WORLD DEVELOPMENT REPORT 2012

GENDER EQUALITY AND DEVELOPMENT

BACKGROUND PAPER

ROLE OF LAW AND JUSTICE IN ACHIEVING GENDER EQUALITY

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2011

This paper was prepared with the support of the
Australian Agency for International Development (AusAID)

The Role of Law and Justice in Achieving Gender Equality

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September 2011

Background paper prepared for the World Bank World Development Report 2012 "Gender Equality and Development"

Justice for the Poor

Legal Vice Presidency
The World Bank

This paper is a product of the collaboration between the Australian Agency for International Development (AusAID) and the World Bank on the East Asia and Pacific-Justice for the Poor (EAP-J4P) Initiative.

Acknowledgements

The authors are grateful to a number of people who helped at various states in the drafting of this paper. In particular, Nicholas Menzies (Justice Reform Specialist, LEGJR) for his continuous support and extensive comments on earlier drafts; Milena Stefanova (Project Officer, LEGJR), Daniel Evans (Consultant, LEGJR) and Elizabeth Morgan (Development Practitioner, PNG-Australia Law and Justice Partnership, Village Courts & Land Mediation Secretariat, PNG Department of Justice & Attorney General) for their invaluable inputs and insights; Barry Walsh (Senior Justice Specialist, LEGJR), Harold Epineuse (Counsel, LEGJR), Richard Nash (Counsel, LEGJR) and Melissa Upreti (Center for Reproductive Rights) for their contributions and comments; Virginia Seitz (Senior Director, Social and Gender Assessment, Millennium Challenge Corporation) and Limpho Masekese Maema (Gender Coordinator, Gender Equality in Economic Rights Programme, Millenium Challenge Account- Lesotho) for their contribution to the drafting of the case study on Lesotho.

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Introduction

1. Why are law & justice important for gender equality?

Law is pervasive and affects many aspects of people's lives, women and men alike. As we witness the growing 'juridification' of life – that is, the expansion and penetration of the legal sphere into more and more aspects of other social (public and private) spheres – the prominence of law and rights in affecting people's lives becomes increasingly obvious. Law and justice impact people's capacity to accumulate endowments, enjoy returns to such endowments, access rights and resources, and act as free, autonomous agents in society.[1] Inequalities in endowments, access to resources and rights, social (and household) status, voice and agency are perpetuated, codified, contested and redressed through norms and the institutions established or resulting from such norms, be they social or legal. Although these inequalities can affect both women and men, women are lagging behind men in many fields.[2]

2. Women and the pervasiveness of law in their lives

The impact of laws on women's lives can be illustrated by the following examples. Denying women the right to acquire, manage and dispose of assets in their own name limits their economic opportunities, productivity and bargaining power in the household (as well as more broadly). An inability to use land as collateral limits women's access to credit, which in turn translates into a limited ability to take advantage of economic opportunities, such as setting up micro enterprises or investing in the land to make it more productive. Land titling designed to facilitate women landowners to register land in their own names has been found to increase access to land for women and improve land productivity.[3]

Similarly, changes in inheritance laws may create incentives for families to invest in daughters. Amendments to the Hindu Succession Act – which took place in a number of India's southern states – gave females and males equal rights to inherit. A study[4] showed how the increased likelihood of

[1] Achieving justice, including gender equality for women, is also a developmental goal *per se*, as it creates a space for women's agency (see Nussbaum, Martha, (1999) "Women and equality: the capabilities approach", International Labour Review, Volume 138, Number 3, 1999 , pp. 227-245(19); and Sen, Amartya (2009) "The Idea of Justice", Harvard University Press). However, the achievement of equality in rights is also instrumental to the achievement of economic development. Data show a positive correlation between equality in rights and gains for women in the social, economic and political realm. In turn, data show that women's advancements in legal, social and economic status translate into gains for the society as whole as women's enhanced voice affects household choices, which, in turn benefit children (in terms of education, health, food security, etc).

[2] Although gender equality refers to both women and men, this paper focuses on women and how law and justice impacts on them differently from men.

[3] Ali, Daniel Ayalew, Klaus Deininger and Markus Goldstein (2011) "Environmental and Gender Impacts of Land Tenure Regularization in Africa: Pilot Evidence from Rwanda" World Bank Policy Research Working Paper 5765.

[4] Deiniger, Klaus, Aparajita Goyal and Hari Nagarajan (2010) "Inheritance Law Reform and Women's Access to Capital: Evidence from India's Hindu Succession Act", World Bank Policy Research Paper 5388

females to inherit led to changes in household investment patterns (e.g., increasing schooling for girls) and to an increase of age at marriage for girls.

3. Law and justice in the World Development Report 2012 on Gender Equality and Development

The World Development Report (WDR) 2012 on Gender Equality and Development highlights the relevant role of law and justice in achieving gender equality. Since the very early stages of production of the report, the legal dimension of gender equality – i.e. the distribution among women and men of rights and entitlements and the different capacities of women and men to access mechanisms for claiming and enforcing these rights and entitlements – stood out as one of the main lines of analysis. Responding to a request by the WDR team, the Justice for the Poor (J4P) program[5] in the Justice Reform practice group helped to shape and elaborate the thinking on the topic.

The collaboration that unfolded focused on the provision of inputs by J4P on specific topics identified by the WDR team. In addition to providing advice at various stages of the preparation of the report, J4P contributed five short papers and a number of case studies. The short papers address issues at the core of J4P's work, including access to justice, enforcement and legal pluralism. The papers also illustrate J4P's approach to reform in the legal and justice arena, one which focuses on a thorough understanding of context. J4P also considers trajectories of change, highlighting the importance of culture and social values in the process of achieving gender equality.

This paper is a compilation of J4P's contributions to the WDR 2012. What follows is a brief overview of the key messages distilled from these papers that consider how justice reform might contribute to gender equality. The papers and case studies prepared for the WDR are appended.

4. What are the common areas of concern for women in the field of law and justice?

Because of the central role that law and justice institutions play in fostering or hindering gender equality, any approach to justice reform needs to take into consideration how gender comes into play – that is, how differences in women and men's social, economic and legal endowments affect the way they experience law and justice in their lives, and how their everyday experience of law and justice simultaneously shapes patterns of social, economic and legal endowments. Both women and men often face similar challenges in accessing justice – such as physical distance from justice service providers, poor infrastructure, and high costs. However, women often experience additional or different "barriers".

The lack of legal guarantees and the existence of unequal or gender-blind legal provisions in many parts of the world, such as in the area of labor, family, property and personal status laws hinder

[5] The World Bank's Justice for the Poor (J4P) program supports the emergence of equitable justice systems. The program focuses on identifying and supporting substantive justice outcomes, rather than pursuing predetermined institutional structures. The program operates in countries where legal pluralism presents a particular development challenge. As a result, J4P is marked by three essential characteristics: (a) engagement with the justice sector as a whole, working with the range of justice institutions present in each country including state, non-state, and hybrid systems; (b) designing and implementing innovative justice initiatives across development sectors, recognizing that rights and accountability are instrumental to achieving broader development outcomes, and (c) expanding and improving the evidence base on which decisions regarding justice outcomes and processes of reform are undertaken.

women's access to justice. Furthermore, women's ability to access justice mechanisms, such as courts, legal aid clinics, and administrative bodies, can also be limited due to economic (lack of money), social and psychological (stigma, restrictions on mobility, time constraints) and educational (limited education, limited access to information and social networks)factors, among others.

Even when these institutions are accessed, biases, lack of gender sensitivity and limited capacity among those that administer justice hinder women's chances of obtaining fair outcomes (see appendices 1 on access to justice, 2 on enforcement and gender equality, and 3 on courts and the judiciary). In some countries, structures able to effectively respond to gender equality concerns are limited. The cumulative effect of these factors is often the creation of a gender inequality trap. The complexity of dynamics between justice and the gender inequality trap, however, is even more subtle. Gender discrimination often starts in the household, the most immediate of the social arenas wherein an individual defines his or her identity. In addition, cultural, social and religious perceptions of gender roles are often ingrained and accepted by both men *and* women who might find abstract concepts of equality and human rights equally foreign, and perhaps even threatening, to an established social order in which their role is known.

