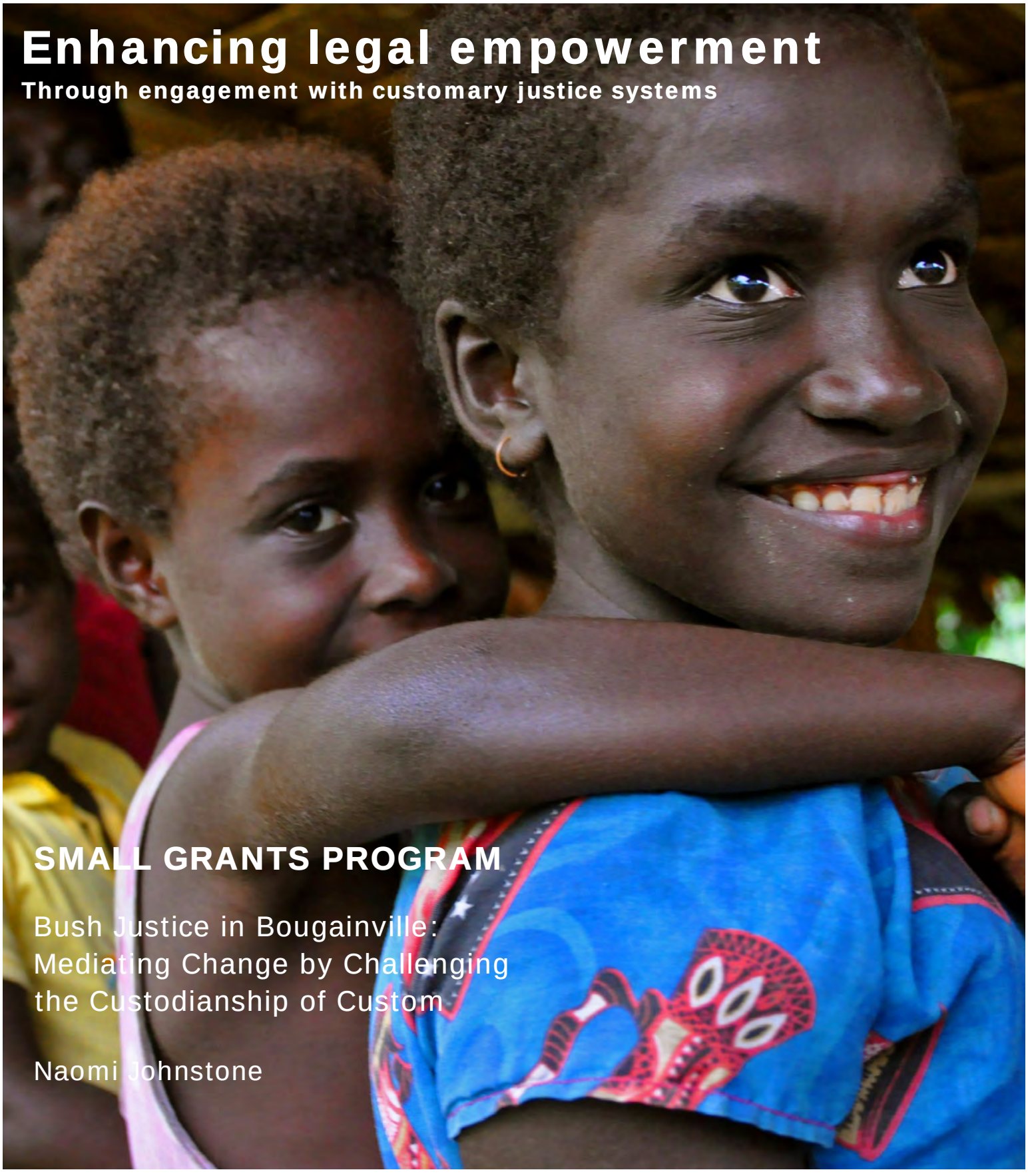
Enhancing legal empowerment

Through engagement with customary justice systems



SMALL GRANTS PROGRAM

Bush Justice in Bougainville:
Mediating Change by Challenging
the Custodianship of Custom

Naomi Johnstone

IDLO
International Development Law Organization
Organisation Internationale de Droit du Développement

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ABOUT THE PROGRAM

This online series showcases research conducted under the IDLO Legal Empowerment and Customary Law Research Grants Program. Through this program, seven bursaries were awarded to scholar-practitioners to evaluate the impact of an empowerment-based initiative involving customary justice. In each case, an outcome mapping methodology, using quantitative data collection methods, was employed to answer the basic question: how have justice outcomes changed as a result of the intervention? This approach reflects a move away from traditional evaluation methodologies that focus on proxy data such as numbers of persons trained or numbers of information resources disseminated, towards a direct examination of behavioral changes and outcomes. The program will culminate in the publication of an edited volume which aims to assist readers develop a better understanding of the relationship between customary justice and the legal empowerment of users and identify possible entry points for engaging with customary justice systems. It features articles on initiatives implemented in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. The series forms part of a broader research program implemented in partnership with the Van Vollenhoven Institute for Law, Governance and Development of Leiden University designed to expand the knowledge base regarding the relationship between the operation of customary justice systems and the legal empowerment of poor and marginalized populations.

PARTNERSHIPS

This program is being implemented by IDLO in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University (http://www.law.leiden.edu/organization/metajuridica/vvi/) and the United Nations Development Programme (UNDP), Somalia.

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DONOR SUPPORT

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Naomi Johnstone

"This is the Bougainville way. It's just when this white man court came in and everyone was running to it, but during the crisis, and after, people started to realise that we want to go back to our way of solving problems."[1]

EXECUTIVE SUMMARY

Papua New Guinean NGO PEACE (People and Community Empowerment) Foundation Melanesia[2] has conducted grassroots dispute resolution training aimed at strengthening customary justice systems in Bougainville since 1994. This research was undertaken with a view towards assessing whether and to what extent such training was successful in enhancing the legal empowerment of users of customary justice systems, particularly marginalized groups such as women. Research conducted in Bougainville in May 2010 involved 394 surveys and 25 interviews and tested a number of access to justice indicators namely, participation and satisfaction in dispute resolution; protection of legal rights; mitigation of power asymmetries; operation of neutrality and bias; balance of individual and community rights; and the influence of women in dispute resolution decision-making. The results of those whose mediator had been trained by PFM were compared to those whose mediator had not undergone training. The research found that the training increased the participation and satisfaction of both male and female users. However by neglecting to address substantive legal rights, power asymmetries and a misunderstanding around neutrality, PFM failed to enhance legal empowerment to the extent that it might have. While the intervention improved female disputants' experience of dispute resolution in almost every area, it had a neutral affect on the gender satisfaction gap. Where the intervention had most success was where it transferred skills and created opportunities for women to become mediators. This enabled them to engage more effectively as leaders in the process of internal dialogue, and to challenge the interpretation and application of discriminatory customary norms.

[1] Interview with B Kova, women's leader (Arawa, 12 May 2010).
[2] In 2005, the Bougainville branch of PEACE Foundation Melanesia separated from the Papua New Guinea NGO and is now called Bougainville Centre for Peace and Reconciliation. However, it largely conducts the same work and will be referred to throughout this paper as PFM.

1. Custodians of custom and change: Customary justice systems in Melanesia

1.1 Introduction

Customary justice systems are the cornerstone of dispute resolution for the poor and disadvantaged in developing countries, with some studies estimating that 80 percent of conflicts are resolved through such fora.[3] This is particularly the case in conflict and post-conflict environments, where the formal justice system is often non-operational or inaccessible. However, like formal justice systems, every customary justice system has context-specific advantages and disadvantages for its users.

In the Melanesian context, customary justice systems have many advantages; they are locally controlled and operated, which makes them geographically and economically accessible, and they hold strong local legitimacy making them a natural partner for disputants in settings isolated from the state system. Moreover, the value placed on the restoration of community harmony and consensus-based decision-making responds to the needs of tightly knit communities whose members share close bonds of social and economic dependency and are dealing with conflict-related distrust and trauma. On the other hand, the customary justice systems in Melanesia are largely unregulated, often lacking procedural safeguards and accountability; they are more susceptible to bias and elite capture, to producing inconsistent results and to perpetuating power asymmetries. This leaves marginalized members of society open to coercive solutions that can be violent, discriminatory and exclusionary.[4]

These challenges and potentials, combined with the centrality of customary fora for poor and marginalized populations, make efforts to engage with them critical to any access to justice or legal empowerment strategy. A key challenge is how to advance legal empowerment and reform in a way that is locally legitimate and preserves the positive aspects of the customary justice system. This paper suggests that the contested, dynamic and flexible nature of culture and custom is a critical factor in the endeavour for legal empowerment. It means that actors can re-examine rather reject customary justice systems, and distinguish between aspects of custom that are discriminatory and those that are not.[5]

In recent years, various actors have trialled different techniques for engaging customary justice systems. One promising strategy is the provision of conflict resolution and mediation training based upon local cultural philosophies but delivered in ways that facilitate local discourse around principles of gender equality and human rights. This approach was adopted by Papua New Guinean NGO PEACE (People and Community Empowerment) Foundation Melanesia during and following the civil conflict in Bougainville.[6] While PFM's work enhanced grassroots peace-building, whether such activities facilitated legal empowerment has not been assessed. To what extent PFM's

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[3] United Kingdom Department for International Development (DFID), *Non-state Justice and Security Systems* (2004) 3.

[4] No doubt, many of these same characteristics are also present in other customary justice systems around the world, however it is extremely important to recognise the diversity of features and operation of customary systems, and to avoid unhelpful stereotyping without context-specific knowledge.

[5] This approach has been advocated by Maori female academic Claire Charters as a way of simultaneously recognizing Indigenous women's rights and reaffirming Indigenous culture (C Charters, 'Universalism and Cultural Relativism in the Context of Indigenous Women's Rights' in P Morris and H Greatrex (eds), *Human Rights Research* (2003)). This approach also recognizes that the task is inextricably linked to politics and power.

[6] In 2005, the Bougainville branch of PEACE Foundation Melanesia separated from the Papua New Guinea NGO and is now called Bougainville Centre for Peace and Reconciliation. However, it largely conducts the same work and will be referred to throughout this paper as PFM.

intervention contributed to the legal empowerment of customary users, particularly women, is the focus of this report.

This report begins by outlining the political, economic and legal context of Bougainville. It then discusses the nature of customary justice systems in Melanesia, and briefly examines how this affects marginalized groups such as women, exemplified in cases of gender-based violence. It then theorizes about ways that legal empowerment could be facilitated through customary legal systems. The work conducted by PFM in the context of Bougainville is described, followed by the results of research undertaken in May 2010. Finally, lessons learned and conclusions are outlined.

2. Bougainville: The political, economic and legal context

Home to around 175 000 inhabitants,[7] and spanning approximately 9,000 square kilometres, Bougainville is geographically part of the Solomon Islands archipelago but is politically part of the state of Papua New Guinea. It is made up of two main Islands, Buka in the north, and the Bougainville mainland. Bougainvilleans are internally diverse, comprising approximately 28 languages[8] and have a different appearance than mainland from Papua New Guineans, with markedly different skin colour (they call other Papua New Guineans 'redskins' in contrast to their own 'blackskin').

2.1 Pre-Conflict

2.1.1 Pre-European contact

Prior to contact with European explorers, there was no sense of nationhood or collective Bougainvillean identity. The governance unit was generally a group of villages, within which there existed an established body of law and dispute resolution. Fighting and skirmishes between village groups were common.

2.1.2 European contact

The first European contact was the French Explorer Louis De Bougainville, who never actually set foot on the island named after him, but anchored off the coast in 1768. In 1901-1902 Roman Catholic and Methodist missionaries arrived – institutions that continue to exert significant influence today. Bougainville was under German control until their defeat in World War I, when the island was passed to Australian control. Australia added Bougainville to their New Guinea territories, but left governance and social services provision to the missionaries. This period of Australian rule, characterised as 'benign neglect',[9] continued until 1964 when a survey team from Australian mining company Conzinc Rio Tinto arrived to explore the island's mineral deposits.

In 1967, the Australian colonial administration signed the Bougainville Copper Agreement with Conzinc Rio Tinto, and the latter began constructing the Panguna mine in 1972. In 1975, Papua New Guinea gained independence from Australia, however, the Constitution gave only limited recognition to customary land ownership: rights extending only as deep as immediately below the soil surface. Consequently, all mineral rights were vested in the Papua New Guinea state. However, two weeks antecedent to Papua New Guinea's declaration of independence, Bougainville leaders issued their own Declaration of Independence of the Republic of North Solomons, afterwards seeking (but not receiving) recognition of their independent status from the United Nations. By 1976, Papua New Guinea's sovereignty had been accepted, but a Bougainville Agreement (August 1976)

[7] The last census was taken in 2000. This figure is from that census data.
[8] Summer Institute of Linguistics (2001).
[9] P Howley, *Breaking Spears and Mending Hearts: Peacemakers and Restorative Justice in Bougainville* (2002) 25.

was set in place that outlined its special relationship with the central government and established the North Solomons Provincial government.

2.1.3 The Panguna mine

The Panguna mine was extremely significant to Papua New Guinea. After Australian foreign aid, it was the largest income source for the Papua New Guinea government. The social impact of the mine, however, was not positive. The mine led to, what Pat Howley describes, a breakdown in traditional values. This was especially because of the new wealth generated and different socialization of the young men employed at the mine, who no longer paid respect to their elders and the rest of the community.[10] This had a strong impact upon the customary system, which functioned on a basis of collective shame and accountability; "[i]f a man has murdered another, his guilt belongs to the whole clan and if it is not paid off in some way, the payback may fall on any member of the clan."[11] Colonization, and the mining experience caused people, especially, the young men, to place their individual rights ahead of traditional communities.[12] This new attitude became known as *mi yet pasin*, or 'the self first, community last'.

The influx of 'redskins' from mainland Papua New Guinea and their higher rate of employment at the mine caused considerable resentment among Bougainvilleans. The rape and murder of a popular local nurse in 1988 was a tipping point; the Home Guard in the area drove out all the people from mainland Papua New Guinea, killing any who resisted and burning their settlements.[13]

2.2 The conflict: 1989-1998

In 1989 Francis Ona formed the 'New Panguna Landowners Association'. They demanded that the Bougainville Copper Limited (BLC) pay 10 billion kina (AUD$14.7 billion, 1989 value) in compensation relating to impact from the mine. When BCL refused, Ona led a campaign of sabotage. BCL promptly withdrew and the Papua New Guinea Defence Force (PNGDF) was sent to Bougainville to quell the disquiet.

After negotiations in 1990, a ceasefire was declared and all Papua New Guinea officials, politicians and security forces were withdrawn, leaving the island under the control of the BRA. While PNG then blockaded the island, the Independent Republic of Bougainville was declared with Francis Ona its self-proclaimed President. However, the Bougainville Interim Government (BIG) was unsuccessful; Ona could not unite the people to effectively lead and provide for Bougainville. At the same time *raskol* (criminal) elements started to develop, with persons opportunistically engaging in criminal activities and indiscriminate violence. BRA commanders often did not have control over their men; instead of protecting the people and maintaining order, many used their power to loot, rape, terrorise and kill civilians: "They were criminals before the war, they were criminals during the war, and they are still criminals."[14]

We hoped that the Army would provide protection against the *raskols* and provide a condition of peace where people could pursue their plans for independence. When the army landed at Kesa (17 September, 1991) the confusion became worse. Who was BRA? What was Resistance? Who was Home Guard? Who was for Independence? And where did the Army stand on the whole matter?[15]

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[10] Ibid 30-31.
[11] Ibid 31.
[12] Ibid.
[13] Ibid 35.
[14] Ibid 40 (quote from Joe Breneke, former Coordinator of Peace Foundation, Bougainville).
[15] Ibid 15.

