Legal reform in the presence of a living custom: An economic approach

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Empowerment of disadvantaged groups of population is a key issue in development. One major difficulty in implementing progressive legal reforms arises from the persistent and contrary influence of custom. In this paper, we present a simple theoretical framework that analyzes how customary rules evolve under the impact of a change in formal law. This evolution is ultimately caused by a modification of relative costs and benefits of exiting the community by members of the disadvantaged groups as a result of change in the law. We also describe how the welfare of these groups is affected and provide illustrative evidence.

dynamics of institutions | social norms

A recent trend in the development literature has been to stress the multidimensional aspects of poverty instead of focusing exclusively on the income criterion. Poor people are not only those with insufficient incomes or inadequate levels of education and health. They often belong to social groups that are disempowered, marginalized, or excluded from the mainstream society (1). Such groups are quantitatively important, as witnessed by scheduled castes and tribes in India; women in most developing countries; nomads and stranger farmers in Africa; and indigenous people in Latin America, Africa, and Asia.

These disadvantaged categories often suffer from oppressive customs, exemplified by the prohibition of remarriage for widows in India (2), footbinding in China (3, 4), female genital mutilation and arranged early marriages for girls in many African countries (5, 6), prohibition of land ownership for erstwhile slaves in West Africa and mobility restrictions for indentured workers in Brazilian Amazon (7), and weak property rights for stranger farmers and nomadic herders in Sub-Saharan Africa (8, 9). In many instances, these customs are sanctioned by powerful informal authorities or mediators who hold a high social and political status in rural societies (10–12).

It is therefore not surprising that the empowerment of disadvantaged groups of population (e.g., women, ethnic minorities, and the poor) is now widely accepted as a key issue for developing countries. One aspect of such empowerment consists of enacting legal reforms that promote the interests of these groups and guaranteeing their access to impartial justice institutions (13). A major difficulty in implementing such reforms lies in the fact that most disputes are settled within the traditional (or informal) legal system, without reaching formal courts. The World Bank experts on justice reform thus estimate that in Sierra Leone, for instance, ~85% of the population falls under the jurisdiction of traditional legal institutions, whereas in Mozambique and Ghana >90% of land transactions are ruled by customary tenure (14).

What role can legal reforms play in contexts where traditional informal institutions are the dominant actors in settling disputes? The general view in the development economics literature is pessimistic: Unless formal law is grounded in customary norms and practices, such reforms are likely to produce neutral or negative effects (11, 12, 15, 16). This view is supported by failed attempts of radical legal engineering carried out by the "Law and Development" movement in the 1970s (17, 18). Legal scholars have hypothesized that the key reason for this failure is the disregard by reformists of local legal reality; in other words, unless the legal "transplant" is designed carefully to organically fit into the legal "body" of the developing country, the transplant is likely to get rejected (19–21).

Anthropologists agree that formal institutions need to be grounded in informal rules and customs, yet they stress the fact that such rules are far from being rigid and that they continuously adapt to changing circumstances (22, 23). We believe that this opposite view is overly optimistic. Numerous examples indeed attest that oppressive customs may be slow to evolve. What we propose in this paper is a dynamic approach in which a policymaker employs the formal law and institutions to induce the custom to change in a progressive direction. In other words, the custom does not evolve under the influence of newly emerging economic environments, but as a response to an external shock deliberately initiated by the state. We denote as the "magnet effect" this mechanism whereby an (oppressive) custom is pulled in the direction of a more progressive statutory law. The immediate implication is that if the magnet effect operates, members of marginalized groups may benefit not only from the application of the formal law when they appeal to it, but also from the induced transformation of the custom itself, when they choose to remain within the informal normative universe.

This implication calls for an explicit analysis of how customary institutions function and how they interact with formal institutions. In this paper, we present the main ingredients of a simple theoretical framework that addresses these questions, as well as the most important analytical results derived in ref. 24. This presentation is done in a way that renders the theory more widely applicable than in the original version. More importantly, on the basis of numerical simulations, we state a number of additional results that highlight more precisely the influence of several key parameters on community size, the custom, and the well-being of marginalized individuals.