5. Gender equality and legal pluralism

In social systems which recognize more than one source of law, a situation of *legal pluralism* arises. In such arenas, different legal institutions, and underlying norms coexist, reinforcing, contradicting and complementing each other. In such societies, everyday transactions such as marriage, inheritance and land exchange fall into the jurisdiction of entities ranging from the state (sometimes at multiple levels) to customary and religious authorities applying a variety of rules: state law, customary law, religious law and local norms. This generates the potential for ambiguities and confusions (even outright conflict) that are, in turn, compounded by the absence or failure of mechanisms for mediating between them.[6] Gender relations sit squarely at the intersection of these different, often contending, normative orders: a country may be a signatory to an international agreement on non-discrimination against women, at the same time that it confers authority on customary legal systems to resolve inheritance disputes that do not recognize the claims of widows; formal religious decrees (e.g., particular forms of *sharia* law) may consign women and men to different public places even as increasingly open access to the global media inexorably challenges

[6] See Tamanaha, Brian Z. (2007) "Understanding Legal Pluralism: Past to Present, Local to Global" Sydney Law Review, Vol. 29, 2007. Legal pluralism also often characterizes issues over which there is larger-scale contestation, such as who controls national budgets, security forces and natural resources. Our focus in this piece is predominantly on local-level manifestations, even as we acknowledge the importance of national and international instances of legal pluralism. We also stress the legal pluralism is not only a developing country issue; many western courts, for example, are currently being asked to rule on the appropriate status of *sharia* law; common law courts are often called upon to apply principles of equity alongside the common law; and judges and juries exist precisely because it's often not clear exactly what "the law" is on a particular issue. For our purposes, the key difference between developed and developing countries with respect to legal pluralism is the presence in the former of coherent, legitimate, accessible, professionalized and adequately-funded mechanisms for peacefully mediating between the contending claims of different legal and normative orders. Indeed, one can reasonably argue that a defining feature of the modernization process itself is the incremental development of such mediation mechanisms, not necessarily the convergence of different constituent systems into a similar whole (though this may occur to some extent).

the normative legitimacy of such practices (or at least heightens awareness of and sensitivity to cross-cultural differences).

Common understandings of legal systems have tended to isolate two sets: the state legal system, i.e. the set of laws and institutions that emanate from and are enforced by the state; and non-state systems (such as religious and customary systems), emanating from traditional sources of authority deriving legitimacy from their social and cultural embeddedness. Orthodox approaches to justice reform have tended to focus on state systems – with most interventions addressing court reforms such as case management, infrastructure, trainings. More recent reforms have also engaged with non-state systems, often as a discrete and fungible set of institutions in need of efficiency- and norm-based reform.

Such approaches fail to appreciate that legal systems do not exist in a vacuum and that, in situations of legal pluralism, different systems continuously interact and influence each other[7]. As a result, dichotomies between state and non-state systems are unhelpful: rather, a landscape of justice institutions exists, with the potential to empower or oppress. In some cases, discrimination against women emerges not solely from any one of the different systems, but rather from their combination. Examples from Kenya and Papua New Guinea (see Appendix 4 on legal pluralism and gender equality) suggest that an holistic approach that takes into account the various norms, institutions and stakeholders that impact the way women experience law and justice is preferable. Instead of trying to design "the" perfect justice system, reform efforts should concentrate on providing women the tools to navigate the complexities of the many existing systems empowering them and making them agents, instead of passive recipients, of justice.

6. A way forward: understanding trajectories of change

An emphasis on the dichotomy between state and non-state legal systems may also obscure alternative routes to change. Laws and justice institutions may at times lead the way towards gender equality. The role of international law (e.g., the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[8] being the most visible example) in calling upon states to prohibit discrimination against women and repeal discriminatory laws has been (and continues to be) important in bringing about changes at the domestic level.[9] State policies and laws have also been critical in many cases to provide equal rights for women and gender-responsive structures for enforcement. More importantly, beyond simply providing legal guarantees, justice systems have the potential to catalyze deeper cultural and social transformations towards gender equality, such as freeing women to take on roles traditionally reserved for men (see Appendix 6 for a case study presenting the experience of Lesotho with gender-sensitive legal reform). Justice institutions, and

[7] Chopra, Tanja and Deborah Isser (forthcoming). Women's Access to Justice, Legal Pluralism and Fragile States.

[8] The convention, adopted in 1979 by the UN General Assembly, provides the following definition of gender equality and an agenda for action: "*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*". It also provides an agenda for action guiding the implementation of its principles by signatory states.

[9] See for example United Nations (2011) "Progress of the World's Women Report, In Pursuit of Justice".

the judiciary in particular, play an important role as agents of change in bringing about justice to women (see Appendix 3).

However, "change from the top" may achieve little when new laws championing gender equality do not consider current social values and beliefs, or when competing legal systems exist that sanction discriminatory practices. Worse, resistance, resentment and even violence against women may occur when such laws do not take into account the social and political contexts where these laws operate. On the other hand, social perceptions of gender roles may have evolved towards equality, while laws and policies lag behind. That policy can poorly reflect behaviour towards gender equality is neither a new phenomenon nor a new insight, but it raises a number of interesting questions: Under what conditions, for example, does policy lead or lag behind behaviour? Are there certain types (or aspects) of issues on which policy seems to play "catch up" to behaviour (e.g., migration, gay marriage, night work, HIV/AIDS), and others on which policy precedes behaviour (policies against sexual harassment and domestic violence, reserved seats for women parliamentarians, no smoking in restaurants, non-discrimination against minorities)? If so, what are their salient characteristics? The enforceability of any given policy is presumably relevant, but there are surely other factors at work. Finally, what role and influence do women – in particular, women's groups and the women's movement – play in determining the trajectories of change? In most realms of development, "policy" debates presume that it is the written pronouncements of governments (e.g., encouraging them to adopt a "goal" of increasing primary school enrolments) that need to be altered as a necessary precursor to changing behavior, but if behavioral change is ultimately what is desired (e.g., adopting safe sexual practices), it may be the case that, in certain realms, policy is only an indirect, complementary, or perhaps even quite secondary, driver of such change.

In these instances, it behoves change agents to explore a range of alternative entry points for eliciting the desired behaviors. In the field of gender equality, we contend that, historically and still today, laws and policies – as both an object and driver of reform – have been one factor among others that have influenced a country's prevailing practices regarding gender equality. Ideas and social norms (especially those expressed in popular culture – see Appendix 5 on ideas and pop culture as agents of change towards gender equality), customary law, religion and social movements are some of the other elements that impact – whether by driving, following, facilitating or hindering – changes towards gender equality.

If society in general and women in particular are to become active participants in the transformation of gender roles and relationships, the main goal of reform efforts should be to create spaces wherein different interest groups can engage with one another on an equitable, locally legitimate and transparent basis. From a gender equality perspective, the goal should not only be that women gain increased access to justice or better enforcement, but that they are able define what justice is. To achieve it, instead of trying to change the "forms" through which laws and institutions work, reforms should rethink and redesign the function of such institutions in order to create those "spaces

for equitable contestation"[10] through which only a legal system that is desirable and fair for those whose lives are affected by it can emerge.

[10] Sage, Caroline, Nicholas Menzies and Michael Woolcock (2010) "Taking the Rules of the Game Seriously: Mainstreaming Justice in Development - The World Bank's Justice for the Poor Program", in Stephen Golub (ed.) *Legal Empowerment: Practitioners' Perspectives* Rome: International Development Law Organization, pp. 19-37

Appendix 1

Access to Justice and Gender Equality

1. What is access to justice and why is it important for gender equality?

Access to justice is important for gender equality because it enables equitable enjoyment of a whole range of rights and resources. Law and justice institutions play a key role in the distribution of rights and resources among women and men across all sectors. They underpin the forms and functions of other institutions and reflect and shape development outcomes.[11] Access to justice therefore is not just a right by itself, it is also a means to ensure equitable outcomes[12].

Access to justice is, more than just making use of the courts (and other justice systems) or providing legal representation, as it is sometimes narrowly defined[13]. It involves:

- Negotiating for equitable rules and processes for effective and sustainable change (rules);
- Influencing the form and function of institutions that deliver public services and regulate access to resources (structures); and
- Empowering the marginalized to challenge inequalities, individually and collectively, their rights and resources (empowerment).

2. What are the barriers to accessing justice?

a. Discriminatory rules and processes. The ability to claim one's rights and seek a remedy is influenced by the content of the laws that sanction these rights and govern the processes for obtaining redress. While there are now in many jurisdictions laws that support the advancement of women and gender equality, discriminatory laws also remain. Common examples include unequal inheritance rights, unequal rights and responsibilities in marriage, laws requiring women to obtain consent of their spouses for travel or employment, evidence given by a woman is not weighed equally as that of a man and limited legal capacity for women. Some ways in which laws can be unequal include:

- *Protective laws* on the surface appear to provide protection for women against harmful and dangerous occupational environments, however, they subvert women's ability to make choices and operate to restrict their access to a wider range of employment opportunities. . These laws include total or partial restrictions on women to work at night, accept employment abroad, or engage in what are considered dangerous occupations, such as mining, and those involving chemicals, among others.

[11] Justice for the Poor, (2011). Justice for the Poor Website http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:21172652~menuPK:3282951~pagePK:210058~piPK:210062~theSitePK:3282787,00.html Accessed 9/14/2011

[12] Yash Ghai and Jill Cottrell (2010) The Rule of Law and Access to Justice", in Yash Ghai and Jill Cottrell, eds. Marginalized Communities and Access to Justice, Routledge Cavendish, citing UNDP, 2004.