Loyalties began to get confused; old feuds and grievances over land and others issues were re-contested.[16] The PNGDF itself sought not only to protect civilians but also to exact revenge and regain control of Bougainville. The PNGDF divided the population into BRA and non-BRA followings, many of the latter living inside 'care centres' theoretically under Government control.[17] Violence ensued; even people within the care centres risked being killed or assaulted if the PNGDF suspected they had BRA sympathies.[18] As the conflict progressed, youths reportedly lost their sense of responsibility and held less respect for what elders said, creating an authority vacuum.[19]

2.3 Peace-building and political stability

In 1994, a reconciliation ceremony was held in Tonu, followed by a church-organized peace march from Tonu to Haisi. This prompted many BRA, fatigued by the violence, to come out of the bush and enter care centres. However, the PNGDF exacted revenge violence, stemming an early opportunity for peace.

In 1997, the Burnham Declaration was signed and a "permanent and irrevocable" ceasefire was entered into on 30 April 1998. The peace process continued, culminating in the signing of the Bougainville Peace Agreement (BPA) on 30 August 2001. This established Bougainville as an Autonomous Region within Papua New Guinea (ARB) with its own constitution and government (Autonomous Bougainville Government, ABG). The only exceptions to what was virtual independent governance related to defence, foreign relations and international trade. Further, the BPA contained a provision for a referendum to be held in 10-15 years of the ABG being established (that is, between 2015-2020) on independence.

The Constitution was drafted by the Bougainville Constitutional Commission and approved by the Papua New Guinea Government in 2004, followed by elections for the Bougainville parliament and President in 2005. This peaceful ballot elected as President Joseph Kabui, former president of the North Solomons Province and BRA/BIG supporter. After Kabui's death in 2008, James Tanis, a former BRA commander was elected. In May 2010, peaceful elections resulted in a new President, John Momis.

The peace agreement and subsequent model of governance included almost all major factions. One important exception is the Meekamui movement. Franis Ona, the former President of the BIG led the split of the Meekamui movement from the BRA in 1998. The movement still controls the area around the Panguna mine and several small parts of south Bougainville. While they have their own forms of governance within these areas, and have declared them 'no-go' zones for outsiders, cooperation with the ABG has increased over time, especially on issues such as health and law and order.[20] A major breakthrough in the integration of the Meekamui occurred in August 2007, where the Panguna Communiqué was signed in a reconciliation ceremony witnessed by the President of the ABG, representatives of the Meekamui Government of Unity, commanders of the Meekamui Defence Force, and customary chiefs.

2.4 Economy

Bougainville is still recovering from the economic impact of war. The formal economy consists of small landholder case crop production, such as copra and coca, as well as some plantations established during colonial rule. Transport infrastructure is currently being rebuilt and improved with Australian and Japanese assistance, and this has enabled people from village areas to sell their crops.[21] However, most of the population

[16] Ibid 6.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] V Boege, 'A Promising Liaison: Kastom and State in Bougainville' (2008) x(12) *Occasional Paper Series*.
[21] Ibid 5.

operates in the subsistence sector, with only 10-15 percent earning cash income.[22] The majority of people grow their own food and then exchange this for other items, a system that consolidates local, social relationships.[23] This system is under increasing pressure, however, by population growth and the impact of climate change on low-lying gardens.[24]

The main opportunity for growth in the formal market is to utilize Bouganville's rich mineral resources. Re-opening the Panguna mine or establishing new mining projects are available, but politically sensitive, options. The ABG has established a mining division and new President John Momis has spoken of his aim to eventually re-open the mine. Civil society, Government and customary leadership are divided over the issues, principally because it raises incompatibilities between the formal and informal economies.[25] A further issue that has been raised regarding the change from a subsistence informal economy to a formal cash economy is that the value of land can be relatively reduced. This has implications for the status of women due to the practice of matrilineal descent in Bougainville. Here, women are considered the customary custodians of land, but men have more opportunities to participate and gain from the cash economy, with the result that perceptions of the value attached to women may reduce.[26]

2.5 Governance and politics

Governance at present is a complementary network whereby customary authorities control local issues and the ABG governs on wider issues. However, there are tensions and diverging opinions over appropriate divisions of responsibility. Principally, the organs of the Bougainville state do not have a monopoly over the maintenance of order and security and rely significantly on non-state actors, namely customary leaders, civil society and NGOs.[27] Further, state governance functions lack legitimacy with much of the Bougainvillean population who see it as distant and irrelevant. Some are only willing to accede state legitimacy "in a limited way, only if and as long as state institutions act in a complementary role to customary institutions."[28] Finally, there is a blurred interface, with almost of all of those in government acknowledging the authority of traditional governance. In many cases, they are themselves close members of their local communities, and in some cases are chiefs.[29]

The Council of Elders (CoE) is an institution intended to bridge the formal-informal governance spheres. While it is a formal structure, in that it is constitutionally implemented, members of the CoE can be chosen by election or according to *kastom*.[30] The chairmen and clerks of the CoE are paid by the government and their work is financed by government grants, head taxes and fines. The most challenging aspect of effective and legitimate CoEs is their relationship with the Chiefs. In some places Chiefs are members, but elsewhere Chiefs choose not to stand. This is for a variety of reasons, including a desire to confine their responsibility to the village level (CoEs work at the multi-village level), or because their customary style of leadership does not align with the formalized processes of the CoEs.[31] Nonetheless, they are widely considered the leaders of the village, often more so than those elected to the CoE and there have been some calls for a Council of Chiefs (CoCs) to replace the CoEs.[32]

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[22] UNDP, *Bougainville Human Development Report: Developing Education from within* (2007) 55.
[23] Ibid 58.
[24] Boege, above n 20, 6.
[25] Ibid 6-10.
[26] UNDP, above n 22, 51.
[27] See further Boege, above n 20, 27.
[28] Ibid 16.
[29] Ibid 30.
[30] Ibid 28.
[31] Ibid 32.
[32] Ibid 31.

Many people struggle with the question of how to build institutions that are authentically all-inclusive and both reflect custom and meet the needs of contemporary local-level government structures.[33]

Civil society organizations and NGOs, such as Peace Foundation Melanesia, enjoy high legitimacy both from the perspective of the communities and the ABG. This is due, in part, to their long established and effective programmes during the conflict, and in the post-conflict peace-building phase: "the maintenance of peace, order and security in Bougainville critically depends on the cooperation of state and non-state customary and civil society actors."[34] Civil society is also the sphere in which women play a very significant and socially accepted role. While participation in the formal political and legal sphere is difficult[35] and customary traditions do not allow much space for customary leadership of women, at least in public. However, several highly respected and effective NGOs are run by women; their skills and work are highly regarded by men both in the customary and formal political sphere.

2.6 Law and legal pluralism

Bougainville is a legally pluralist environment with communities making use of both the formal legal system and a range of customary norms. While there is a range of views on what the interface between these systems should look like, customary law is strong and viewed by most, including representatives of government and public service, in positive terms.[36] The practice of customary law – within which there is considerable variation – in relation to state law is, however, quite varied.[37] In some places customary law is the principal basis for decision-making, while in others state law is relied upon with customary norms taken into limited consideration. According to recent research by Boege, "[o]ften people are confused and do not know which cases to take to the state system and which to address in the customary system."[38] However despite some confusion on the relationship of the two systems, virtually all agree that customary should play some role:

> [S]ome assert that custom can deal with most issues, even serious crimes like rape and murder, and that the state law should only be referred to in exceptionally difficult circumstances. Others say that the state law has to prevail but that in certain cases custom has to be taken into account.[39]

According to Boege, most communities and customary leaders believe that greater emphasis should be placed on the customary legal system *vis-a-vis* the state legal system and other 'western institutions' such as prisons. Customary mechanisms, which are "presented as the genuine traditional form of justice",[40] are widely accepted as pre-dating colonization and many believe that they should form the basis of any state justice system. One rationale is that customary justice prioritizes the restoration of relationships, community harmony[41] and equilibrium; as noted by the Bougainville Constitutional Commission, Bougainvilleans "want a justice system that is not solely focused on punishment of crime, but also on reconciliation and restoration of relationships damaged by disputes."[42] According to a chief from Siwai:

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[33] Ibid.
[34] Ibid 16.
[35] There are three reserved seats for women as MPs, however no other women have been elected. These were reserved because of the work that women engaged in during the conflict and peace-building phase is held in such high regard (M T Havini and J T Sirivi, *As Mothers of the Land: The birth of the Bougainville Women for Peace and Freedom* (2004).
[36] Boege, above n 20, 22-23.
[37] Ibid 22.
[38] Ibid.
[39] Ibid.
[40] Ibid 24.
[41] Bougainville Constitutional Commission, *Report of the Bougainville Constitutional Commission* (2004) 55.
[42] Ibid.

> Restorative justice is not a new method in our societies. It is what our ancestors used for thousands of years to resolve minor and major dispute, up until colonial times.[43]

The formal court system is weak with district courts sitting irregularly and their relative high cost and geographical distance presenting barriers for the majority of Bougainvilleans. The court building in Buka, where the national court visits and the provincial court sits, was newly built after being razed several times during the conflict. A system of village courts – which are closer to the people but remain part of the formal court system – does exist but often exceed their official jurisdiction in terms of their application of customary law and the cases they are authorized to deal with.[44] The legitimacy of these courts is also poor, both a cause and effect of its disuse during the conflict. While the BPA and the Bougainville Constitution provide for a 'Bougainville court system', the cost of establishing this along with the desire to maintain space for the customary legal system, has delayed such an endeavour. In terms of the interface between the formal and customary courts, government representatives "are aware that they have to collaborate with non-state institutions" and "the Bougainvillean government and administration have taken a course of action which ... is open to strengthening the role of non-state customary approaches."[45]

3. Legal empowerment and customary law: Theory and arguments

Forging new conceptual and empirical relationships between a previously neglected area in the law and development field – customary law[46] – and the scholarship on legal empowerment is a challenging task. This section commences by defining empowerment and the concept of 'customary law'. It goes on to describe the challenges presented by customary legal systems for women's legal empowerment, and the possible ways that legal empowerment can be facilitated by external and internal agency.

3.1 Definitions

3.1.1 What is 'empowerment'?

A multitude of definitions of empowerment exist, stemming from various disciplines, ranging from feminist to development theories.[47] At the juncture of these two fields, and informed by her practice in South Asia, Naila Kabeer defines empowerment as the "expansion in people's ability to make strategic life choices in a context where this ability was previously denied to them."[48] A more recent definition holds that the goal of

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[43] J Tombot, 'A Marriage of Custom and Introduced Skill: Restorative Justice Bougainville Style' in S Dinnen (ed), *A Kind of Mending: Restorative Justice in the Pacific Islands* (2003) 259.
[44] Boege, above n 20, 22.
[45] Ibid 26.
[46] For example, it has been noted that many of the 78 assessment of legal and justice systems undertaken by the World Bank between 1994 and 2005 mention customary law as significant to many people, but none examine systems in any detail or examine links between these and the formal system (L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (2005) 3).
[47] In the context of development, empowerment theory has been highly influenced by Amartya Sen's scholarship. See, for instance, A Sen, *Freedom and Development* (1999); A Sen, *Commodities and Capabilities* (1985). See also, one of Sen's collaborators, M C Nussbaum, *Women and Human Development: The Capabilities Approach* (2000).
[48] N Kabeer, 'Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment' in B Sevefjord (ed), *Discussing Women's Empowerment - Theory and Practice* (2001) 19. This involved three different components, the first two of which are resources and agency. Together, Kabeer says these make up Sen's 'capabilities' - the potential that people have for living the lives they want. The 'functioning' is the term Sen uses to refer to the particular ways of 'being and doing' realized by different individuals. These realizations

empowerment is “to increase the influence that members of the group can exert over their own lives, over social conditions and process, and over politics and governances.”[49]

An important aspect of empowerment concerns power dynamics. A definition that considers power describes empowerment as a “process by which individuals and groups gain power, access to resources and control over their own lives. In doing so, they gain the ability to achieve their highest personal and collective aspirations and goals.”[50] Alsop recognizes that empowerment often means redressing power imbalances, but that this can be perceived as a necessarily zero-sum equation.[51] This type of zero-sum power exchange, where one person’s gain is another’s loss, is generally considered to be *power over* another. Having one dominant side and one subordinate side characterizes these relationships. In terms of law, one dimension of this power relationship is the prevention of particular people or concerns from even reaching a decision-making forum.[52] According to Mosedale, “this dimension of power is concerned with the rules and methods of legitimizing some voices and discrediting others.” [53]

However, there are three other sorts of recognized power relationships that do not act in a zero-sum way but that are pertinent to envisioning correlations between legal empowerment and customary law: *power to* has been described as power that “increases the boundaries of what is achievable for one person without necessarily tightening the boundaries of what is achievable for another party”;[54] *power with* refers to the collective power people have when they join together for a common purpose or with a common understanding or goal;[55] and *power within* refers to the self, to self-confidence, -awareness and -assertiveness. These ideas are linked to legal empowerment. One implication is that it may not be enough to open up access to decision-making; interventions that lead people to see themselves as capable and entitled to occupy the decision-making arena might also be necessary.[56]

An important element of empowerment that has not been emphasized in the preceding definitions or in the discourse more generally, is that it is a process that cannot usually be imposed by outsiders,[57] or bestowed by a third party.[58] Thus while development interventions cannot empower vulnerable groups such as women, *per se,* they can assist women to empower themselves.[59] Rowlands notes that appropriate external interventions can quicken and strengthen the process, and should act in a facilitative way that has full respect for the people concerned.[60] Srilatha Batliwala, an Indian activist and researcher, recognizes, like Rowlands does,[61] that women have been led to participate in

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are conceived by Kabeer as the third component of empowerment: achievements (N Kabeer, 'Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment' in B Sevefjord (ed), *Discussing Women's Empowerment - Theory and Practice* (2001) 20.

[49] J O'Connell, 'Empowering the disadvantaged after dictatorship and conflict: Legal Empowerment, transitions and transitional justice' in S Golub (ed), *Legal Empowerment: Practitioners' Perspectives* (2010) 117.

[50] S Robbins, P Chatterjee and E R Canda, *Contemporary Human Behavior Theory: A Critical Perspective for Social Work* (1998) 91.

[51] R Alsop, *Empowerment in Practice: From Analysis to Implementation* (2006) 2.

[52] S Mosedale, 'Assessing Women's Empowerment: Towards a Conceptual Framework' (2005) 17 *Journal of International Development* 243, 250.

[53] Ibid.

[54] Ibid.

[55] Z Oxaal and S Baden, *Gender and empowerment: Definition, appraoches and implications for policy* (1997) 1.

[56] J Rowlands, 'Empowerment Examined' (1995) 5(2) *Development in Practice* 101, 102.

[57] Ibid 105.

