an element of social justice) may be a prerequisite for access to legal justice for women. Equally, improving women's access to legal justice may positively influence social and economic justice, for example by demonstrating to men that they cannot mistreat women with impunity, thus eventually modifying adverse gender attitudes. The focus of this discussion, however, is essentially access to legal justice, and in particular, access to legal justice for women.[67]

2.1. Narrow conception of justice

Justice can be separated into the procedural and the substantive. Liberal western states of the 18th and 19th century took a narrow, procedural approach to justice, reflecting the laissez-faire, essentially individualistic philosophy of rights prevailing at the time. In this sense, there was no substantive criterion of justice independent of or prior to procedure. The focus was on the legal process, thus as long as the procedure was fair the outcome would be "just". Under this philosophy, access to justice was a basic human right, but as a state was not required to act affirmatively to realise this right substantively, this only meant *formal* access to justice. [68] Thus women, or poor people, for example, had the right to access "justice" if the law said they did. Whether they could afford, or had the social capacity, to use this "right" to get a substantively fair outcome was irrelevant.

[67] From here on in, any reference to "justice" or "access to justice" refers to access to *legal* justice as defined in this chapter. In essence this a legal system which leads to outcomes that are fair and just, with effective remedies for wrongs and effective realization of rights, and access to justice means equal access for all members of society and the genuine capacity to access this system to its full effect.

[68] Mauro Cappaletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1977-1978) 27 *Buffalo Law Review* 181, 183-184. See also Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public International Law* 85, 88; William E. Conklin, 'Whither Justice? The Common Problematic of Five Models of "Access to Justice"' (2001) 19 *Windsor Yearbook of Access to Justice 2001* 297, 298. Wouter Le R. De Vos, 'Alternative Dispute Resolution from an Access-to-Justice Perspective' [1993] *Journal of South African Law* 155, 156.

2.2. Wider conception of access to justice

The 20th century saw a vast expansion of state power in regards to welfare and the recognition of economic, social and cultural rights.[69] As laissez-faire societies grew in size and complexity, and as prevailing philosophical norms shifted, it was recognised by philosophers[70] and states that affirmative state action would often be required to ensure the attainment of these rights for all. The concept of justice has thus come to mean not only fair procedure but also socially fair outcome. Consequently, it has been recognised by modern states that affirmative state action is required to realise the right to effective access to justice.[71] Cappalletti and Garth, in their comprehensive and influential world survey on access to justice in the 1970s, held that "effective access to justice can thus be seen as the most basic requirement – the most basic 'human right' – of a modern egalitarian system which purports to guarantee, and not merely proclaim, the legal rights of all."[72] In this sense, access to justice encompasses two basic purposes of the legal system: the system must be equally accessible to all; and it must lead to results that are individually and socially just.[73]

It must be emphasised that access to justice is not just about money and the ability to access the justice system (for example, through legal aid). Money, access to the formal court system, and access to legal representation does not necessarily guarantee access to *justice*. Likewise, access to justice is not just about the existence of normative rights, protections and remedies, because these alone cannot guarantee actual fair and effective outcomes for all. International agencies have shifted their focus to reflect this change in philosophy.[74] The United Nations

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[69] New Zealand, for example, became a "welfare state" that redistributed wealth to provide for those in need. On the international scale, the aftermath of World War Two saw the establishment of and expansion of international rights documents such as the ICESCR and the ICCPR that recognised civil, political, economic, social and cultural rights.

[70] John Rawls, for example, argues that in order for rational people to fulfill their plans they must be guaranteed access to certain primary goods, natural and social. Similarly, Joseph Raz argues that the ideal of personal autonomy cannot be realized where individuals are unable to take advantage of the options offered to them. See Stephen Bottomley and Simon Bronitt, *Law in Context* (3rd ed, 2006), 81.

[71] Ronald Sackville, 'Some Thoughts on Access to Justice', 89.

[72] Mauro Cappaletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', 185.

[73] Wouter Le R. De Vos, 'Alternative Dispute Resolution from an Access-to-Justice Perspective', 155.

[74] For example, the United Nations Development Programme (UNDP) defines access to justice as the "ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievances in accordance with human rights principles and standards." See Ramaswamy Sudarshan, 'Rule of Law and Access to Justice: Perspectives from UNDP Experience' (Paper

Development Programme (UNDP) has emphasised that access to justice must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.[75]

3. ATTAINING ACCESS TO JUSTICE

Access to justice (for all members of society) has three components:[76]

i. Normative protections (the existence of a remedy), through laws and law reform, legal and regulatory frameworks, and customary norms;
ii. Legal empowerment (the capacity to seek a legal remedy); and
iii. Institutions and mechanisms, both formal and informal, so there is the capacity to provide an effective remedy.

These are integrally linked. In the context of women, for example, the legal empowerment of women could be the impetus for law reform in a country. Conversely, law reform affirming international treaties, such as CEDAW or the ICCPR could encourage this legal empowerment, as by government affirming rights, this encourages women to push for actual protection of these. Further, normative protections give the formal ability to access a justice system.[77] Laws and legal and regulatory frameworks can also be used to establish and regulate institutions and mechanisms. Institutions may be: formal, such as a court; informal, such as alternative dispute resolution (ADR); or a customary remedial system. Legal empowerment,[78] such as community driven programmes to increase awareness of rights, or

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presented at the European Commission Expert Seminal on Rule of Law and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003), 2. The World Bank, although it to some extent has continued its institution-building approach, has expanded its view of access to justice. For example, the Senior Vice President and General Counsel Robert Danino, in a conference on Judicial Reforms in 2005, stated that "people's rights remain imaginary if the institutions charged with enforcing them cannot be reached. People have to have the *knowledge* and the *capacity* to claim their rights [my emphasis]." See Roberto Danino, 'Improving Access to Justice' (Paper presented at the International Conference & Showcase on Judicial Reforms, Manila, Philippines, 29 November 2005), 4.

[75] United Nations Development Programme, *Access to Justice: Practice Note* (2004), 6.

[76] Ramaswamy Sudarshan, 'Rule of Law and Access to Justice: Perspectives from UNDP Experience', 2.

[77] In New Zealand, for example, the *Bill of Rights Act 1990* gives everyone who is charged with an offence the right to a fair and public hearing by an independent and impartial court (s25(a)) and the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown (s27(3)).

[78] For an excellent discussion of legal empowerment see Stephen Golub, 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative'. Also see Ana Palacio, 'Legal Empowerment of the Poor: An Action Agenda for the World Bank' (World Bank, 2006) and Commission on Legal Empowerment of the Poor, 'Working Group One: Access to Justice and Rule of Law' (Commission on Legal Empowerment of the Poor, 2007).

the capacity (economic or social) to access both formal and informal legal services, gives these institutions and mechanisms the genuine capacity to provide an effective remedy for wrongs.

Clearly then, normative protections (providing for rights and the existence of a remedy on paper), institutions and mechanisms (which have the capacity to provide the remedy), and legal empowerment (which is the impetus for and makes effective these two former factors) together provide the capability to access justice.

Fig. 1 illustrates this model of "access to justice". All three components are essential for achieving access to justices as I define it, that is, the genuine capacity to access and utilise the legal system to its full effect, leading to effective remedy for wrongs, and the effective realisation of rights. Thus development initiatives in any country should focus on these areas to improve access to justice

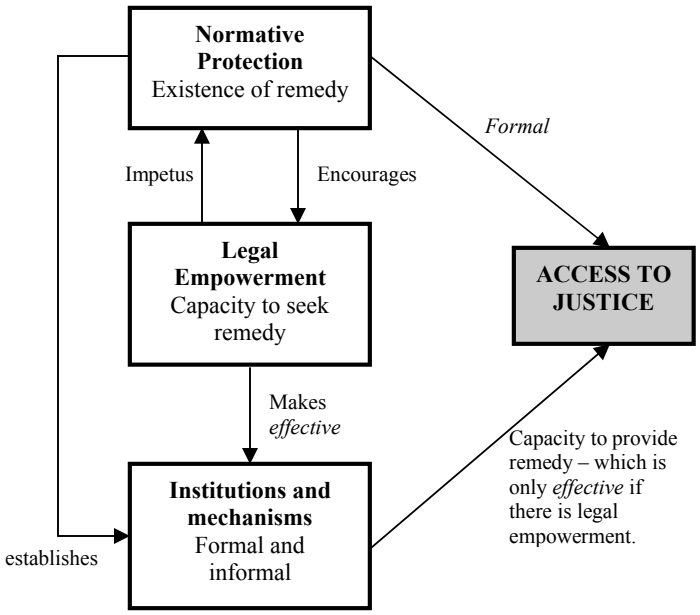

Fig. 1

4. IMPORTANCE OF WOMEN'S ACCESS TO JUSTICE FOR DEVELOPMENT

The attainment of access to justice is an aspect of legal development. As explained above, according to Sen's theory of development each individual freedom is a constituent component of human development as a whole. The various aspects of development (or freedom) must be considered both the principal means of development and as ends in themselves. Thus ensuring women's freedom to access justice is both a development end in itself and has a significant influence on social, political and economic aspects of development. Further, women's access to justice is instrumental to the rule of law, which itself is a development end and a means to all other aspects of development.

Fig. 2 on the following page illustrates the importance of access to justice to development. It summarises the following arguments and can be used as a model to describe the relationship between access to justice and development.

4.1. Women's access to justice as an end in itself

Legal development, as an end in itself, must enhance all people's capability (that is, their freedom), to exercise their rights and entitlements. All sectors in society must have access to justice – men and women, the young and the old, the rich and the poor. Without the fair and equal access to justice for women, a country cannot call itself "developed", no matter how far it has progressed in other areas.