Simple Theory of Customary Institutions

Consider the following simple analytical framework for studying the interaction between customary institutions and the modern state (see ref. 24 for the complete presentation of the model and the setup of numerical simulations). A community (for instance, a rural village) consists of a large number of (marginalized) individuals plus one customary authority (e.g., the shalish in Bangladesh, the bagarusi among the Haya of Tanzania) (25, 26). The community provides some benefit to all of its members, and

per capita benefit $y(n_t)$ depends positively on the community size n_t. In other words, there is some loss for each community member if some individual exits the community. For example, the benefits of mutual aid networks depend on the number of participant members that determines the effectiveness of risk pooling (27–29). The game consists of an infinite number of periods, and in any period t, an individual either belongs to the community or is an outsider.

In each period, a marginalized member finds herself, with some positive probability δ, in a situation that is traditionally ruled by custom. The customary authority is the primary instance for setting a norm of behavior in the community in such cases. However, for the outsiders, such a norm is set by the modern state (see, for example, the discussion of Ghana in refs. 30 and 31).

The customary norm of behavior is some costly action v_t that the marginalized individual has to carry out. It belongs to a range of possible actions whose values are comprised between 0 (most costly) and 1 (least costly), with the cost $c(v_t)$ decreasing in action. It is natural to consider stricter conservatism as corresponding to a more costly action, i.e., an action whose value is closer to 0.

The key building block concerns the objective of the customary authority. In this simple model, we assume that this authority is conservative, in the sense that, ideally, he would prefer the marginalized people to carry out the action with the highest cost, $v_t = 0$. His payoff decreases if the custom that he announces is more favorable to the marginalized people (i.e., implies a lower cost for them). Let us denote this loss with $g(v_t)$. However, announcing the most conservative custom might have two negative consequences for his payoff. First, if such decisions prompt a larger fraction of the marginalized group to leave the community, he loses some of the benefit $y(n_t)$ that the community provides. Second, as explained below, such decisions might lead to more massive recourse to the modern state, in which case the customary decision of the traditional authority is overruled. This rise in recourse would entail a loss in the prestige of the customary authority, whose function and role narrowly depend on the number of cases it successfully handles. The customary authority bears this loss because appealing against a customary verdict is tantamount to *openly* challenging his authority. Anthropological evidence shows that this prestige motive is of crucial importance for the customary authorities (32). Let us denote the proportion of disadvantaged group members that make recouse to formal courts with α_t and the prestige component of the customary authority's payoff function with $X(1 - \alpha_t)$.

The temporal structure of interactions within each period is as follows:

i) The current "state" of the economy (a stochastic variable σ^i_t), affecting the outside options of each marginalized individual i, is realized.
ii) The customary authority declares the custom for the current time period, v_t.
iii) Each individual community member observes the realization of "state" of the economy and decides whether to stay in the community or leave it. If she decides to leave, the decision is irreversible.
iv) Any marginalized individual who remains in the community and finds herself in a dispute (let us denote this state with $d^i_t = 1$) can choose to disobey (i.e., break the norm) and act according to the formal law's prescription (denoted with f). Let us call this decision $a^i_t = 1$.
v) The customary authority metes out a certain punishment p on the norm breaker.

Our assumption concerning the punishment meted out to deviant community members is based on extensive field evidence that such measures are indeed taken against the community members and can in some cases be very harsh (33).

End-of-period payoffs are as follows. For the customary authority, it is

$$U_t = y(n_t) + X(1 - \alpha_t) - g(v_t) \quad [1]$$

and consists of a payoff that is increasing in the community size, decreasing in the proportion of community members who disobey the custom that he set at the beginning of the period, and decreasing in the extent that the custom he sets deviates from his preferred custom.

Each community member receives a payoff

$$W_t = y(n_t) - d^i_t \Big[a^i_t(1 + p + c(f)) + (1 - a^i_t)(1 + c(v_t)) \Big], \quad [2]$$

which is increasing in the community size and, if she has found herself in the situation regulated by the custom ($d^i_t = 1$), decreasing in the level of costly action (custom, v_t) that she has to carry out. The individuals outside of the community receive a payoff

$$\Omega_t = \sigma^i_t - d^i_t [1 + c(f)], \quad [3]$$

which depends on the current state of the economy and on the value of their "outside opportunities". In addition, if they find themselves in the situation regulated by the custom, their payoff increases if the norm of behavior set by the modern state (f) is more progressive. As for the outside opportunities, their value varies across individuals and is observed only by the individual concerned.

