

# How Do Local-Level Legal Institutions Promote Development?

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## Abstract

This paper develops a framework and some hypotheses regarding the impact of local-level, informal legal institutions on three economic outcomes: aggregate growth, inequality, and human capabilities. It presents a set of stylized differences between formal and informal legal justice systems, identifies the pathways through which formal systems promote economic outcomes, reflects on what the stylized differences mean for the potential impact of informal legal institutions on economic outcomes, and looks at extant case studies to examine the plausibility of the arguments presented.

The paper concludes that local-level, informal legal institutions can support social substitutes for the enforcement of contracts, although these substitutes tend to be limited in range and scale; they are flexible and could conceivably be adapted to serve the interests of the poor and marginalized if supportive organizational and social resources could be brought to support the legal claims of the disempowered; and they are more likely to support personal integrity rights than the positive liberties that are also constitutive of development as freedom.

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## How do local-level legal institutions promote development? <sup>1</sup>

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The pathways through which the rule of law, legal and judicial institutions, and formalized dispute resolution can promote economic growth and development are, though empirically contested, at least theoretically clear. Many have argued, for instance, that stable and predictable rules increase the long-term returns to savings and investment, that crime and insecurity keep vulnerable individuals and groups in positions of dependence and poverty, and that adjudication processes (and their shadow) affect the distribution of resources.

Many people in the developing world, however, live in rural or peri-urban areas where formal state institutions, including courts and the legal system, have little authority. To resolve disputes and clarify ambiguities in social rules, they typically do not rely on the state-sanctioned system of law and justice, at least not primarily, but rather on a heterogeneous set of clan leaders, village elders, official or semi-official councils, tribal chiefs, formally elected or appointed village heads, religious and spiritual leaders, and similar individuals who are collectively thought to maintain and dispense “customary” or “informal” justice. Do these informal, local-level legal institutions promote development in the same manner as formal legal and judicial institutions? Are the mechanisms the same? Are the social and political conditions and organizations needed to support formal and informal rule of law institutions similar? This essay aims to develop and set theoretical expectations for the relationship between local-level legal institutions and economic outcomes.

The first section below presents a stylized account of the differences between formal and informal legal institutions in developing economies. The succeeding sections describe the ways in which formal legal institutions are believed to promote three important economic outcomes, and then, using the key differences between formal and informal legal institutions identified in the first section, examine whether local-level legal institutions could perform similar functions.

The three sets of economic outcomes examined are aggregate growth, the reduction of poverty and inequality, and the development of basic human capabilities. Each of the three sections uses cases from the informal legal system of Indonesia to illustrate the differences between formal and informal legal systems, and to demonstrate the plausibility of the points made. The illustrative cases are largely taken from a recent study of non-state justice institutions in Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (World Bank 2008).

A few caveats. This paper distinguishes local-level legal institutions from local political and social authority. It attempts to isolate informal dispute resolution at the local-level and to assess the ways in which it advances and hinders development objectives. In reality, however, local-level legal institutions are interwoven with (and sometimes identical to) local political authority, which by definition is crucial for social order. It would not be difficult to show that in the absence of social order altogether few economic objectives can be obtained; rather, this article makes the somewhat stylized distinction between the legal and socio-political functions of local authorities, and focuses on the former. Second, and related, the paper emphasizes the economic effects of local-level legal institutions. Although they perform other crucial functions in many places, such as absorbing complaints and preventing low-level conflicts from escalating into mob or collective violence, and although security obviously facilitates economic activities, the focus here is for the most part on the direct economic effects.

Third, it has been noted repeatedly that, in every society, informal institutions, organizations, and norms are as important for the promotion of economic activities as courts and other legal and quasi-legal institutions. Examples include stable trade relationships constructed on the basis of kinship or ethnic affinities, norms of reciprocity that help close-knit communities

live without fences dividing family plots, and local traditions regarding proper employer-employee relationships. Ellickson (1991) usefully distinguishes three elements of any legal order: self-control based on norms (voluntary compliance), punishments and rewards enacted by the party to an agreement (actions taken by the parties to a contract themselves), and third-party dispute resolution and enforcement. All three exist in any legal system; social order is particularly stable when they are mutually supportive and when the meta-rules regarding their selection and use are widely and clearly understood. This paper focuses on triadic (third-party) dispute resolution, perhaps unnaturally isolating it from the other mechanisms of social control, and attempts to compare its operation in state and non-state settings.