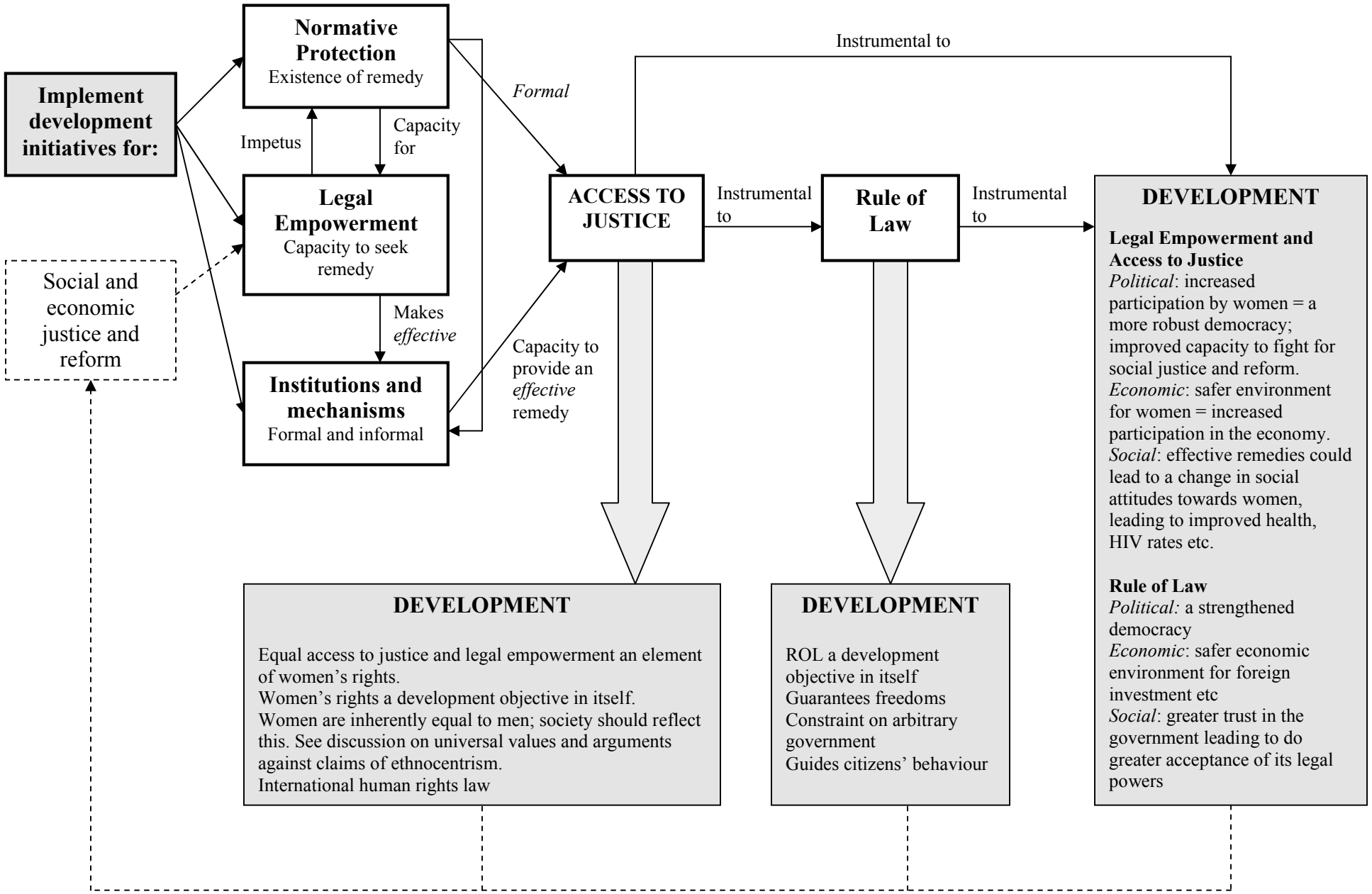
Implement development initiatives for:
Normative Protection
Existence of remedy
Impetus
Capacity for
Legal Empowerment
Capacity to seek remedy
Makes *effective*
Institutions and mechanisms
Formal and informal
Social and economic justice and reform
Formal
Capacity to provide an *effective* remedy
ACCESS TO JUSTICE
Instrumental to
Rule of Law
Instrumental to
Instrumental to
DEVELOPMENT
Legal Empowerment and Access to Justice
Political: increased participation by women = a more robust democracy; improved capacity to fight for social justice and reform.
Economic: safer environment for women = increased participation in the economy.
Social: effective remedies could lead to a change in social attitudes towards women, leading to improved health, HIV rates etc.
Rule of Law
Political: a strengthened democracy
Economic: safer economic environment for foreign investment etc
Social: greater trust in the government leading to do greater acceptance of its legal powers
DEVELOPMENT
Equal access to justice and legal empowerment an element of women's rights.
Women's rights a development objective in itself.
Women are inherently equal to men; society should reflect this. See discussion on universal values and arguments against claims of ethnocentrism.
International human rights law
DEVELOPMENT
ROL a development objective in itself
Guarantees freedoms
Constraint on arbitrary government
Guides citizens' behaviour

Fig. 2

4.1.1. Universal value of women's rights

Equal access to justice for women[79] demands recognition of the inherent equality of women and men. Although some rights are arguably culturally specific,[80] the right of women to be treated equally and fairly is a universal right reflecting a universal value and thus a legitimate development aim. This may appear to raise issues of ethnocentrism, and claims that I am showing insufficient respect for, and attempting to impose western values on, other cultures. However, as influential feminist philosopher Martha Nussbaum has argued, the charge of "westernising" looks like "a shady political stratagem, aimed at discrediting forces that are pressing for change."[81] Further, more legitimate criticisms based on culture, diversity and paternalism have also been countered by Nussbaum.

Firstly, charges of "westernisation" can be seen as a political strategy used by those to obscure real forces for change within a country. Nussbaum gives an example of the disingenuousness of opponents who claim that all women in India were happy before western ideas came along to disrupt them. In reality, there were indigenous movements for women's education, for the end of *purdah*[82], and for women's political participation that gained strength in the 19th and early 20th centuries ahead of British and US feminist movements.[83] It is naïve to think of women's rights as a purely western concept. People and governments should not be able to throw up claims of "westernisation" to legitimise the status quo or to resist genuine push for change.

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[79] Requiring normative protection for women's rights and the existence of remedies for women, the institutions or mechanisms to provide remedies, and the legal empowerment of women to make these effective.
[80] For example, the "right to bear arms" enshrined in the US Constitution, it is not considered a right in most other countries around the world; the right to private property, is specific to capitalist societies. The inherent equality of men and women, on the other hand, deals with fundamental human dignity rather than distribution of resources in society.
[81] Martha C. Nussbaum, *Women and Human Development* (2000), 38.
[82] *Purdah* is the cultural (and for some, religious) practice of secluding women and enforcing high standards of female modesty. It can take two forms – either physical segregation or the requirement of women to cover their bodies and conceal their form. *Purdah* is practiced by in both Muslim and Hindu societies. The limits imposed by this practice vary according to different countries and class levels. From Hanna Papanek, 'Purdah: Separate Worlds and Symbolic Shelter' (1973) 15(3) *Comparative Studies in Society and History* 289.
[83] Martha C. Nussbaum, *Women and Human Development*, 38.

A second criticism is an argument from culture. For example, some cultures have powerful traditional norms of female modesty, deference, obedience, and self-sacrifice that have defined women's lives for centuries. It can be argued and that one should not assume that these are bad norms, incapable of constructing good lives for women, and that western women are condescending when they assume that only the lives that they lead can result in happiness.[84] However Nussbaum argues that a woman c*an* choose to lead a traditional life, so long as she does so with certain social and economic opportunities in place, ensuring that it is a *free* choice. Even where women appear to be satisfied with traditional customs, it is necessary to probe deeper. A woman with no property rights under the law, no formal education, no legal rights of divorce, and who is likely to face violence if she works outside the home, who then says that she endorses traditions of modesty, purity and self-abnegation has not really had a free and fully informed choice on the matter.[85]

Additionally, traditions should not be oversimplified, ignoring counter-traditions of female defiance, strength and protest within societies.[86] For example, female protest against unfair treatment by males is a very old theme in Indian tradition[87], and the public norm of subservience ignores the private tradition of protest.[88] Women themselves should be asked what they think of these traditions, which are "typically purveyed, in tradition, through male texts and the authority of male religious and cultural leaders, against a background of women's almost total economic and political disempowerment."[89] Just as we cannot make sweeping generalisations about "New Zealand culture", we must recognise that all nations are diverse. We in New Zealand would never tolerate a claim that women in our own society

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[84] Martha C. Nussbaum, *Women and Human Development*, 41.

[85] Ibid., 42-43 and Chapter 2 generally. Nussbaum gives an example of a group of women in Andhra Pradesh, who initially resisted a government project aimed at the construction of a women's collective out of fear for their husbands' reactions. However over time they began to see the advantages that can be gained by collective discussion: they now get a health visitor to come regularly, demand a teacher shows up regularly, have gained greater respect from their husbands, and traditions of deference have ceased to seem good.

[86] Nussbaum argues that "[e]quating the entirety of a culture with traditional or change-resisting elements is frequently a ploy of both chauvinism and imperialism, used to justify domination." Ibid., 46.

[87] Ibid., 44.

[88] Nussbaum tells a story of woman she met, Uma Narayan, who had a traditional upbringing. She was told by her mother "never to question male authority, and taught norms of female submissiveness, silence, and innocence – all the while hearing from the same unhappy mother a constant stream of highly articulate protest against the misery such confining traditions caused." Narayan thus "understood her tradition as a Janus-faced one, with two quite different female voices – the silence of subservience and the turbulent voice of protest." She told her mother that "The shape your 'silence' took… is in part what has incited me to speech." Ibid., 42.

[89] Ibid., 42.

must embrace traditions that arose a thousand years ago. It thus seems condescending to treat women from other cultures as bound by the past in ways that we are not.[90] Governments should not be able to hide behind "culture" to resist legitimate calls for change.

A further argument in relation to culture is the appeal to cultural relativism – the idea that normative criteria must come from within the society to which they are applied. However people do not make moral judgments from purely within their society. The world is indisputably linked; each society cannot be seen in isolation. For generations, cultures and societies have borrowed from one another. For example, the ideas of Marxism have influenced conduct in Cuba, China and Cambodia.[91] Democracy, which originated in ancient Greece, is now extremely important across the world. Christianity and Islam, which both started in Judea as small dissident sects, have both profoundly influenced the whole globe.[92] For the whole of human history, societies have borrowed from one another without worries about "purity".[93] As Aristotle said, "In general, people seek not the way of their ancestors, but the good."[94] Ideas of feminism, democracy, and egalitarian welfarism can be inside any known society. By deferring to a chauvinistic view of a society's traditions, and making it the last word, we deprive women (and the men who support them) the freedom to strive for change, tolerance and their perception of "the good."

A third criticism of women's equality as a universal value comes from the good of diversity. This argument is that "our world is rich in part because we don't all agree on a single set of categories, but speak many different languages of value… each cultural system has a distinctive beauty, and… it would be an impoverished world if everyone took on the value system of America."[95] An analogy can be drawn here with preserving languages to preserve linguistic diversity. However cultural diversity is different to linguistic diversity as cultural practices have the capacity to harm people. It is possible to believe that the Maori language should be preserved without thinking the same about domestic violence, absolute monarchy,

[90] Martha C., Nussbaum, *Sex and Social Justice* (1999), 37.
[91] Martha C. Nussbaum, *Women and Human Development*, 48.
[92] Ibid., 49.
[93] Martha C., Nussbaum, *Sex and Social Justice*, 37.
[94] Aristotle, *Politics*, quoted in Martha C. Nussbaum, *Women and Human Development*, 49.
[95] Martha C. Nussbaum, *Women and Human Development*, 50.

or female genital mutilation in other cultures.[96] Nussbaum argues that this objection based on diversity does not undermine the search for universal values. Instead, it makes us ask whether the cultural values in question are among the ones worth preserving. She argues that traditions are not worth preserving simply because they are old – we have to assess the contributions they make against the harm they do. We should preserve types of diversity that are compatible with human dignity.[97]

The final criticism of universal values is the paternalistic argument, that is, when we use universal norms as a benchmark for the whole world, we are telling people what is good for them, rather than allowing people to form their own conceptions of the "good." We are thus showing little respect for people's freedom as free agents. However the endorsement of universal values (as long as these values are facilitative rather than tyrannical)[98] is actually compatible with a commitment to respecting people's choices. Without a universal value of gender equality, only half of society's citizens, men, are essentially free to form their own conception of the good. The other half, women, are at the mercy of potentially paternalistic value systems themselves that claim that they are promoting women's good, which tell women what they can and cannot do.[99]

4.1.2. Women's rights under international law

Evidence from international law also reveals that the women's equality is a universal value. The fair, equal and just treatment of women is a right recognised in many international human rights documents. For example, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR)[100] requires that State Parties undertake to respect and to ensure to all individuals the rights recognised in the Covenant, without regard to any distinctions such as sex. The ICCPR also guarantees equality before the law and protection against

[96] Martha C. Nussbaum, *Women and Human Development*, 50.
[97] Additionally, it is arguable whether the tradition of male dominance and gender inequality can even be encompassed in cultural diversity. As Nussbaum argues, "Getting beaten up and being malnourished have depressing similarities everywhere; denials of land rights, political voice, and employment opportunities do also. Insofar as there is diversity worth preserving in the various cultures, it is perhaps not in traditions of sexual hierarchy, any more than in traditions of slavery, that we should search for it." Ibid., 51.
[98] Ibid., 59.
[99] Ibid., 51-52.
[100] *International Convenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR").

discrimination on the grounds of sex under Article 26. Article 3 of the International Covenant of Economic, Social and Cultural Rights (ICESCR)[101] requires States Parties to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.