[58] S Mosedale, 'Assessing Women's Empowerment: Towards a Conceptual Framework' (2005) 17 *Journal of International Development* 243, 244. According to Kabeer, this would be an example of negative agency. Her conception of negative and positive agency reflects the distinction made by Sen between negative and positive freedom.

[59] Ibid.

[60] J Rowlands, 'Empowerment Examined' (1995) 5(2) *Development in Practice* 101, 105.

[61] Ibid 102. Rowlands talks in terms of ‘internalised oppression’.

their own oppression.[62] Because of this, women require access to ideas and knowledge that change their understanding of power, their self-image and then also encourage them to take action.[63] In this context and as a framework for empowerment, external interventions can facilitate access to ideas and knowledge, extend understandings of power and increase self-confidence in a way that leads to increased influence, choices and capability as well as access to resources, decision-making and control, at both individual and collective levels.

3.1.2 What is 'law'?

If legal empowerment is empowerment pertaining to legal aspects of life, then it begs the question, what is legal, or what is law? This jurisprudential question has occupied many scholars over the centuries, and it is beyond the scope of this paper to examine the debates. Legal pluralist scholars, in particular, have spent significant time and energy considering whether calling customary norms 'law' is valid or helpful, and how to distinguish between what is legal and non-legal.[64] The approach taken here is to accepts that consensus about a general definition of law in unlikely, and thus to begin with one's context and objectives, and then specify how key terms are to be used.[65] In this way the context and the purpose of the inquiry lead to the criteria for distinguishing legal and non-legal normative orders.[66]

The context of this research, and purpose of examining programmatic interventions in relation to customary justice systems, is legal empowerment of the poor and disadvantaged populations. The 2009 report of the Secretary-General on Legal Empowerment of the Poor ("Legal Empowerment Report") recognizes that the day-to-day life of the poor in many developing countries is governed by informal, customary norms, practices and institutions.[67] It notes that, in some cases, these customary institutions and norms are used creatively and developed to become effective in many aspects.[68] On the other hand, it recognizes that customary law and practices can discriminate against those who are most vulnerable, particularly women and juveniles.[69] As recently asserted by Bangledeshi female scholar, Khair, it is these day-to-day realities and practical needs, set within a wider, specific social, cultural, political and economic environment that legal empowerment strategies and interventions must be tailored to, if they are to be effective

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[62] S Batliwala, 'The Meaning of Women's Empowerment: New Concepts from Action' in G Sen, A Germain and L C Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (1994) 132. This is an aspect of the *power over* relationship, where the subordinate party does not even realise that these dynamics are at play.

[63] Ibid. Empowerment is conceptualized by Batliwala as "a spiral, changing consciousness, identifying areas to target for change, planning strategies, acting for change, and analyzing activities and outcomes". S Batliwala, 'The Meaning of Women's Empowerment: New Concepts from Action' in G Sen, A Germain and L C Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (1994) 132. These ideas seem to be clearly influenced by Paulo Freire, another influential third world activist. The idea of developing consciousness, or 'conscienization' was an important element of his work on adult education and empowerment in Brazil. See for example, P Freire, *Pedagogy of the Oppressed* (1972).

[64] See for instance, M Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1; J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; G R Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) *Journal of Legal Pluralism and Unofficial Law* 21; S Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869; and more recently, B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review*.

[65] W Twining, 'A Post-Westphalian Conception of Law' (2003) 37(1) *Law & Society Review*, 250.

[66] An alternative approach which would also be appropriate here is to use Tamanaha's non-essentialist, conventionalist approach, which says that "[l]aw is whatever people in a social area conventionally recognise as law through their social practices. Anything not so identified is not law" (B Tamanaha, *A General Jurisprudence of Law and Society* (2001) 197). While this approach does have its issues (for example, see Twining, above n 65, 199), custom in Papua New Guinea could be regarded as law for this purpose: according to the former PNG Minister for Justice who describes custom as "law for Melanesia" (B Narokobi, *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (1989) 5-6).

[67] United Nations General Assembly (UNGA), *Legal empowerment of the Poor and eradication of poverty: Report of the Secretary*-General, A/64/133 (13 July 2009) 3.

[68] Ibid para 2.

[69] Ibid.

for the poor and disadvantaged.[70] Thus, in the context of the lives of poor populations and for the purpose of legal empowerment, it seems appropriate to label customary justice and administrative systems 'law'. Indeed, though this reasoning has not been outlined before, a number of scholars and multilaterals have recently been calling customary and informal systems 'law' for the purposes of legal empowerment, giving credence to the idea that there is a correlation worth examining. For example, the Legal Empowerment Report uses the terms 'customary law' and 'customary legal systems' on several occasions.[71] Golub has recently stated that 'law' for the purpose of legal empowerment practice is not just formal law, but includes traditional justice systems and village-based customary systems.[72] Similarly, the World Bank has recognized that 'legal', for the purposes of legal empowerment and access to justice, extends beyond the formal legal system to include traditional community dispute-resolution structures and other informal institutions.[73]

3.1.3 What is 'Customary Law'?

General features

Customary legal systems operate in a multitude of ways, and significant variation can be found between and within countries, provinces and even villages. That said, some similarities can be identified between systems, or within a particular geographic area. The following section deals with similarities between customary systems of the Pacific, focussing particularly on Melanesia.[74]

To begin, while 'tradition' and customary law are closely related, it is important to make the distinction between them. In this paper, 'tradition' is used for practices and beliefs seen as having come from a community's ancestors.[75] The distinction relates to the dynamic nature of customary law. Because it is not static, but rather, responsive and subject to change,[76] some aspects relate back to the time of the ancestors, while other aspects have developed more recently. In the Pacific, custom has adapted for centuries in response to innumerable forces of change. The most influential of these were colonization[77] and Christianity[78], which together make it almost impossible to determine pre-contact application of custom in the Pacific, including Melanesia.

More recent forces, such as the gaining of independence, civil unrest, violent conflict, mass emigration, Aid agencies, and globalization have all affected, and continue to affect, how customary systems operate. Consequently, customary leaders now have to deal with a variety of complex social issues, such as sexual abuse, domestic violence, trauma from conflict, and alcohol and drug-related crime,[79] as well as economic issues relating to development, land and resource use, foreign investment and exploitation and cash economies. Associated changes, such as urbanization and movement towards individual enterprise has meant that fewer people are involved in community decision-

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[70] S Khair, 'Evaluating Legal Empowerment: Problems of Analysis and Measurement' (2009) 1 *Hague Journal on the Rule of Law* 33, 35.
[71] UNGA, above n 67, 3, 6, 7.
[72] S Golub, 'What is Legal Empowerment?' in S Golub (ed), *Legal Empowerment: Practitioners' Perspectives* (2010) 6.
[73] A Palacio, *Legal Empowerment for the Poor Action Agenda for the World Bank* (2006) 8, 21.
[74] However, it is likely a number of characteristics will be recognisable to those operating in other customary legal systems in Asia, Africa, the Americas and Europe. 'Melanesia' will refer, in this study, to Vanuatu, Papua New Guinea, the Solomon Islands, New Caledonia and Fiji.
[75] New Zealand Law Commission (NZLC), *Custom and Human Rights in the Pacific* (2006) 48.
[76] Ibid 46.
[77] For an enquiry into the impact of colonial contact on customary law and values in the Pacific, see ibid 45-47.
[78] However, in the Pacific Christianity is seen as 'local' and of the Pacific, not as a foreign import and is a very important and deep-rooted part of pacific life. This does not mean however, that traditional values and beliefs have been displaced. Often the two sit alongside each other, or impact upon one another.
[79] NZLC, above n 75, 55.

making, and many leaders have lost customary legal knowledge and dispute resolution skills.[80]

Changes also occur in customary systems as a result of internal contestation.[81] In societies where customary law is strong, a multitude of norms exist within the social network that are applied contextually with qualifications, from area to area.[82] Parties to a dispute might advance one or another norm in negotiating substantive positions, or procedures, but space remains for mediators, the community, and the disputing parties to reflect on which norms best fit the situation and whether the norms might be adjusted to enable agreement.[83] These changes must occur, however, through "culturally approved mechanisms and adapted to pre-existing norms and institutions".[84] Nevertheless, it remains that customary law is infrequently absolute and can accommodate different individual and group responses to its norms.[85] Accordingly, custom is often described by scholars as "flexible, fluid and changing, but not as amorphous". [86]

A feature of customary legal systems in the Pacific is that they do not generally distinguish between civil and criminal cases.[87] Rather both are viewed as incidents that cause tension, and call for the resolution of community and individual stress.[88] Most Pacific peoples would identify with the philosophy that focuses on restoring relationships and treating people as part of the community despite wrongs committed.[89] As noted for other customary societies, justice systems based on reconciliation, restoration and rehabilitation "are more appropriate to people living in close-knit communities who must rely on continuous social and economic cooperation with their neighbours."[90] Thus, many customary legal systems in the Pacific use approaches very similar to what is now regarded in the West as 'restorative justice'.[91]

While customary legal systems have numerous strengths[92] there are areas that present serious challenges for legal empowerment. The following section focuses on the position and rights of women, and to a very minor extent, juveniles within customary law systems.[93] As noted earlier, it is extremely difficult to know pre-contact application of custom, in particular, in regard to women. This is especially because the perspective of

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[80] Ibid.
[81] These processes will often occur hand in hand however, but not necessarily.
[82] NZLC, above n 75, 54-55.
[83] Ibid.
[84] A A An-Na'im, 'Toward a Cross-Cultural Appraoch to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in A A An-Na'im (ed), *Human Rights in Africa: Cross-Cultural Perspectives* (1992) 27.
[85] Ibid.
[86] NZLC, above n 75, 54-55.
[87] Ibid 155.
[88] Ibid.
[89] Ibid 156.
[90] L Huyse, 'Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies' in L Huyse (ed), *Traditional Justice and Reconciliation after Violent Conflict* (2008) 181 (citing Penal Reform International, *Access to Justice in sub-Saharan Africa* (2002)). According to Mihn Day, the conciliatory approach of customary legal systems is mainly due to the need for sustainable social cohesion of the society (M Day, 'Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda' (2001) 16 *Georgetown Immigration Law Journal* 235, 249).
[91] J Braithwaite, *Restorative Justice and Responsive Regulation* (2002). However, it is important to note that most customary legal systems do not only practice 'restorative' justice, but, to varying degrees, have important elements of deterrent and retributive justice. And similarly, customary legal systems might be formal, negotiated or a mix (P Clark, 'Hybridity, Holism and 'Traditional' Justice: The Case of the *Gacaca* Community Courts in Post-Genocide Rwanda' (2007) 39 *George Washington International Law Review* 4).
[92] See for example, E Wojkowska and J Cunningham, 'Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor' in S Golub (ed), *Legal Empowerment: Practitioners' Perspectives* (2009) 6-7.
[93] This is not to suggest that juveniles or children's rights are minor, or that the challenges faced by them for legal empowerment within customary systems are minor, rather that an in-depth examination of the issue relating to them is unfortunately beyond the scope of this paper. Further research on this topic would be valuable.

European males writing about cultural practices and norms is now recognised to have frequently ignored women's perspectives or roles.[94] It is often claimed that respect for women is a customary value or principle. While this may have been true, "proper respect for women is often not apparent in customary practices today."[95]

3.2 Scope for legal empowerment: Women and customary law

It is worth noting that the legal empowerment of women is not a challenge confined to customary legal systems in the Pacific, nor to customary systems more generally. The impediments faced by women and girl children around the world, despite long-standing global recognition of the principle of gender equality[96] are met in formal courts, administrative fora, as well as customary systems.[97]

This said, the Legal Empowerment Report does note the particular challenges of vulnerable groups in relation to customary legal systems, recognizing that informal norms often discriminate against women and juveniles[98] and that women make up the majority of the poor.[99] It dedicates a whole section to the legal empowerment of women, acknowledging a number of important areas: a) substantive discriminatory legal provision and norms in both statutory law and customary legal systems, b) women's knowledge of their rights and capacity to claim them, and c) means of redress and access to justice and remedies.[100] These substantive and procedural areas are used as a basis for describing some of the particular challenges for Pacific women in the following section.

3.3 Challenges for women in the Pacific and Melanesian context

3.3.1 Substantive issues

A major concern in Bougainville, Melanesia and across the Pacific is violence against women.[101] While there may have been, and still are in some cases, customary protections for women who are victims of violence in the Pacific, some modern customary institutions have been blamed for implicitly tolerating violence against women.[102] Indigenous women have asserted that, in the past, women were treated with deep respect, and sexual offences were punished severely within the customary system.[103] They attribute recent 'softening' to processes of colonization, which lowered the status of women, as well as unresolved post-conflict trauma, and the breakdown of customary governance mechanisms.[104]

The lenient punishment of gender and juvenile crimes is of particular concern.[105] Restorative processes are widely viewed as minimizing the seriousness of these offences and diminishing the rights of women victims to be heard and receive a remedy.[106] A woman might feel compromised by the reconciliation process "especially if the effect of the crime on her is made secondary to the task of maintaining good relations between

[94] G J Zorn, *Women, Custom and International Law in the Pacific* (2000) 11-12.
[95] NZLC, above n 75, 84.
[96] UNGA, above n 67, para 15.
[97] Ibid.
[98] Ibid 3.
[99] Ibid 18.
[100] Ibid 6.
[101] Violence against women has been described as 'endemic' by Amnesty International (Amnesty International Aotearoa New Zealand, 'Abuse of Women Endemic in Papua New Guinea' (March-April 2006) *Freedom Letter* 1).
[102] P Martin, 'Implementing Women's and Children's Rights: The Case of Domestic Violence in Samoa' (2002) 27 *Alternative Law Journal* 227, 230.
[103] M Davis and H McGlade, 'International Human Rights Law and the recognition of Aboriginal Customary Law' in Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Background papers* (2006) 381, 403-404.
[104] Ibid. See also, L Behrendt, 'Human Rights Trump Customary Law Every Time' *National Indigenous Times* (Australian Capital Territory) 26 January 2006, 97.
[105] NZLC, above n 75, 163.
[106] Ibid.

families."[107] However, it is important to highlight that these same women might feel simultaneously satisfied in that the solution is supported by her family, and if regret by the offender is sought.

3.3.2 Procedural issues

The absence of procedural safeguards in customary justice processes pose risks to all disputants. However, because of their relative lack of power, weak or discriminatory procedures have a greater adverse impact on women and juvenile victims. Customary systems' informality, adaptability and non-adversarial approach, while sometimes presented as strengths,[108] can give rise to bias or conflicts of interest, as well as other natural justice issues concerning a fair hearing and proportionality.[109] For example, the extent to which families and parties to a dispute are represented, and whether customary procedures are open to the community, can contribute to transparency and constrain power abuses and bias.[110] On the other hand, having families and the community present may pressure vulnerable parties into accepting an inequitable outcome.

Despite these challenges, research in Melanesia has shown that women and youths generally support the customary system, even if they feel that certain aspects promote inequality.[111] Change, therefore, does not necessarily involve a rejection of custom, but a re-examination of some customary norms to ensure that they "support rather than victimize women" and other vulnerable groups.[112]

An initial challenge in this regard is male domination of custom's interpretation, adaption and application.[113] It has been suggested that custom may be used by traditional male leaders to hold onto positions of relative power, and that men feel their position is 'under threat', which leads them to "assert their position as the custodians of a custom presented as unchanging and unchallengeable."[114] One way male interpretations have been, and might continue to be challenged, is to draw on gender-neutral customary principles and practices, for example where women have equal status in relation to leadership roles and social organization.[115] Other examples of how change can be facilitated are explored in the following section.