[13] See e.g. Maru, Vivek (2009), Access to Justice and Legal Empowerment: A Review of World Bank Practice, Justice and Development Working Paper Series, 9/2009, World Bank, p. 1; and Cappelletti, Mauro and Bryant Garth, eds. (1979) "Access to Justice: Emerging Issues and Perspectives", vol. 3. Milan: Sijthoff and Noordhoff – Alphenaandenrijn; Yash Ghai and Jill Cottrell, "The Rule of Law and Access to Justice", in Yash Ghai and Jill Cottrell, eds. (2010) *"Marginalized Communities and Access to Justice"*, Routledge Cavendish.

- *Gaps* in legal and regulatory frameworks to address specific inequalities against women also exist. Few countries in the East Asia and Pacific region, for example, have legislation on workplace harassment despite information suggesting that 30-40% of women suffer verbal, physical and sexual harassment.[14] Non-recognition of certain categories of employees may impact disproportionately on women workers, such as domestic workers – a large majority of whom are women – as they are left with limited legal protection.
- *Gender-neutral laws*, although appearing to be unbiased, may impact disproportionately on one sex if they do not take into account existing inequalities. For example, complicated investment procedures may impact on women more due to restrictions on their travel and access to resources[15]; general provisions on assault may fail to protect women from domestic violence.

Laws, formal and informal, are interconnected. Discriminatory laws in the area of family and marriage impact women's economic opportunities. Although not directly dealing with economic fields, they can strip women of property rights, such as through provisions that provide for unequal inheritance rights, power over property vesting in the husband, or division of community property failing to recognize women's domestic work.

b. Limited awareness, skills, resources, support and power to claim their rights. Women as justice users have limited capabilities to access justice due to a variety of barriers:

- *Awareness and skills.* Women may have less access to information about their rights and entitlements as well as how to seek remedies. They may also be excluded from engagements over matters external to the household, such as land and natural resources negotiations, business and enterprises.[16]
- *Resources.* Financial cost, especially in developing countries, is one of the reasons cited by women for a failure or delay in seeking redress.[17] A study in Indonesia found that nine out of ten female heads of household surveyed were unable to access courts for divorce cases mainly due to financial costs, including court fees and transportation expenses as the average cost of a religious court case was approximately Rp 800,000 (or four times the monthly per capita income for those living on or below Indonesia's poverty line).Divorce cases cost Rp 2,000,000 (without a lawyer) or Rp 10,000,000 (with lawyer). [18] By failing to

[14] UN (2006). In-depth study of all forms of violence against women> Report of the Secretary-General. Sixty-first sessio. A/61/122/Add.1.
[15] Simavi, Sevi, Clare Manuel, and Mark Blackden (2010) "Gender Dimensions of Investment Climate Reform: a Guide for Policy Makers and Practitioners". Washington, DC: The World Bank
[16] See for example Justice for the Poor research in Timor-Leste (Felix da Costa Diana (forthcoming November 2011), "Equity in Investment: The Challenge of Making Women's Voices Heard, Examples of Agri-business Engagements in Timor-Leste" ,) and in east Asia and Pacific region, (by Sum, June-wei(forthcoming November 2011) "Bringing Women to the Table – Land, resources, and investor negotiations",).
[17] Banda, Fareda (2009) "Women and Access to Justice", in Ayesha Kadwani Das and Gita Honwana Welch, *"Justice for the Poor: Perspectives on Accelerating Justice"*, New Delhi:Oxford University Press , p. 133.
[18] Sumner, Cate, Matthew Zurstrassen and Leisha Lister (2011) "Increasing Access to Justice for Women, the Poor and those Living in Remote Areas: An Indonesian Case Study", Justice for the Poor Briefing Note, Volume 6, Issue 2. Washington, DC: The World Bank.

access the courts, many of these women were failing to also benefit from pro-poor government programs.

- *Mobility and geography.* Where judicial structures are distant from communities, people, including women are less willing to make claims. However, long distances can disproportionately impact on women, where there are no childcare support facilities or where social practices limit women's ability to travel.
- *Support.* Even where women are aware of their legal rights, they may not claim them due to dependency, shame or fear. Women may not seek redress due to an "ingrained dependency or powerlessness: feeling that her situation is inevitable or that she feels incapable of changing her life".[19] This may be compounded by reluctance to sue a spouse or family member and the desire to maintain the relationship.[20]
- *Power.* Many women lack the power to engage in contestations over rights and resources. Social norms may, in some cases, dictate a subordinate position for women, both in public and private spheres. Women may have limited spaces to speak out and assert their claims. In some cases, women's claims are not considered "legal claims". Women may have less confidence in themselves as claimants of rights and resources.

  Decision-making is often in the hands of men. Women have low participation as leaders or actors in justice institutions (e.g. as judges, prosecutors, police, heads of agencies, village chiefs) and at various levels (e.g. national and local levels).

c. Ineffective justice structures

Ineffective justice structures hinder women's access to justice. In addition to barriers that affect both women and men, such as lack of infrastructure, limited staff, corruption, poor case management, among others, women may also experience gender-based challenges, such as:

- *Gender-bias and lack of sensitivity.* Justice mechanisms may be gender-biased or lack gender sensitivity. For example, there are still prevailing beliefs within justice institutions that domestic violence and marital rape are private matters and not properly within their jurisdictions.
- *Limited capacity.* Even where judges, magistrates and justice personnel in general are not biased and understand gender issues, they may not have the skills or the institutional capacity to address gender inequalities (e.g. ensuring privacy and confidentiality to victims of violence).
- *Limited structures.* There may also be limited structures to consciously and specifically respond to gender concerns. (e.g. no gender strategy, no systematic referral systems to sources of support for violations).

[19] Veneklassen, L., "The Methodology of Participatory Research and Women's Legal Rights" in Women and Law in Southern Africa Working Paper No. 2 (1990) at 133 as cited in Banda (2009) cit., at 136
[20] Ibid.

Furthermore, the *dichotomization of formal and informal justice systems* spurs debate – that informal systems are more accessible while formal systems have tendencies to be "less discriminatory" – but often obscures the complexities of context, and fails to consider issues of hybridity (the existence of institutions that draw on elements and the legitimacy of both formal and informal systems) and mutual influence (systems reinforce each other). The latter point can mean that justice is inaccessible for women anywhere[21]. Commonly the above debates are based on limited evidence.

3. What efforts enable access to justice for women and men?

a. Strengthen substantive framework on gender equality

Access to justice requires addressing discriminatory as well as detrimental gender-blind provisions in both formal and informal rules. Efforts may include legal assessments, revising laws, multi-stakeholder dialogues/fora and public interest litigation. Targeted legal provisions like temporary special measures, special funds, outreach programs, targeted recruitment of women of justice institutions can also be considered.

b. Empower women as claimants and agents of change

Addressing capability barriers is important for women to be able to claim their rights. However, merely addressing them is not enough without changing the power dynamics. Empowering women, both *individually and collectively* is therefore important; enabling women to engage in social contestations and shape the discourse and processes that perpetuate inequality. Initiatives can focus on: (a) opening up spaces for women to negotiate and speak up, (b) facilitation work, e.g. community facilitators or paralegals, (c) increasing legitimacy and capacity of women's groups, (d) building women as a collective force, and (e) developing women decision-makers and actors in the justice sector.

c. Establish gender-responsive structures

Focus must be placed on the effectiveness (functional aspects) of the mechanism rather than on its form alone. Mechanisms and procedures tailored to the specific context and based on careful assessments and evidence ("best fit") are preferable to putting in place "best practice" models. Initiatives can include: (a) gender sensitivity training and capacity/skills building efforts for justice actors, (b) efforts towards effective handling of women's grievances and provision of remedies, (c) establishing gender strategies, plans, mechanisms, and (d) increasing women's access to legal aid services.

[21] See e.g. Ayuko, Benita and Tanja Chopra (2008) "The Illusion of Inclusion: Women's Access to Rights in Northern Kenya"
Justice for the Poor Research Report. and Monson, Rebecca (2010) "Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands". Justice for the Poor Briefing Note, Volume 4, Issue 3. Washington, DC: The World Bank, .

Appendix 2

Enforcement and Gender Equality

1. What is enforcement and why is it important for gender equality?

Enforcement can be understood to mean "the act or process of compelling compliance with a law, mandate, command, decree or agreement".[22] Without effective enforcement mechanisms, the law, mandate, command, decree or agreement will generally have no impact.[23] Enforcement transforms the *de jure* (law, mandate, command, decree or agreement) into the *de facto* and enables both women and men to enjoy rights and resources.

2. How can we enable better enforcement?

There are numerous variables affecting how enforcement can and/or will take place. These include:

(a) nature and substance of the law, mandate, command decree or agreement which is the subject of enforcement;
(b) enforcement mechanisms; and
(c) social context of enforcement.

Issues relating to legal pluralism and access to justice also impact on enforcement but are dealt with in separate papers.

3. Nature and substance of the law

Laws, whether formal or informal, provide the substantive content of enforcement. Justice institutions refer to them to measure the mandate and extent of their engagement. Gender equality enforcement benefits from:

- *Clear and specific laws.* Although most Constitutions and laws have a general guarantee of equality, absent specific legal language on rights to be enforced, responsibilities of enforcement agencies and measures for enforcement, among others, enforcement will be uneven, discretionary and arbitrary. Where discriminatory norms exist, ambiguous laws open the door for discriminatory enforcement. Guidance on the interaction of different laws and structures with each other (i.e. formal and informal laws, general and specialized laws) facilitates enforcement.