*Formal and informal legal institutions: A stylized account*

Local-level legal institutions in the developing world take a variety of forms whose origins generally predate colonial state-building. Generally speaking, European colonists layered their own legal systems and codes on top of local and “traditional” practices, with the former more often applied in the cities (especially for commercial and criminal law), while the latter was used to maintain social order in the bush, the interior, and the countryside. The simultaneous existence of two or more legal orders – a situation of “legal pluralism” – continues in many places. In places where state authority is weak or distant, people tend to prefer local-level legal institutions to official channels and use them to address most day-to-day conflicts, including disputes related to land, inheritance, and domestic and family issues. A 2001 survey in Indonesia, for instance, found that 86% of respondents preferred these informal procedures to formal legal processes. (Stephens 2003) In many cases, people take the more costly,

intimidating, and uncertain step of approaching the police and local magistrates only when the informal system does not produce an accord, or when the gravity of a crime leaves them little choice.

It is not entirely accurate, then, to think of formal and informal legal institutions as entirely separate systems of justice. First, the formal legal system serves as a kind of reserve option for some of the disputants who are involved in, or considering approaching, local legal level institutions. In eleven of the thirty-four cases described in *Forging the Middle Ground*, for instance, the disputants in pursuit of justice utilized both the informal and state-centered legal systems. The availability of the state-centered venue has the effect of making local-level legal institutions a kind of first step in the formal legal process, and infusing the former with some of the adversarial, individualistic characteristics of the latter. (This can also work the other way: in some cases, disputants first went to the police or other organizations of the formal system, but turned to the informal system when they encountered indifference, ineffectiveness, or a demand for a bribe.) Second, many jurisdictions have actually granted local and “traditional” legal systems a degree of official recognition. For example, the *gram panchayats* (village-level governments) and *lok adalats* (“people’s courts”) in India are now invested with a degree of state authority (Besley, Pande et al. 2004; Galanter and Krishnan 2004). This is even truer of the *barangay* justice system in the Philippines, which is a compulsory step of conciliation and meditation at the village level (Stephens 2003). In Indonesia, Law 22/1999 on Regional Governance and Government Regulation 72/2005 on the Village granted “binding authority” to the *Adat* (Customary Law) Councils. The quasi-official incorporation of local, informal legal institutions in the state system, and the fact that in some cases decisions of local bodies can be

appealed in formal state courts, colors the formal legal system with some of the substantive doctrines and procedures of traditional justice.

These mutual influences notwithstanding, it is possible to identify a set of stylized differences between formal, state and informal, local legal systems. Obviously, there is great variation in local legal institutions – they vary, for instance, in the punishments they render (ranging from rebukes and shunning to caning, ostracism, and more severe sanctions), the extent to which they incorporate other ethnic groups, and their relationships with the formal state system of justice. Nevertheless, they tend to share certain properties. The characteristics presented below are not meant to be essential or structurally identifying differences, but rather empirical tendencies whose delineation is useful for studying the likely possibilities and limits of local legal institutions for the promotion of economic outcomes.

First, there is more fluidity and variation in local-level legal institutions than in formal state legal institutions (Characteristic 1). To some extent, local institutions are more various as a result of scale: the state claims sovereignty over a large territory, whereas localities are smaller and more numerous, and consequently more varied in their substantive and procedural characteristics. In Indonesia, “there are as many as 300 discrete ethnic groups with their own forms of *adat* [customary law].” (World Bank 2008, p. 6) More fundamentally, however, the difference rests in the distinction between written and oral traditions. From one perspective, the entire project of state-building, including legal codification and unification, consists in making varying local practices “legible” across time and space (Scott 1998). Local legal institutions, on the other hand, are not typically written down, and vary from one village to the next. Even within the same village, rules can change when leadership turns over. There is a Minangkabau saying in Indonesia that compares a change in local law, *adat*, to seasonality: “If the river is in spate, the

washing plate is shifted. With a change of *raja* [leader] comes a change of *adat*.” This changeability suggests that informal legal institutions may maintain a closer connection to local social and economic conditions, and may adapt to social changes more easily, than formal legal institutions. There have been efforts in many places to codify customary law. For instance, officials in Central and West Kalimantan in Indonesia have assembled *adat* law books (World Bank 2008, p. 26) The Mogadishu and Garissa Declarations attempt to systematize customary law in Northern Kenya (Chopra 2008). Still, informal legal institutions, generally speaking, remain less formal, less structured, and more oral than state-centered formal courts.

Second, local legal institutions are embedded in cosmic and social significations (Characteristic 2). Although there is again wide variation in the manner and extent to which this is true, local and informal legal rules generally derive their authority, at least in part, from divine sources. The religiously informed principles that local legal institutions invoke are also connected, in the manner that Durkheim described, to the norms, values, and roles that reproduce social structures (Durkheim 1995 [1912]). This means that dispute resolution typically aims at the restoration of social and cosmic order after a breach or potential breach has occurred. Although particular individuals and societies may emphasize this characteristic of local-level legal institutions more than others, it is no exaggeration to say that in some cases of local-level dispute resolution, the continued existence of the cosmos is at stake. That also means that the community and all of its members, moreover, and not just the parties to the dispute, have a significant stake in the resolution of a conflict, and that the dispute resolver’s principal objective is social order. Collective punishments reinforce the extent to which the people beyond the disputants are implicated in a satisfactory resolution of the conflict that restores trust, or if not trust, than at least a normatively rationalized *modus vivendi*.