3.4 How can legal empowerment for women and other vulnerable groups be facilitated, in the context of customary law?

The Legal Empowerment Report recognizes that the very nature of the legal empowerment project is likely to threaten vested interests, thus presenting a difficult

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[107] Ibid. For more see, J Braithwaite, above n 91; G Johnstone and W V N Daniel, *Handbook of Restorative Justice* (2006). For restorative justice in the context of the Pacific, see J Mackey, 'Meshing traditional approaches and Western methods: potential and problems' (2005) 8(3) *ADR Bulletin*; J Braithwaite, 'The Fundamentals of Restorative Justice' in S Dinnen, A Jowitt and T N Cain (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands* (2003); N Rita, 'Restorative Justice and Women in Vanuatu' in S Dinnen, A Jowitt and T N Cain (eds), *A Kind of Mending: Restorative Justice in the Pacific* (2003).
[108] NZLC, above n 75, 158.
[109] Ibid.
[110] Ibid 160.
[111] Ibid 164. As do many Pacific women advocates, including some of those in Bougainville. Interview with J Kauona Sirivi, President, Bougainville Women for Peace and Freedom (Arawa, 12 May 2010). For an example relating to the Solomon Islands, see S E Merry, 'Changing Rights, Changing Culture' in J K Cowan, M-B Dembour and R A Wilson (eds), *Culture and Rights* (2001).
[112] UNIFEM, Commonwealth Secretariat, the Pacific Islands Forum Secretariat and the Secretariat of the Pacific Community, 'Outcome Statement' (conference document from the *Pacific Regional Workshop on Strengthening Pacific Partnerships for Eliminating Violence against Women*, Suva, Fiji Islands 17-19 February 2003, 8).
[113] V Griffen, *Women Speak Out! A Report of the Pacific Women's Conference, 17 October – 2 November* 1975.
[114] NZLC, above n 75, 101. Douglas notes, however, that there may be more scope for women's legal empowerment in the customary legal system as this is more acceptable to men and therefore easier to access for women than the formal justice system. S Douglas, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (2007) 15.
[115] Zorn, above n 94, 12.

challenge in terms of persuading those who feel threatened.[116] It does not, however, supply any ideas for how to do this, beyond building alliances with stakeholders and "seeking ways to overcome cultural impediments."[117] The purpose of this section is to offer some suggestions and to theorize about how this might be done in the context of customary law. This provides a basis for analysing the work of Peace Foundation Melanesia and the results of the survey data outlined later in the paper.

As previously stated, customary law, like culture, is dynamic; it has the ability to change and adapt, and is not homogenous and discrete but contested and plural. It is therefore not necessarily the *nature* of customary law that is to blame for holding to substantive practices and procedures that are inimical to the interests of women and other vulnerable groups, but rather, those within the system who, for several reasons, resist change.[118] As recognized by Sudanese Islamic scholar An-Na'im, powerful individuals and groups often dominate the interpretation of customary and cultural norms, applying and manipulating them to their advantage.[119] He states, "it is vital for disadvantaged individuals and groups to challenge this monopoly and manipulation.[120] However, as recognized in empowerment theory and practice, it may be necessary to increase understanding and awareness of the power dynamics; of the possibility and often, the imperative of change.

An-Na'im asserts that, "given the extreme importance of cultural legitimacy", challenges to the monopoly on cultural norms by powerful groups should be done through internal cultural discourse, which will allow alternative interpretations to be offered.[121] This has some merit in the present context, given both the nature of customary law and the nature of empowerment, which cannot be bestowed by anyone else. However, it is pertinent to remember Rowlands and Batliwala, both female scholar-activists who encourage appropriate external interventions as a way of quickening and strengthening the process the empowerment, and that are often necessary to facilitate access to ideas and knowledge.[122] These ideas, knowledge and awareness, in the context of customary law and legal empowerment in the Pacific, may pertain to a variety of customary values or rights that women and vulnerable groups are not aware of; ideas and rights relating to fair and due process, including the right to be heard; human rights relating to substantive areas such as violence against women, including domestic violence, and rape; the option and capability to go to the formal legal system; ways vulnerable parties might participate more fully in dispute resolution. Alternative interpretations, and in turn, adapted procedures, norms and processes should be the result. These alternative interpretations are bound to meet some resistance. It is the conclusion of the New Zealand Law Commission that a helpful way of overcoming or reducing such resistance is through arguments drawn from custom, tradition and human rights.[123] This involves access to information and the careful and respectful facilitation and dissemination of new ideas and resources, and importantly, in ways that allows them to be weaved into the existing cultural and customary law fabric.

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[116] UNGA, above n 67, 16.
[117] Ibid.
[118] NZLC, above n 75, 102.
[119] An-Na'im, above n 84, 27-28.
[120] Ibid 27-28.
[121] Ibid.
[122] S Batliwala, 'The Meaning of Women's Empowerment: New Concepts from Action' in G Sen, A Germain and L C Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (1994) Start Page, 132. Empowerment is conceptualized by Batliwala as "a spiral, changing consciousness, identifying areas to target for change, planning strategies, acting for change, and analyzing activities and outcomes" (S Batliwala, 'The Meaning of Women's Empowerment: New Concepts from Action' in G Sen, A Germain and L C Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (1994) 132). These ideas seem to be clearly influenced by Paulo Freire, another influential third world activist. The idea of developing consciousness, or 'conscienization' was an important element of his work on adult education and empowerment in Brazil (see for example, P Freire, above n 63).
[123] NZLC, above n 75, 102.

As recently stated by Khair, in the context of legal empowerment of the poor and marginalized, merely grafting borrowed ideas and processes from foreign legal cultures is unlikely to be effective.[124] In terms of cultural legitimacy and sustainable change, the 'local' is what will be most powerful in influencing the interpretation and application of law, as well as in moulding legal attitudes and values.[125] This is especially true in the context of customary law. If customary law is to incorporate and recognize human rights and other rights, they must be seen to be culturally valid and locally owned. Though it is not only human rights that are at issue when considering women and customary law, these are a helpful starting point in some respects. It is important to consider human rights and issues of customary law and culture not only for the substantive merits of human rights, but also because, in the Pacific, there is considerable resistance to the idea of human rights; they are seen by many as 'women's affairs' and ideas that are foreign and imposed.[126] Thus, if effective ways of advancing human rights in customary legal systems in the Pacific can be found, other legal issues and rights in relation to women's legal empowerment may be dealt with, or conceived of in the same way. Martha Nassbaum's conception of equitable justice might then be achieved; a process that requires both the removal of harmful law and practices, and ensuring that women are empowered to claim their rights.[127]

One approach to this is to look for internal values or norms that can be used to develop or add cultural legitimacy.[128] This way, rights, and processes can begin to be locally legitimized and 'owned' through values, norms and a process of change that is already recognized and approved by the community or society.[129] Carolyn Graydon, writing about Timor-Leste, has suggested a similar approach, stating that "entrenched human rights values already existing in the culture" should be used as the basis for sustainable human rights protection with a view to influencing change in customary legal systems.[130] A variation on this approach has been demonstrated through the relating of human rights to Islamic scriptures and law when facilitating women's legal empowerment in post-tsunami Aceh.[131]

The New Zealand Law Commission calls this 'harmonization' of customary law and human rights, and sees the process as enabling human rights to "be introduced in ways that are relevant to Pacific peoples and legitimate in terms of the peoples' own norms."[132] Another aspect that the Commission sees as part of this process is the review of customary *practices* in light of underlying customary *values*, in addition to social change and human rights. This reflects the view, supported by many Pacific writers and leaders, that common underlying values remain constant, although practice may vary over time and may not always match the value.[133] It is envisioned that through this process, some practices may no longer be found to fit with the underlying, values and principles. Thus, using this approach, it is claimed that "human rights values assist in making change, not to displace custom but to help perfect the match between customary values and

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[124] S Khair, 'Evaluating Legal Empowerment: Problems of Analysis and Measurement' (2009) 1 *Hague Journal on the Rule of Law* 33, 35. Indeed, Lawyer, chief, and former vice-President of Fiji, Ratu Joni Madraiwiwi, has stated that an approach that forces people to take side between human rights and traditional will be counter productive, as it will only cause resentment. (Ratu Joni Madraiwiwi, 'Human Rights and Tradition' (speech delivered at the Fifth Annual Pacific Human Rights Awards, Suva, Fiji, 25 February 2005).
[125] Ibid.
[126] NZLC, above n 75, 84.
[127] M C Nussbaum, *Women and Human Development: The Capabilities Appproach* (2001).
[128] A A An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in F M D Abdullahi Ahmed An-Na'im (ed), *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 339.
[129] Ibid.
[130] C Graydon, 'Local Justice Systems in Timor-Leste: Washed up, or watch this space?' (2005) 68 *Development Bulletin* 66.
[131] E Harper, *Promoting Legal Empowerment in the Aftermath of Disaster: an Evaluation of Post-Tsunami Legal Assistance Initatives in Indonesia* (2009) 18.
[132] NZLC, above n 75, 79.
[133] Ibid 12. They state that custom should not be judged purely by practices that are inconsistent with its fundamental values.

customary practices."[134] With regard to women, they note that customary *values* can provide the basis for communities to internalize women's equality, just as human rights can strengthen customary views regarding women's legal issues.[135]

A final, critical component of enhancing legal empowerment through customary law is vulnerable groups' access to leadership and decision-making positions. Attitudes claimed to be based on custom throughout the Pacific exclude women and youths from positions in national and local government, as well as customary bodies.[136] This exclusion means that disadvantaged groups are not best placed to facilitate change or to protect their rights.[137] Opening up space for such groups to become leaders and decision-makers within the customary sphere, therefore, is clearly important. One situation that has the potential to provide such a 'space' is during transitional periods, such as following disaster or conflict.

3.5 Legal empowerment and customary law in a transitional context

It is the author's opinion that through participatory engagement with civil society and community-based organizations during transitional periods, customary law can be strengthened and legal empowerment facilitated, and can in turn, support transitional justice and political stability.[138] Danne, writing primarily from a transitional rule of law perspective, claims that to undermine, or not give due recognition and support to customary legal systems in post-conflict situations, is likely to lead to a less stable environment, in which "even greater human rights abuses" may abound.[139] He argues that the most effective way to ensure rights in post-conflict, transitional societies where customary law is strong is through reform,[140] including through grassroots civic education, and by identifying jurisprudence that can strengthen customary law institutions and precepts. The scope for legal empowerment in such a setting is clear, and it is significant that he envisions how this can be done in a way that engages civil society and grassroots organizations.

3.6 What might legal empowerment look like, in the context of customary law?

Having briefly canvassed the literature and bearing in mind the relatively new and evolving concept of legal empowerment, this section summarizes what legal empowerment in the context of customary legal systems is, how it might be facilitated.[141]

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[134] Ibid 80.

[135] Ibid 84. It is equally worth noting at this point, that just as culture and customary law are not static and uncontested, neither are human rights. Merry's extensive and informative work on local appropriations and adaptations around the world of human rights concepts by local and Indigenous actors is informative of an aspect of this process (Merry, above n 111, 47. This way, the traditional divide between so-called relativistic cultural protection and universalistic human rights is avoided. She also presents how human rights have evolved and changed in response to new circumstances and input, concluding that rather that being essentialized, bounded and uncontested, human rights are also fluid and changing (Merry, above n 111, 31).

[136] NZLC, above n 75, 90.

[137] Ibid.

[138] O'Connell's recent paper suggests that transitional justice initiatives, and transitional periods more generally, create openings and attract resources that can be used to advance legal empowerment. In turn, legal empowerment may support transitions and transitional justice. This section draws on the nascent literature on the role of indigenous dispute resolution in transitional justice to build on O'Connell's assertion and place it in the context of customary law (O'Connell, above n 49). This area is one worth investigating further. While there is only space in this paper for a very brief exploration of the intersection between legal empowerment, transitional justice and customary law, further research in the context of Bougainville will be conducted by the author in the near future.

[139] A Danne, 'Customary and Indigenous Law in Transitional Post Conflict States' (2004) 30 *Monash University Law Review* 199, 223.

[140] Ibid.

[141] By no means is this an exhaustive list of how legal empowerment might operate, or produce in the context of customary legal systems; rather, it outlines, with the Bougainville case study in mind, some possible elements of legal empowerment and customary law.

Of the definitions that have emerged, for the present purpose, Stephen Golub's is the most useful for understanding legal empowerment. His defines legal empowerment as "the use of law to specifically strengthen the disadvantaged."[142] The word 'strengthen' is broad enough to encompass the many dimensions of empowerment, as outlined previously. It is also a relative term, reflecting that change can be a protracted process that may face setbacks.[143] Golub's explanation also recognizes the critical bottom-up nature of empowerment, thus distinguishing it from the dominant top-down, state-centric, institutional and court-based 'rule of law' efforts:[144] "it aims to build such populations' capacities to act on their own, although without precluding the reality that often outside actors work directly with them to provide help."[145]

Building on the theory outlined earlier, some helpful ways of facilitating legal empowerment in the context of customary law are noted below:

- Transferring new skills and information in a way that they can be locally 'owned' and weaved into the fabric of existing culture;
- Facilitating internal dialogue with both marginalized and dominant groups;
- Drawing on customary values to integrate human rights and new processes; and
- Working directly with the marginalized and supporting existing civil society and community-based organizations.

This work can be undertaken with a view to reaching the following legal empowerment objectives:

- Increased participation in customary processes;
- Increased awareness, knowledge and recognition of women's rights;
- Increased awareness and understanding of power relations;
- Increased skills for adjudicators in dealing with power imbalances within a dispute;
- Increased opportunities for decision-making and leadership with a view to challenging masculine monopolies over customary application and interpretation;
- Increased capacity of vulnerable parties to participate and assert rights.

4. Bougainville and the PEACE Foundation Melanesia Intervention

4.1 Bougainville and customary law

Following World War I, Bougainville was politically split from its closest geographical, ethnic and linguistic neighbour, the Solomon Islands. Following World War II, Bougainville was passed to Australian colonial administration, which annexed the island to their New Guinea territories, and signed an agreement with the Australian mining company Conzinc Rio Tinto Limited. A subsidiary of the latter, Bougainville Copper Limited proceeded to establish, what was at the time, the world's largest open-cut mine, leading to an influx of thousands of international and mainland Papua New Guinean employees to central Bougainville.[146]

[142] Golub, above n 72, 6.
[143] Ibid.
[144] M Stephens, 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed' (2009) 1 *Hague Journal on the Rule of Law* 132, 135.
[145] S Golub, 'The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice' (2009) 1(1) *Hague Journal on th Rule of Law* 101, 6.
[146] Soon afterward in 1975, Bougainvilleans tried unsuccessfully first, to unilaterally declare independence, and second, to join with the Solomon Islands.

4.2 The 'crisis'

The Panguna mine led to environmental degradation and a perception among Bougainvilleans of unequal benefits. These factors precipitated a civil war, known locally as 'the crisis'. During this period, from 1989 until the ceasefire in 1998, mining employees pulled out of Bougainville, and Papua New Guinea administrative and governance structures, including the courts and police, were withdrawn.[147]

Following the ceasefire, traditional, customary methods of dispute resolution and reconciliation were employed at the grassroots level. The purpose was to restore relationships and end the fighting between the Papua New Guinea Defence force and the Bougainville Revolutionary Army (BRA), as well as intra-Bougainvillean factions. In 2001, a Peace Agreement was signed that gave Bougainville autonomous status and provided for the establishment of the Bougainville Constitutional Commission (BCC).