- *Gender-targeted provisions.* Gender-neutral language in law does not always result in gender-sensitive enforcement. It can create the same ambiguities as unclear or vague laws.

[22] Black's Law Dictionary, 9th Ed.
[23] World Bank (2001) "Engendering Development - Through Gender Equality in Rights, Resources, and Voice" World Bank Policy Research Report. Washington, DC: the World Bank.

Hence, in many countries, gender-specific provisions, (e.g. women-targeted interventions or temporary special measures or affirmative action) and gender-specific laws (e.g. gender-based violence legislation and gender equality laws) have been drafted to "fill in" gender gaps in enforcement. Increasingly, gender equality legislation is relied upon to create conceptual clarity and set standards (e.g. by providing a clear definition of discrimination or a list of discriminatory acts, law enforcement agencies know what to promote or sanction).

4. Enforcement mechanisms

Enforcement mechanisms provide the structure for compliance with law, mandates, commands, decrees or agreements. These structures may be formal, informal or hybrid.[24]. Without such structures, the law remains declarative or symbolic, and actual behavior can depart from the prescribed one without any consequence.

There are many general challenges to the enforcement of laws: lack of knowledge, lack of enforcement skills, corruption, inappropriate structures and limited infrastructure, among others. In many of these cases, women may be differently or disproportionately impacted than men. Nevertheless, there are specific challenges when enforcing gender equality such as:

- *Clear responsibilities and accountability.* There is often lack of clarity on responsibilities for enforcement of gender equality. Responsibilities must be clearly established- not only for enforcement, but also for accountability. In many cases, the drafting of regulations, protocols or guidelines assists implementers in carrying out their responsibilities (e.g. rules for handling cases of gender-based violence).
- *Gender-sensitive and skilled human resources.* People within the enforcement structures have to be sensitized to gender concerns and must possess the capacity and skills to respond accordingly. Inclusion of gender training into their education and training programs (e.g. judicial training, law school curriculum), development of tools, review of protocols and judicial decisions are among some of the initiatives undertaken.
- *Equal Representation.* Women are unequally represented among enforcers. Levels of representation of women differ markedly across the world and between agencies. For example, the global average for women in the judiciary is 48%, however, for the police it is only 11%. South Asia fares most poorly in terms of representation of women, with only 4% of the judiciary, 14% of the prosecution, and 14% of the police being female. This compares

[24] State formal enforcement structures are generally divided into: (a) State structures, which includes: (i) criminal enforcement structures – which involves ensuring compliance with penal laws and generally composed of the police, prosecution, courts, prison services, bailiffs, and a collections agency and (ii) civil enforcement structures- which involves submitting a claim before a state court or tribunal, to seek redress (e.g. injunctive relief, performance or damages), and appropriate follow up mechanisms to ensure compliance with the judgment; or the use of private alternative dispute resolution mechanisms (for example, mediation, negotiation, arbitration or conciliation) to enforce rights. (b) Informal structures refer to non-state structures, including (i) private alternative dispute resolution systems (generally on civil matters), such as mediation, arbitration, employer-employee boards, and (ii) informal customary, religious and community systems (which include civil and in some cases, criminal structures) - e.g. customary councils, village elders. Discussions on hybridity, centrality and legitimacy of, and relationship among these systems are also explored in appendix 4..

to comparable figures of 49%, 35% and 11% for the same institutions in Central and Eastern Europe.[25] Where women are represented, they may not have the same rights as their male counterparts. For example, in some areas in Vanuatu, women justices in island courts cannot take part in walking the boundaries of the land, an integral aspect of land cases, due to customary restrictions on involving women[26] in land-related matters. Efforts should be undertaken to ensure women are equally represented within enforcement agencies, and enjoy equal powers. In PNG, female local magistrates in village courts have been increasing since 2004 with promising impacts on increased women's access to these courts.[27]

- *Engendered enforcement mechanisms.* The lack of gendered structures and processes also hinders enforcement. Despite several criticisms of its inability to address inequalities, gender mainstreaming remains a common strategy for making enforcement structures more gender-responsive. The application of gender mainstreaming has been uneven and sometimes misinformed (e.g. equating mainstreaming to gender-neutrality). Experience suggests that putting these measures in place (e.g. as part of a gender mainstreaming strategy) facilitates better enforcement, subject to a review of context
- *Gender focal points*. Gender machineries (e.g. commissions on gender equality or ministries of women) often establish gender focal points in enforcement agencies. Responsibilities of gender focal points range from being liaisons for case referrals, repositories of technical expertise, implementers of gender work and catalysts for change . Although a step towards better enforcement, designating gender focal points by itself does not lead to better enforcement without giving them sufficient political mandate, influence, capacity and resources.
- *Specialized or engendered complaints mechanisms.* Clearly defined complaint mechanisms for discrimination facilitate enforcement. Discussions center around whether there is a need to (a) establish special complaints mechanisms for gender equality, on the one hand, (e.g. special courts, family courts or women's courts, women's desks in police units[28]) which can provide specialized services but may run the risk of isolating gender work solely to that court, unit or desk, and (b) engender general structures, on the other hand. Multiple venues to bring complaints (e.g. village level officials, school teachers, social workers) or effective referral systems help surface inequalities. Support services for victims, whether medical, financial, legal, protective, among others, are an integral aspect of enforcement as they enable victims to identify inequalities in practice, pursue complaints and get redress.
- *Strategies and plans on gender equality.* Enforcement may have been identified as part of a gender equality plan; in the country's development or sectoral plan (e.g. Indonesia's access to justice strategy); or may have a specific gender plan itself (e.g. Philippines and its five

[25] UN Women (2011) "Progress of the World's Women Report 2011-2012: In Pursuit of Justice".
[26] World Bank (forthcoming 2011) "Island Courts in Vanuatu", Justice for the Poor Research Report. World Bank. Washington DC.
[27] Papua New Guinea Village Courts and Land Mediation Secretariat. Unpublished background study on female village magistrates in Papua New Guinea.
[28] In 1985, Brazil opened women's police stations "Delegacias Especiais de Atendimento às Mulheres" or"DEAMs" . Today there are 450 DEAMs throughout the country. Since the passing of the Maria Da Penha law in 2006, the DEAMs have been granted a leading role in initiating legal proceedings in cases of violence against women (see Legal cases that changed women's lives).

year plan for a gender-responsive judiciary). These strategies/plans provide priorities and directions for enforcement agencies.

- *Gender budgets and funds.* Enforcement entails funds. Whether gender is mainstreamed or targeted interventions are in place, allocations need to be made. Enforcing gender equality is not cost-free.
- *Gender equality database.* Maintaining a gender equality database which includes sex-disaggregated information and gender analysis will assist enforcers as clear data on inequalities will enable a more informed response.

Inclusive dialogue and collaboration. Women's voices are often not part of dialogues on enforcement and as a result their needs and challenges are overlooked. Enforcement requires putting in place structures that enable continuous dialogue between enforcers and women – i.e. women beneficiaries, women's NGOs, and gender experts. Enforcement agencies should also go beyond seeing women simply as beneficiaries but as active partners in enforcement – e.g. collaborating with women facilitators to consult with women in communities, partnering with women's NGOs to find cases of trafficking against women, and supporting structures (such as *nari adalats* in India) where women play a dispute resolution role. In Indonesia, engagements between the enforcement structures and PEKKA, an NGO composed of women-headed households, including through multi-stakeholder forums, was critical to policy changes on access to legal services access to justice[29].

5. Social context of enforcement

A wide variety of elements can be targeted to ensure the general cultural environment is conducive to allowing and supporting enforcement of gender equality:

- *Addressing discriminatory norms.* As discriminatory norms permeate enforcement institutions, identifying these norms is critical. For example, police officers may refuse to take domestic violence cases seriously because it is seen as a private matter, or worse, blame women for the violence because, for example, she failed to perform her household chores well. Another example is where justice institutions exclude women's claims due to social norms about who speaks and represents the family in public places[30]. Initiatives to address these issues will vary by context but may include research, raising public awareness of and gaining support for gender equality and women's rights, multi-stakeholder dialogues, education, and mass media interventions.
- *Women's empowerment*. Building women's individual and collective empowerment means enabling women themselves to be active agents in influencing decisions on the directions, content and process of enforcement. This may entail, depending on contexts, changing their

[29] Sumner et al. (2011), cit.

[30] See, for example, Rebecca Monson, Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands, Justice for the Poor Briefing Notes, Volume 4, Issue 3, April 2010 (on how the legal system recognizes the customary right to speak on land in a public arena as vested only in a few men) and World Bank Indonesia Social Development Unit Justice for the Poor Program, Forging the Middle Ground: Engaging Non-State Justice in Indonesia, May 2008, pp. 44-45 (in Minangkabu, membership in the customary or *adat* council is restricted to men, and hence, women rely on their matrilineal uncle to represent their interest in the council).

perceptions of subordination to men; building women's confidence/positive self-image and supporting them overcome stigma; building women's knowledge, skills and leadership; enhancing their access to information and resources for decision-making; strengthening their ability to inform and engage; and increasing their bargaining power through collective action.