Third, judicial power in local legal institutions is typically less autonomous from other forms of governmental and social power (Characteristic 3). Often, the figure invested with the authority to settle disputes – a village head or chief – is the same person who makes local rules, collects taxes, mobilizes collective resources, employs community members, distributes food in times of scarcity, or makes key economic decisions; and if he himself does not do any of those things (he is usually a man), close family members often do. Judicial positions are often allocated on the basis of kinship, or even bought and sold, as was the case in *ancien régime* France. Of course, strict separation of powers is an oft-cited but rarely achieved ideal in systems of formal law, as well; but it is usually an important constitutional or aspirational principle, whereas the unification of social, political, legal, and normative power is often intrinsic to the principles justifying social order at the local-level.

#### *Legal institutions and economic growth*

The notion that law guarantees economic transactions is at least as old as Plato, who noted that lawlessness harms contracts (*Republic* Book IV). Weber developed the relationship systematically, arguing that the Puritan devotion to rationalized work promoted industrial capitalism and that bureaucratic rationality based on codified law was more efficient than its alternatives. But the contemporary emphasis on the “rule of law” in economic development is somewhat different, and owes much to North’s (1990) argument that economic growth in England during the 19<sup>th</sup> century depended on the prior development of firm property rights and enforceable contract law, which protected individual investors both from state expropriation and private party appropriation of value, respectively. Together, enforceable contract law and firm

property rights made possible financial intermediation and the long-term capital investments that productivity-driven economic growth required. North and Weingast (1989) and Olson (1993), among others, amplified the notion that the most important economic role of law is to entrench property rights and constrain state power; and Sokoloff and Engerman (2000), La Porta et al (1998), and Acemoglu et al (2001), among others, provided econometric evidence that legal rules and institutions that constrain state power significantly explain variance in long-run economic growth across countries. As a result of work in this vein, development agencies now routinely emphasize state accountability for policy choices, legally enforceable property rights, and more broadly, institutional checks and balances, in their governance agendas. For a summary of much of this literature, see Davis and Trebilcock (2008).

Despite this “rule of law orthodoxy” (Carothers 2006), however, there are several questions about the relationship between legally based predictability and economic growth. First, societal norms can substitute for legal contracts, which suggests that a strong legal system may not be a necessary condition for economic growth. Specifically, most of the successful East Asian growth accelerations of the last century, including those in Japan, South Korea, Taiwan, Singapore, and now China, have relied, for the security of contracts, at least as much on informal norms within family groups and kin networks as on state-enforced formal rules (Ginsburg 2000; Upham 2002). Something similar occurred, argue Putnam et al (1993), in Northern Italy. Greif (1989) argues that eleventh century Maghribi traders successfully created a coalition that used reputational sanctions to facilitate long-distance trade in the absence of a formal legal system. To take another example, informal sector workers in urban centers such as Lima (De Soto 2000) and Lagos (Packer 2006) have developed effective, low-cost procedures that facilitate economic exchange in the absence of formal property rights. Second, in many of the East Asian growth

accelerations, the principal driver was not the informationally self-sufficient individual or corporate investor, who is the primary vehicle of capital accumulation and growth in North's account, but the state itself, whose officials offered export incentives, sanctioned cartels, and erected barriers to entry in a non-transparent, unpredictable, unequal, and perhaps unfair manner. Some modes of economic growth, in other words, involve empowering rather than constraining the state (Ginsburg 2000). Third, even if one stipulates that property rights and enforceable contracts are conducive to development, the institutional form in which those principles should be embedded remains indeterminate. For instance, although a system of independent common law courts with the powers of judicial review and civil contempt is often considered, at least since Hayek, as the paradigmatic constraint on state power, there are reasons to believe that administrative review within the executive branch, in the French tradition, might be a more effective check on the "caudillismo" that is said to have been a limiting factor for Latin American growth (Brumm 1992). Finally, when courts and other "rule of law" institutions are powerful, their effectiveness arises from a complex relationship to the civil service, private actors, political leaders, and political parties, rather than from "autonomy" or "independence" pure and simple. When a judiciary enjoys the power to arbitrate disputes and hold state and business officials to account on the basis of law, that does not mean that the judiciary hovers somewhere above or beyond politics and social influence – that is a myth, though perhaps a necessary and "noble lie." Rather, it means that judicial politicization and social influence on the judiciary, which are inevitable, are occurring in a legitimate manner (Upham 2002).

In summary, although there are clear theoretical pathways through which courts and formal state institutions might promote economic growth, formal legal institutions do not appear to be a necessary condition for even high rates of growth to occur. What about local-level legal

institutions? Could they promote economic growth, even theoretically, by guaranteeing contracts and protecting against expropriation?