4.3 The Bougainville Constitution

The BCC Report noted that Bougainvilleans "want a justice system that is not solely focused on punishment of crime, but also on reconciliation and restoration of relationships damaged by disputes."[148] This was carried over into section 13 of the *Constitution of the Autonomous Region of Bougainville*, which provides for a strengthening of customary authority.[149] Subsection four is particularly relevant, stating that:

> The customary system of justice in Bougainville, based on the restoration of peace through the restoration of harmony in relationships between people, shall be recognized and reinforced to the extent not contrary to Christian principles.[150]

Specifically relevant to the post-conflict process, section 15 asserts that peace, mediation, reconciliation and harmony should be pursued when dealing with disputes and that the use of violence should be avoided. Also relevant is section 18, which provides that the government will guarantee and support institutions and NGOs charged with protecting and promoting human rights.

4.4 Formal justice sector

The Bougainville Constitution provides for the establishment of a formal court sector in sections 112-120.[151] Progress towards this goal has been sluggish; the provincial courthouse has only recently been rebuilt (after being burned down several times during the conflict), and district courts (apart from in Buka) sit infrequently.[152] Village courts, which have been in existence throughout Papua New Guinea since independence, are part of the formal system, but apply mainly customary law. They are also used in Bougainville to varying degrees of acceptance and success.[153] They are mandated to use

[147] The village courts were not operational in most places either (PFM, Aims and Objectives, 2004)
[148] Bougainville Constitutional Commission, *Report of the Bougainville Constitutional Commission* (2004) 55.
[149] Also, section 51 extensively outlines the areas in the Constitution where the role and authority of the customary governance system will be recognised. These include criminal law, land law, human rights abuses, the police service and many others.
[150] Section 37(1) provides that "Customary values which enhance the dignity and well-being of Bougainvilleans shall be recognized, promoted and preserved."
[151] Sections 112-120. However, it has recently been suggested that the high cost of establishing this, the lack of capacity to administer it, along with the desire to maintain space for the customary legal system, means that the practical establishment of these courts may take considerable time (Boege, above n 20, 22).
[152] Also, there are two very inadequate prison cells in the whole of Bougainville, visited by the author in 2009. For the most part, the people in them (a mix of those on remand, convicted, juveniles and seniors) remain in them voluntarily, for security reasons.
[153] Boege, above n 20, 22.

mediation and apply custom in certain areas of criminal and civil law, however, they often exceed their jurisdiction.[154]

4.5 Customary law and the interface with the formal system

The Autonomous Bougainville Government (AGB), established in 2005, is slowly building its capacity and legitimacy, but continues to rely heavily on civil society and customary institutions to maintain peace, order and security.[155] Almost all government actors acknowledge the authority of traditional governance, and many retain close ties with their local communities.[156] While there is no consensus on the interface between the formal and informal systems, most agree that customary law should play some role in the administration of formal justice.[157] In practice, the application of customary law is varied, and ordinary people are confused about which cases they should take to the customary system and which should be referred to the formal system.

5. The 'crisis', conciliation and custom: Bougainville and The PEACE Foundation Melanesia Intervention

The social, economic and environmental impact of the Conzinc Riotinto mine was a key factor precipitating the civil conflict – known locally as 'the crisis' – that engulfed Bougainville between 1989 and 1998. During this period, government administrative and justice sector personnel were withdrawn from Bougainville, leaving the population with few tools to manage conflicts and stem escalating violence. Thus, the formal system was essentially non-operational during this period throughout most of Bougainville. Since the formation of the new Bougainville Constitution and Autonomous Government in 2005 it has slowly being building capacity and legitimacy but continues to rely heavily on civil society and customary institutions to maintain peace, order and security.[158] It was in this context that PEACE Foundation Melanesia (PFM) started to conduct grassroots training on non-violent dispute resolution. Their training methods, based on mediation and restorative justice techniques, drew parallels with customary legal processes, the practice of which had dwindled since the time of colonial rule.

5.1 To the Manner Born: Custom and PEACE Foundation Melanesia's mediation

Papua New Guinea's Attorney-General and Minister for Justice, Bernard Narokobi established PEACE Foundation Melanesia[159] in 1989 based on his assessment that the formal court-based system was not adequately responsive to the needs of the Papua New Guinean people and did not empower communities to resolve their disputes. In 1994, in an effort to begin addressing some of the social consequences of the Bougainville conflict, the Bougainville Interim Government (BIG) invited PFM to conduct a conflict resolution training session, which focused on mediation. Participants immediately recognized the commonalities between PFM dispute resolution techniques and traditional customary approaches to conflict resolution both of which emphasized values such as

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[154] *Village Court Act 1989*, ss 52-59. See further, for PNG wide: PNG Justice Advisory Group, *Village Court System of Papua New Guinea* (2004) 7. For urban village court case study, see M Goddard, ''Three Urban Village Courts in Papua New Guinea' Comparative Observations on dispute Settlement' in S Dinnen and A Ley (eds), *Reflections on Violence in Melanesia* (2000); and M Demian, 'Custom in the Courtroom, Law in the Village: Legal Transformations in Papua New guinea' (2003) 9 *Journal of the Royal Anthropological Institute* 97. A study on the village court of Bougainville is due to be released from the Bougainville Law and Justice Sector Program (AusAid) in October 2009.

[155] Boege, above n 20, 16.

[156] Ibid 30.

[157] Ibid 22-23.

[158] Boege, above n 20, 16.

[159] PFM was known as the Foundation for Law, Order and Justice up until 1995.

preserving community relationships and consensus-based decision-making.[160] Participants and local actors requested additional trainings, which led to the development, in cooperation with local chiefs, of a training methodology that was thought to be congruent with Bougainville customary principles and processes.

The Community Justice Course targets a cross-section of community members including chiefs, women, youth, civil society leaders and church leaders of different denominations. The main objective is to build conflict resolution skills in local communities, and in turn promote intra- and inter-community social harmony and local ownership over justice processes.[161] Trainings cover people skills, gender issues, listening skills, assertive communication, power differentials, negotiation and leadership. The methodology employs role-plays with Bougainville-specific case studies, and tries to promote discussion of potentially challenging ideas in relation to values with which participants are familiar and accepting.

The "empowerment of women as equal partners" is an important and recurrent message in many of the training's modules. It is intended that, through the training, women will be armed with the information and skills to assert themselves and speak up among men and chiefs, while in parallel promoting a community-wide appreciation of women's rights and contributions. A related goal is to facilitate greater participation in decision-making, including by women and vulnerable groups, so that outcomes represent the perspectives, needs and expectations of the wider community, as opposed to only those of 'the bigman and his followers'. The modalities of the trainings are structured towards these ends. Men and women form small groups of approximately six participants, where they discuss together issues presented by the trainer. This places women and men in an unusual situation that arguably pushes cultural boundaries; women try out their skills as mediators and decision makers and chiefs and other males are compelled to observe them in such roles. This facilitative 'space' is tightly controlled through established guidelines on issues such as mutual respect that are communicated at the beginning of the training and monitored by the facilitator.

In each village where training is conducted, participants who show particular interest and aptitude are invited to undertake further training to become PFM training facilitators. PFM found that people prefer trainers who understand the local variations in culture, custom and language, and who can build on existing relationships as they put their new skills into practice. The course includes (albeit brief) components on the Papua New Guinea Constitution and the formal justice system with a view to empowering these facilitators to work cooperatively with police, community police and village court magistrates.[162]

It is generally agreed by both scholars and beneficiaries that PFM's efforts had a positive impact in terms of reconciliation and peace-building in Bougainville.[163] However, whether

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[160] Processes of mediation and restorative justice are seen as akin to Melanesian customary law. In 2010, PFM's Mission Statement is "to be a strong and dynamic organization promoting the use of mediation and restorative justice using Melanesian custom law as the basis of reaching consensus and agreement." Their Vision statement is "to provide people and community empowerment through the establishment of sustainable community justice initiatives that uses win-win mediation and restorative justice to repair community relationships and minimize law and order issues." (Peace Foundation Melanesia, *Mission and Vision Statements* (2010), PFM <http://www.peacefoundationmelanesia.org.pg> at 27 April 2011). It should be noted however, that PFM Bougainville is now operating separately from the Port Moresby-based PFM. The latter group administers this website.

[161] The information in this section is drawn from PFM information brochures, pamphlet, annual reports and interviews with PFM current and former directors of the Bougainville operation.

[162] PFM material states that "Restorative justice is not a stand alone, isolated system", but rather should be linked with the law and justice policy, crime prevention measures, community participation, human rights, corruption, and special attention to the rights of women in the justice system (PFM, *Information Brochure* (2002)). "We believe that the place for justice and the practice of law is within the community itself… working in a complimentary manner and with the full support of the formal sector" (PFM Mission Statement (2004)).

[163] Interview with H Hakena, Executive Director, Leitana Nehan Women's Development Agency (Buka, 3 May 2010); Boege, above n 20.

and to what extent the intervention enhanced legal empowerment has not yet been analysed. In order to provide insights into this question, the next section presents the results of field research conducted by the author in nine rural villages and one urban location in Bougainville.

6. Research Design

6.1 Research questions

The overarching aim of the study was to examine whether PEACE Foundation Melanesia facilitated legal empowerment through their training intervention. Several legal empowerment objectives were selected from those identified earlier that might have been facilitated by the type of intervention undertaken by PFM:

Research questions:

How and to what extent has the PFM intervention:

1) Increased participation in customary dispute resolution processes?
2) Increased awareness, knowledge and recognition of women's rights?
3) Increased awareness and skills for mitigating existing power imbalances within a dispute?
4) Improved decision-making and objectivity and reduced bias?
5) Increased knowledge and protection of vulnerable groups?
6) Helped vulnerable groups challenge customary application and interpretation, by providing information and access to leadership and decision making positions, thus mitigating elite capture?

6.2 Ethical review

This research was reviewed and authorized by the University of Otago Human Ethics Committee. Consultations were held with IDLO and the partner organization throughout the project to ensure cultural appropriateness, conflict-sensitivity and gender sensitivity.

6.3 Method of testing questions

While most existing assessments relevant to legal empowerment[164] seek to provide broad comparative analysis of justice and right systems from a top-down perspective, the author agreed with Masser's assertion that:

> to really measure legal empowerment, a more subject-centric approach is needed, one which examines policies, institutions, and organizations only to the extent that, and at the moment when, they impact the lives of the poor, marginalized, and vulnerable who we wish to empower.[165]

Gramatikov, and his colleagues from the Measuring Access to Justice in a Globalizing World project, have developed a research methodology that follows a subject-centric approach, and aims to compare access to justice across jurisdictions and countries.[166] They use the concept of 'paths to justice', a notion born in the socio-legal literature to focus on users' perceptions of quality of justice (process and outcome) and cost.[167] While Gramatikov recognizes the difficulties associated with measuring informal dispute routes

[164] For example, those contained in Annex two and three of Commission on the Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone, Volume 2: Working Group Reports* (2008).
[165] A L Masser, *Measurement Methodologies for Legal Empowerment of the Poor* (2008) 6.
[166] M Gramatikov and M Laxminarayan, *Weighting Justice: Constructing an Index of Access to Justice* (2008) 7.
[167] M Gramatikov, *Methodological Challenges in Measuring Cost and Quality of Access to Justice* (2007) 11. Gramatikov defines a path to justice as "a commonly applied process which users of justice address in order to cope with their justice needs." (M Gramatikov and M Laxminarayan, *Weighting Justice: Constructing an Index of Access to Justice* (2008) 9).

of paths to justice,[168] both formal and informal processes can be placed within the scope of this broad definition.[169] The Measuring Access to Justice project uses a standardized questionnaire administered to actual clients to gauge their perceptions of quality of the process, the outcome, and gain information on cost.

For this research, their short questionnaire was adapted to measure users' perceptions of customary legal processes in post-conflict Bougainville, and used as a as a comparative tool for evaluating the impact of PFM's training. It was extended to include a section on general attitudes and confidence levels towards legal empowerment issues and avenues for dispute resolution in Bougainville that disputants and non-disputants could both complete.

As noted in the recent Asian Development Bank evaluation of their pilot legal empowerment projects, bare statistics based on survey data does not reveal the answers to important 'why' and 'how' questions that might be garnered from qualitative data.[170] Two strategies were thus employed to collect qualitative data. First, the survey instrument contained several questions that required writing an explanation or description of the process or outcome.[171] Second, 25 interviews were conducted with a variety of actors.

6.4 Survey sites and data collection

During three weeks in May 2010 a small research team of four research assistants led by the author, carried out over 400 surveys throughout Bougainville. Of these, 394 useable surveys were gathered. A total of 231 of the 394 respondents who had been through a dispute resolution process with a chief or mediator in the last 12 years[172] completed the first two sections of the survey. These sections were designed to gauge their satisfaction with the dispute resolution process and outcome. This group will be referred to as the 'disputants'. The total group of 394, each of whom filled out a section of community attitudes to dispute resolution and customary law, will be referred to the 'respondents'.

The surveys were conducted in ten village locations[173] and one urban location, with approximately 30-40 participants in each village. These villages were mainly in Central Bougainville District, which together with the Southern District, were the areas most affected by the civil conflict, and where PFM's training has been concentrated.

Bougainville has not had a census since 2000 and the relatively new ABG does not yet have the capacity or recording systems to enable random sampling lists of survey respondents. Because most of PFM training has been done in villages, not the two urban centres, random selection door knocking was not considered appropriate. Instead, seven villages and one urban location were selected in collaboration with PFM with a view to identifying a spread of places throughout central Bougainville where PFM had conducted training. Only two villages in Southern Bougainville were chosen because of existing security concerns. Only one village in north Bougainville was chosen as relatively few training workshops were held in this district. The current Director of PFM, Clarence Dency, obtained permission from each village chief beforehand, explained what would take place, and asked a chief and one PFM trainer or mediator to ask members of the community over 16 years old willing to participate to come to the central village hall/meeting place on a pre-arranged date.[174] The author personally conducted interviews

[168] Gramatikov, above n 167, 16.
[169] M Gramatikov and M Laxminarayan, above n 167, 9.
[170] Asian Development Bank (ADB), *Legal Empowerment for Women and Disadvantaged Groups* (2009) 11.
[171] While respondents filled these sections out, most did not.
[172] This number was chosen because the conflict ended in 1998, twelve years previous to this field research.
[173] Central Bougainville: Atamo, Pakia, Bovo Valley, Wakunai, Bovonari, Kanavitu, Boromai, Arawa (urban); South Bougainville: Wisai, Polamato; North Bougainville: Haku
[174] In some villages everyone undertook the survey at the same time, in others we waited throughout the day for people to go in and out, taking turns as they tended their gardens.

with disputants, chiefs and mediators in half of the locations, and also conducted interviews with members of the formal justice sector, Aid sector, NGO sector, and female civil society. All interviews with women were undertaken without men present and usually were conducted by the author alone. In some instances, the presence of a female interpreter (that the interviewee was comfortable with and who met confidentiality requirements) was present.