- *Gaining public awareness and support.* Gaining public support facilitates enforcement by making gender equality a concern for all. This may lead to increased watchfulness on, and reporting of, gender inequalities, private regulation of behavior, increased support for victims and decreased tolerance for discrimination. Working with men heightens awareness that gender equality is not only a "women's issues". Gaining public support also helps minimize backlashes against gender interventions and women themselves.

6. The importance of analytical work

Good enforcement should be based on good evidence and analysis. However, many countries' enforcement structures still lack information –on their women users (e.g. on the disputes women face, the type and quality of justice services available to women, barriers, including forms of inequalities, that women face in engaging with justice institutions) and on themselves – (e.g. few structures also include gender in evaluations or assessments of institutions). This affects the capacity of enforcement structures to respond accordingly to gender concerns with appropriate interventions.

Appendix 3

The Judiciary as a Change Agent for Gender Equality

1. Context

The judiciary or courts in any state typically stand apart from other justice sector institutions as providing state-sanctioned determination of any persistent dispute. Courts of justice can be powerful agents for social change when they work without gender bias and to support gender equality, as their pronouncements carry the backing of the state and may thus be enforced or become a norm across a broad range of citizens through established channels of state-citizen engagement. As a result, although only a small percentage of people directly use courts in any country, the influence a court can exert goes beyond those who come into direct contact with them.

This is not to say that courts are always an effective or desirable means of pursuing gender equality. They may be ineffective as the majority of citizens may not be affected by judicial decisions: in Sierra Leone, about 85 percent of the population is predominantly governed by customary law.[31] They may be undesirable because of structural issues within the court that undermine gender equality (gender balance in the judiciary being one that is discussed below, along with access issues such as distance from the family home, and a range of other concerns including gendered laws around standing in court or even gender equality as an enforceable right), or credibility issues that might undermine positive gender outcomes. As a result, the value of the judiciary to the promotion of gender equality always has to be seen within the broader context of state and non-state justice institutions and the social and political dynamics that mark the state's relationship with its citizens (particularly in the country's periphery).

Nevertheless, the judiciary may by itself be the driver of gender-progressive change, or it can be a tool of the state in bringing about change. A few examples – by no means exhaustive – of how the judiciary can have a progressive impact on gender equality are provided below.

2. Judicial decisions

Courts typically have the exclusive right to interpret the Constitution and state laws and can do so in ways that promote gender equality. For example, the Botswana High Court and Court of Appeals interpreted the country's Constitution as prohibiting sex discrimination, even if it was not explicitly identified as one of the grounds of discrimination.[32] Courts have also been instrumental in striking down legal provisions and state actions that discriminate on the basis of gender, such as on unequal inheritance rights,[33] the inability of women to transmit nationality to their children[34], and the refusal

[31] James-Allen, Paul (2004), "Accessing Justice in Rural Sierra Leone – A Civil Society Response", in Open Society Initiative, "Justice Initiatives: Legal Aid Reform and Access to Justice"
[32]Attorney General of the Republic of Botswana v Unity Dow, AHRLR 99 (BwCA 1992)
[33]Dhungana v Nepal, Supreme Court of Nepal, Writ No. 3392 of 1993, 2 August 1995.
[34] Attorney General of the Republic of Botswana v Unity Dow, AHRLR 99 (BwCA 1992)

to grant accreditation for national elections to a party representing the lesbian, gay, bisexual and transgender community.[35]

In certain countries in which the judiciary is active around rights enforcement, courts have laid down directives and guidelines in the absence of laws. In Nepal, the court directed the Nepalese government to introduce a bill before Parliament in consultation with women's groups, sociologists and other concerned actors by studying legal provisions in other countries.[36] In India, the Supreme Court, in addition to declaring sexual harassment as unlawful under the constitution and international conventions, provided guidelines for observance at all workplaces and other institutions which would remain applicable until sexual harassment legislation was adopted by parliament.[37] In another Indian case, the High Court provided directions to improve government schemes on maternal and infant mortality.[38]

3. Special jurisdiction

The state, by creating special courts (e.g. family courts, courts for rape and sexual offenses) or specific regimes (e.g., family matters reserved to religious or customary courts) can influence outcomes and shape the content of rights in different ways for different individuals. Special courts, as well as gender units within the judiciary, can use specially-trained judicial actors on gender equality and rules that are gender-sensitive.

4. Rules and regulations

Rules that govern court procedures (or "rules of procedure"), which are generally drafted by the judiciary themselves, can provide a gender-sensitive environment. These rules include allowing women subjected to sexual violence to testify in private chambers, non-adversarial procedures in resolving disputes, special waiting areas for victims, confidentiality and privacy, and simplified evidentiary requirements.

Judicial codes of conduct also have provisions that supplement the rules of procedure in facilitating a comfortable and non-discriminatory environment, especially for women (be they litigants, witnesses or judges), including the use of gender-fair language and prohibition of sexual harassment.

5. Infrastructure and resource allocation

Physical access is crucial, and policies aimed at increasing the number of courthouses or judges or creating mobile courts may benefit women more than men, as women usually suffer from limited mobility and time more than their male counterparts. Women may also be disproportionately affected by the cost of court fees. In Indonesia, a study on female-headed households identified court fees as a main barrier for getting divorce certificates, which in turn prevents them from

[35] Ang Ladlad LGBT Party v. COMELEC, April 8, 2010, G.R. NO. 190582, Philippine Supreme Court
[36] Dhungana v. Nepal, Supreme Court of Nepal, Writ No. 3392 of 1993, 2 August 1995.
[37] Vishaka and Others v. State of Rajasthan, (1997) 3 S.C.R. 404 (India)
[38] Laxmi Mandal v Deen Dayal Hospital, W.P.(C) Nos. 8853 of 2008

accessing pro-poor government subsidies. This, supplemented by other efforts, led the Indonesia Supreme Court to increase the budget allocation to court fee waiver schemes enabling a 14-fold increase in the number of poor people accessing courts.[39]

6. Gender balance in the Judiciary

Equal representation of both sexes on the bench – as well as in administrative functions – can have an impact on the gender-responsiveness of courts. Women judges contribute to the representativeness and diversity of the courts. While it is important for women to have equality of opportunity, the courts themselves should be reflective of society and not draw upon a narrow demographic background alone.[40] Some women judges bring forward women's experiences and also spearhead initiatives on gender in the judiciary. In Papua New Guinea, policies aimed at increasing the number of women in village courts has seen an increase from 10 female village court magistrates in 2004 to 384 by the end of 2009.[41] Further research on the impact of women judges on access to justice in particular and gender equality in general is needed.

[39] Sumner et al. (20011) cit.
[40] Feenan, Dermot(2008), "Women Judges: Gendering Judging, Justifying Diversity, Journal of Law and Society, Volume 35, No. 4, pp. 490-519.
[41] Recent achievements of the Australian Aid Program in Papua New Guinea. http://www.ausaid.gov.au/country/papua.cfm, accessed May 2, 2011

Appendix 4

Legal Pluralism, Development and Gender Equality

1. Context

There is a broad consensus that building the rule of law is a fundamental goal of development, both as an end in itself and as a means to realizing related objectives (such as 'good governance' and effective service delivery). That women as well as men should be the beneficiaries of a fair, transparent and accountable legal system is also generally accepted. However, to date, traditional law and justice reform efforts have often yielded highly sub-optimal results. Such interventions tend to concentrate mostly on state institutions and state law, with not much consideration to underlying social values and beliefs, and although engagement with non-state law is increasing these are often addressed only tangentially and then mostly only to advocate for their alignment with the state system. State law and legal institutions are, however, only one of the rule systems affecting people's lives and, under certain circumstances, they may turn out to be the most remote and foreign.

Women in particular are often most affected by the intersection of different legal systems – and of these with underlying social values. Because law (and the institutions that apply and enforce it) is a powerful tool through which gender inequality is both perpetuated and redressed, justice reform efforts should be mindful of how the current system and the proposed reforms impact gender equality. Moreover, we suggest that an approach focusing on inequalities in the lived experiences of women and men, and as a result taking into account the various legal and value systems affecting women and men in a particular context is well placed to deliver meaningful results. Although such a holistic approach may not always translate in more complex and politically sensitive endeavors, it also potentially opens opportunities for reformers, by creating entry points and new spaces for inclusion and participation.

The following note aims to provide an overview of the main issues surrounding legal pluralism, its relevance to development in general and to gender equality in particular. It offers some examples of how the encounter of different legal systems may play out differently for women and men. Finally, it sets forth some suggestions on how best to engage with justice reforms concerned with fostering gender equality in legally plural settings.