The game is infinitely repeated, $t = 1, 2, \ldots, \infty$. We assume that community members are myopic (i.e., the make their choices to maximize the current-period expected payoffs), whereas the customary authority is forward looking and thus maximizes the present discounted value of the sum of per-period utilities, $\sum_{t=1}^{\infty} U_t$ (an extension of the model with forward-looking community members is analyzed in ref. 24).

Main Qualitative Results

We can now present the main qualitative results of our model. We assume, without loss of generality, that the formal law is more progressive than the prevailing custom (i.e., $f > v_t$). Under these conditions, marginalized individuals may have an interest in leaving the community or disobeying the custom set by the traditional authority. If the current state of the economy and its future prospects are sufficiently promising (σ^i_t are high), those with the best opportunities outside the community will choose to leave. Those with weaker opportunities will generally remain in the community, but may choose to disobey the custom.

Recall that the model allows the customary authority to adapt the custom strategically in response to changes in the economy or in the formal law (at step 2 of the game described above). The informal judge, we assumed, has a preferred verdict ($v = 0$), and he is naturally inclined to pronounce a custom in line with this preference; but, being a member of the community, he also cares about the community public good—and, therefore, about community size n_t. Also by assumption, he dislikes disobedience by community members, as this weakens his authority within the community. For these reasons, he may deviate from his "ideal" custom, in the direction of the formal law f, to discourage exit and disobedience by community members.

The model predicts that, in the event of a progressive legal reform, individuals belonging to the marginalized group may leave the community and, henceforth, rely on norms set by the modern state (f). Similarly, there is likely to be a higher incidence of norm breaking ($a^i_t = 1$) among community members.

The key feature of the model is, however, that the legal reform may incite the customary authority to adapt the custom v_t in the direction of the law f. The same effect can be achieved if outside

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options (σ^i_t) for the marginalized individuals are improved. The intuition is as follows. As outside options get better or the formal law becomes more progressive, the marginalized individuals find it relatively more attractive to exit the community. Note that outside of the community, the formal system is the only forum for settling disputes. As the disadvantaged group members start to leave the community (for either of the two reasons), the customary authority, for the sake of preserving the benefits related to community size, is more inclined to pronounce a custom that does not coincide with his preferred one.

Moreover, as the formal law becomes more progressive, the disadvantaged group members are more prone to challenge the customary authority by appealing to formal courts. This change has a direct effect on the prestige of the traditional authority. In particular, he becomes more sensitive to such appeals and therefore willing to go to greater lengths to discourage such behavior.

Solving the model allows us to construct taxonomy of four possible cases.

Case 1. If the formal law is sufficiently conservative (f is relatively low) and the outside options are not very attractive (σ^i_t are relatively low), all individuals remain within the community ($n_t = 1$ for any t) and the customary authority sets his preferred custom ($v_t = 0$ for any t). In this conservative situation, no marginalized individual ventures into the norm breaking ($a^i_t = 0$ for any i and t).

Case 2. If the formal law becomes more progressive (f increases), the customary authority adapts the custom in the same direction to discourage marginalized people from breaking the local norm; however, at least initially, the community remains intact.

Case 3. If the formal law becomes sufficiently progressive (f is sufficiently high), or the outside options are sufficiently attractive (σ^i_t are relatively high), the customary authority finds it too costly to persuade all community members to remain in the community and those with the highest outside options begin to leave. Moreover, because the custom adapts less than proportionally to a change in the formal law ($dv_t/df < 1$), the distance between the two increases as the formal law becomes more favorable to the marginalized group and, as a result, there is a growing proportion of members of this group that deviates from the custom within the community ($a^i_t = 1$). By contrast, an improvement in the outside opportunities (keeping the formal law unchanged) brings the custom closer to the formal law and, therefore, lowers the incidence of norm breaking within the community.