In any research study, there is the possibility of bias. In this study, the area most vulnerable relates to the involvement of Clarence, the Director of PFM. The villages where surveys were undertaken were chosen in collaboration with Clarence, and it is possible that his suggestions were based on good practice, giving a more positive impression of the work impact than is the case elsewhere. The potential effect of this was mitigated by using data from 11 different locations.

6.5 Due diligence and security

PFM in Bougainville separated from PFM in mainland Papua New Guinea in Port Moresby and re-named itself the Bougainville Centre for Peace and Reconciliation (BCPR). Due diligence on BCPR was conducted through Pat Howley, director of PFM in Bougainville, the AusAid Law and Justice programme manager, and the New Zealand police Manager in Bougainville.

Partnering with BCPR was the main method by which safety and logistical support were secured. Villages targeted were vetted by BCPR and no overnight trips were taken. Accommodation was provided by the Volunteer Service Abroad (New Zealand) and the New Zealand police contingent provided ongoing security information and advice. While Internet access was not available, international and domestic cellular phone coverage was generally possible, and where it was not a satellite telephone was provided by AusAID. The Meekamui No-Go Zone, the birthplace of the BRA was visited, however only following consultation with international advisors.

6.6 Statistical tests

Statistical significance was tested using the PASW (formerly SPSS) statistical analysis programme, under the supervision of a professor experienced in psychology and law at Otago University, New Zealand. The main test used was an Independent Sample T-Test, which showed between which data there was a statistically significant difference, and to what extent. Then, Frequency Tables were produced to work out the percentages of those who agreed (an aggregate of those who ‘strongly agreed’ and those who ‘agreed’) and disagreed with specific statements. Means relating to the 5-point response scale, as well as other technical statistical information, on which the statistical tests were based, are available from the author. Crosstabs, for simple data, were also generated. A One-Way ANOVA (Analysis of Variants) test was conducted for each of the results where there was a significant gender difference to test whether there was any correlation with this finding and with whether the respondent had a trained, or untrained third party. No statistically significant correlation was found for any of the statements.

7. Taking stock: Empirical results

In May 2010, field research was conducted in Bougainville with a view to understanding the impact of the PFM intervention. A key challenge identified earlier in this report is the advancement of legal empowerment and reform in a way that is locally legitimate and preserves the positive aspects of the customary justice system. The research was designed to test whether, and to what extent, the intervention was able to do this.

The research proceeded from the basis that access to justice is a critical tenet of legal empowerment and that a bottom up, subject-centric methodology was important. Thus,

a survey was developed that included a) indicators designed to measure users' perceptions of the quality of justice in terms of process and outcome,[175] b) indicators to test the impact of the intervention on positive aspects of customary systems, such as restoration of relationships and community harmony and c) indicators to test whether the intervention had resulted in attitudinal change toward women and power sharing in dispute resolution. This was used to survey 394 people in Bougainville communities where PFM training had taken place. The responses of persons who had resolved a dispute through a mediator[176] (either someone from the community or a village chief) who had participated in PFM training, were compared to persons whose dispute was resolved by a mediator who had not participated in a PFM training.[177] The principle areas of investigation were how and to what extent did the PFM intervention: increase participation in customary dispute resolution processes; increase awareness, recognition and capacity to assert legal rights; increase awareness and skills for mitigating power imbalances within a dispute; improve decision-making objectivity; retain positive aspects of the customary system such as community harmony; mitigate elite capture by providing access to leadership and decision making positions for women and community members.

A central theme throughout each of these areas of investigation was the particular impact of the intervention for women's legal empowerment. Accordingly, each area of quantitative investigation was statistically tested for gender differences. The issue of gender-based violence was chosen as a pertinent example of where these differences manifest in Melanesia. While it was not possible to separately analyse the quantitative results of disputants with cases of gender-based violence, qualitative data from 25 interviews with disputants, female civil society members, mediators, trained and untrained chiefs was used to come to conclusions about the impact of the training for women's legal empowerment in relation to domestic violence and rape.

7.1 Survey data

Survey results from 394 people were gathered. Each of these participants completed a section relating to attitudes toward dispute resolution, the data from which is found in Table 3. Of these 394 people, the 231 who had participated in a dispute resolution process with a mediator or chief completed two sections on the dispute resolution process and outcome. This data is displayed in Tables 1 and 2. The total 394 will be referred to as the 'respondents', and the latter 231 will be referred to as the 'disputants'.

As can be seen in Tables 1 and 2, around one-third (n = 85) of the total disputant sample size (n = 231) responded to the survey questions in relation to a dispute that had been dealt with by a chief who had *not* received training from PFM. Around two-thirds (n = 146) of the total sample size responded to the questions in relation to a dispute that had been dealt with by a third party who *had* been trained by PFM. Of these, around half (n = 70) were disputes handled by chiefs who had been trained,[178] while the other half were a variety of people from the village chosen to be mediators, but who were not chiefs (n = 76). Statistical testing showed no significant[179] difference between the responses of those who had disputes dealt with by trained chiefs and trained mediators, therefore these two subgroups were merged to the one 'Trained Third Party' group. Of the disputants, 45 percent were male and 55 percent were female.

[175] Many of the indicators used for this were from the recently developed Hague Model of Measuring Access to Justice project. For more, see M Gramatikov, M Barendrecht, M Laxminarayan, J Ho Verdonschot, L Klaming and C van Zeeland, *A Handbook for Measuring the Costs and Quality of Access to Justice* (2009).
[176] 'Mediator' in this sense does not refer to a professional or trained mediator other than as trained by PFM, and possibly paid a very small amount by the parties. '
[177] For indicators in the third section (c), the results of those who had been a participant in PFM training were compared to those who had not.
[178] This includes 16 cases where respondents noted that they were dealt with by a trained chief *and* mediator.
[179] The term 'significant' is used throughout the paper to mean statistically significant, to either 5% or 1%.

The results are divided into tables: satisfaction and participation in the dispute resolution process; perceptions of objectivity, power and rights in the dispute resolution process; incidence of a resolution or outcome to the dispute; outcome satisfaction and attitudinal change resulting from the community training program.

7.2 Taking part and taking to it to heart: participation and satisfaction

Table 1. Survey findings for users' experience of the dispute resolution process

Survey Statement	Dispute was handled by:		Respondent:	
	Trained 3rd Party	Untrained Chief	Men	Women
	(*n* = 146)	(*n* = 85)	(*n=103)*	(*n* = *128*)
	Percentage of participants who agreed with the statement			
I was encouraged to express my views	98**	65**		
I was satisfied with the mediator/chief	91**	54**		
I participated fully in the process	94**	55**	81*	66*
I was satisfied with the process	97**	61**	89*	79*
My views were considered during the process	89**	55**		
I experienced healing through the process	85**	58**		
The process had a positive impact on my relationships	86*	78*		

* Statistically significant difference at $p < .05$
** Statistically significant difference at $p < .01$
Total sample size: $n = 231$

An examination of the survey and interview data suggests that PFM training made a statistically significant (hereafter, significant) positive difference to the satisfaction of disputants, and led to increased participation by disputants.[180] Table 1 illustrates that over 84 percent of the 146 respondents whose dispute was mediated by a party with PFM training agreed that:

- they were encouraged to express their views;
- they were satisfied with the process;
- they were satisfied with the mediator or chief;
- they participated fully in the process;
- their views were considered during the process; and
- they experienced healing through the process.

Respondents whose mediator did not participate in a PFM training agreed with these statements only 50 to 70 percent of the time (a statistically significant difference at 1 percent; p >.01).[181] There was also a significant difference when this data is disaggregated and analyzed by gender; male respondents were more likely than female respondents to have been satisfied with and have participated in the dispute resolution process.

[180] Most of the survey statements in the section relating to process showed statistically significant (either $p <$ .05, or $p <$ .01) differences between the experience and perceptions of those whose disputes were handled by a third party who was trained by PFM, and those where the third party was not trained. In short, statistical significance at less than 5 percent ($p <$ .05) means that the chance of this result occurring as a coincidence was less than 5 percent. In other words, 5 times out of a hundred this result might happen by chance. Significance at less than 1 percent ($p <$ .01) means that there was less than one in a hundred chance that this happened by coincidence. Statistical significance was tested using an independent sample T-test through the PASW (formerly, SPSS) software programme. Then frequency tables were used to work out the percentages of those who agreed (putting together those who strongly agreed and those who agreed). Means, relating to the 5 point response scale are available with the author.
[181] See footnote 178 for an explanation of this.

An additional interesting finding is the positive effect that training appeared to have on the disputants' relationships. However, the significant difference between the two groups was less than other findings ($p > .05$ rather than $p > .01$) because 78 percent of those with an untrained chief also agreed that the process improved their relationships.

7.3 Taking over and taking the rap: power, bias and rights

Table 2. Survey findings for users' perceptions of the dispute resolution process

Survey Statement	Dispute was handled by: Trained 3rd Party (n = 146)	Dispute was handled by: Untrained Chief (n = 85)	Respondent: Men (n = 103)	Respondent: Women (n = 128)
	Percentage who agreed with statement			
My legal rights were explained to me	75**	52**	72*	62*
I was confused about what my legal rights were	25	21		
The process was objective and unbiased	90**	42**	80*	66*
It was hard to express my perspective because I was not as powerful as the other parties involved	32	39	28*	39*

*Statistically significant difference at $p < .05$
** Statistically significant difference at $p < .01$
Total sample size: $n = 231$

Table 2 illustrates that 75 percent of respondents whose mediator received PFM training and 52 percent of respondents whose mediator did not receive PFM training had their legal rights explained to them.[182] The gender of the disputant also seemed to have an impact on whether their rights would be communicated to them, males were more likely (regardless of whether their mediator was trained or untrained) to have had their legal rights explained to them than females (72 percent and 62 percent respectively).

Anecdotal evidence suggests that, although statutory legal rights relating to gender equality were not part of the PFM training, participants did come away with and retain some knowledge of the rights vested in women by the Papua New Guinea Constitution as well as women's decision-making rights in relation to land and land-related resources:[183] "I learned that women have rights too, for example, to take part in decision making and in government".[184]

Table 2 shows that 90 percent of respondents whose mediator received PFM training agreed with the statement that the dispute resolution process was objective and unbiased, whereas only 42 percent of respondents whose mediator did not receive PFM training agreed with the statement. Again, perceptions of bias were affected by gender: 80 percent of male disputants (regardless of whether their mediator was trained or untrained) agreed with the statement compared to 66 percent of women disputants.

How power dynamics impacted the resolution of disputes was a further topic examined in the survey. Approximately 35 percent of all disputants found it difficult to express their perspective because they felt that they were not as powerful as the other parties involved. Whether the third party had received training or not made no significant difference. However, female disputants overall were significantly more likely than males to find it hard to express their view because of power asymmetries of parties involved (39 percent and 28 percent respectively). This finding was supported by interviews with

[182] When the issue was framed negatively to check for positivity bias, stating 'I was confused about what my legal rights were', around a quarter of all disputants agreed, with no significant difference between trained and untrained.
[183] Interview with D Bebeus, trained chief (Atamo, 8 May 2010). Because of the matrilineal system in Bougainville, this is not quite as significant as it may seem.
[184] Interview with L Tamoi, mediator and youth leader (Atamo, 8 May 2010).

trained mediators and untrained chiefs, most of whom had very little awareness or understanding of how power asymmetries impact dispute resolution, nor practical techniques to ameliorate such imbalances within the context of a dispute.

For all of the process-related survey statements, no statistical correlation was found between training and gender, that is, the intervention did not improve, or make worse the gap between male and females' perceptions of the dispute resolution process.[185] In other words, the PFM training improved both female and male satisfaction levels overall, but in those areas that there were differences in the responses of males and females overall, the impact of training on that gender *gap* was neutral.

7.4 Taking one's chances: incidence of outcomes

Figure 1. Survey findings for the effect of training and gender on receiving an outcome

		Outcome	No outcome	Total
Trained Third Party		110 (80%)	27 (20%)	137 (100%)
Untrained Chief		45 (58%)	33 (42%)	78 (100%)
		155 (72%)	60 (28%)	**215** (100%)

		Outcome	No outcome	Total
Women		77 (62%)	47 (38%)	124 (100%)
Men		84 (81%)	20 (19%)	104 (100%)
		161 (71%)	67 (29%)	**228** (100%)

The second part of the survey focused on the satisfaction of disputants in relation to outcomes resolved. Figure 1 demonstrates that disputants whose mediator participated in PFM training were more likely to obtain an outcome than those whose mediator did not (80 percent and 58 percent respectively). Once again, overall males fared better than females (whether their mediator received training or not); 81 percent of males obtained an outcome to their dispute whereas only 62 percent of females obtained an outcome.[186]

[185] This conclusion was reached by conducting a One Way ANOVA (analysis of variants) test for each of the results where there was a significant gender difference to test whether there was any correlation with third party training. No statistically significant correlation was found for any of the statements.

[186] This finding is borne out by the interviews with several women disputants who said that, from their perspective, there had not been an outcome to their cases. Some problems concerned chiefs not considering their case worth taking; chiefs coming up with a decision that they felt was unfair, and the inability to appeal beyond this. Interview with survey participant, disputant (Hako, 19 May 2010); interview with survey participant, disputant (Bovo Valley, 14 May 2010).

7.5 Taking them to the cleaners: outcome satisfaction

Table 3. Survey findings for users' perception of the dispute resolution process

Survey Statement	Dispute was handled by:		Respondent:	
	Trained Chief or Mediator (n = 146)	Untrained Chief (n = 85)	Men (n=103)	Women (n=128)
	Percentage who agreed with the statement			
The outcome restored community harmony.	86**	76**		
The needs of the community were considered in the outcome.	75*	67*		
My individual needs were considered in the outcome.	69**	49**		
The outcome enabled me to move forward with my life.	88**	64**	86*	73*
The outcome restored my emotional harmony.	88**	59**	85**	70**
I received an explanation for the outcome.	84**	52**	82**	64**
I was satisfied with the outcome.	85**	60**	86**	68**

*Statistically significant difference at $p < .05$
** Statistically significant difference at $p < .01$
Total sample size: $n = 231$

As set out in Table 3, 86 percent of respondents whose mediator received PFM training agreed with the statement 'the outcome restored community harmony', compared to 76 percent of respondents whose mediator did not received PFM training.[187] Interestingly, however, PFM training seemed to make it significantly more likely (p < .05) that community needs were considered in obtaining an outcome to a dispute: 75 percent of disputants whose mediator received PFM training agreed with the statement 'the needs of the community were considered in the outcome', whereas 67 percent respondents whose mediator did not receive PFM training agreed with the statement. The lowest levels of agreement were in relation to whether individual needs were a material consideration in the outcome; respondents whose mediator was PFM trained were more likely to feel that their individual needs were considered in the dispute resolution (69 percent), compared to 49 percent of respondents whose mediator was not PFM trained.

In relation to overall satisfaction with the outcome and its restorative aspects, PFM training did seem to have a significant positive impact (p > 0.01). Between 84 and 89 percent of disputant whose mediator was PFM trained agreed that

- the outcome restored their emotional harm;
- they received an explanation for the outcome;
- the outcome enabled them to move forward with their lives; and
- they were generally satisfied with the outcome.