The most important international human rights law document for the recognition of women's rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[102] By accepting the Convention, State Parties commit themselves to undertake a series of measures to end discrimination against women in all forms,[103] including committing to incorporate the principle of equality of men and women in their legal system; to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises. The Convention provides the basis for realising equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life as well as education, health and employment. [104]

Of the 192 countries in the United Nations, 160 countries are Parties to the ICCPR;[105] 156 countries to the ICESCR;[106] and 185 countries to CEDAW.[107] These numbers are highly

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[101] *International Covenant on Economic, Social and Political Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[102] *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ("CEDAW").
[103] Art 2. In Art 1, the Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field
[104] See CEDAW generally at United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, *Text of the Convention on the Elimination of All Forms of Discrimination Against Women* (2007) <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> at 14 September 2007.
[105] Office of the United Nations High Commissioner for Human Rights, *Status of ratification: International Covenant on Civil and Political Rights* (2007) <http://www.ohchr.org/english/law/ccpr-ratify.htm> at 14 September 2007.
[106] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification: International Covenant on Economic, Cultural and Social Rights* (2007)
<http://www.ohchr.org/english/countries/ratification/3.htm> at 14 September 2007.
[107] Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations: Convention on the Elimination of All Forms of Discrimination Against Women* (2007)
<http://www.ohchr.org/english/law/cedaw.htm> at 14 September 2007.

significant as evidence that equality of women is a universal value and that women's rights are universal rights that have risen to the level of customary international law.[108]

4.1.3. Women and development

Women's access to justice is thus an important development end in itself, as the equality of women is a universal human right that should be present in all societies. Women have not achieved equality in society if they do have the equal capacity to use the legal system (however this system is manifested in a particular society: formal, informal, or a combination of the two) to achieve fair and just outcomes, nor the capacity to achieve effective realisation of their rights.

4.2. Women's access to justice as instrumental to social, economic and political development

As earlier discussed, all aspects of human development – social, political, economic and legal – are interconnected. Improving women's access to justice can thus have a significant effect on other areas of development. For example, effective and just remedies for women in relation to crimes such as domestic or sexual violence, and the real recognition of and respect for women's rights, could lead to a change in social attitudes towards women. This has various flow-on effects for development as a whole. For example, economically, a change in attitudes would mean a safer environment for women to participate in the local economy. Socially, it could lead to a decrease in HIV rates in society, as women's sexual dignity would be respected. Politically, the legal empowerment of women, as an aspect of access to justice, could lead to women becoming more politically active, and would thus improve their ability to fully engage in all areas of society. Further, this increased participation of women results in a more robust democracy.

[108] Melissa Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement' (2004-2005) 35 *California Western International Law Journal* 275, 281. For more reading on where customary law has been evinced by the existence of treaties see *Military and Paramiltary Activities In and Against Nicaragua (Nicaragua v United States of America) Merits Judgments* [1986] ICJ Rep 531.

4.3. Women's access to justice as instrumental to the rule of law

Access to justice is an essential element of the "rule of law". The rule of law is both an integral part of legal development (thus a development aim in itself) and instrumental to social, political and economic aspects of development.

4.3.1. Women's access to justice as an element of the rule of law

As explained in Chapter One: 5.3, the rule of law is not about what the law is and what it formally asserts. To uphold the rule of law, institutions must be accessible to all – formally and functionally – and a legal system must give people the capability to effectively exercise their rights.[109] As women should have equal rights to men, women's access to justice is instrumental to the rule of law, as access to justice enables a person's capability to effectively exercise their rights.

4.3.2. The rule of law as a development end in itself

The rule of law, in addition to access to justice, is an aspect of legal development. It should be seen as a development objective, regardless of its effects on economic, social and political development.[110] As previously explained, Sen's notion of development states that it should enhance people's capabilities to function, and should remove sources that constrain freedom. The rule of law guarantees substantive freedoms, is a constraint on the arbitrary use of government power, and guides citizens' behaviour in their society. A state cannot proclaim to uphold the rule of law if women are arbitrarily unable to effectively realise their rights, or obtain fair and effective remedies for wrongs.

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[109] Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', 265.
[110] Kennedy argues that the over the last decade, the shape of law itself has become the shape of development, in that the "rule of law" defines the good developed state and "international human rights" defines human freedom and human flourishing. See David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', 158.

4.3.3. The rule of law as instrumental to other aspects of development

Just as access to justice influences social, economic and political development, the rule of law can influence these other aspects, thus is instrumental to human development as a whole. A state that upholds the rule of law is more trusted, both domestically and internationally. Domestically, greater trust of the government in society leads to greater acceptance of the state's legal powers, aiding the effective implementation of social and economic policies and laws. The rule of law aids political development in that it strengthens democracy, as an independent judiciary (arguable one aspect of the rule of law) can uphold political rights such as free speech. Further, a state that upholds the rule of law is more attractive for both foreign and domestic investors, thus aiding the economic development of a country.

5. IMPROVING WOMEN'S ACCESS TO JUSTICE: THE IMPORTANCE OF GRASSROOTS CHANGE

As women's equality is a universal value, and women's access to justice is essential to development, it is necessary to recognise that some cultural practices that do not respect women's right to access to justice need to be altered or abandoned. However there are still important questions of authority and legitimacy when it comes to these developments. If and when it turns out that certain traditions need to be abandoned to facilitate social, economic or political change that are needed for other reasons, it is a choice that all the people involved have to face and assess.[111] The choice is neither closed (accepting the traditional "norm"), nor is it one for the elite "guardians" of tradition to settle (such as religious or secular authorities). Nor should cultural "experts" (either domestic or foreign) decide. The legitimacy of adhering today to views enunciated in the past has to be decided by those who live today; change must happen at the grassroots level. Development is freedom, and it is the people directly involved in and affected by the change that must have the freedom and opportunity in deciding what course should be chosen.[112] Thus women should be involved in decision-making, and further, as participation requires knowledge and basic educational skills, women also need equal treatment in these (and all other) aspects of society.

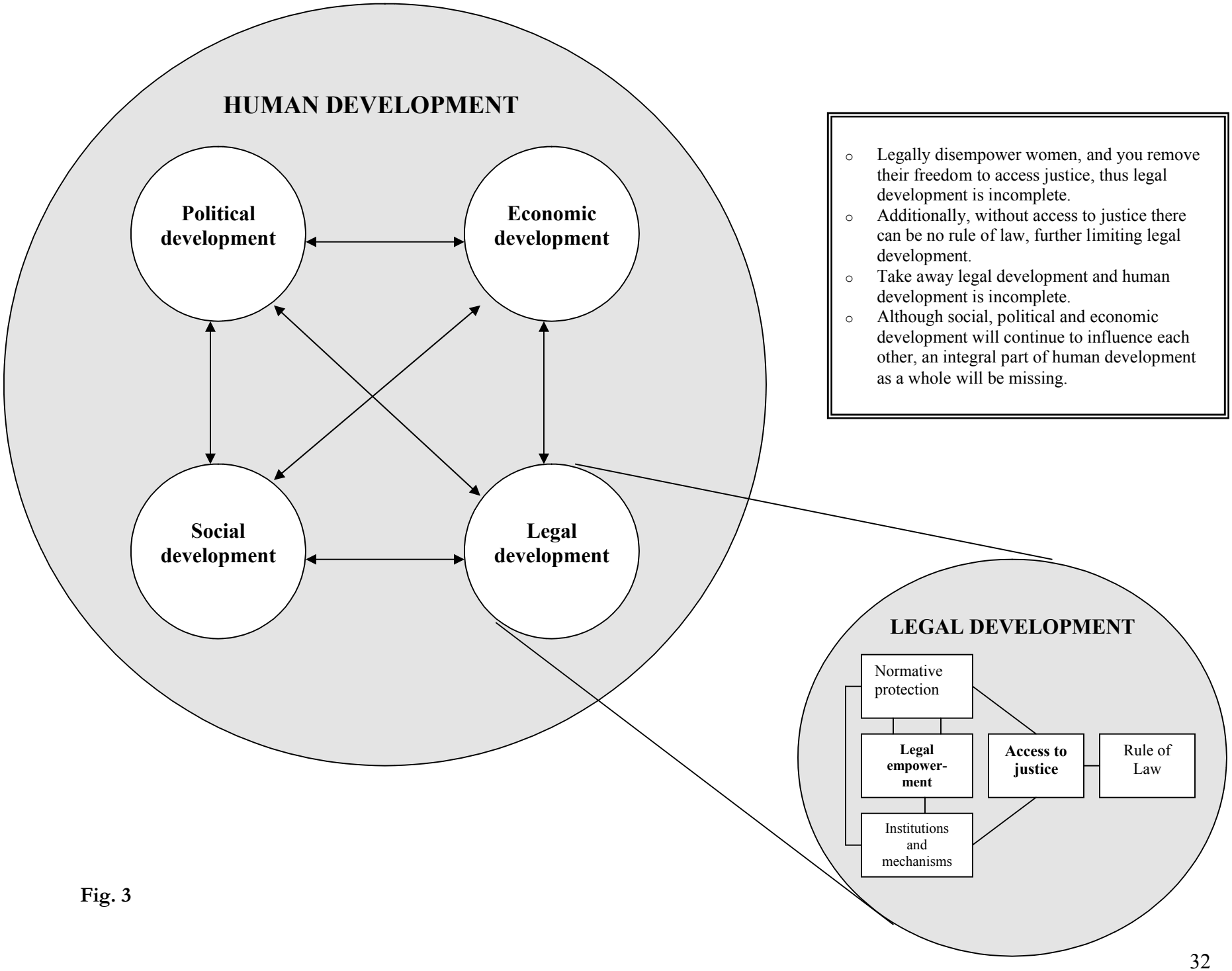
[111] Amartya Sen, *Development as Freedom*, 31.
[112] Ibid., 31-32.

6. CONCLUSION

Women's access to justice is central to legal development (as an end in itself), as women are inherently equal to men, and women's equality is a universal human right. It is also central to human development as a whole, as improving women's access to justice can have a positive influence on social, political and economic development. Further, access to justice for all is an element of the rule of law, itself an ends and means of development. Without fair and equal access to justice for women, a country cannot call itself "developed", no matter how far it has progressed in other crucial aspects of development. Therefore, practices and norms of any country that are inconsistent with women's access to justice should be changed or abandoned in order to respect the universal value of women's equality. As development is freedom, this change must happened at a grassroots level – the people directly involved in and affected by this change must have the freedom and opportunity to decide what course is to be chosen.

This attainment of access to justice for women has three integrally linked arms: normative protections (the existence of rights and remedies), institutions and mechanisms (having the capacity to provide a remedy) and legal empowerment of all members of society. Together, these ensure the genuine capacity to access and utilise the legal system to its full effect, leading to fair remedies for wrongs and the effective realisation of rights. Thus, in theory, if any one of the three arms of access to justice is missing, this will have a negative effect on the development of a country.