2. What is legal pluralism?

Law – and the institutions that make, implement and enforce it – is usually identified with the state. The state, however, is but one of the many sources of authority we abide by in our everyday life. A web of norms – personal values, regulations, codes of conduct, cultural and religious tenets – continuously shapes our thoughts, actions and interactions. Some of these norms we elevate and codify, giving them the name and status of "law". When social actors recognize more than one source of law in the social arena, a situation of *legal pluralism* arises: a complex set of laws,

institutions, and underlying norms – some of them complementary, others potentially contradictory – are in play. As such, legal pluralism is a ubiquitous social fact, manifest in a plurality of forums (national, supranational and international bodies, alternative dispute resolution bodies, religious and customary authorities, etc.) and a plurality of laws (statute, customary law, religious law, international and regional laws, such as the European Convention of Human Rights, etc.). Legal pluralism characterizes countries such as the United Kingdom, which allows certain Shari'ah institutions to function in parallel to and under the ambit of state courts; similarly, Catholics around the world may enter and dissolve marriages according to canon law, with proceedings and consequences that are regularly different from those set by state law. Common law courts often apply and decide between competing norms and rules based on equity, statute, and judicial precedents while some civil courts, such as in Egypt and Kenya, recognize religious norms.

As social facts, laws and institutions are never static, reflecting shifting power dynamics and socio-political arrangements. Just like languages, they are evolving tools of social communication, used to deal with and mediate a reality that is embedded in that particular social context. And just like languages, laws and institutions are interwoven with (and reflect) group and individual identities.

3. Legal pluralism and development

Engaging with justice reform and creating equitable institutions – or, more broadly, building the rule of law – are complex endeavours which need to be carefully tailored to a specific context. The existence of more than one legal system is a key characteristic of such context, and needs to be assessed and understood in these terms, at least for two reasons.

First, when multiple legal systems exist, focusing on *one* of the systems, or trying to force the multiple systems into uniformity, risks low levels of impact, or even alienation, among target populations whose social life is embedded in a particular, localized set of norms and values.

Second, every development intervention engages with and alters the prevailing normative order, and does so at all levels, from the state/formal system to the local customary normative structures. When building a new health system, for example, new entitlements are created, and so are possible conflicts and grievances; power structures and rule systems are also affected. When building a road, land must be expropriated and landowners compensated for it, and that in turn will touch upon issues of customary land tenure and usage rights. In all such cases, part of the success or failure of interventions will depend upon how successfully, legitimately and equitably these interventions engage with all such rule systems.

4. Plural legal systems at work

Interactions among constituent legal systems can take different forms. Legal orders in plural legal systems can exist independently from, and unrelated to, each other. This form of "wild" legal

pluralism is ubiquitous[42]: street committees in Brazil, Animist or Christian authorities in Chinese villages, Shari'ah Councils in Britain, tribal *jirgas* in Afghanistan and Pakistan, caste *panchayats*, customary water management bodies in Tanzania are just a few examples.[43]

In other cases, relations among different legal systems are ordered and managed through specific meta-rules (i.e., conflict of laws rules), creating a sort of "weak" legal pluralism. For example, the state, as the legal order exerting (or claiming) higher authority, can recognize non-state law and institutions, as is the case when constitutions recognize religious and or customary law in countries in Latin America, Asia and Africa, but also in Scandinavia, Australia, Canada, and the United States. Or, the state may create or recognize separate jurisdictions for ethnic/religious groups or on certain issues, such as religious courts for Muslims in Indonesia. Concurrent legal orders may also coexist, as in Israel, where maintenance cases may be dealt with by applying religious or general civil law, or the state may establish or incorporate alternative dispute resolutions (ADR) systems or non-state institutions, creating hybrid institutions such as village and island courts in Solomon Islands, Vanuatu and Papua New Guinea.[44]

5. Legal pluralism and women's experience of justice

The nature and extent of the interactions between different legal systems shapes the way people experience justice in their life. For women in particular, the intersection of state legal systems, customary laws, religious tenets and local power dynamics may create processes that heavily affect their ability to access resources and exercise agency. For example, different systems may reinforce each-other (or one manipulates the other) to entrench exclusive power relations. In Solomon Islands the encounter of formal law with *kastom* resulted in the marginalization of women in land dealings and participation in benefits resulting from those dealings.[45] Traditionally, men have had a prominent role in land dealings. In colonial times, most transactions took place between foreigners and men. This was mainly due to the fact that men were usually more educated than women and could speak and write in English. In addition, according to some, customary norms provide that women "*no save tok"* – that is, may not talk about land – and should "stand behind" men.

Nevertheless, it is a feature of *kastom*, with an emphasis on communal (albeit hierarchical) rights, that women enjoy a relevant role in decision making, including on land issues. However, the process of land titling, which entails a shift from a communal to an individual conception of land rights, has heavily benefitted a small number of landholders, the great majority of them men who, exercising their traditional right to "talk" about land, have stepped forward and registered land

[42] von Benda-Beckmann, Franz, (2005) "Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism," in Kuppe & Potz (eds), Law & Anthropology: International Yearbook for Legal Anthropology, cited in Menzies, Nicholas (2007) Legal Pluralism and the Post-Conflict Transition in the Solomon Islands: Kastom, Human Rights and International Interventions.

[43] International Council on Human Rights Policy (2009) When Legal Worlds Overlap: Human Rights, State and Non-State Law. Geneva: ICHRP. 2009.

[44] Evans, Daniel, Goddard Michael with Don Paterson (2011), The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands. World Bank Working Papers Series, 13/2011

[45] Monson, Rebecca (2010) cit.

under their name. Nowadays women participate to decision making mostly informally (e.g. through conversations within the household) and their ability to share the benefits accruing from landholding rights is often limited.[46] Similarly, in Kenya, formal land titling programs resulted in men holding the great majority of land. Recent studies suggest that formal titling has had the effect of entrenching patrilineal landholding and inheritance systems.[47]

New benefit inflow and the appearance in a community of new actors bringing new rules and arrangements may also give rise to or exacerbate discriminatory practices. The women of Lihir, Papua New Guinea, for example, lament that with the coming of mining companies and relative arrangements with local landowners, women have been sidelined in the communities, as matrilineal structures of inheritance and land rights have been replaced by patriarchal patterns.[48]

In these cases, what seems to happen is that traditional patriarchal values resurface - or gain new strength - in formal law arrangements, to the detriment of women's rights and ability to influence decisions. Indeed, while traditional systems usually provided spaces for women's participation (whether or not they held land owners rights), formal law limits land dealing rights to those who have formal title to the land, without taking into account pre-existing arrangements tied to a communal ownership structure.

6. Legal pluralism, development and gender equality: challenges and opportunities

While legal pluralism is a universal social fact, it is likely to be most intensely experienced in developing countries. There may be a lack of meta-rules; a deep individual and social identification with differing systems; a greater gulf between the systems, or less historical time to intermediate between the systems. Given the contextual complexity it creates, legal pluralism presents unique challenges: to citizens seeking justice, to governments seeking to exert legitimate control and authority, and to policymakers and development workers who seek to act in predictable environments towards the attainment of agreed-upon objectives.

For women, navigating the different systems can be particularly daunting. Lack of knowledge (including of their own rights), social stigma, cost, limited access to social networks and support may translate into the inability to take advantage in practice of the multiple "legal pathways" that might be available to them.[49] In addition, as noted before, at times *all* the available systems, whether by design or application in specific social contexts, discriminate against women, hindering their ability to obtain justice.

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[46] Monson, Rebecca (2010) cit.

[47] Harrington, Andrew. (2010). Women's Access to land In Kenya. Justice for the Poor Briefing Note, Volume 4 Issue 1. The World Bank: Washington DC. See also, Harrington, Andrew and Tanja Chopra (2010). Arguing Traditions. Denying Kenya's Women Access to Land Rights. Justice for the Poor Research Report No. 2. Washington DC: The World Bank

[48] Menzies, Nicholas and Meg Taylor (2012) "Unearthing Legal Pluralism", in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds.) *Legal Pluralism and Development* New York: Cambridge University Press.

[49] Lund, Christian (2012) "Access to Property and Citizenship: Marginalisation in a Context of Legal Pluralism", in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds.) *Legal Pluralism and Development* New York: Cambridge University Press.

When the formal system is more protective of women's rights than the informal one, discrimination may nevertheless resurface through specific provisions allowing customary principles to prevail. In a significant number of countries in Sub Saharan Africa, for example, the supreme expression of state law, the constitution, while sanctioning the principle of non-discrimination, exempts customary and religious law from it (or is silent on the point), thereby effectively legitimizing discriminatory treatment in matters falling under such systems. Marriage, family, inheritance and property laws are those areas most often left under the domain of customary law (and often the criteria for the application of one system over the other are vague, leaving great margins of discretion to those called to apply the law). As a result, even where formal law may guarantee principles of equality and non-discrimination, in practice a high percentage of women (e.g., all women who entered a customary marriage) may still be subject to different, potentially discriminatory norms.