Case 4. Finally, if the customary authority is highly unwilling to deviate from his preferred custom, so that the custom does not evolve at all in response to a progressive legal reform or an improvement in outside opportunities, the likelihood of exit and disobedience within the community is at its maximum.

Welfare Impact of Progressive Reforms and Simulation Results

The key policy questions that our model addresses are as follows: How does a progressive legal reform affect the welfare of different sections of the marginalized population? How does this effect depend on the ability of the customary authority to inflict punishment on the marginalized individuals? Clearly, a reform that moves the norm of behavior in the direction that reduces the cost of action for the marginalized individuals has one clear positive effect on their welfare: It unambiguously enhances the welfare of the individuals outside of the community and has a positive effect on those who remain in the community but decide to disobey the custom and follow the norm set by the modern state.

However, there are two further effects: The customary authority might adjust his behavior and, thus, the community size does not remain constant. The first effect corresponds to the positive impact of the adjustment of the custom made by the traditional authority, eager to preserve his prestige and to retain the benefits from a larger community. The second effect implies that a more progressive formal law entails more massive exit, which reduces the welfare of individuals remaining in the community.

It is evident from the above that marginalized people who have left their native community unambiguously benefit from a progressive legal reform. By contrast, the effect is ambiguous for those who have chosen to remain behind and who belong to the weakest sections (given that they have the lowest outside options). If the aggregate welfare of the marginal group is measured simply as the sum of individual utilities of all its members, the impact of a progressive legal reform is therefore ambiguous. The positive effect of a progressive legal reform is even less clear if we adopt the Rawlsian criterion of social justice, i.e., concentrating primarily on the welfare of the weakest members.

Calculating analytically the net effect of a progressive legal reform is a formidable task. We therefore resort to numerical simulations (the detailed procedures for a typical simulation are described in ref. 24). The graphical representation below summarizes in a clear visual way the results concerning the relative strength of different effects at work, as well as the impact on the welfare of marginalized individuals remaining within the community.

Fig. 1 *A–C* presents, respectively, the custom (v), the community size (n), and the level of welfare of marginalized individuals inside the community (W), as a function of the formal law (f, on the vertical axis) and the level of punishment imposed by the customary authority on deviant members of the community (p, on the horizontal axis). In Fig. 1 *A–C*, moving horizontally rightward corresponds to harsher punishment by customary authority (higher p), whereas moving vertically upward corresponds to a more progressive formal law (higher f). Level curves describe the constant levels of custom, community size, and welfare of marginalized individuals.

The following patterns emerge from the simulations. First, for a given harshness of punishment, a more progressive formal law always implies more exit from the community and, therefore, a smaller community size (Fig. 1*B*) and a more progressive custom (Fig. 1*A*). Second, the reaction of community size to a same-size change in formal law is stronger when the level of punishment is higher. Contrarily, the adjustment of the custom to a change in formal law is more pronounced for lower levels of punishment. This result can be noted from the fact that a same-size vertical move has a bigger effect on the community size at higher levels of punishment (level curves are generally more densely situated closer to the right edge of Fig. 1*B*), whereas it has a bigger effect on the custom at lower levels of punishment (level curves are generally more dense closer to the left edge of Fig. 1*A*). This latter finding implies that if the customary authority is able to influence also the severity of the punishment, he can avoid changing substantially the custom (as a reaction to the legal reform) by increasing the punishment severity. Thus, the two instruments of the customary authority (punishment and level of custom) would act as substitutes. In fact, for all values of formal law, a rightward move (i.e., more severe punishment) induces a fall in community size (Fig. 1*B*) and a more conservative custom (Fig. 1*A*).

What is the effect of harsher punishment or a more progressive law on the utility of the marginalized individuals remaining inside the community? Fig. 1*C* indicates that for any value of formal law, a tougher punishment always reduces the welfare of the marginalized insiders, whereas a more progressive formal law increases it.