For disputants whose mediator was not PFM trained, the results for these four statements were all between 52 percent and 64 percent. For those with a trained mediator, the results were significantly higher (between 84 and 88 percent).
Females were significantly less likely than males (p > 0.01) to agree with these statements, showing that they were less satisfied with the outcome and the impact it had on them. As with the process-related results, the intervention was found to have a

[187] Overall, for those with trained third parties, the satisfaction levels in relation to outcome were somewhat lower than those previously canvassed in relation to the process. The average for the positively worded questions in Table 1 was 89 percent for those with trained third parties. In Table 2 it is 79 percent. For those with an untrained chief, levels hold steady at 58 percent for both process and outcome related statements.

neutral affect on the *gap* between how males and females perceived the dispute resolution outcome.[188]

7.6 Taking it to the people: the community training programme

The final element of the survey sought to compare the attitudes of respondents who had participated in the PFM community training (*n* = 178) relating to dispute resolution, compared to responded who had not (*n* = 216).

Table 4. Community training and attitudes

Survey Statement	Community training (*n* = 178)	No community training (*n* = 216)	Total (*n*=394)
	Percentage who agreed with statement		
Men and women should have equal opportunities to participate in dispute resolution	98**	76**	85
It is important for women to participate in dispute resolution	92**	73**	81
The role of dispute resolution is reserved for the village chiefs	18**	32**	25
Domestic violence is a private issue	22**	53**	39

* Statistically significant difference at $p < 0.05$
** Statistically significant difference at $p < 0.01$

Respondents who had participated in the PFM training had extremely high levels of agreement with the statements 'men and women should have equal opportunities to participate in dispute resolution' and 'it is important for women to participate in dispute resolution' (98 percent and 92 percent respectively), when compared to respondents who did not benefit from the PFM training (76 percent and 72 percent respectively).

Anecdotal evidence collected through interviews revealed that the community training had dramatically changed the way some men thought about women. One community chief stated that he realized he had been "using his wife as a slave," but that the training had helped him to realize that women play a major role in the household and community, that they also have rights and are important, and that they have the power to accomplish things.[189] Others came to realize that they should listen more to women's perspectives and opinions and that men often quash women's rights.[190]

Fifty-three percent of respondents who did not participate in the PFM training (*n* = 114) felt that domestic violence was a private issue, compared to 22 percent of trained respondents. Similarly, while only 18 percent of trained respondents believed that dispute resolution was in the exclusive domain of community chiefs, one-third of untrained respondents believed this to be true.

8. Mediating change: discussion and analysis

A key challenge identified earlier in this chapter was how to advance legal empowerment and promote reform in a way that is locally legitimate and retains the strengths of the

[188] See footnote 53 for an explanation of how this conclusion was reached.
[189] Interview with D Bebeus, trained chief (Atamo, 8 May 2010). It made others aware of aspects of gender discrimination, for example, that often women "get landed with a lot of work - lots more than men" and that women are frequently abused and exploited by men in Bougainville. Interview with L Tonoi, mediator and youth leader (Atamo, 8 May 2010).
[190] Interview with B Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010). One youth leader said that he learnt about "gender balance; that women and men should work together to try to restore this life in Bougainville." Interview with L Tonoi, mediator and youth leader (Atamo, 8 May 2010).

customary justice system. The contested, dynamic and flexible nature of culture and customary justice systems present challenges for access to justice, but also offers potential for legal empowerment and reform. This potential can be harnessed by nuanced and pragmatic interventions that hold a profound understanding of the local context. Such interventions would be cognisant that any process advancing legal empowerment and rights recognition must be locally driven and owned. The 'local' will always be most powerful in influencing the interpretation and application of law, as well as in moulding values. One approach is to facilitate dialogue between all sectors of society, stimulated by new information but drawing on local values and other accepted legal sources. This type of engagement can develop cultural legitimacy around challenging ideas of inclusive process, gender equality and rights. A complementary strategy is to provide conflict resolution training and leadership opportunities to not only recognized customary authorities but also to marginalized groups. This will empower the latter to challenge the dominant, and sometimes discriminatory, interpretation and application of customary norms.

PFM's provision of conflict resolution training – congruent with local cultural philosophies but delivered in a way that facilitated dialogue around human rights principles – is an apt intervention to test what elements of legal empowerment and reform are likely to result from this kind of engagement. The research presented in this chapter was designed to test the impact of the PFM intervention for legal empowerment of men and women, particularly in relation to participation and satisfaction in dispute resolution; awareness and protection of legal rights; mitigation against power asymmetries; operation of neutrality and bias; balance of individual and community rights; and influence of women in dispute resolution decision-making.

Three key findings from this research provide insight into strategies for engagement with customary justice systems in Melanesia, the Asia-Pacific region, and more broadly in the developing world. First, two fundamental components of legal empowerment are participation and substantive legal rights. By focusing on the former while largely neglecting the latter, the PFM intervention failed to enhance legal empowerment to the extent it might otherwise have done. This failure was augmented by a lack of understanding or willingness to address power asymmetries by mediators and misunderstandings about 'neutrality'. Second, PFM's approach succeeded in retaining strong local legitimacy and ownership, partly through maintaining positive elements of the system such as cultural, economic and geographic accessibility. PFM-trained mediators also managed, at least in the eyes of disputants, to retain the focus on restoring community harmony while at the same time advancing legal empowerment by balancing this factor with the needs of the individual. Third, in terms of women's legal empowerment, survey results showed that the PFM intervention improved female disputants' experience of dispute resolution in almost every area, but had a neutral effect on the gender gap between the experiences of men and women. However, where real change is happening is with the female trained mediators, who are addressing issues such as domestic violence and rape in alternative, more empowering ways than their male counterparts.

8.1 Sending the 'rights' message: participation alone is not enough

To advance legal empowerment and reform for users of customary justice systems, two elements are essential. First, meaningful participation and second, the capacity to assert or uphold substantive legal rights. The former relates to procedure and process, while the latter relates to the outcome of the dispute.

Meaningful participation is a first step to empowerment, particularly for marginalized and vulnerable groups. The inability to respectfully share perspectives, views and experiences goes to the heart of the exclusion that determines marginalization. Meaningful participation is also a significant contributor to overall satisfaction with dispute

resolution. Empirical research has shown that fairness is often perceived in terms of procedure and participation, rather than outcome.[191]

The survey results indicate that PFM training greatly improved the participation of users. They felt that they participated fully in the process: they were encouraged to express their views and believed that their views were considered. Together, these factors probably contributed to the significantly higher levels of satisfaction from disputants with a trained third party.[192] This finding was supported by interviews with trained chiefs and mediators, most of whom stated that they consulted all concerned parties to the dispute and encouraged them to provide their own version of events and how it affected them.[193]

But increased participation and emphasis on procedure alone is not enough. Legal empowerment will not be advanced where there is little understanding of substantive rights and an inability to uphold them. In an environment where the emphasis is on community harmony, increased participation is only part of achieving empowerment. The PFM intervention failed to have the impact it could have because of three main considerations: i) it did not focus on substantive rights; ii) power asymmetries were not addressed; and iii) its training on bias and neutrality was interpreted in such as way that resulted in minimal normative or legal boundaries. Together, these factors mean that in some cases, including those relating to gender-based violence, vulnerable parties continue to be pressured into outcomes that are unjust, unsafe and counter to human rights.[194]

8.2 Taking apart taking part

PFM unabashedly focused on improving dispute resolution processes, particularly in relation to mediation and restorative justice. In their view, conflict is to be dealt with by mediators and chiefs "not in the way of a judge but as a person who assists the two conflicting parties to come to a decision that suits them both."[195] Substantive rights were only minimally addressed in the training. This is reflected in the survey results. Although these showed that PFM-trained mediators were more likely to explain legal rights to disputants, the incidence of this was still relatively low compared to other topics. Further, trained mediators and chiefs were likely to only discuss procedural rather than substantive rights, for example, the rights of both men and women to participate in public meetings, raise grievances, and express their views about community issues.[196]

In a context of generalized gender discrimination the power asymmetries, negotiated settlements and minimal recognition of legal rights present particular risks for female disputants. One woman who received PFM training many years ago said that this gave her increased awareness of her right not accept domestic violence and also gave her the confidence to approach local chiefs for a resolution. They told her that it was partly her fault and refused to deal with the matter. She then went to the village mediators who heard both parties but were unable to come to a solution and did not suggest further action. She and her children still suffer from domestic violence.[197]

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[191] L Klaming and I Giesen, *Access to Justice: The Quality of the Procedure*, TISCO Working Paper Series on Civil Law and Conflict Resolution Systems (2008).
[192] This was not statistically tested so is only speculation.
[193] Interview with D Bebeus, trained chief (Atamo, 8 May 2010); Interview with J Loloala, mediator (Polamato, 10 May 2010); Interview with A Sapur, mediator and village court magistrate (Hako, 19 May 2010).
[194] Rita Naviti, a former registrar of the Supreme Court of Vanuatu, has noted that the use of traditional restorative justice in conflicts where there are power imbalances between the individuals can be unwise, particularly in the male dominated societies of Melanesia (R Naviti, 'Restorative Justice and Women in Vanuatu' in S Dinnen, A Jowitt and T Newton Cain (eds), *A Kind of Mending: Restorative Justice in the Pacific* (2003) 95).
[195] Peace Foundation Melanesia (PFM) pamphlet (2005) 2.
[196] Interview with D Bebeus, trained chief (Atamo, 8 May 2010); Interview with J Loloala, mediator (Polamato, 10 May 2010); Interview with L Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with B Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010).
[197] Interview with survey participant (Bovo Valley, 14 May 2010). Toward the end of the interview the woman said "Most of the time I feel like I have no strength at all ... What can I do?"

8.3 More power to whom?

The second consideration PFM did not adequately address is how various kinds of power asymmetries affect the capacity of disputants to assert their opinions, let alone their legal rights. An important element of empowerment is an increased understanding and awareness of power relations. However, despite some training on different types of power, only a handful of male mediators or chiefs appeared to be aware of possible power imbalances in their disputes, whether these were between victims of violence and offenders, males and females, the community and individuals, or chiefs and those of lesser status.[198] This is reflected in the survey results: over a third of all disputants said that they found it difficult to express their perspective because they were not as powerful as other parties involved. For women, this rose to 40 percent.

Thus, even though it is more likely that a disputant with a PFM-trained mediator will participate more fully, and although decisions are supposedly consensual, disputants are often under significant pressure to agree to what is broadly understood to be fair and equitable.[199] Such understandings often favour of more powerful parties, leaving less powerful parties vulnerable to having their legitimate complaints ignored and being pressured or "consensused" into accepting solutions they find unsatisfactory.[200] This is most concerning when numerous power asymmetries are at play, for instance, in cases of gender-based violence. However, encouragingly, female mediators demonstrated an awareness of power dynamics, especially with regard to cases of domestic violence and rape.[201]

8.4 Objectionable objectivity

The third consideration in this discussion on participation and rights is (mis)conceptions of objectivity. In an effort to mitigate against chiefs judging with bias and prejudice, PFM training strongly emphasized the importance of neutrality and objectivity. This is reflected positively in the survey results: trained mediators were significantly more likely to be perceived as objective and fair. This finding was supported by interviews with trained mediators and chiefs who emphasized that this was a feature of their decision-making.[202] While at first glance this appears positive, interviews revealed that there is widespread misunderstanding among mediators about the meaning of 'neutrality'.[203] It seems that many interpret the term as not incorporating any normative or legal boundaries within which substantive outcomes and solutions must fall. Instead, these are yielded to the goal of reaching 'mutually acceptable' solutions.

While this approach may be legitimate for some cases, for many it is not. This was demonstrated most pertinently in a rape case, where the victim was forced by her family to marry the rapist. The mediation team dealing with the case felt that they could not condemn this outcome, because they had to be 'neutral' and allow the parties to decide as they wished, as long as both sides agreed.[204]

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[198] Interview with L Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with B Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010).
[199] World Bank Indonesia, *Local, Not Traditional Justice: The Case for Change in Non-State Justice in Indonesia*, Justice for the Poor Program (2006).
[200] World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 44.
[201] Interview with T Mano, mediator (Arawa, 12 May 2010); Interview with A Sapur, mediator and village court magistrate (Hako, 19 May 2010); Interview with B Kovo, mediator (Arawa, 12 May 2010).
[202] Interview with M Lusman, PFM trainer and mediator (Wakunai, 7 May 2010); Interview with B Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010). B Harekin recommends that mediators bring in an independent mediator from a third clan in disputes where one side is from their clan and the other is not.
[203] For example, in a case of domestic violence described by a mediator, the tension held was expressed like this: "Sometimes we tell them to stop, but for us, as a mediator, we cannot tell a person his mistake, we have to beat around the bush." Interview with L Tamoi, mediator and youth leader, (Atamo, 8 May 2010).
[204] Interview with three members of the Siwai Peace Committee, (Arawa, 11 May 2010).

One way of addressing this weakness could be to incorporate substantive legal training for mediators. Some form of accountability mechanism for mediators and the outcomes they reach is also critical. A further way of increasing accountability and legal empowerment would be the addition of substantive legal rights training for the community. Interviews showed that community-level awareness of legal rights was very low, but that the desire for increased knowledge about rights was strong.[205]
Increased participation in dispute resolution and recognition of some procedural rights are important steps towards legal empowerment. However, in a context of widespread inequalities and various power asymmetries – most notably in relation to gender – these are simply not enough. To advance legal empowerment, especially for the marginalized, users need to have the awareness and capacity to assert both procedural and substantive legal rights. Further, mediators and chiefs must clearly appreciate the need to uphold certain normative and legal boundaries in their dispute resolution and refer certain cases onto the formal system.

9. Doing it 'the Bougainville way'

Part of the challenge identified is the advancement of legal empowerment and reform. This section focuses on methods of achieving these goals in a way that is locally legitimate and preserves the strengths of customary justice.

It is reasonably clear that the PFM intervention holds strong local legitimacy. Interviews showed that the process and training was locally owned and considered to be helping to strengthen 'the Bougainville way' of resolving disputes.[206] One can surmise that this is due to a number of factors. First, the NGO was invited by the interim Bougainville Government due to its longstanding reputation for work in Papua New Guinea. This pattern has continued; PFM only undertakes training in villages where it is invited. Second, the 'outsider' presence has always been minimal. Bougainville staff were employed without delay to be 'trainers of trainers' and then as district and regional coordinators. Accordingly, the initiative is considered locally to be owned and driven by Bougainvilleans. Finally, the training methodology drew on sources that were locally recognizable and accepted, including customary values and context-specific examples and solutions. Local discussion was facilitated around potentially challenging concepts such as gender equity, power sharing and human rights, but in way that meant they could be woven into the existing fabric of culture and customary law.

The PFM intervention was also able to preserve other strengths of the customary system. Geographic and economic accessibility are those particularly relevant to access to justice for the poor. By providing training in numerous isolated areas, the dispute resolution forum is decidedly more accessible than the single urban Court. The relative flexibility of mediation and training means the forum is also more accessible in terms of time, convenience and cost. Further, during the conflict, there were significant security risks in travelling to the formal court on the other end of the island during the few periods that it was operational.

Another important characteristic of the customary justice system in Melanesia is the emphasis on restoration of community harmony and relationships. This philosophical underpinning is a strength in close-knit and highly interdependent societies as well as in environments recovering from civil conflict. However, an unchecked emphasis on social harmony becomes dangerous when the perspective and needs of marginalized users and victims are regarded as secondary or even overlooked.