Fig. 3 on the following page illustrates how access to justice (and the rule of law) is a part of legal development, and how legal development is a constituent component of human development as a whole. It shows that all aspects of development influence each other (thus are means to development) and that human development is incomplete if one aspect is missing (thus each aspect is an end in itself).



- Legally disempower women, and you remove their freedom to access justice, thus legal development is incomplete.
- Additionally, without access to justice there can be no rule of law, further limiting legal development.
- Take away legal development and human development is incomplete.
- Although social, political and economic development will continue to influence each other, an integral part of human development as a whole will be missing.

Fig. 3

PART II: POSITIVE ANALYSIS

CASE STUDY

Chapter Three:

Papua New Guinea's Legal Framework and Women's Access to Justice: the current situation

1. INTRODUCTION

Part I has developed a normative framework for demonstrating the relationship between women's access to justice and development. Part II will take this normative model and subject it to a positive analysis, using women's access to justice in Papua New Guinea (PNG), in order to illustrate how this model can be used in practice to identify gaps in the development agenda of a country.

As explained in Chapter Two, the attainment of access to justice requires three things: normative protections, legal empowerment, and institutions and mechanisms. In this chapter I will examine how PNG's legal framework fits into the model of "access to justice" as demonstrated in Part I, as an understanding of the situation of women's access to justice in PNG is crucial to appreciating the development situation as a whole. That is, I will look at the components of access to justice that *are* present in PNG (the final chapter will outline parts that are not present). Firstly, I will outline PNG's normative protections for women, and women's rights, and those protections that relate to access to justice. Secondly, I will describe PNG's legal institutions and mechanisms which provide remedies, both formal and informal.

2. NORMATIVE PROTECTIONS

2.1. The Constitution

2.1.1. Background

PNG's Constitution became operational on Independence Day, 16 September 1975.[113] It was the result of a long consultation process undertaken by the Constitutional Planning Committee and the people.[114] The Constitution is the fundamental law of the country. It establishes the institutions of the state, sets out the parameters in which each of these are to operate, and is supreme law. Section 11 of the Constitution states that all acts of government that are inconsistent will be deemed invalid.[115]

2.1.2. Equality of citizens

Section 55 of the Constitution declares, in unequivocal terms, that every citizen, whether male or female is equal. This provision must be considered together by the courts with Goal 2 of the *National Goals and Directive Principles*[116], found in the Preamble of the Constitution. Goal 2 encourages and promotes equality of accessibility to government goods and services, participation in all forms of government activity, and respect for each other.[117] The courts

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[113] Eric L. Kwa, *Constitutional Law of Papua New Guinea* (2001), 5.

[114] The Constitution has been described as "homegrown", because it was formulated within PNG by the people of PNG. It is an "exhaustive blueprint", one of the longest constitutions in the world. See Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 2.

[115] The judiciary is mandated to guard against any abuse or exploitation, to impose sanctions on violators of the Constitution, and to ensure that the various institutions are restrained from exceeding their powers. See Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 1.

[116] The National Goals and Directive Principles are guidelines to help PNG achieve a certain level of change that would "bring happiness and prosperity to the people of PNG." They are the goals the people of PNG aspire to achieve as an independent state. They set out broad principles for the development of PNG. The inclusion of these is to ensure that everyone is involved in the implementation of government policies "in the light of a basic indication of the direction of national policy." From Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 14.

[117] Ibid.,166. The relationship between Goal 2 and s 55 was accepted and applied by the National Court in *In the Matter of an Application under s 57 of the Constitution: an Application by ICRAF Inc; In Re Miriam Willingal* (1996) N1506.

have expanded the scope of s55 to cover marital relations and penalties for sexual offences.[118]

The main difficulty with Goal 2 is its incompatibility with customary practices in many parts of the country. PNG is a male-dominated and kin-based society where there is entrenched gender disparity and traditional and negative attitudes towards women. The disadvantages experienced by Papua New Guinean women occur in all areas of society – education, employment opportunities, health, the justice sector and political participation. Nevertheless, the equality of women is enshrined in the Constitution, the supreme law of PNG.

2.1.3. Protection of the law

Section 37 of the Constitution provides full protection of the law to every person. Section 37(1) provides a general right available to everyone, and the subsequent subsections are criminal procedure rights that are available to those who are in custody, detained by police, or charged with an offence. This right gives women full protection of the law.

2.2. Criminal law legislation

The prevalence of domestic and sexual abuse of women is high in PNG. This is the main area in which women are not able to access justice. Nevertheless, criminal law provisions enable the state to prosecute and punish acts of violence against women. For example, no distinction is made in the law between violence that happens in the domestic context and violence that occurs in the context of wider community life. Thus, for a charge of assault, it is no defence for a man to claim he was "disciplining" his wife.[119] Further, amendments to the Criminal Code in 2003 reformed the definition of rape to include marital rape. The amendments also broadened the definition of sexual penetration, created the offence of inducing another person to commit an act of sexual violence (recognising that rape is often

[118] *The State v Robinson* [1992] PNGLR 205; *In the Matter of an Application under s 57 of the Constitution: an Application by ICRAF Inc; In Re Miriam Willingal; The State v Keungu* [1993] PNGLR 124. From Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 167.
[119] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, (2006) 30.

used as a means of retribution), and abolished the requirement that there must be evidence to corroborate the victim's testimony in rape and sexual assault cases.[120]

2.3. International legal obligations

PNG as a signatory to CEDAW has an obligation to ensure that measures are undertaken to end discrimination against women in all forms (see Chapter Two: 4.1.2). However it is not a party to the two major rights treaties, the ICCPR or the ICESCR.

3. INSTITUTIONS AND MECHANISMS

3.1. The formal legal and justice system

PNG has a Westminster-style government and a western legal and judicial system. The formal law and justice sector is made up of the following recognisable institutions: [121] the Royal Papua New Guinea Constabulary (RPNGC) to enforce the law and ensure the maintenance of peace and order; Courts and the National Judicial Staff Services to administer the law and provide a forum for dispute resolution; Department of Justice and Attorney General to provide legal advice to the State and to ensure operations of the justice system; Correctional Services to provide custody and rehabilitation services; and the Ombudsman to guard against the abuse of power by and to ensure accountability of those in the public sector.[122] PNG thus has formal institutions that *in theory* mean that women can access "justice".

3.2. The status of customary law

Customary law continues to play an important role in PNG. Understanding the interactions between the western law and justice institutions and the customary law and self-regulation of

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[120] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 30-31.
[121] Papua New Guinea Law and Justice Sector Program, *Final Programe Design Document: Annex A: Problem Analysis*, 3.
[122] Government of Papua New Guinea Law and Justice Sector, *The Ombudsman of Papua New Guinea* (2007) <http://www.lawandjustice.gov.pg/www/html/102-the-ombudsman.asp> at 14 September 2007.

indigenous governance is essential to understanding the challenges of access to justice facing women in PNG. This is because many of the problems relating to women's access to justice are due to either discriminatory customary norms or failures of the formal system to effectively integrate customary law.

3.2.1. History

Customary law in pre-colonial PNG reflected the social and political organisation of the country at the time, that is small, essentially 'stateless' societies. Thus rather than having one centralised entity, authority was dispersed. If there was a morally binding relationship between the parties, such as a dispute between members of a community, principles of restorative justice were fundamental. On the other hand, if the dispute was with strangers or members of a rival group, retribution was a likely response.[123]

In the Pre-Independence period, when Australia was the colonial authority, 'custom' was never officially accorded the status of law, and no attempt was made to incorporate customary institutions into the formal legal system. However 'traditional' structures were only interfered with when they were perceived to be a threat to colonial authority – it was believed that 'custom' would eventually die out under the impact of 'civilisation' and 'modernisation.'[124]

The development of a 'home-grown' legal system was a central theme in the post-Independence period. It was envisaged that custom and customary law would play a major role in the legal order.[125] In fact the preamble to the Constitution expressly called for "development to take place primarily through the use of Papua New Guinean forms of social and political organisation." The importance of community structures was also recognised, and "the constitutional scheme was thus receptive to the development of a more

[123] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, (2002) 3.
[124] Ironically, however, while official thinking asserted that indigenous institutions were inadequate for the administration of justice, colonial administration was in fact dependent on them in practice for the maintenance of peace in most rural areas. Thus custom continued to shape the daily lives of most Papua New Guineans. See Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 4.
[125] Ibid., 8.

holistic and restorative approach to crime control and conflict resolution, including a greater degree of community participation."[126]

However despite the initial idealism, there was little practical progress towards to fulfilling these goals and the subordination of local institutions prevailed. The growing emphasis on 'nation-building' drew attention away from the role of indigenous structures, and towards a modern system of centralised governance.[127]

For many observers, this has contributed to the erosion of social controls and the subsequent growth in PNG's law and order problems.[128] There are various interrelated reasons for this. Firstly, the modern centralised system weakened local regulatory systems. Secondly, the modern system markedly failed to facilitate the mutually supportive interactions that had developed between the *kiap* (the Australian district officer who acted simultaneously as administrator, policeman, magistrate and gaoler at local levels) and the indigenous ways of doing justice.[129] Finally, centralisation and specialisation closed down or weakened many of the points of articulation between formal and informal systems that had contributed to peace.[130]

The formal system was thus deficient for local litigants. As the magistrate became constrained by a large number of procedural, substantive and evidentiary rules, the process took longer and entailed a cumbersome and formalistic process, and it was all conducted in a

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[126] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 8.
[127] Further, few of the recommendations of the Law Reform Commission, who advocated greater integration between western and Papua New Guinean legal traditions, were implemented, due to a lack of adequate funds, effective leadership and political commitment. Also, as in the formal system, lawyers and judges "are trained in the thinking and methods of the Anglo-Australian legal system, they have tended to seek solutions to problems in the English common law far more often than from their country's own customary laws. Only the Village Courts, which do not involve lawyers or professional judges, consistently have applied custom rather than statutes or the common law to the disputes that villagers bring to them." See Bruce Ottley, 'Reconciling Modernity & Tradition: PNG's Underlying Law Act' (2002) 80 *Reform* 22 and Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 4.
[128] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 4.
[129] *Kiap* justice accorded more closely with indigenous practices because it "approached dispute in a more holistic way than was possible under formal western juridical practice. In doing so, it produced outcomes that were generally acceptable in local terms." Ibid., 4-5.
[130] Ibid., 5.

foreign language. Local people viewed the new centralised system as "exclusionary, confusing, and often profoundly unjust."[131]

3.2.2. From 'customary law' to 'underlying law': The Underlying Law Act 2000

The Papua New Guinea Underlying Law Act 2000 (the Act)[132] was enacted to implement s20 of the Constitution.[133] Its enactment has to some extent shifted the emphasis back towards a greater integration of western and customary law. It is an attempt to "reconcile the forces of modernity and tradition."[134] With this Act PNG has sought "to create a national legal system that will satisfy the perceived needs of its modernised and globalised sectors while, at the same time, giving a major role to the traditions of its people."[135] The Act states that the sources of the country's underlying law are 'customary law' and the 'common law in force in England immediately before the 16th September, 1975'.[136] However the intent of the Act is to give clear precedence to customary law.[137]

3.2.3. Customary institutions

Today, minor disputes in rural areas are still typically dealt with by largely informal means, as the formal law and justice sector remains geographically (and socially) distant for many Papua New Guineans. Informal customs vary, but are likely to include a combination of the

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[131] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 5.
[132] The Bill to create the underlying law was actually drafted by the Papua New Guinea Law Reform Commission in 1976, but the legislation was not enacted until 2000. From Bruce Ottley, 'Reconciling Modernity & Tradition: PNG's Underlying Law Act', fn 3.
[133] This section provides, inter alia, that an Act of Parliament shall declare the underlying law of PNG and provide for the development of underlying law.
[134] Bruce Ottley, 'Reconciling Modernity & Tradition: PNG's Underlying Law Act'. Papua New Guinea has in fact set for itself an obligation that goes further than any other state in the South Pacific islands in mandating the formal recognition of customary law within its national legal system.
[135] Bruce Ottley, 'Reconciling Modernity & Tradition: PNG's Underlying Law Act'.
[136] *The Underlying Law Act 2000* (the Act), s3(1).
[137] This is reflected in the provisions which state that when deciding a case, a court *shall* apply customary law unless the law is inconsistent with the Constitution or written law. Common law, on the other hand, *shall not* be applied and is not part of the underlying law unless the rule has met the text of applicability, that is, it is consistent with the Constitution, a written law or a customary law (ss 4(3), 4(4) and 4(5)).

following methods: negotiation or mediation by kin, 'traditional' leaders or church officials; village moots; or the decisions of local *komitis*.[138] Also widely used are the Village Courts.