Does this mean that a more radical legal reform should be always preferred to a gradual one? Not necessarily. Fig. 2 presents the results analogous to those in Fig. 1, but with a steeper loss function $g(v_t)$ of the customary authority. Whereas the qualitative patterns in Fig. 2 *A* and *B* are similar to those of Fig. 1, we observe that with this steeper loss function custom adjusts
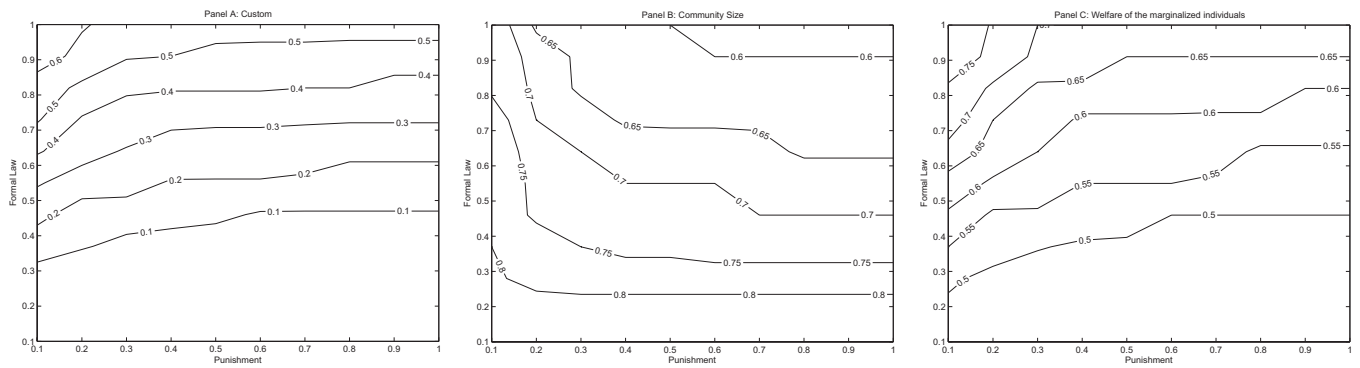
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Fig. 1. Impact of formal institutions and harshness of customary punishment, under a moderate loss function of the customary authority.

to a smaller degree. As a consequence, the negative community-size effect on the welfare of marginalized insiders can dominate the positive magnet effect. We indeed see in Fig. 2C that the welfare of the marginalized is clearly nonmonotonic in formal law. In other words, given a certain harshness of punishment, a more progressive formal law can first lead to an increase in welfare (because the fall in community size is not very strong initially), but, as the formal law becomes even more progressive, exit by community members becomes sufficiently big to dominate the positive magnet effect. The overall effect of the reform on the welfare of the marginalized is then negative.

Case Study 1: Women's Land Rights in Senegal

In Muslim West Africa, the customary law provides that women do not inherit land, even though the Quran explicitly demands that women inherit half the share of their brothers, and the statutory law, inspired by the Napoleonic Code, prescribes equal inheritance shares for men and women (the testator may write down a will but his ability to modify the rule is limited) (34). In the Senegal River Valley, the custom was applied strictly until recently. Women never thought of invoking the Islamic law to advance their interests lest they should antagonize their male relatives and be compelled to forsake the social protection that they have traditionally enjoyed. Under the customary land tenure system, indeed, women are ensured against various contingencies, in particular the prospects of separation/divorce, widowhood, and unwed motherhood. In such circumstances, they typically have the right to return to their father's land where they are allowed to work and subsist until they find a new husband. In terms of our theory, this feature means that the cost of appealing to the Islamic law (considered here as the formal law) and of resorting to the local marabout (considered here as the formal judge) was too high in terms of (insurance) benefits foregone. Moreover, the psy-

chological cost of taking a land dispute to the formal judge was also perceived to be large insofar as, in the women's view, open disputes between close kin "are to be avoided at all costs." As a consequence, the Islamic law and, a fortiori, the statutory law had no impact on women's welfare.

Over the last decades, however, as shown by a study of 16 villages located in the delta area (department of Dagana) and the middle valley (departments of Podor and Matam), the cost of being excluded from the community life has fallen as a result of an increase in women's education and an expansion of their non-agricultural employment opportunities (34). Moreover, women who have completed their primary schooling and those who have a nonagricultural occupation (or are engaged in the marketing of agricultural products) have a tendency to manifest their opposition against customary practices such as the levirate system (whereby a widow has to marry a brother of her deceased husband). Interestingly, the custom has recently evolved toward enhancing women's rights.