To begin with, contract *enforcement* is probably the wrong image for the activities of informal legal institutions. Many customary councils and leaders do not, in their dispute resolution capacity, have the power to compel compliance with their positions and opinions, at least not in the face of determined opposition. One *damang* [traditional leader] told Stephens (2003, p. 229), “[b]oth parties must wish to resolve the case peacefully. If not, there is nothing we can do.” Of course, apex and other high courts in formal legal systems also rely on willing compliance when resolving disputes among economic elites, organs of the state, and other powerful parties; but the local-level the formal legal institutions command more enforcement power than informal ones typically do.

This problem is particularly problematic for disputes involving land, which are the perhaps the most common form of growth-related economic conflict in areas in which informal, local legal institutions hold authority. (Trade exchanges seemingly do not rely on informal legal institutions to resolve disputes, perhaps relying on reputational, kin, or network-related rules instead.) Because informal legal institutions tend to be changeable, and reliant on oral traditions (Characteristic 1), they can be unreliable. Although written texts do not necessarily constrain the actions of the dispute resolver in formal state-centered legal systems, they can, in some settings, discipline the judge or legal official and provide a benchmark against which he or she can be held accountable for judgments, leading to consistency across over time and space. In oral traditions that form of accountability is not available, and the decisions of the dispute resolvers can seem arbitrary to disputants, as in the following case from Souhoku Village, Seram Island, Maluku, Indonesia:

Udin and Haryadi bought land off Among Pieters. The land was registered, but Among did not transfer the certificate at sale. The land was adjacent to another plot, owned by Minggu Tamaela. Later, Among asked Udin and Haryadi to cut down a tree on the land. After they did this, Minggu protested that the tree was actually on his land. He threatened Udin and Haryadi with violence if they did not return the tree.

Udin and Haryadi reported the incident to the village head (*raja*). The *Raja* and his village staff called the parties to a meeting at his office to resolve the problem. He requested Among and Minggu to pay to have the precise land boundaries measured by the Land Administration Agency. This ultimately determined the precise boundaries and resolved the dispute.

Six years later, Udin got into a fight with his neighbor Lahamaku over the boundaries of their respective land plots. Udin reported the case to the *Raja*, who this time sent his own “land team” to measure the boundaries. The team determined that the disputed land belonged to Udin, but because Lahamaku has been using the land for a long time, he had a right to purchase it. Udin was not satisfied with this outcome, but accepted it nonetheless, noting that there were few alternatives for ordinary villagers other than to accept the authority of the *Raja*. (World Bank 2008, p. 20)

Of the study’s eleven reported cases of land disputes taken to informal legal institutions, only one was successfully resolved (two were partly resolved and eight largely unresolved), and that one involved a dispute between a man and his half-brother who settled out of pressure to maintain family and neighborhood relations. If the problem lies in oral traditions and the absence of written records, could records and laws be generalized, and codified, in a manner that would help informal legal institutions resolve land disputes? Perhaps. But even if local and informal laws could be codified and made more predictable, legal institutions would, for the most part, continue to rely on trust and mediation, rather than coercive power. That trust emerges from their embeddedness in social and cosmic significations (Characteristic 2), which in turn depend on dense, local ethnic and linguistic continuities. Formalizing or codifying local-level legal institutions might then displace the social substitutes for contract specification, with a zero (or even negative) net effect on economic growth and its correlates, including investment. Brasselle, Gaspart, and Platteau (2002), for instance, found that the security of land rights in southwestern

Burkina Faso had little effect on investment, a finding they attribute to the fact that “traditional village order, where it exists, provides the basic land rights to stimulate small-scale investment.” In this case, relationships established by ancestors and passed down through generations seemingly established de facto and stable long-term land use rights.

The locally specific strength of informal legal institutions limits the extent their potential scale. They are less likely to produce relatively stable property rights when migration and ethnic diversity are increasing, or when cross-ethnic or cross-village disputes arise. *Forging the Middle Ground* found nine cases involving inter-village disputes; of these, only three were successfully resolved. There were, in addition, three cases involving individuals external to a village, and in none of these was the case resolved and its outcome fully executed. (World Bank 2008, p. 31) This suggests that the dispute resolving power of local-level legal institutions might be limited to relatively small scales of social organization, and that they may be less suitable to varieties of economic organization that entail the relatively rapid creation of cooperative ventures, which typically occur at relatively high levels of growth and require complex cooperation among strangers.