3.3. Hybrid institution: the Village Courts

Village Courts are 'hybrid' institutions that operate throughout PNG. They are generally considered as the most significant institutional innovation in the law and justice sector since Independence.[139] In contrast to the primary role of formal courts, which is to provide for the adjudication of disputes in accordance with the laws of the country, the primary role of the Village Courts is to ensure peace and harmony in the communities in which they operate.[140] Village Courts are thus intended to provide an accessible forum for dealing with minor disputes and infractions, one that is responsive to the needs and expectations of local communities.[141] Another primary function is to apply custom[142] whether or not it is inconsistent with any Act. However the courts must operate in accordance with the Constitution.[143] Where a Village Court operates in excess of its jurisdiction, the National Court can set aside its decision.[144]

In the Village Courts, lawyers are not allowed to represent parties. This is viewed "as a way to keep the formal justice system at a distance and allow the Village Courts to be conducted as people's courts."[145] They are presided over by village leaders appointed as magistrates after

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[138] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 5. *Komitis* are local village deputies.

[139] The Village Courts were established by the *Village Courts Act 1973*, at the end of the colonial era, and fall within s172 of the Constitution. The powers and jurisdiction of the Village Courts are now set out in the *Village Courts Act 1989*. For more about the Village Courts see Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 9; Government of Papua New Guinea, *Magistrates' Manual: Chapter 18 - The Village Courts,* PacLII<http://www.paclii.org/pg/Manuals/Magistrates/Part4Chapter18.htm> at 4 September 2007, 18.1; Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*; and Michael Goddard, *Discussion Paper: Women in Papua New Guinea's Village Courts* (2004).

[140] s52 Village Courts Act. See Government of Papua New Guinea, *Magistrates' Manual: Chapter 18 - The Village Courts*, 18.2.1.

[141] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 9.

[142] Custom is determined in accordance with Sections 2, 3 and 7 of the Customs (Recognition) Act.

[143] ss 57(1) and (2). See Government of Papua New Guinea, *Magistrates' Manual: Chapter 18 - The Village Courts*, 18.8.1.

[144] This was shown in *Maris v Nalik Village Court* [1994] PNGLR 314 and *Re Mark* [1995] PNGLR 234. From Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 128.

[145] Government of Papua New Guinea, *Magistrates' Manual: Chapter 18 - The Village Courts*, 18.2.3.

consultation with the people. They usually do not have any formal legal training.[146] The courts are obliged to attempt the resolution of disputes first by way of mediation.[147] Where a mediated settlement cannot be reached, the courts may issue and order for the payment of a monetary fine or community work in criminal cases, and compensation orders, work orders and orders relating to custody and land use in civil cases.[148]

The Village Courts represent the most extensive government network in the country, and in rural areas they are the closest government presence.[149]

4. CONCLUSION

PNG has normative protections for women. The equality of women is enshrined in the Constitution, and PNG has committed itself to CEDAW. As women are equal before the law, all remedies available to men in regards to both the criminal and civil formal justice system are available to women. PNG has functioning western legal and judicial mechanisms and institutions, such as a police force and a court system, to provide remedies and to protect rights. Further, although in the informal justice system (in particular, the Village Courts) custom can be applied above formal legislation it is nevertheless subject to the Constitution. Therefore, regardless of customary practices, women must also be treated fairly and equally in this system. However, there are still significant barriers for women to access justice, as the normative protections and the mechanisms and institutions are not providing effective or just remedies or outcomes, nor protecting women's rights. A crucial piece of the

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[146] The appointed magistrates are likely to be well acquainted with the customary practices of the community, generally come from the areas in which their particular court is located, and are appointed taking into account their recognised roles as prominent members of their community. Government of Papua New Guinea, *Magistrates' Manual: Chapter 18 - The Village Courts*, 18.2.4.

[147] s53 *Village Courts Act*.

[148] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 50.

[149] This is due to the rugged terrain, remoteness and diversity in topography of PNG. The majority of the country is not accessible by road, even between the most major town centres. Thus rural communities based on the traditional, kin-based village structure, which make up 85% of the population, have little contact with or access to the police or the formal justice system and must walk long distances to reach government services. While designed primarily for rural areas, the courts also operate in urban centres. In 2001, there were approximately 1100 courts, covering approximately 84% of the county: AusAID, *Overseas Aid: About Papua New Guinea* (2007) <http://www.ausaid.gov.au/country/png/png_intro.cfm> at 22 September 2007; NZAID, *NZAID: Where do we work?: Papua New Guinea* (2007) <http://www.nzaid.govt.nz/programmes/c-png.html> at 22 September 2007; Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 3; Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 9 and Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 49.

link, that is, the legal empowerment of women, is missing, and this is having an adverse effect on the development of PNG. This will be discussed in the next chapter.

Chapter Four:

Women's access to justice in Papua New Guinea: The missing link and its relationship to development

1. INTRODUCTION

Despite the normative protections for women in PNG, and despite the presence of law and justice institutions, women do not have the same access to justice as men. There are barriers in both the formal and informal systems, with the result that the various legal institutions are unable to provide effective outcomes and remedies for women. These barriers relate to the legal empowerment of women, and problems within the institutions themselves. These are having an effect on the development of PNG, in relation to women's rights, the situation of women in society, and on development of PNG as a whole.

In this chapter I will firstly look at the barriers to access to justice facing women in PNG. I will examine barriers within the formal criminal justice system and within the Village Court system. Secondly, I will look at the effect that these barriers are having on the development of PNG. Thirdly I will look at how improving women's access to justice could aid development of PNG as an end in itself, as a means towards strengthening the rule of law and as means towards development of PNG as a whole.

2. BARRIERS TO ACCESS TO JUSTICE

The main way in which women in PNG engage with the justice system is as victims of violence. This includes bodily and sexual violence, both within the domestic sphere and outside the home. Crimes of violence against women are very common, yet they are under-reported and the justice system does not deal with offenders and victims in ways which protect women's rights as citizens, or in ways which provide effective and just outcomes for women. Barriers to access to justice in relation to crimes of violence will therefore be the main focus of my discussion. However, as women in PNG are also discriminated against in many other areas, I will at times move outside the realm of violence.

2.1. Formal criminal justice system

2.1.1. Royal Papua New Guinea Constabulary (RPNGC)

Women face two main barriers to accessing justice when dealing with the RPNGC. Firstly, women are often reluctant to report crimes. Secondly, there are issues surrounding police inaction and inadequacy in investigations when a woman does complain. Women are thus legally disempowered, as they lack the capacity to seek a remedy.

a. Reluctance to report crimes

An AusAID Law and Justice Sector Program (LJSP)[150] examination of RPNGC crime reports shows that more than 90% of crimes are committed by men. Interestingly, the majority of victims of reported crimes are also men. Although it thus appears that the whole domain of 'law and order' is male oriented, this is only a partial image, and information from LJSP community studies suggest that women in PNG are often reluctant to report crimes.[151] There are several reasons for this reluctance.

Firstly, there are culturally specific reasons for low reportage of rape and sexual assault. Many women do not think that their complaints will be taken seriously, or see no reason to report the crimes at all, due to the ways in which sexual assaults and breaches of sexual morality are culturally conceptualised (by *some* people) in some parts of the country, including how these crimes are conceptualised by the police themselves.[152] Whilst national

[150] Australia is PNG's main aid contributor. In the 2007-2008 period they will give an estimated $355.9 million in aid. Australia (through AusAID, its development agency) developed the PNG-Australia Development Cooperation to "help PNG reduce poverty, promote sustainable development and improve the quality of life for all Papua New Guineans." One of its programs is the *Law and Justice Sector Program*, one of three major activities in the law and justice sector. The program provides support to law and justice agencies and community organisations, with PNG and Australia jointly agreeing on priority areas of support. Agencies include Police, Correctional Services, Ombudsman Commission, Justice and Attorney-General's, Judiciary and Magisterial Services. Its budget is $150 million for the 2004-2009 period. From the AusAID, *Overseas Aid: About Papua New Guinea* (2007) <http://www.ausaid.gov.au/country/png/justice.cfm> At 4 October 2007.

[151] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children' in Papua New Guinea Law and Justice Sector Program (ed), *Gender Analysis* (2004), 54.

[152] Remember that due to cultural and geographic diversity, attitudes and behaviours do vary across PNG.

laws reflect internationally accepted norms of the definition of rape, in some areas of PNG female autonomy, especially in respect of bodily integrity, is not recognised. Further, many people (including women) believe that behaviour such as drunkenness effectively constitutes consent to sex. [153]

Secondly, there is a general lack of faith that people will be dealt with justly by the police – either as an offender or a victim. Also, there is a lack of confidence in the abilities of the police. For example, for some there is the fear that the 'raskols'[154] (who commit many of the crimes) are more likely to be able to inflict reprisals should a woman report a crime, than the police are to arrest the perpetrators.[155]

Thirdly, women are unwilling to interact with police as complainants due to the fear of police brutality and violence. Reports of police brutality are frequent, coming in a variety of forms, including sexual abuse.[156] However relatively few cases of policemen sexually abusing women complainants or those in custody result in criminal charges, as most women do not register complaints when they have been abused. Further, the police fail to expedite any complaints that there are against them, further undermining confidence in police.[157] There are reported incidences where police have threatened prostitutes with arrest unless they have sex with them, which constitutes rape by threat.[158] These human rights abuses are not a recent phenomenon in PNG – "dysfunctional oversight and accountability mechanisms have fostered police impunity and have allowed patterns of abuse to persist over years."[159] This

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153 Abby McLeod, 'Gender Analysis of Law and Justice Sector Agencies' in Papua New Guinea Law and Justice Sector Program (ed), *Gender Analysis* (2004), 27.

154 'Raskols' are PNG gangs, found primarily in the larger cities such as Port Moresby and Lae. 'Raskol' is Tok Pisin (an official pidgin language) for 'rascal'. *Raskol* gangs are generally unemployed, uneducated youth from urban squatter settlements. These gangs "operate with relative impunity in the absence of effective deterrence from the police or informal community controls… However they are often well integrated into their local communities. As well as ties of kinship and personal associations, *raskols* often engage in acts of redistribution by providing material and other benefits to their neighbours in often the pooresr and most socially deprived urban communities." *Raskolism* has become the largest occupational category in the informal urban economy, with an estimated 18% of the population in Port Moresby, for example, relying on crime as their principle source of income. From Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 2-3.

155 Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 60.