There is no evidence, though, that the custom has adjusted to the point of following the Islamic prescription or the statutory law provision. Instead, what we find is an evolving practice of transfers aimed at compensating women for their de facto exclusion from inheritance of a portion of their father's land. The same phenomenon has been observed in Niger (35), where women, in recognition of their ownership rights, receive part of the crop harvested on the family land by their brothers under an arrangement known as *aro*. This said, women's access to land often remains fragile and difficult to secure: Owing to their absence from the native village following marriage, they typically find it difficult to exercise whichever rights over land might have been granted to them, all of the more so as their male relatives are ready to exploit the situation (35).
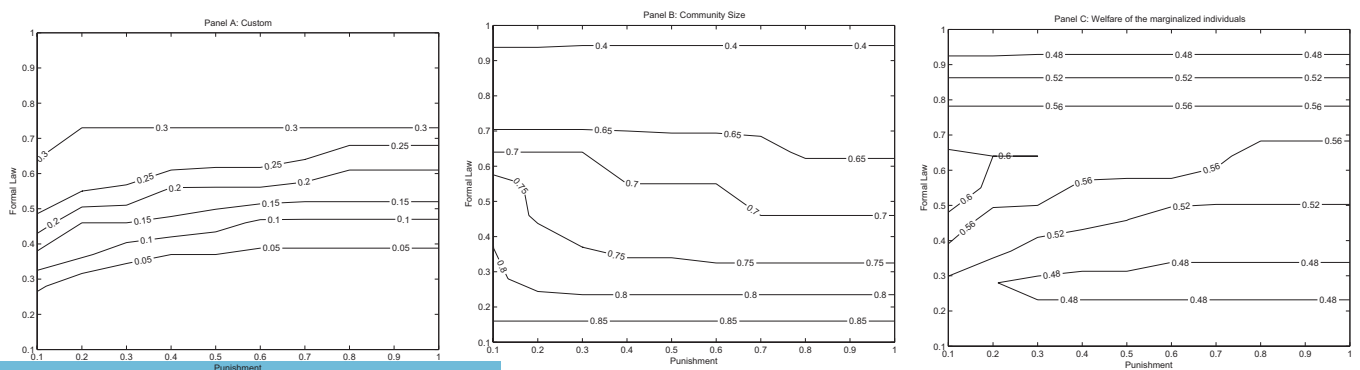

Fig. 2. Impact of formal institutions and harshness of customary punishment, under a steep loss function of the customary authority.

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Case Study 2: Inheritance Law in Ghana

The Provisional National Defense Council (PNDC) government that succeeded Nkrumah at the leadership of Ghana in December 1981 adopted a reformist approach to numerous issues. This new approach is attested to by the so-called PNDC Law 111 whereby the Ghanaian government attempted to regulate practices of intestate succession in favor of the wives and children of a deceased man, particularly among the groups governed by a matrilineal system (the Akans). By deciding that the nuclear family should become the focus of succession, this law "appears to be an attack on customary law" (ref. 36, p. 29). Under the matrilineal system, the brothers and sisters born to the same mother occupy a more important place than the spouse inside the family sphere, and, as a consequence, the relationship between a father and a son is much weaker than in patrilineal societies (37–39).

Upon careful examination, the PNDC Law 111 is not as radical as it is sometimes purported to be. In particular, it makes a pivotal distinction between family assets and the assets personally acquired by a deceased person. Whereas family assets (assets inherited from the matri-clan) continue to be regulated by the custom, personally acquired assets are to be divided according to a rule that earmarks the highest share of these assets to the nuclear family (surviving spouse and children) and a smaller one to the extended family. A colonial law, the Marriage Ordinance (1884), was even more favorable to the nuclear family, yet it applied only in cases of officially registered marriages. Following continuous protestations by traditional chiefs, the law was amended in 1909 (37, 40, 41).

Although empirical evidence is scarce, it is still sufficient to enable us to describe the impact of the PNDC Law 111. First, 22% of a sample of 250 household heads (around the city of Kumasi), i.e., a significant minority, declare their preference for following the prescriptions of the law. By contrast, 37% have expressed a preference for the customary inheritance practice, whereas 25% admit that they make inter vivos gifts either to escape the matrilineal succession custom—gifts are then made to children—or to avoid the Law 111's prescription—gifts then go to members of the matri-clan (31).