This rootedness in locality might also make the incentives of dispute resolvers in informal legal institutions diverge from those of the formal system’s judges and magistrates. In state-centered formal legal systems, dispute resolution processes can produce a snowballing effect as dispute resolvers, in order to maintain their own neutrality as they settle disputes, generate neutral rules, which, in turn, produce the conditions for economic transactions and other strategic behavior predicated on those rules, which then lead to an increasing number of agreements that require a return to the dispute resolver to clarify those rules (Stone Sweet 1999). This kind of snowballing is less evident in local-level legal institutions, where the dispute

resolver faces a tension between maintaining the local social significations that maintain his authority (Characteristic 2) and generating (more ontologically and culturally neutral) rules that accommodate outsiders.

Local legal institutions, moreover, do not operate in a network or hierarchy of similar institutions from whom they can draw authority and support. This limits the willingness of local legal institutions to refer cases to other venues, which in turns limits the range and power of their decisions. The following case, from Sumpur & Bungo Tanjung, West Sumatra, in which *adat* leaders choose not to refer a dispute to more powerful authorities, exhibits this phenomenon:

The case has a long and complex history. It concerns approximately 100 hectares of agricultural land along the border of two *nagari* that was cultivated by residents of both. Sumpur *nagari* claims it is their *adat* land, whereas residents of Bungo Tanjung claim they now have registered title. The Sumpur village head sees the conflict as one between two *nagari*. The vice-chair of the Sumpur *Adat* Council believes the conflict is internal within Sumpur, as he feels that some lineage heads “illegally” sold or pawned land to Bungo Tanjung. Similarly, a women’s group believes the conflict is the result of the illegal sale of *adat* land and that the lineage heads are not willing to acknowledge this mistake. Yet another village group says it is a village boundary dispute.

The dispute remains unresolved because lineage members are implicated, effectively blocking the case being heard by the *Adat* Council. *Adat* leaders are also reluctant to deal with the case through the courts as they feel this will diminish the influence of the *adat* institution. (World Bank 2008, p. 83)

In summary, formal legal institutions may or may not be a necessary condition for contract enforcement and modern economic growth. In some settings, they appear to have played a significant role, but were seemingly secondary to social relationships in others. Local-level legal institutions may well be able to provide the agreements necessary to sustain modest economic investments, especially through the ways in which they mediate conflicts and promote

social cooperation. Those powers are likely, however, to be limited in range and scale; and local-level dispute resolvers may not have incentives to expand the reach of their decisions.

### *Legal institutions, inequality, and poverty*

Legal and judicial institutions shape the distribution of power and rights in a society, which in turn affects the distribution of resources, inequality, and poverty. Who is welcomed as a citizen with full rights of political participation and legal protection, and who is not; whether the rules and regulations shaping economic and social life are applied in an equal and equitable fashion; who speaks for the family and inherits property; the extent to which the authorities protect vulnerable individuals from crime, predation, and economic exploitation – these are some of the many ways in which the operation of legal institutions impinge on inequality and poverty in both the short- and long-run.

The literature on the conditions under which courts and formal state-centered legal institutions reduce or increase poverty and inequality is enormous. Here it is worth emphasizing three points. First, judicial opinions regarding economic inequality tend to reflect the views of the broader political system from which judges are recruited and to which they are accountable (Dahl 1957; Epstein and Knight 1998). Second, supporting social, political, and civil organizations, such as NGOs and organized civil society, are crucial for the mobilization and enforcement of legal claims on behalf of disadvantaged groups (Epp 2003; Gauri and Brinks 2008). And third, dramatic, court-led social change is rare, and when it does happen, it requires sustained and continuous involvement on the part of litigants and courts (Rosenberg 1991).

What are the ways in which the activities of informal, local legal institutions might reduce inequality and poverty? To begin with, it is clear that local legal institutions are rarely insulated from other forms of government and social power (Characteristic 3). As a result, informal negotiations under the auspices of local legal institutions are dominated by elites, and weaker parties typically settle for whatever meager justice the powerful offer. A study of 18 villages in Indonesia found that “in all cases where [such] power imbalances existed, informal negotiations failed,” and weaker parties were coerced into accepting a decision favorable the powerful and not complaining about it (Stephens 2003, p. 228). It is important to note, however, that formal legal institutions are typically dependent on even stronger governmental and social powers, especially outside of national and provincial capitals, despite whatever autonomy or independence exists on paper. In many settings, formal legal institutions may be no more, or even less, likely to further the interests of marginalized individuals than their informal counterparts.

The incentives of local-level dispute resolvers might also limit the extent to which their activities reduce economic inequalities. As noted above, because the social authority of the dispute resolver rests on the stability of the local social order (Characteristic 2), rather than on his ability to resolve disputes per se, dispute resolvers in local-level legal institutions generally aim to preserve order, even if this comes at the expense of fairness. In *Forging the Middle Ground*, there were instances where the local authority seemingly accepted a resolution based on violence or its threat, as in the following case from Panangguan, East Java:

This land dispute between Halim (hamlet head) and Amir (Halim’s cousin) occurred in 2001 in Panangguan village, Pamekasan District, East Java. The dispute began when Amir returned to Panangguan after some time away. Upon

returning he heard that someone had offered Halim Rp. 8 million for land he believed still belonged to his father.