156 Abby McLeod, 'Gender Analysis of Law and Justice Sector Agencies', 27.

157 For example, in 1999 only 355 out of 811 complaints were processed. Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 62.

158 Ibid.

159 Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 20.

failure by the RPNGC to deal with assaults on women by members of the force as crimes further reinforces the idea in PNG that such abuses of women are trivial crimes or minor breaches of rights.[160]

b. Police inadequacy and inaction

Information from LJSP community studies and from internal RPNGC investigations shows that sometimes officers ignore complaints of serious offences made by women, or deal with them in discriminatory ways. The two most common offences that are dealt with in this way are rape/sexual assault or domestic abuse by a husband or relative. The reasons for this are generally due to societal attitudes about such crimes.[161] However at other times, this police inadequacy and inaction in regards to investigations appears to be due to lack of understanding of the relevant rules of evidence.[162]

Police inaction in PNG may be due to either limited resources, or a decision to marginalise women's complaints in light of limited resources. A working group commissioned by the government in 2004 to conduct a review of the RPNGC found that "many members do not have a Police Note Book or pencil, pens and biros. Consequently no attempt has been made to keep any form of records."[163] This has an adverse effect on women attempting to make complaints. For example, women's organisations in three provinces visited by Amnesty International reported that it was often difficult to get a response from police due to there being "no police cars, no petrol for the cars or no police available."[164] This can be seen as, in some respect, as much of an illustration of police priorities and the marginalisation of women as it is of limited resources. For example, in areas where there was a strong relationship with a particular policewoman, it was easier to secure a response or arrest.[165]

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[160] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 62.
[161] Ibid., 61. For example, Amnesty International has reported that in their discussions with women, they were told that "women reporting incidents of domestic violence were still regularly sent home by police and told their problems were "family matters" or "should be dealt with by the Village Court." Many police men and women themselves conceded that this is common practice." From Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 33.
[162] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 61.
[163] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 6.
[164] Ibid., 43.
[165] Ibid.

Discriminatory practices by the RPNGC include suggesting to female victims that compensation should be the primary course of action, and the constant appeal to deal with crimes against women in accordance with custom (as opposed to men, who are usually dealt with both legally and in accordance with custom), which ultimately condones the criminal actions of men and disrespects women's rights to access to justice.[166]

2.1.2. Prosecutions

Even in situations in which women do complain, and police do conduct adequate investigations and lay appropriate charges, cases of violence against women often do not proceed to successful prosecution because victims and witnesses withdraw their cooperation. This happens for two reasons. Either the victim is intimidated and threatened into dropping the complaint, or there is overwhelming pressure to resolve the problem outside the formal justice system through compensation. Delays in the formal criminal justice system add to the pressure to resolve the issue quickly and "restore peace and harmony" in the community.[167] The prevailing view is that police and prosecution are "impotent to act once a victim has 'chosen' to pursue the compensation route."[168]

2.1.3. The court system

There are barriers within the formal court system that inhibit women's access to justice. Firstly, the judicial system is male-dominated at all levels. Most of the Village magistrates, District Court magistrates, judges, lawyers, police prosecutors, and clerical staff that a woman would encounter are men.[169] This has adverse affects on women's access to justice in two ways: there are fewer people in the system sensitive to women's needs[170] (thus, for example, leading to women feeling intimidated); and, as only a few women in PNG's history

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[166] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 61.
[167] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 39.
[168] Further, it is rarely explained to or understood by victims that they have a right to both compensation and formal prosecution and punishment of the perpetrator, or that compensation is also available through the formal system under the Criminal Law (Compensation) Act. See Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 40.
[169] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64.
[170] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', in Papua New Guinea Law and Justice Sector Program (ed), *Gender Analysis* (2004), 17.

have had any role in the making and enforcing of national laws,[171] the institutions are arguably less likely to actively uphold women's interests.[172]

Secondly, inequalities in Papua New Guinean society mean that women are less likely to be educated than men[173], and are thus more likely to be disadvantaged by the unfamiliarity with the language, procedures and the knowledge of the legal system itself.[174] Furthermore, Papua New Guinean women are not typically used to public speaking and thus find it difficult and intimidating to speak in court. They also fear reprimand from their husbands if they take a domestic incident to court.[175]

Thirdly, physical and economic barriers restrict women. For example, rural villages are often five or six hours from the nearest town centre and a woman will often lack the finances necessary to get there. Even urban women still have to catch a bus to the court, and thus have additional problems in relation to fears for personal security (especially in Port Moresby). Further, women will often lack the finances to pay the court fees.[176]

2.2. Informal system and the Village Courts

The Village Courts are an important aspect of the PNG legal system. Due to the topography of PNG, and its highly rural and tribal society, the Village Courts are the most accessible avenues for justice for the majority of people. They are also an important link between customary laws and practices of the country and the formal mechanisms of the state.[177]

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[171] Politics is seen as a men's game in PNG. Women have minimal opportunity to participate directly in community decision-making processes. When they do contest in elections, they are rarely successful, and physical and social threats are sometimes made against them. Lady Carol Kidu is currently the only woman in PNG's Parliament. Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 3.
[172] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64.
[173] Women receive fewer education opportunities compared to men in PNG. The female literacy rate is 51%, compared to 63% for males. From AusAID, *Overseas Aid: About Papua New Guinea*.
[174] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64.
[175] Interview with Abby McLeod, Specialist Pacific Advisor to the Regional Office - Pacific International Deployment Groups, Australian Federal Police (Telephone interview, 23 August 2007).
[176] Interview with Abby McLeod.
[177] Dinnen explains that: "Their [the Village Courts] strength lies in the provision of an accessible legal forum that is highly responsive to local expectations. Their location between the national court system and local dispute resolution mechanisms make them and important point for creative interaction between formal and informal justice sectors. With appropriate support and supervision, these courts can provide 'semi-autonomous social fields' that are capable of integrating different regulatory regimes at local levels, like *kiap* justice in an

Village Courts have the jurisdiction to determine and apply custom. In the exercise of their jurisdiction, Village Courts have no power to imprison at the first instance, may not resolve serious matters such as rape or homicide, must observe the minimum requirements of natural justice, and cannot apply custom that is inconsistent with the Constitution.[178] However, in practice the Village Courts often exceed their jurisdiction by resolving serious criminal matters that should have gone through the formal justice system.[179] They do so due to pressure from their community to restore peace and harmony quickly, or because they and the community are unaware of the exact limits of their jurisdiction.[180]

Further, Village Courts often discriminate against women when resolving disputes using the primary customary remedy of restorative justice, thus perpetuating their subordination, and ultimately denying women access to justice. It is argued that restorative justice provides a major role for the community and those who have been most directly affected by an offence or dispute. Its objective is to restore the balance and harmony and to heal the relationships damaged by wrongdoing or conflict. The offender can make amends for an infraction and then be reintegrated back into the community.[181] However, Martha Macintyre argues that:

> The emphasis on restorative justice and the invocation of continuities in customary law as essential to the maintenance of harmonious communities often ignore the fact that the customs that have developed usually entail relations that are between social groups represented by men.[182]

In other words, the focus on restorative justice reinforces the power imbalances between women and men, as in many communities it is the men who have formed the customary law due to their dominance in decision-making. The Village Courts are dominated by men. Women in these communities are generally considered inferior and are thus systematically

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earlier era." See Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 9-10.

[178] Eric L. Kwa, *Constitutional Law of Papua New Guinea*, 128.

[179] This can be seen as more of a reflection of the failure of the formal justice system than of the Village Courts themselves. Rather than usurping authority, the Village Courts often "fill the void that is created by a remote and ineffective police service and a costly, backlogged formal judicial system." Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 54.

[180] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 54.

[181] Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 11.

[182] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64.

disadvantaged, and their rights often overridden despite the existence of the Constitution.[183] The Constitution, in fact, reinforces inequities according to Sarah Garap, as it "declares the equality of rights and opportunities for all people, yet supports the preservation of customs and traditions where men still rule."[184]

The preservation of underlying inequities and the continued denial of women's access to justice are evident in discriminatory outcomes in many Village Courts.[185] For example, one aspect that is particularly discriminatory is in regard to the remedy of compensation, in which the court often orders the money to go the male members of a woman's family rather than the woman herself. This happens even when the crime is against the body of the woman herself, for example rape or assault.[186] Other examples of discrimination include: that female adulterers are punished more harshly than males;[187] the refusal by a woman to marry a man chosen by relatives is considered delinquency rather than an assertion of her legal rights; assaults by a husband or male relative being justified and excused as 'customary' if the woman concerned was 'disobedient';[188] Village Court officials ignoring grievances related to domestic violence; and women being denied the equal opportunity to put their case.[189] Thus, although women have access to the Village Courts, they do not actually get *justice*.

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[183] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 17.
[184] Ibid.
[185] For an alternative view, read Michael Goddard, *Discussion Paper: Women in Papua New Guinea's Village Courts*. He is an Australian academic who monitored several hundred cases before three Village Courts in the 1990s, and has argued caution before universally condemning the Village Courts as inherently discriminatory and gender-biased. He comes to the conclusion that women are generally confident and reasonably successful users of the courts, and that the courts are an important resource for aggrieved women with limited avenues for seeking justice and recompense. He argues that comments about discrimination are "recycled and polemic anecdotes" and that more rigorous research on the matter is required. Although I acknowledge his comments, and agree that sometimes the Village Courts are the only source of recompense, I respectfully disagree with his comments. All other research ardently spoke of discrimination: see Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children'; Sarah Garap, 'Gender in PNG - Program Context and Points of Entry'; Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!;* Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*. Further, all three development workers whom I interviewed spoke of discrimination in the courts, with one specifically countering Goddard, saying that neither she nor anyone else who had experienced the courts shared his view.
[186] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64.
[187] Abby McLeod explained to me that in Kumandika, the village she lived in, if a woman had been adulterous, she would get a fine of 1000 kina, whereas a man would get a fine of 300 kina.
[188] Abby McLeod explained that in domestic violence cases, it is often asked by the court what the woman did "to deserve it".
[189] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 64-65 and Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*,, 51. See also Sinclair Dinnen, *Discussion Paper: Building Bridges: Law and Justice Reform in Papua New Guinea*, 9. Development workers whom I interviewed echoed these statements.

3. NEGATIVE EFFECT ON DEVELOPMENT

These barriers, relating to both the legal empowerment of women and to problems within mechanisms and institutions in both the formal and informal systems, result in the various legal institutions being unable to provide effective outcomes and remedies for women. Women in PNG thus do not have the same access to justice as men. This situation perpetuates women's subordinate status and the acceptability of violence against women in society, as it allows violence to continue with some level of impunity, so there is no impetus for men to change their behaviour. This, in turn, has a negative effect on women's equal rights (as a development end in itself), on the rule of law, and on the development of PNG as a whole.[190]

3.1. Effect on women's development

As Papua New Guinean women have less capacity to seek a remedy compared to men, and as the institutions and mechanisms available to provide remedies and protect rights do not provide fair and effective outcomes, women have less access to justice than men, and therefore do not have equal rights.

Further, as this contributes to the perpetuation of high levels of violence and the continued acceptability of the subordination of women, women in PNG must endure related problems of heavy workloads, invisibility of their economic contribution and development needs, discrimination in educational and employment opportunities, and feelings of insecurity, vulnerability and the inability to exercise their rights.[191] Thus, women's "physical, psychological and social well being is seriously negatively affected."[192]

[190] Refer to Fig. 2 and Fig. 3.
[191] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 13 and email from John Mooney to Tess Bridgman, 16 August 2007.
[192] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 13.