Second, most female plaintiffs prefer to take land- and family-related cases to chiefs' or family courts. The minority of those who prefer the formal court thinks that the court is impartial to women and capable of enforcing its decisions. On the other hand, women who prefer the customary ways tend to lay emphasis on the ability of indigenous courts to repair and restore damaged relationships through arbitration, mediation, and advising. The low take-up rate of litigation relating to Law 111 is often attributable to women's perception of the high cost of a legal recourse, typically the fear of severe sanctions in the form of separation from their children, being forced to leave their homes, and loss of valuable family and clan relationships (33, 42, 43). Due to "fear of spiritual reprisals from the family, family and community pressure and the strong moral sense not to wash the family linen in public," they are reluctant to take the family members of their deceased husband to the formal courts when these members infringe on their inheritance rights (ref. 31, p. 27).

Third, from another field study (44) it appears that a widespread practice followed by Akan household heads nowadays consists of dividing the personal assets of the deceased person into three equal parts: one-third for the surviving spouse, one-third for the children, and one-third for the extended family. Interestingly, this practice coincides with the prescription of the succession law of 1909, which could not be enforced when it was enacted.

Numerous elements of our theoretical discussion are well reflected in the above-presented evidence. In particular, the magnet effect is apparently at work because the custom has evolved in the direction of the new law, and it is difficult to argue that the entire transformation of the custom is an endogenous adaptation to rising land pressure. Moreover, the fact that a relatively small number of women dare to seek the assistance of the modern court system to advance their interests is in line with the assumption that informal sanctions are severe enough to be taken into consideration whenever a choice of arbitration types is contemplated by a plaintiff. The magnet effect nevertheless operates because Law 111 has changed the relative costs and benefits of the customary authority. Finally, under the impact of Law 111, the custom has been driven to evolve toward the prescription of an old law, which for the spouse and children is more favorable than the custom yet less so than Law 111. It is thus as though this old law acted as a focal point situated between the custom and the new law, at which a new (probably transitory) equilibrium could be established.

Conclusion

There is increasing agreement that poverty in developing countries has diverse dimensions that need to be taken into account to tackle it effectively. Among these dimensions, social exclusion is probably the least precisely measured but also one of the most challenging hurdles on the way to the emancipation of the poor. Social exclusion typically involves the subjection of marginalized groups of the population to oppressive rules and norms that are often sanctioned by customary authorities.

How to dampen the impact of these unfair rules and customs so that marginalized people gain more freedom to choose the way they live is therefore a major issue. The main contention of this paper is that it is possible to use progressive legal reforms as a lever of change of conservative customs, to the extent that such reforms modify the relative costs and benefits of exiting the community by members of the disadvantaged groups. If our theory is valid, the usual argument according to which progressive laws are of little relevance because they are hardly applied or appealed to becomes questionable. Indeed, even though the law seems to be invoked infrequently, it may play an important role by forcing the custom to adapt in the direction pointed by the law. This indirect effect operating through the magnet function of the law may affect the livelihoods of many marginalized individuals who remain in the informal normative universe.

Our approach rests on the idea that the situation of these people may improve if new outside options are opened to them. New outside options are generally understood as new economic opportunities emerging from nonagricultural growth, and there is no doubt that such a process supplies a solid path toward emancipation from oppressive norms through the channel of migration. However, it is unsatisfactory to just rely on nonagricultural employment insofar as it develops slowly in many poor regions of the world. Hence the critical importance is shown of the second channel that we emphasize, i.e., legal reforms backed by modern courts to which marginalized people can threaten to appeal. It follows from our theory that when the statutory law is made more progressive, and the custom adapts as a consequence, the gap between the former and the latter increases. By contrast, when outside economic opportunities improve in the presence of unchanging formal law, this gap is narrowed (given that the custom is expected to adapt itself to the enhanced exit options of the marginalized groups). However, in the end, what matters is not this gap proper, but the real impact of a progressive legal reform on the well-being of the intended beneficiaries. What we argue is that this level of well-being can increase significantly despite a widening gap between the statutory law and the custom.

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