Halim's older brother, Ali, offered to help mediate the disagreement. Three meetings were held at Ali's house to clarify rightful ownership. At these meetings the matter could not be resolved and so Halim reported the dispute to the village head. A week later the village head convened a meeting where Halim and Amir plus their witnesses were invited to discuss and resolve the problem. The village head now explains how the process worked:

*Because [the problem] could not be resolved at the lower [hamlet] level, it was brought to the village level. In order to resolve the problem, I referred to the document [from out-of-date land record books, Petok C, that were used during the Dutch colonial period] I had in Halim's father name. The witnesses' explanations were somewhat confusing. They could not agree on a decision. It seems that [the land] was not purchased transparently in the past. It seems that the land was sold when he needed money, and he wanted to redeem it if he had the money. It was certainly bought cheaply. Amir's side acknowledged this. According to Halim's side, the transaction was a sale. The atmosphere of the meeting was tense. Amir threatened violence. Then I divided the land. I returned part of it to Amir. I put pressure on him. If he did not accept the solution, then the village would take the land. They were frightened. The community very much supported this method. The problem was resolved.*  
(World Bank 2008, p. 19-20)

These case studies suggest that socially marginal individuals are less likely to receive support from local-level legal institutions. (The same is true, of course, in most state-centered formal legal institutions.) *Forging the Middle Ground* reports cases in which members of disadvantaged groups, such as women (pp. 30, 31, 45), ethnic minorities (p. 27), newcomers to the village (p. 84), and alleged practitioners of black magic (p. 81) failed to gain support in local, informal legal venues. Conversely, the report describes a prominent male political figure who is believed to have violated proper *adat* marriage procedures but who easily avoids paying fines levied by the local *adat* council (World Bank 2008, p. 33). Many have noted that local legal institutions tend to be typically composed of male elders (the anthropologist Franz Von Benda-Beckmann has called *adat* "the law of senior males" (quoted in World Bank 2008, p. 8)), and that these "judges," like those in formal legal systems, tend to hold views that resemble

the populations from which they are drawn. The following case involving domestic abuse represents the attitudes visible in some cases:

Sri lived in a simple house with her husband on one of the main roads in the urban kecamatan of Pahandut, near the center of Palangkaraya, Central Kalimantan. According to Sri's sister Eka, when engaging in sexual intercourse, Sri's husband would be extremely violent, hitting and biting her. Unable to tolerate it any longer, Sri left her husband and told her father what was happening. They reported the problem to the police. After two weeks of inaction, the police suggested that the problem be resolved through the *damang*, the traditional customary leader.

Under Dayak *adat*, if a wife leaves her husband, the assumption is that she is seeking a divorce. So, when the families met before the *damang*, Sri's husband requested a divorce. Dayak custom also dictates that on divorce, property and goods must be transferred to the wife, in accordance with a written pre-nuptial agreement. Sri did not want a divorce, just for the violence to stop. However, a divorce agreement was written up, the husband signed and she felt compelled to sign as well. This was partly driven by threats from the husband's lawyer that she would be fined Rp 100 million for absconding. Sri, ignorant of the law and unable to afford legal counsel, knew no better. 'It's hard when people are strong, smart and rich,' observed her sister, Eka.

The *damang* did not deal with the domestic violence aspect, feeling this was being handled by the police. The police, however, had already referred the problem to the *damang*. So, it fell through the cracks. The husband did not honor the agreed division of property. 'They don't care,' said Eka. Although the *damang* lives literally across the street from the husband, he has taken no action to enforce the agreement. No social sanction has been applied against the husband either – he is still invited to neighborhood and *adat* events. Indeed, the strong sense was that domestic violence is not treated as a serious problem. When asked about the case, the *damang*'s secretary laughed and said, 'It's just excessive libido.' (World Bank 2008, p. 46-47)

Although the comments of the *damang*'s secretary may represent the worst concerns of human rights activists and other legal modernizers, it is important to point out that, precisely because local legal institutions are fluid and customs are unwritten (Characteristic 1), they might adapt easily to new social circumstances. This may be particularly true in settings, like Indonesia, with historically syncretic cultural practices. *Forging the Middle Ground* describes, for instance, the emergence of an effective, indigenous women's NGO that manages to change

custom so that women gain representation on the local *adat* council (p. 48). On the question of whether local-level legal institutions can promote development, perhaps the key issue is not the substantive content of protections in local customs, but the social and political resources that marginalized individuals can bring to bear when disputes arise. As Brinks puts it, it may be the absence of a “dense network of formal and informal ancillary institutions that support rights, providing the incentives and capacity for the duty bearers and enforcement agents to comply with the law,” that is the primary obstacle to equal protection in local legal institutions. (Brinks 2008, p. 2) There is some support for this view in *Forging the Middle Ground*. Note that the disputant in the case above complains not about the content of adat law, but that there is little that can be done when people are “strong, smart, and rich.” In addition to the women’s economic cooperative group in Batu Gadang, West Sumatra, described above, the following case below is noteworthy, since it shows that securing social support can, in the eyes of local disputants, remedy the disadvantage of being a woman and an outsider, and that weaker participants in disputes do actually look for ways to empower themselves, in anticipation of future conflicts:

The two parties are neighbors in Sumpur, West Sumatra. One is a lineage head and the other a woman married into another clan in the *nagari*. The conflict erupted over a fight between their children, resulting in verbal insults being exchanged between the parties, during which the lineage head was addressed as “you” rather than by his *adat* title. Some clan members of the lineage head overheard this and submitted a written complaint to the *Adat* Council (KAN) that their clan head had been insulted according to *adat*.

The members of KAN are all the lineage heads and thus male. They invited the parties to explain what had happened and then formed an investigation team to research the appropriate punishment. Ultimately, the woman was fined Rp. 300,000, to be paid to the KAN. The money was to be paid to the KAN, rather than the individual “victim”, as the insult was considered to be against the *nagari* as a whole.

The woman considered the decision unfair, as the lineage head had also insulted her during the argument. Furthermore, as she said, “This is not the first time he has been addressed as “you” by someone. But there has been no case of

sanctions before.’ The Head of the KAN also realized that both parties were equally guilty. ‘But the lineage elder wanted to give a lesson. Now many young people do not respect their *mamak*.’ He also acknowledged that there was social envy that the woman had managed to start a successful business and build a house in the *nagari*, whereas the lineage head was still living in a bamboo hut with no secure income.

The woman had not been formally adopted into a local clan and thus had no clan head to speak on her behalf. She was in *adat* terms still an outsider. If she had had a local lineage head to represent her, the case might have been solved between the lineage heads instead of going straight to the KAN. Having learned from the experience, she was adopted into the clan of *Datuk* Basa Nan Tinggi, who will represent her in future *adat* cases. (World Bank 2008, p. 27-28)

To conclude, local-level legal institutions, like their formal counterparts, do not generally protect the interests of marginalized individuals and reduce economic inequalities. This may not, however, be related primarily to the content of local customs, which are in fact adaptable, but to the relative disparities in prestige, power, and material resources of the disputants, which can be used to influence legal decisions and evade sanctions. If true, this suggests that reforming local-level legal institutions may not be as daunting as changing local cultures, and that supportive institutions, such as NGOs, locally embedded paralegals, and other organizations, might be able to help local-level legal institutions promote economic equalities.

### *Legal institutions and human capabilities*

Sen (1999) argues that development does not take place merely when income or utility increase, although those are common correlates of development. Development is best conceived, instead, as the expansion of freedom to perform the essentially human activities whose emergence constitutes, as Aristotle would have put it, human flourishing. Sen calls these the capacity to perform these activities “capabilities.” Although Sen has not presented a definitive list, Nussbaum (2000) proposes one: living a life of a normal length and in good health, living

without fear of assault, engaging in imagination and the full range of emotions and practical reason, having connections to friends and community and the natural world, knowing one's own dignity, and shaping one's own environment through political participation and the holding of personal property.

Democracy is important, in Sen's view, because the expansion of political and civil freedom is itself constitutive of development, because the wider distribution of information and organizational power associated with democracy promotes equitable economic outcomes, and because democracy facilitates the wide deliberation necessary for the social construction of economic needs. A democratic conception of the rule of law is crucial for the promotion of development as the expansion of human capabilities. As Sen puts it, "Legal development must, constitutively, take note of the enhancement of people's capability – their freedom – to exercise the rights and entitlements that we associate with legal progress." (Sen 2000, p. 11)

There are at least two areas where formal legal institutions can directly support or hinder development understood as the expansion of human capabilities: the negative liberty entailed in personal integrity rights ("living without fear of assault," in Nussbaum's phrase above); and the positive freedoms associated with the capabilities to live a normal and healthy life and to participate in social and economic relations, both of which require public action, whether in the form of the state's delivery of services such as health care, education, and water and sanitation, or of their financing. The support of state-centered, formal legal institutions for personal integrity rights is related to the capacity of the legal system to gather information about particular cases, which tends to be correlated with the social and economic resources of victims (Brinks 2007). The support of state-centered formal legal institutions for positive freedoms depends on the power of courts to hold the state accountable for the delivery of basic services, which itself is a

function of the organizational capacity of civil society, and of the autonomy of the judiciary (which itself tends to increase in proportion to the fragmentation of the political system). (Ferejohn, Rosenbluth et al. 2007; Gauri and Brinks 2008) Are non-state, informal legal institutions similar?