3.2. Effect on social, economic and political development

The prevailing traditional and public attitudes towards gender in PNG, which are perpetuated partly by women's lack of access to justice, "serve as a stumbling block to the country's socioeconomic development."[193] Gender inequity disadvantages women and girls in education, employment opportunities, health and political participation, which then diminishes their contribution to the life and development of PNG as a whole.[194]

Further, the prevalence of crime (of which against women is effectively condoned in PNG society due to the lack of effective and just outcomes in the justice system) reduces the quality of life for all. It means people (women especially) live in an atmosphere of mistrust and fear. The result is a lack of sense of community and breakdown in communal responsibility.[195] Crime also has broad economic effects – it is expensive for the government and discourages investment.[196]

Crimes such as rape and sexual assault are prevalent in PNG, within and outside the home, impacting on all levels of the community. As explained above this is partly due to police brutality, police inadequacy inaction, and discrimination within both the formal and informal justice system, which encourages the idea that these crimes can be committed with impunity. This has significant social effects. In regards to health, these attitudes, and this behaviour, impacts on contraception acceptance, STD transmission and family nutrition, and thus contribute to PNG's Maternal and Child Health indicators[197] being the poorest in the region.[198] It also increases health issues such as HIV/AIDS. Girls aged between 15 and 19 have the highest rate of HIV/AIDS in the country.[199] Socially, victims of rape and sexual assault experience social isolation due to the shame, leading to situations such as absence

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193 Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 17.
194 'Gender in PNG - Program Context and Points of Entry' in Papua New Guinea Law and Justice Sector Program (ed), *Gender Analysis* (2004), iii.
195 Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 53.
196 Ibid.
197 Child and Maternal Health indicators include things such as maternal mortality ratio, infant mortality and under five mortality.
198 Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 1.
199 Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 5. See also Human Rights Watch, *Still Making Their Own Rules: Ongoing Impunity for Police Beatings, Rape and Torture in Papua New Guinea* (2006), 27.

from work, leaving school, and not being able to find employment. Widespread fear of rape leads to loss of independence. It means that women in PNG are afraid to go outside at night, and cannot travel freely (further exacerbating women's ability to access courts). This fear is also a major reason that female education statistics show reluctance by families to send their daughters to school. Incidences of cases of rape at school fuel this reluctance. This fear further limits the range of activities available for women, for example it limits their ability to move freely between villages, attend meetings or join in activities, or take jobs. [200] Thus the talents and abilities of women at a personal, local and national level are not utilised for the development of the country.

3.3. Effect on the rule of law

As explained in Chapter Two: 4.3.1, one aspect of the rule of law says that a legal system ought to be judged according to whether it enables people's capability to exercise their rights.[201] As women face barriers to access to justice, they do not have the capability to effectively exercise their rights, thus PNG practice is in breach of the rule of law.

Furthermore, the informal traditional responses to crime in PNG often breach human rights. The traditional kinship system of dispute resolution, including methods of restorative justice, is based on collective rights. This makes it difficult to reconcile the customary system with the individual rights base of contemporary western values, which are reflected in international rights documents. PNG has committed itself to such values, as it has signed CEDAW and has affirmed individual human rights in the Constitution. This rights-based conflict impacts upon the legitimacy of the formal justice system and poses a threat to the rule of law.[202] Further, problems in the law and justice sector and threats to the rule of law prejudice overall investment. This has significant indirect effect on the development of PNG as it inhibits investment and growth, thus contributing to increasing poverty levels generally.[203]

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[200] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 56.
[201] Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', 265.
[202] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 10.
[203] Email from John Mooney to Tess Bridgman, 16 August 2007.

4. IMPROVING ACCESS TO JUSTICE FOR WOMEN IN PAPUA NEW GUINEA

4.1. Recognising the importance of culture, but in defence of universal values

When discussing change and reform in PNG, it is necessary to recognise the importance of culture and ask what Papua New Guineans themselves want. However it is also necessary to recognise women's equality as a universal right; claims of "westernisation" or "ethnocentrism" cannot be argued to legitimise the status quo and block genuine internal calls for change.[204] There are several reasons for not accepting that the subordination of women and the prevalence of violence against women in PNG is firstly, part of the "culture", or secondly, that these aspects of Papua New Guinean society should be allowed to continue.

Firstly, sweeping generalisations cannot be made about "Papua New Guinean culture" as PNG is an incredibly diverse country where customary laws, norms and practices vary greatly and continue to evolve and change.[205] As Nussbaum explains, equating the entirety of a culture with traditional or change-resisting elements is frequently a ploy used by those in power positions to justify domination.[206] Traditions should not be oversimplified, ignoring protest and movements for change within society.[207] These movements for change are discussed in more detail below.

Secondly, even in the parts of the country where these customary norms and practices do exist, as these norms are inconsistent with women's rights they should not be allowed to persist. Traditions are not worth preserving simply because they are old. Regarding customary norms and practices that result in women failing to receive access to justice in PNG, questions should be asked about the contributions they make against the harm they

[204] Refer to discussion on universal values in Chapter Two.
[205] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 73. With 463 000 square kilometres of land area, 3.12 million square kilometres of sea area and 600 separate islands, rugged and mountainous terrain, and over 700 tribes (each with its own language), PNG is one of the most diverse repositories of geographic, biological, linguistic and cultural wealth in the world: AusAID, *Overseas Aid: About Papua New Guinea*.
[206] Martha C. Nussbaum, *Women and Human Development,* 46.
[207] Ibid., 44.

do.[208] Further, legally, the PNG government has obligations in relation to the elimination of gender-based violence and other forms of gender discrimination. CEDAW clearly states that existing norms and practices offer no excuse for PNG avoiding its obligations.[209] The government has agreed to be part of the international community and is not acting in a vacuum.[210] Therefore, even where women's rights as recognised under the treaty are not consistent with certain 'customary' norms and practices, women are entitled to demand from the government that these norms will not be used as an excuse for failing to implement the treaty, or for failing to take proactive measures to modify or abolish these norms.[211]

Thirdly, there is significant movement for change in PNG. These movements come from within the government and from civil society. PNG has signed up to CEDAW and has enshrined the equality of women in its Constitution. The necessity of gender equity has been recognised in various sectors of government, including in the Law and Justice Sector in its *Law and Justice Sector Gender Strategy*. This strategy recognises that gender equality is central to sustainable development and poverty reduction, and is a key issue in the law and justice sector. It recognises that women are grossly underrepresented in the sector, have less access to the justice system than men, and that women frequently receive inequitable treatment before the law, on the basis if gender. It has created strategic objectives, including one to increase women's access to the formal justice system and one to monitor women's experiences of restorative justice initiatives and encourage gender equitable practices.[212] PNG also has a National Women's Policy, which was developed as a contribution towards realising the National Goals and Directive Principles – of commitment to equality for all and the active participation of women – that are set out in the Constitution.[213] In the formal judicial system, some Village Court decisions affecting women have been successfully challenged on the basis that the customary law that was applied was discriminatory and

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[208] Martha C. Nussbaum, *Women and Human Development*, 51.
[209] Article 2(f) of CEDAW provides that states must undertake "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."
[210] Interview with Abby McLeod.
[211] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*,73-74.
[212] Strategic Objectives 5 and 6. See Government of Papua New Guinea, Law and Justice Sector, *Sector Gender Strategy* (n.d) <http://www.lawandjustice.gov.pg/www/html/775-sector-gender-strategy.asp> at 22 September 2007.
[213] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 6.

therefore inconsistent with the Constitution.[214] In Parliament, legislative amendments criminalising marital rape have been introduced (see Chapter Four: 2.2).[215]

Moreover, there are considerable movements for change within PNG civil society, which legitimates the argument that people should not be able to throw up claims of "westernisation" to resist genuine internal pushes for change. For example, many local women's organisations are on the frontline of a struggle to stop violence against women. This includes women and organisations who, among other things, offer paralegal advice, conduct training on human rights, HIV/AIDS, health and small business, and who lobby the police to investigate incidents of sexual and domestic violence.[216] When asked by Amnesty International whether they viewed violence against women as wrong and against women's rights, these women "answered with an emphatic 'yes'."[217]

4.2. Importance of grassroots local solutions

Therefore it is evident that there are significant calls for change within PNG society – those customary laws, norms and practices that are inconsistent with women's rights should not be allowed to persist simply because they are 'tradition.' However, in saying this, it is also important to recognise the importance of finding grassroots solutions to the problems that lie behind women's inability to access justice. Recall that according to Sen, development is freedom, and as certain customary norms, laws and practices need to be abandoned in PNG to facilitate change, the people directly involved in and affected by the change must have the freedom and opportunity in deciding what course should be taken.[218]

According to John Mooney, an independent contractor for AusAID who has spent much time in PNG, transplanting or further expanding overly formalistic western legal systems is thus not necessarily beneficial. Informal community based systems of justice based on maintaining peace and harmony, and righting wrongs through mediation and restorative

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[214] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 69.
[215] Ibid., 30, 69.
[216] Ibid., 2.
[217] Ibid.
[218] Amartya Sen, *Development as Freedom*, 31-32.

justice, have a deep history in PNG.[219] However changes to make these necessary consistent with women's rights need to be done in consultation with these communities. Because of PNG's unique topography and many diverse languages and cultures, the government and development agencies must work with the men *and women* in these rural societies and tribes to develop and encourage innovative approaches to suit the uniqueness of each.[220] As Abby McLeod[221] explains, "nothing will work unless there is local ownership of it."[222] Furthermore, women themselves need to be asked what 'justice' means for them.

4.3. What is currently being done and what more needs to be done to address women's access to justice

It is not the purpose of this dissertation to tell the PNG government or donor and development agencies such as AusAID what they should be doing to fix PNG's problems in relation to women's access to justice. Without extensive on-the-ground research, it would be naïve to think that such assumptions could be made. Instead, the purpose is to use the situation in PNG to demonstrate the relationship between women's access to justice and development. Nevertheless, I will give a brief survey on: the official objectives and acknowledgments of the Government in relation to gender equality in the law and justice sector; some actions that have been taken in relation to improving women's access to justice; and recommendations for further action from AusAID's PNG Law and Justice Sector Program (LJSP), development workers, and Amnesty International. The purpose of this study is to show how these recommendations fit into my model of access to justice and development.

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[219] Email from John Mooney.
[220] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 12.
[221] Abby McLeod is the Specialist Pacific Advisor to the Regional Office of the Pacific International Deployment Group, Australian Federal Police. She has lived and worked in PNG.
[222] Interview with Abby McLeod. Another development worker reiterated these ideas of local ownership and the need for relevance in a telephone interview on 27 August 2007.