However, the existence of alternative legal systems may be instrumental in enhancing women's access to justice**.** When the state system is centralized, is weak and has limited outreach, is geographically or culturally distant, or difficult to access due to procedural or linguistic barriers, rural dwellers and marginalized groups may find local traditional or religious dispute resolution bodies important in providing a forum to seek redress. In particular, non-state justice systems may offer women an option that is more readily available – in terms of cost, vicinity, language, shared culture and values – than the formal one. Research conducted in Indonesia, for example, shows that women are generally happy with informal justice mechanisms, both as decision making institutions and as bodies able to help them navigate the different systems.[50] In contexts where the principles of justice reflected by state-law are felt as distant and foreign, traditional institutions might be felt to be better able to respond to people's grievances and administer justice. For example, in cases of domestic violence, retributive justice solutions such as incarceration may not be the preferred solution for a woman and her community, who would lose a productive member and whose livelihood might be compromised. Compensatory and reconciliatory justice dispensed by traditional institutions might be more appealing, and spare women from being ostracized by their community. While not advocating one set of norms over another, this simply serves to highlight the normative complexity in engaging with legal pluralism and gender equality.

It is important to recognize that institutions and legal systems are not reified objects; rather, they are socially embedded, meaning that individuals can shape institutions through contesting "common understandings" that derive out of shared social practice. Women's ability to participate in social practice and in the negotiation over the definition and legitimacy of norms and institutions is thus key to the quality of those norms and institutions in terms of gender equality - and of development outcomes. In effect, we are interested in how women shape (or do not shape) the rules of the game or institutions that affect their daily lives. In situations of legal pluralism, women might find spaces to negotiate their claims and exert agency.

[50] Humaida, Lisa Noor (forthcoming 2012) "Women and Dispute Resolution: A Case Study on How Adat Institutions Work to Settle Disputes in Aceh" Justice for the Poor Briefing Notes, Washington DC: The World Bank

The existence (or creation) of alternative legal regimes offers opportunities for women to shape new understandings of rights and norms, and develop a new "legal consciousness"[51] An example is the *nari adalat* in India a women's court created in India to deal with human rights issues. In these courts concepts of human rights, traditional forms of justice administration, and ideas of women's empowerment are merged to create a new legal culture, through which traditional practices such as patrilineal inheritance systems and women's subordinate role in marriage can be challenged.

An institutional response to legal pluralism which may enhance access to justice for the poor and marginalized, including women, are hybrid institutions – institutions that share elements of both state and non-state systems and which are formally recognized by the state and integrated in the formal judicial system. Examples of such institutions are local courts in Solomon Islands and island courts in Vanuatu. These dispute resolution mechanisms may present an opportunity for innovative solutions for navigating multiple legal orders.

Ultimately, however, how well women navigate legal pluralism depends on their capacity to understand their own rights and articulate claims. In certain societies, where patriarchal norms relegate women into the private sphere, women might have no access to justice, no matter how many alternative legal systems are there to choose from. In other cases local justice mechanisms may serve as arenas for contestation of existing rule systems, and, through the infusion of new concept of justice, such as human rights, may bring about a new understanding of rights and how to claim them.

7. Conclusions

Making justice and law reform work in contexts of legal pluralism is challenging. At a basic level, it is a question of numbers: there are simply more institutions, laws, principles, values and actors involved. And with that goes the question of complexity: all those laws, institutions, and actors interact with and influence each other. Making the law work to enhance gender equality amidst such complexity might be even more challenging, as a range of international actors and strongly-held normative principles are also involved. In order to fruitfully engage in contexts of legal pluralism, and to capitalize on the opportunities such contexts offer, practitioners need to be prepared to acknowledge these facts and engage accordingly. For this we offer the following suggestions.

Tailor Interventions to the specific context and engage with all the relevant actors and processes.
Approaches to justice reform in legally plural contexts should be carefully reconsidered. Not only should one shift focus from "best practice" to "best fit" and assess the specific socio-political context, reformers should carefully map existing processes, institutions and relevant actors and engage with them as appropriate in order to maximize impact and minimize unintended consequences. Interventions should seek to foster change using different entry points, including formal institutions, social movements, traditional governance mechanisms and civil society.

[51] Merry, Sally Engle (2012) "Legal Pluralism and Legal Culture: Mapping the Terrain", in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds.) Legal Pluralism and Development New York: Cambridge University Press

*Building and strengthening institutions***.** Interventions may capitalize on legal pluralism by revitalizing, modernizing, "engendering" existing institutions. Hybrid institutions, such as *gacaca* institutions in Rwanda, local courts in Afghanistan and Solomon Islands, *adat* institutions in Indonesia, and village courts in Papua New Guinea, are one response, among others, to situations of legal pluralism; they apply a set of rules to deal with such situations in a particular way, managing tensions between competing legal regimes. While no panacea (and indeed sometimes becoming part of the problem rather than part of the solution), their "hybrid" nature offers the potential to combine desirable aspects of the "formal system" with the accessibility and social and cultural legitimacy usually enjoyed by traditional institutions.

Focus on legal empowerment. In order to foster gender equality in a way that meaningfully engages women, rather than reducing development interventions to a choice between systems or norms, interventions might look to increase women options and empower women to make the choice themselves. This could be done by simultaneously shifting women's adaptive expectations and reducing barriers to women's social participation, thereby allowing them to be part of the construction of institutions and to contest what is legitimate for a rule system to uphold. The implications for programming are thus twofold: (i) projects could focus on increasing women's expectation of better treatment (for example, through empowerment interventions), and (ii) projects could target barriers to women's participation (for example, through incentivizing women's participation in local governance institutions)

Stronger links/partnerships with advocacy programs and interventions aimed at behavioral change (especially communication and education). Lack of awareness, poor legal literacy and general discriminatory attitudes are often an obstacle to the success of law and justice interventions aimed to foster gender equality. Linking interventions with advocacy and communication programs that work to create the space for new ideas and perceptions to take hold, as well as educating women and men about their rights and entitlements - and the links between these and social wellbeing - would maximize projects' impacts.

Appendix 5

The role of popular culture and ideas as agents of change in gender equality

Whether efforts to bring about greater gender equality take place directly through changes in government policy or indirectly through efforts by civil society groups to change public attitudes, it is important to consider where the original drive for such change came from. For most people for most of history, it has seemed entirely natural and normal that men should 'rule' everything from households to companies to countries, yet that is clearly not the view today in many countries. When and how did the historically dominant view begin to change, and through whom was that change initiated and sustained?

While individual women (and some men), along with certain ancient religious texts, have long called for greater gender equality, recent research by cultural historians has argued that it was the middle decades of the eighteenth century when broader notions of gender equality began to take hold across Western societies.[52] And according to this scholarship, the initial drivers of change were writers, artists and intellectuals, who forcefully articulated new views of individualism, human rights and the role of pernicious social circumstances in thwarting human potential. To realize their objectives, these authors undertook an overt strategy of changing elite sensibilities regarding the causes, costs, experiences and immorality of human suffering, doing so by pioneering new forms of mass communication (such as the novel) and public awareness campaigns (such as pamphlets and celebrity endorsement), as well as exploring innovations in popular entertainment (such as theatre).[53]

How popular culture changed social attitudes

In the eighteenth and nineteenth centuries, those campaigning to end slavery knew that sustained success required bringing about widespread societal changes regarding how slavery was understood by everyday people, and especially influential elites. Pioneering methods of public persuasion that remain commonplace today, the abolitionists invented campaign buttons, testimonials from recent 'converts', endorsements from sympathetic public figures and celebrities, mass produced posters, and community drama. The women's movement subsequently adopted many of these tools as they began their campaigns for suffrage, equal pay, reducing domestic violence and enhancing reproductive health rights. They recognized that mainstreaming feminist principles required altering how women and men everywhere understood these issues, which in turn required deploying modes of communication familiar to different social groups, whether novels and plays for elites or street theatre and popular songs for everyday citizens.

These techniques remain relevant to the practice of development today. Traditions of popular theatre have spread to encompass the emergence of new media, particularly radio and TV, and have been adopted by people seeking attitudinal change about women's equality. In Bihar, a group of academics and development practitioners developed, scripted and broadcast *Taru*, a weekly radio show. *Taru* dealt with issues of gender equality, family size, reproductive health, and caste and communal harmony. This was linked to folk theatre performances that toured targeted villages, and participatory workshops involving male and female youth. Both aimed to increase awareness of the show and play out some of the gender issues it raised on stage. Qualitative fieldwork found significant shifts in attitude among young men, with an increase in mixed social networks.

[52] See Hunt, Lynn (2007) *Inventing Human Rights: A History* (New York: Norton)
[53] Here writers were updating earlier innovations, such as the "clever housewife" in sixteenth century French theatre.