*Forging the Middle Ground* shows that *adat* councils in Indonesia can successfully resolve cases of crime and violence. Of the thirty-four cases described, twelve involved conflicts that initially presented to an informal legal institution as cases of physical or sexual violence, crime, or domestic abuse. Of these twelve, informal legal institutions were able to resolve six in ways that both satisfied the disputants and that meted out justice, however rough. In the other six, however, although some level of (possibly transient) village comity was established through the work of informal legal institutions, those institutions were not able both to satisfy the victim and punish the offender. (The report claims that the cases are broadly representative of informal dispute resolution in Indonesia; for present purposes, that is sufficient to demonstrate the plausibility of the claims presented here). Examples of the latter include a case in which a woman was raped by her brother in law; although both families were fined for making subsequent threats, the rape itself was not addressed (p. 77). There was another case in which the *adat* council managed to stem the threat of further violence after a land dispute resulted in murder, but was not able to settle the land dispute itself or resolve the homicide (p. 85). It is noteworthy that all six cases that were, more or less, successfully resolved involved fights among youth. *Adat* leaders enjoy persuasive power over youth, and the parties involved (the youth and their families) appear to have been of more or less equal social stature. This suggests that local-level legal institutions respond to cases of violence and personal security similarly to formal legal institutions – social and economic disparities dramatically affect which people gain

protection. And the fact that local-level legal institutions are not distinct from other sources of local power (Characteristic 3) may also limit their power to handle complex disputes among individuals or groups with significant social power.

There were no cases in the sample in which local legal institutions were able to hold social or political authorities to account for failures to deliver basic services. There were two cases, however, in which villagers approached *adat* or village councils to stop industries from emitting silt runoff that was causing flooding and damaging roads, houses, and paddies. In neither case were local-level legal institutions able to resolve the problems to the satisfaction of villagers. Similarly, in study prior to *Forging the Middle Ground*, there were five cases “in which powerful government officials embezzled development funds,” and in all five cases “written agreements [developed] through informal justice mechanisms to repay the money were ignored.” (World Bank 2008, p. 35) One exceptional case involved a women’s cooperative, mentioned above, that was able to mediate a dispute involving electricity theft and to lobby successfully for a new village road. But the following case from a village in East Java may be more typical:

Limestone has been mined near Sampung village in East Java since the Dutch colonial period. Since independence the operations have been owned by the local government but managed by a private company, PT Sari Gunung.

For over 20 years the community has complained to the company and the district government about the negative environmental impacts and damage to village infrastructure. The mine produces significant amounts of *grosok*, an unusable by-product mixture of chips and silt. As the mine is on a hill above the village, during the wet season the *grosok* flows down from the mine into the village. During heavy rain it causes significant damage to roads and some private residences. . . .

Suddenly in 1997 the district government built drains in the village so that the rain water and *grosok* would be channeled away from the village. However, this simply shifted the problem from the western hamlet to the eastern hamlet. . .

Shifting the problem from the western to the eastern hamlets began to fuel intra-community tensions. In 2003 a group of youths and farmers, tired of cleaning the *grosok* after heavy rain and having their fields polluted by dirty water, blocked the drains that diverted the water. Learning of this act of protest the village head called the youths to his home for a meeting. The community in eastern hamlet interpreted this as a hostile move by the village head, and approximately 20 villagers from the eastern hamlet arrived at the village head's house. . . .

Legal action was never considered let alone taken by the village government. The Director of the mine explained that every year he gave company profits to the district government, thus, in his opinion it was up to them as to whether they would resolve the *grosok* issue. . . .Residents of Sembuluh II village in Central Kalimantan complained of skin diseases from water pollution they believed was caused by a local palm oil plantation. And yet, as a woman from the village said, 'We are reliant on them for jobs and money. We are too scared.

This case, and more generally the low rate of success in the cases in which villagers try to hold public actors accountable for their actions, suggest that local-level legal institutions may require, in order to be able to contribute to development understood as the expansion of positive liberties, the fragmentation of power at the local-level. Although studies of the formal legal system emphasize the fragmentation of political power, here it is the unification of social as well as political power that is problematic, and which is typical of the environment in which local-level legal institutions operate in developing countries (Characteristic 3). Local-level legal institutions seem to be more effective in protecting at least some people from the threat of assault and supporting personal integrity rights.

### *Conclusion*

Local-level institutions are characterized by fluidity and variation associated with oral culture, their insertion in social and cosmic significations, and their close association with other forms of political and social power. These typical characteristics affect their power to promote development outcomes. Local-level legal institutions can support social substitutes for the

enforcement of contracts, though these substitutes tend to be limited in range and scale; they are flexible and could conceivably be adapted to serve the interests of the poor and marginalized if supportive organizational and social resources could be brought to support the legal claims of the disempowered; and they are more likely to support personal integrity rights than the positive liberties that are also constitutive of development as freedom.

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