4.3.1. Government objectives and acknowledgments

As explained above, the Law and Justice Sector of the PNG government has created a Gender Strategy to promote gender equality for both employees and users of all law and justice sector agencies, in order to achieve the Constitutional goal of integral human development for all.[223] The government has also made specific acknowledgments in a 2007 White Paper entitled *A Just, Safe and Secure Society: A White Paper on Law and Justice in Papua New Guinea*. Among other things, this White Paper acknowledges a variety of actions that should improve access to justice for women. For example, it acknowledges the need for an "establishment of special procedures or tracks in… alternative dispute resolution, and… a new human rights track to deal with breaches of Constitutional rights."[224] It says that "more women lawyers will be encouraged to become magistrates."[225] In relation to Village Courts, it states that they must stay within their jurisdiction, improve cooperation with police, and collaborate and cooperate with district courts, community based corrections and the community and its elders in order to be effective.[226]

4.3.2. Actions currently being taken

Various actions have been put in place to provide a general voice for women. For example, the National Council of Women has been established by legislation and is recognised by the government as the body that speaks for women in PNG.[227] It can potentially aid in the legal empowerment of women, by pushing for legislative change (to increase normative protections for women) and giving a voice to women thus supporting the effort to ensure that legal institutions and mechanisms have the capacity to provide effective remedies and outcomes for women. However this body is constrained by weak capacity, lack of resources, poor accountability, poor communication and lack of funding.[228] Another example is the Provincial Councils of Women. These have been established to create links with women in

[223] Government of Papua New Guinea, Law and Justice Sector, *Sector Gender Strategy*.
[224] Government of Papua New Guinea, Law and Justice Sector, *A just, safe and secure society: A White Paper on Law and Justice in Papua New Guinea*, 6.
[225] Ibid., 18.
[226] Ibid., 19.
[227] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 14.
[228] Ibid., 14-15.

the specific provinces, and are umbrella organisations for other smaller women's groups and associations. They conduct many programs for women, including small business training, health and leadership skills.[229] However they are usually poorly resourced and suffer from poor communication between villages.[230]

In terms of law and justice specifically, there have been some positive initiatives designed to improve police responses to women reporting crimes of gender-based violence. For example, there have been moves towards sensitising the justice system towards women and youths. Legislation passed a few years ago makes it easier for women to bring sexual violence cases, and there has been a great deal of education in relation to these. In parts of the country, hospitals now have witness support rooms for cases of violence and sexual violence, which assists police in statement-taking.[231] In Port Moresby and Wewak community policing initiatives are aimed at providing a more integrated and supportive response to victims of crime, particularly women. Police have developed networks with women's organisations and other NGOs that have made it easier for cases to be referred to police, and for police to refer women to services such as para-legal advice or counselling.[232] Furthermore, donor-funded and government sponsored workshops, conferences and professional training of police, Village Court staff and welfare officers in relation to gender-awareness happens at some level.[233] There have also been attempts to encourage the nomination of more female Village Court magistrates.[234] However these initiatives do not have nationwide coverage.[235] They are largely ad hoc, are not delivered systematically and uniformly to targeted regions or sub-sections of the community, and are generally not followed up by any assessment of their impact or success.[236]

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[229] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 14.
[230] Ibid., 15.
[231] Interview with Nicole Murphy, Law and Justice Policy Officer, PNG Branch, AusAID (Telephone interview, 27 August 2007).
[232] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 38.
[233] Ibid., 61. For example, AusAID development worker Sarah Garap has written a training manual for Village Court magistrates addressing human rights, and has taken this around the country in an attempt to train local magistrates. From interview with Abby McLeod.
[234] Currently there are only about four or five (with over a thousand Village Courts) throughout the whole country. Interview with Abby McLeod.
[235] Ibid.
[236] Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!*, 61 and interview with Abby McLeod.

4.3.3. Recommendations

In order to improve women's access to justice in PNG, in particular to protect women's rights and ensure fair and effective outcomes in cases of domestic and sexual violence, the AusAID LJSP Gender Analysis, Amnesty International and individual development workers whom I talked to have suggested a raft of options. These range from broad goals to change societal views and attitudes and initiatives to legally empower women generally, through to institutional changes. For example, in terms of normative protections there has been a push for legislative review and enforcement of policies that aim to eliminate domestic violence. In terms of legal empowerment there is support for awareness-raising and behaviour-change programmes, including educational programmes that highlight the changing nature of society and gender relations. Further, there is support for expanded counselling services, the provision of legal aid for women in domestic violence and custody cases, and national quotas for women's involvement in community decision-making boards.[237]

5. POSITIVE EFFECT ON DEVELOPMENT

Improving women's access to justice in PNG will have a positive effect on all aspects of development. It will aid in the capability of women to enjoy all aspects of human freedom. Firstly, it is an important development end, as it is an element of gender equality, which is a development objective in itself. Secondly, due to the interconnectedness of all forms of human development, women's access to justice is instrumental to social, political and economic development. Thirdly, it is instrumental to the rule of law, which itself is both a constituent of legal development and instrumental to other aspects of development.

5.1. Effect on women's development

Improving women's access to justice in PNG will reflect the inherent equality of women and men. As women are equal to men, and gender equity is a universal value, PNG will continue

[237] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 18; Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children'; Abby McLeod, 'Gender Analysis of Law and Justice Sector Agencies', 56. See Abby McLeod, 'Gender Analysis of Law and Justice Sector Agencies', 73-74 for a more detailed list of recommendations.

to have low development indicators until this is recognised. Further, improving women's access to justice will enhance women's role and identity as equal citizens and improve their physical, psychological and social well being.[238]

5.2. Effect on social, economic and political development

As discussed, all aspects of human freedom cannot be seen in isolation from each other. Therefore improving women's access to justice will have positive effects on the social, economic and political development of PNG.

Firstly, in terms of social development, improving women's access to justice may result in societal attitude and behavioural changes in PNG, thus aiding in women's equality in other aspects of society. As women get just and effective remedies for violence committed against them, and as women's rights are more stringently protected, perpetrators of crimes against women may change their behaviour and attitudes as their actions are no longer seen as acceptable and crimes against women can no longer be committed with relative impunity. Women's capacity and freedom to participate in education and employment would thus increase, as the fears of violence would be reduced. Improved attitudes towards women would also lead to improved health and HIV rates. Secondly, this all then aids in the economic development of PNG, as women's abilities in the workforce and economy would thus be better utilised. Finally, legally empowering women, and the general societal change in attitudes in regard to gender equity, could be the impetus for increased participation by women in the political and decision-making spheres. This in turn (demonstrating the interconnectedness of every aspect of society as a whole) could lead to further social and legal reform benefiting women, as they would have more of a voice in decision-making both locally and nationally.

Admittedly, as the LJSP Gender Analysis recognises, changes in attitudes, beliefs and everyday practices may be needed *prior* to any policy, legislative and institutional changes in order for these to be successful.[239] However, it is to be noted that, under my model of access

[238] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 13.
[239] AusAID Law and Justice Sector Programme 'Gender in PNG - Program Context and Points of Entry', iii.

to justice and development (Fig. 2), these factors are actually mutually reinforceable. The legal empowerment of women – giving women the capacity to seek a remedy – ensures that both formal and informal mechanisms provide effective remedies and full protections of rights. This requires changes in societal attitudes, but also simultaneously, can be the impetus for societal change as people begin to realise that they will not be able to commit crimes against women and abuses of human rights with relative impunity. This illustrates the inherent interconnectedness of all aspects of development.

5.3. Effect on the rule of law

Women's access to justice is instrumental to the rule of law in PNG for a variety of reasons. Firstly, normative protections for women's rights, and the mere existence of remedies, are not enough. To uphold the rule of law, the PNG legal system must constitutively consider people's substantive freedom to exercise their rights and entitlements. Further, it is not sufficient that good "rule of law" institutions merely exist. These institutions must also be accessible to all – formally and functionally. Thus the rule of law propounds that a legal system ought to be judged according to whether it enables people's capability to exercise their rights.[240]

Secondly, improving women's access to justice will help to remedy the rights-based conflict in PNG that poses a threat to the rule of law. Currently, some customary rights and methods of restorative justice are inconsistent with individualistic human rights that PNG itself has affirmed. As explained earlier, this rights-based conflict impacts upon the legitimacy of the formal justice system and poses a threat to the rule of law.[241] Improving women's access to justice through identifying which customary laws and practices are inconsistent with women's rights and questioning their worth, using grassroots solutions that Papua New Guineans themselves will have ownership of, and ensuring both men and women participate in this decision-making process, will help towards remedying this right-based conflict.

[240] Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', 265.
[241] Sarah Garap, 'Gender in PNG - Program Context and Points of Entry', 10.

Thirdly, police violence and abuses of power are in breach of the rule of law. PNG cannot call itself developed if the government agencies do not follow the rule of law. Enhancing women's access to justice would allow an effective response to police violence and abuses of power, which would thus lead to gradual improvement in the rate of reports, women's cooperation with police inquiries and the conviction rates for crimes against women and children, further enhancing access to justice.[242] The circularity of this demonstrates how all of development reforms flow into and mutually reinforce each other. Finally, as explained in Chapter Two: 4.3.2 and Chapter Four: 3.3 the rule of law is instrumental to all other aspects of development.

6. CONCLUSION

Women in PNG face barriers to access to justice in both the formal and informal legal system. These barriers are due to problems within in the institutions themselves (for example, resource problems and discrimination) and women's lack of legal empowerment (due to societal attitudes about the status of women and the subsequent effect this has had on women's ability to utilise the justice system to its full effect). These barriers have had a negative effect on PNG's development. As women's access to justice is central to the development of PNG, addressing these barriers is crucial as improving women's access to justice will have a positive effect on legal development, gender equality and other aspects of human development. However in order for any changes to be effective it is necessary to have local ownership of solutions. Further, as they are directly affected, women must participate fully in development initiatives.

[242] Martha Macintyre, 'Major Law and Order Issues Affecting Women and Children', 62.

CONCLUSION

Development issues are extremely important in the world today. Much of the world's population is faced daily with inadequate income, widespread hunger, gender inequality, environmental deterioration and lack of education, health care and clean water. Since World War Two, debates and approaches to development have moved from the need for economic reforms to establish macroeconomic stability and promote growth, to a focus on the need for strong institutions, governance and human rights protections to enforce the rule of law and promote democracy. Recently, there has been a shift in the development sphere to understanding development as "freedom", that is, development has to be concerned with enhancing the lives people lead and the freedoms people enjoy. It has been recognised that all aspects of human development, from economic growth, strong institutions and the rule of law, to legal development (such as access to justice and human rights), social welfare and political freedoms are substantive definitions of development. All aspects are both tools to facilitate development and development objectives in themselves.

As an element of legal development, access to justice, and more specifically, women's access to justice, therefore has an important part to play in development. Access to justice requires normative protections, institutions and mechanisms and, crucially, legal empowerment, to ensure that all members of society have the genuine capability to access and utilise the justice system to its full effect (whether it be formal, informal or customary), leading to effective remedies for wrongs and the effective realisation of rights. Gender equality (as a constituent component of development) is contingent on, among other things, equal access to justice for women. Further, women's access to justice is instrumental to economic, social and political development, and the rule of law.

I have used the case of women's access to justice in Papua New Guinea to demonstrate the integral relationship between access to justice and development. Women in PNG face many barriers to justice. Despite the existence of normative remedies and protections of their rights, and despite women's formal ability to utilise the legal system, women do not get fair and effective outcomes compared to men, and their rights are not fully upheld. Due to their

subordinate status, women are not legally empowered – among other things, they face discrimination in the both the formal and informal justice system, are reluctant to report crimes, and receive inadequate attention when they do. This situation serves to perpetuate women's inequality as it reinforces women's subordinate status and allows men to continue to commit crimes against women with relative impunity. This has a detrimental effect on PNG's development.

So where to from here? This paper is not intended to solve PNG's access to justice issues, but rather to draw a link between the theories and realities of development and by examining a specific aspect of law, women's access to justice. It has highlighted the importance of access to justice for development. In doing so, this is the first step towards linking theory with reality. Sen's theory of development must be assessed on an ongoing basis in light of empirical research, development initiatives (based on local ownership of solutions) and development indicator outcomes, so that if the theory (like previous theories) turns out to be deficient, it can be altered. In this paper, I have started the process by taking one specific aspect of development (women's access to justice) and assessing it against one country's development situation.

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