[205] Interview with D Bebeus, trained chief (Atamo, 8 May 2010); Interview with A Sapur, mediator and village court magistrate (Hako, 19 May 2010).
[206] Interview with B Kova, women's leader (Arawa, 12 May 2010).

Survey results show that the PFM training neither detracted from the positive reconciliatory effect of the dispute resolution process on users' relationships, nor from the consideration of community harmony (Tables 1 and 3). At the same time the users' survey showed that trained mediators and chiefs were significantly more likely to take into consideration individual needs in relation to the outcome. This suggests that trained mediators and chiefs are more likely than their untrained counterparts to balance community with individual needs.

These results demonstrate an important lesson learned: reforms that increase access to justice for marginalized members can be facilitated in a way that is locally legitimate. Advancement to legal empowerment can also occur without dislodging positive elements of customary non-state justice such as cultural, geographical and economic accessibility, and importantly, community harmony and the restoration of relationships.

9.1 Propping up or prodding forward the system? Women in mediation and as mediators

Despite the challenges marginalized groups such as women and youths face accessing justice through customary justice systems, previous research in Melanesia has shown that they largely support these fora, even if they feel that some aspects should change to be fairer toward them.[207] This was supported by interviews with women in Bougainville. Indeed, many are proud of *kastom*.[208] However, they also maintain that a re-examination of norms and processes is required to address the problems women face when trying to access justice through the customary system.[209]

This research led to three main conclusions specific to the legal empowerment of women. First, there is a gap between the perceptions of men and women of dispute resolution and the PFM intervention had a neutral effect on this gender gap. Second, some gains were made by PFM in changing attitudes towards women's involvement in dispute resolution. Third, real changes were made by having female mediators. Each of these conclusions are discussed below.

9.2 Failing to bridge the gender gap

First, the user survey results showed a number of areas where women responded significantly less positively than men regarding the dispute resolution process (whether or not the mediator or chief had been trained). This indicates a gender gap in the satisfaction of customary dispute resolution processes.

The majority of questions relating to participation and process-satisfaction showed no significant gender difference. However, three of the four statements regarding legal rights, bias and power indicated that men had a significantly better experience of the dispute resolution process in these areas. Results related to outcome disclosed the most significant differences. Women were far less likely to receive an outcome than men. Further, they were significantly less likely to be satisfied with the outcome or to receive an explanation for it. They were also [significantly] less likely to believe that the outcome restored their emotional harm or helped them to move forward with their lives.

Gender gaps were less evident in relation to participation. However, where other considerations come into play – such as bias, power asymmetries, and recognition of substantive legal rights, the gap widens. As these dynamics play out in the dispute

[207] M Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); for the Solomon Islands: Merry, above n 111; and Interview with J Kauona, President, Bougainville Women for Peace and Freedom (Arawa, 12 May 2010).
[208] The Melanesian pidgin word for customary law.
[209] Interview with H Hakena, Executive Director, Leitana Nehan Women's Development Agency (Buka, 3 May 2010); Interview with J Kauona, Director, Bougainville Women for Peace and Freedom (Arawa, 12 May 2010); and T Havini, Hako Women's Collective (Buka, 3 May 2010).

resolution process, it is not surprising that the most significant differences were found in relation to the actual resolution (or lack thereof) of the dispute.

Turning to the impact of the PFM training, results showed that it improved responses of both men and women disputants on almost every indicator regarding access to justice. However, the effect of the intervention on the gender *gap* remained neutral. Critically, through its focus on participation and process, the intervention failed to reduce the widest gender gap, which relates to the resolution and outcome for women. Vulnerable women may thus be left similarly unprotected and disadvantaged following the intervention.

9.3 Inconsistent and incremental

The second finding in relation to women's legal empowerment is that PFM training had a positive impact on people's attitudes relating to gender, but mediators' practice is less consistent. The survey results show that respondents who had benefited from PFM training were significantly more likely (regardless of gender) to agree that men and women should have equal opportunities to participate in dispute resolution. Further, they felt that it is important for women to participate in dispute resolution. This supports the findings in section one which show that the result of training was not just an attitudinal one but one that translated into the increased participation by both women and men.

The gender-based violence issues discussed in the training also seem to have made a favourable impact on attitudes. Those who had been trained were significantly more likely to *dis*agree that domestic violence is a private issue. Interviews supported these results; trained mediators were more likely than untrained chiefs to recognize domestic violence as an issue to be addressed. However, the interviews also illustrated that in practice, there was an inconsistent approach by mediators to cases involving domestic violence and rape. Some changes were promising, for example, the reporting of cases of rape to the formal system and involvement of community police. Other approaches were very concerning, for example, pressuring a victim of domestic violence to go back to her husband and allowing the parents of rape victims to be the sole arbiter of the outcome.

The lesson learned is that while there have been some improvements in attitudes towards women's involvement in dispute resolution and increased recognition of the need to address domestic violence, changes in practice are slow and inconsistent. On the one hand this is very concerning for the women involved. On the other hand it must be acknowledged that these issues, in any culture or circumstance, are not prone to quick fixes. The nature of such change is incremental, contested, and likely to be resisted. One recommendation however, as mentioned earlier, is to incorporate accountability measures on the mediators and their outcomes, which may lead to more consistent outcomes and sustainable improvements.

9.4 Mediating change

The third finding in relation to women's legal empowerment is that real change began to occur with the installation of female mediators. Both men and women were trained in mediation skills. While there were not as many women trained as originally hoped for, a number did go on to act as mediators.[210]

The establishment of women in decision-making and dispute resolution roles is a legal empowerment outcome in and of itself, but it also contributes to the access to justice of

[210] While PFM did not reach their target of 50 percent women participants, estimates are that around one-third were women. Interview with P Howley, former Director of Bougainville Peace Foundation Melanesia (telephone interview, 10 February 2010). The training helped some women in other dispute resolution and leadership capacities. For instance, a group of women in Atamo got together after the training and banned jungle juice (home-brewed strong alcoholic drink) from their villages because of the violence and crime it was causing. Interview with L Tamoi, mediator and youth leader (Atamo, 8 May 2010);

female users. Interviews revealed that the female mediators are dealing with issues relating to gender, and particularly gender-based violence, in a different and more empowering way than most male mediators and chiefs.

The alternative approaches that female mediators are using show that they are operating in ways that address some of the areas of weakness previously identified. The female mediators interviewed seemed more likely to recognize substantive legal rights, especially in relation to violence against women, and had little hesitation drawing normative and legal boundaries in regard to acceptable decision-making by parties involved.[211] They were also more inclined to refer cases onto the formal system where they thought they could not guarantee an equitable solution.

In cases of domestic violence the female mediators had several approaches that differed from their male counterparts. A common tactic was to threaten the perpetrator with action in the formal court system if the violence did not stop. They would simultaneously inform the victim of her right to take the case to the formal court and explain how she could do so. They also made sure that women knew they had the option of leaving the situation. Some would also refer women onto an NGO that supports victims of domestic violence.

Female mediators also had a greater awareness of gender-based power imbalances than their male counterparts. Their responses included referring the case onto the court system if they felt that they could not manage the imbalance; providing trauma counselling for female victims of violence or abuse; being gentle and inclusive of such victims; and only having the parties in the same place if the victim was comfortable with this.

It seems clear that female mediators slowly but successfully challenged the interpretation and application of customary legal norms and processes in a way that helped facilitate legal empowerment outcomes for women. Interestingly, these women appear to be largely accepted and supported by the trained male mediators and chiefs, who expressed a desire for more female mediators.[212] This acceptance is surprising. It has been previous experience that any moves to displace traditional chiefs, and more generally to upset male domination of the interpretation and application of custom, are strongly resisted. However, two factors are tentatively posited by way of explanation for the lack of resistance in this case.[213]

The PFM training engaged with all sectors of society, including both men and women, together in a respectful environment. This methodology seemed to help facilitate an attitudinal change toward the contribution and roles of women, and ultimately an acceptance of women as mediators. The lesson learned is that by engaging rather than alienating the dominant groups – not just men, but chiefs – it is more likely that recognition and protection of women's rights will be widespread and sustainable, rather than being viewed as a threat.

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[211] The examples in this section are taken from interviews with the following: A Sapur, mediator and village court magistrate (Hako, 19 May 2010); T Mano, mediator (Arawa, 12 May 2010); Interview with B Kovo, mediator (Arawa, 12 May 2010); Interview with survey participant, disputant (Hako, 19 May 2010).

[212] Interview with B Kovo, women's leader (Arawa, 12 May 2010); Interview with T Mano, mediator (Arawa, 12 May 2010); Interview with A Sapur, mediator and village court magistrate (Hako, 19 May 2010); Interview with Bruno, trainer and mediator (Bovo Valley); Interview with L Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with J Kolala, mediator (Polamato, 10 May 2010); Interview with C Vave, mediator (Wakunai, 7 May 2010); Interview with M Lusman, mediator (Wakunai, 7 May 2010). The process of change is slow however, with the female mediators admitting that sometimes men do not respect them as much. They do not talk to them as much, and overlook them as a mediation option in their area. Interview with A Sapur, mediator and village court magistrate (Hako, 19 May 2010).

[213] A third contextual factor is that most Bougainville is matrilineal. However, due to the lack of research of this issue, it is unclear to what extent and how this changes dynamics.

The other factor is a contextual one but is applicable elsewhere. The circumstances of Bougainville – the impact of colonization, copper mining and civil conflict – were such that the traditional power structures were already uncertain and in upheaval. When PFM began work, chiefs did not enjoy a [or: their traditionally] strong power base. It is likely that this contributed significantly to them being supportive, or at least open, to women and other community members joining the ranks of decision-makers and leaders. This state of uncertain power dynamics may also be present elsewhere during transitional periods, providing opportunities and space for legal empowerment.

In summary, what then has been in the overall effect of the PFM intervention for women's legal empowerment? The intervention has, to an extent, advanced women's legal empowerment. The survey clearly showed a gender divide in the experiences and satisfaction of dispute resolution. Women were less satisfied in relation to a number of material aspects of the process, but primarily in relation to the end result, or lack thereof, of their search for justice. However, the impact of the PFM training for mediators had an undoubtedly favourable effect for women on almost every tested indicator. What did not change, however, was the gap between men and women's experiences. Similarly, the attitudinal survey showed that those who had been through training were more receptive to women participating in dispute resolution and to recognizing domestic violence as an issue to be addressed. On balance, so did the trained mediators. However, there remain vast inconsistencies and concerns with the approaches to gender-based violence by some trained mediators and chiefs.

Thus, it is clear that the PFM intervention has contributed to certain advancements in women's legal empowerment. However, had additional focus been placed on recognizing and protecting substantive legal rights as opposed to concentrating only on supposed 'win-win' solutions in a context of generalized gender discrimination and power asymmetries it is likely that legal empowerment outcomes for women would have been significantly better. It is acknowledged that building this kind of knowledge and capacity would have involved a significantly larger and broader project. Whether it was in recognition of this or otherwise, where the greatest gains were made – in a comparatively quick and effective way – was the facilitation of women mediators. This is perhaps the most potent way that the PFM intervention empowered women because it facilitated a challenging the dominant interpretation and application of customary norms and processes.

9.5 Conclusion

Fundamental characteristics of many customary justice systems, including those in Melanesia, are dynamism, flexibility and emphasis on community harmony. These can present challenges for people accessing justice through these fora, especially marginalized or vulnerable groups. In an environment of generalized gender bias, these attributes give rise to particular difficulties for women, as exemplified in cases of gender-based violence.

However, the fluidity of the customary system can operate both negatively and positively. While it is often presented as an entry point for discrimination and abuse, it also makes customary systems capable of reform. The contested, dynamic and flexible nature of culture and custom means that actors can re-examine rather than reject customary justice systems, and distinguish between aspects of custom that are discriminatory and those that are not. Nuanced and pragmatic interventions can accelerate this process in a way that empowers marginalized groups such as women, through the injection of new ideas, skills and knowledge.

PFM's provision of conflict resolution training in Bougainville is an apt intervention to determine what elements of legal empowerment are likely to result from this kind of engagement. The PFM intervention facilitated internal dialogue between all sectors of

society through the methodology of their mediation and restorative justice training. The training provided new skills and knowledge but drew on local values, context-specific examples and other locally accepted legal sources such as the national constitution to develop cultural legitimacy. It did this to facilitate the discussion of challenging ideas around inclusive process, gender equality, and rights in a way that meant that they could be weaved into the existing cultural and customary law fabric. This approach acknowledged that any change process facilitated by an intervention must be seen to be culturally valid and hold local legitimacy. PFM's approach successfully achieved this.

The PFM intervention also succeeded in preserving other strengths of the customary justice system relevant for access to justice for the poor, namely economic and geographic accessibility. PFM-trained mediators similarly managed, at least in the eyes of disputants, to preserve the customary focus on restoring community harmony. They did this while at the same time advancing legal empowerment by taking into consideration the needs of the individual; a balancing exercise the untrained mediators were less inclined to conduct.

The extent of these empowerment outcomes and reforms was mixed however. In relation to process and participation the intervention was largely successful. The training focus on process-related skills such as mediation, facilitation and communication greatly improved the participation and satisfaction of male and female users in a variety of areas. Training also bought favorable attitudinal changes towards women's participation in dispute resolution. Increased participation in dispute resolution and recognition of some procedural rights are important steps towards legal empowerment.

However, in a context of inequality and power asymmetry – most notably in relation to gender – this was not enough. To advance legal empowerment, users need to have increased capacity to assert not only procedural but substantive legal rights. This must be accompanied by a clear appreciation by mediators and chiefs of the need to uphold certain normative and legal boundaries in their dispute resolution and refer certain cases onto the formal system.

It was here that the PFM intervention fell down. They did not touch on substantive legal rights, failed to address power asymmetries within disputes, and their training around neutrality was interpreted as having few normative or legal boundaries. Consequently, in some cases vulnerable parties continue to be pressured into outcomes that are unjust, unsafe and counter to human rights. In relation to women's legal empowerment, while the intervention improved women disputants' experience of dispute resolution in almost every area, it had a neutral effect on the gender gap. This is particularly concerning given that the largest gender gap was in relation to those areas mentioned above – legal rights, power and bias – as well the final outcome of the dispute. Further, mediator practice showed some improvements in the protection of rights (as compared to untrained chiefs) but many inconsistencies. This was especially concerning in relation to cases of gender-based violence.

Where real legal empowerment and reform was initiated by the PFM intervention was through its provision of conflict resolution training and leadership opportunities for women. PFM did not fall into the trap of dealing solely with recognized chiefs, however, nor did it ignore or alienate them. The PFM training methodology brought both marginalized groups, such as women and youth, together to discuss ideas and practice dispute resolution mediation on the same footing as chiefs. This meant that the latter were engaged in the process of change, and the former were empowered to challenge, albeit slowly, dominant, and sometimes discriminatory interpretations and applications of customary norms.

The PFM intervention has demonstrated the challenges and potential of one kind of approach towards reforming customary justice systems. The intervention was locally

owned and driven; it engaged with the local politics of culture, change and contestation and with dominant actors, while at the same time trying to empower the marginalized and vulnerable. This kind of intervention, it is shown, can produce progressive change toward legal empowerment. It is of an incremental, at times inconsistent nature, but it seems likely that it will also be long lasting. The kind of broad and deep issues that the legal empowerment endeavours to deal with are not prone to quick or simple fixes. We can but learn from each attempt, remaining flexible and reflexive in our approach.