Source: Hochschild (2006); Harter *et al* (2007)

In the 1750s, it should be recalled, slavery and judicial torture were also 'normal' practices, and efforts to alter perceptions of their social acceptability were one manifestation of broader philosophical and popular shifts in understanding the nature and extent of human difference. If it was slowly becoming unacceptable to think that certain people (Africans) were mere 'goods' to be exchanged or non-human 'beasts' to be brutalized into submission, or that inflicting severe pain was an appropriate means of extracting truthful statements, it was a short logical step to propose that neither should other overt forms of human difference – with gender being the most obvious – be a basis of discrimination. In this sense, Mary Wollstonecraft's seminal *A Vindication of the Rights of Woman*, written in 1792, applied to gender equality the new emerging view among leading writers and political reformers elsewhere, namely that all humans had a right to a life of 'liberty, fraternity, equality' (France). Indeed, so successful were these campaigns that the authors of the US Declaration of Independence could confidently assert that, far from being novel, the view that "all men are created equal" was now a "self-evident truth."

In historical terms, such sweeping normative changes and corresponding policy shifts were (and remain) unprecedented, but it warrants further explanation as to how such change was put in motion and why it subsequently took more than a hundred and fifty years before humanity was again able to formally commit itself to norms (and laws) of human equality, as it did with the Universal Declaration of Human Rights (1948). In both cases, however, it is important to acknowledge the independent role of new ideas about human difference generally, and gender relations in particular. Between the 1740s and 1760s, for example, three famous novels by men about young women – Jean-Jacques Rousseau's *Lisa*, and Samuel Richardson's *Clarissa* and *Pamela* – embodied and promulgated a wholesale change in understanding gender relations. At this time, the novel itself was a new form of mass communication; though obviously directed at elites (i.e., those who were literate and could afford to buy books), novels transported readers into new worlds of emotion and imagination, presenting alternative but visceral renderings of women's experiences of and responses to crushing social conventions.

These novels were best-sellers across Europe and eagerly translated. For mid-eighteenth century readers it was a revelation that men (no less) could write so movingly and sympathetically about the plight of vibrant young women who, through the binding powers of social norms, were trapped in loveless relationships and unable to pursue their desires, talents and aspirations. Yet it was an even bigger revelation – and for some, seditious and salacious – that these women then summoned the courage to defy expectations and laws, to leave unhappy circumstances and strike out on their own. (Ibsen's *A Doll's House* would revisit this theme a century later, as would the novels of George Elliot and the Bronte sisters.) Before gender policy changes could be articulated, campaigned for and enacted, the very possibility of such changes first had to be imagined, making it important for policy-makers to understand and adopt forms of communication that transmit, shape and contest ideas. Put more generally, changing what is thinkable often precedes changing what is say-able and do-able.

Similar explanations centered on the role of changing ideas can account, at least in part, for why gender equality subsequently faced such fierce and effective resistance in the nineteenth century. Opposition to notions of human equality found expression and legitimacy in appropriated forms of evolutionary theory and civilization, which were invoked to reassert the 'natural' basis of human hierarchy and the inherent superiority of both Western culture and its elites. In this instance, pseudo scientific ideas were harnessed to buttress political claims regarding human difference with brutal. It took the devastation of two world wars before the international community could summon the collective will to articulate, and enshrine in law, commitments to genuine human equality, even as these remain (very) imperfectly realized in the early twenty-first century.

Appendix 6

Donor Conditionality and Gender-Sensitive Legal Reform

A Case from Lesotho[54]

Change towards a more gender-equitable legal framework can be fostered in a number of ways. The state – on its own or under donor's pressure – may take the lead, and spearhead change from the top, creating spaces for society to engage. Or interventions may seek to set in motion a behavioral and attitudinal change so to prepare the ground for the formal recognitions of new rights and capacities. Which one has better chances of succeeding and enduring depends on the specific social, political and economic context, historical legacies, the geo-political environment, and perhaps sheer luck. The case study below is one example – by no means necessarily replicable–where legislative innovation has catalyzed broader changes in attitudes and social perceptions which in turn have prepared the ground for broader legal reform.

Until 2006, statutory law relegated Basotho women married[55] in community of property (the vast majority in Lesotho) to the status of legal minors, lacking autonomous legal capacity. This meant that, for example, they could not own property, dispose of it, set up an enterprise or company, be party to a contract, open a bank account, bring a case to court, or leave the country without the consent of their husbands. Customary law denied women legal capacity. In a context of heavy male migration women left behind were unable to make –and implement – important decisions impacting the household and the community. Other statutory laws, such as property, inheritance and company laws, also contained discriminatory provisions against women.

Various stakeholders had been advocating for legal reform for at least five years and two white papers had been developed on the topic. In 2006, within months of having received a letter from the Millennium Challenge Corporation (MCC) stating that they would require gender equality in a number of economic rights (previously identified in one of the white papers) as a precondition to MCC signing a compact with the Government of Lesotho to provide them with significant grant funds, the Legal Capacity of Married Persons Act (LCMP) was passed.

The LCMP repeals the powers held by a husband on the property and person of his wife, and recognizes the legal capacity of married women (whether or not married in community of property) and their ability to perform certain activities previously barred to them. These include: guardianship over minor children, ability to choose their domicile, ability enter into contracts, register immovable

[54] This case study is based on a research carried out for the World Bank Report "Lesotho – Sharing Growth by Reducing Inequality and Vulnerability: Choices for Change – A Poverty, Gender and Social Assessment" (2010). Washington DC. Additional information was gathered during a January 2011 interview with Virginia Seitz, Senior Director, Social and Gender Assessment, Millennium Challenge Corporation and through contribution by Limpho Masekese Maema Gender Coordinator, Gender Equality in Economic Rights Programme, Millenium Challenge Account- Lesotho.

[55] Whether married under common law or by customary rites.

property in their own names, act as directors of companies, access to credit, ability to stand in court, and more.

However, the LCMP, for all its innovative strength, has to be conceived of as a piece of puzzle, where, unless all other pieces are made to fit, it is impossible to see a coherent picture. After the passage of the LCMP, many statutory laws still contained discriminatory and contradictory provisions,[56] and the Laws of Lerotholi (the codification of Basotho customary law) were still heavily discriminatory. In addition, unfamiliarity with the new law by judges, other legal officials, the financial sector, other professionals and also women themselves, made implementation difficult, and generated resistance and backlash.

In the years following the passage of the LCMP, the MCC has been supporting and closely assisting the Government of Lesotho as well civil society associations in a number of activities aimed at enhancing the impact of the LCMP. Such activities include:

- Amendment of a number of laws that were inconsistent with the LCMP and still discriminatory;
- Awareness campaigns for women;
- Training of judges, other legal professionals, financial sector and other professionals about the letter, meaning and application of the LCMP;
- Sensitization of men, to help them understand the real impact of the law and possible benefits to the whole population (not just women);
- Development of Implementation Guidelines on the Legal Capacity of Married Persons Act for uniform and consistent interpretation; and
- Amendment of the laws of Lerotholi in order to harmonize its provision with the LCMP, which is currently in progress.

In February 2011, after two and a half years of implementation of the gender training and outreach activities in all the ten districts of the country, the Millennium Challenge Account (MCA)– Lesotho conducted a Knowledge, Attitudes, Practices and Coverage Survey (KAPC) to assess the training and outreach impact of the private Sector Development Projects under which the gender program falls. Findings indicate that 76% of respondents are aware of gender equality and LCMP-related issues. This denotes a positive change since the inception of the LMCP and the related advocacy efforts.[57]

There is significant awareness of economic rights among respondents interviewed. Almost 87.5% of all the respondents know that both men and women should have equal opportunities including

[56] The LCMP indicated the following laws as contradictory and in need of harmonization with the LCMP: the Deeds Registry Act 12 of 1967, the Administration of Estates Proclamation 19 of 1935, and the Land Act 1979, Marriage Act 10 of 1974.

[57] Approximately 60% of the people interviewed in the survey claimed to be aware of human rights while 76% said they are aware of the concept of gender equality. Overall, awareness of human rights is slightly lower among women than men whereby 63.6% of male respondents claimed to have heard about human rights against 57.8% of women. In relation to gender disparities on knowledge of gender equality, more men (79%) than women (74.4%) mentioned that they are aware of gender equality.

access to jobs, loans, businesses, training, and information; 86.7% know that men and women have equal authority to make decisions about use of resources including land, while 73.1% are aware that men and women have equal rights regarding opportunities like the provision of loans, justice and other services.[58]

In short, this case illustrates how external pressure, here in the form of heavy donor conditionality, combined with government buy in, an active civil society and a number of complementary activities (also facilitated by continuous donor involvement) created the conditions for a legislative change to happen *and* have some impact on women's lived realities.

[58] Although only 17% of people interviewed in the survey appear to be aware of the LCMP, this is attributed to the fact that during training and outreach activities the Act is referred to not in its formal name but names formulated to enable better understanding of the contents and their rational. The Legal Capacity of Married Persons Act is known as the "law of married persons" or "the law for women's rights" or the "law for gender equality". This is supported by respondents' affirmative answer on the actual provisions of the Act. Results revealed that widowed (84%) and separated women (70.6%) are most aware of the Act while never married and divorced women were least aware of the Act . This is due to the fact that most widowed and married women whose rights where hindered under the former regime, have been positively impacted by the new provisions. Over 90% of respondents who know about the Act indicated that they also know all the listed provisions and their benefits in terms of women's economic empowerment and overall goals to reduce poverty and grow the economy.