Confronting Oppressive Custom: Reformism versus Radicalism

by

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Introduction

The economists’ approach to social norms and customary rules has invited strong criticism from a large group of other social scientists, development anthropologists in particular. The problem is seen to lie in the static nature of the equilibrium outcomes depicted as social conventions or norms, which follows from the definition of the latter as “self-sustaining systems of shared beliefs” (Aoki, 2001: Chap. 3; see also Young, 1996; Basu, 2000, Greif, 2006). Critics lay stress on the fact that, far from being static, customs and social norms underpinning them tend to continuously adjust to changing circumstances (see Yousfi, 2011, for a useful discussion). The transformation of ‘traditions’, according to this view, occurs because individuals or groups tend to manipulate customary rules in a strategic manner, whenever it suits their interests (see, e.g., Moore, 1986; Berry, 1993). Both views are obviously correct since it is equally easy to cite examples of enduring or of evolving customs: for instance, land tenure rules have substantially changed in Sub-Saharan Africa during the last half century while customs proscribing widow remarriage in India or encouraging child marriage in many poor countries of Asia and Africa, and customs prescribing female genital mutilation in West Africa, have proved quite resistant to change.

In this contribution, attention is limited to persisting harmful practices that are supported by strong social norms. We cannot rule out the possibility that such norms emerged in the distant past as an efficient response to some circumstances (e.g., polygamy has arisen in conditions of land abundance to cope with the shortage of labor). Nowadays, however, they create zero-sum games from which some people or groups benefit while others suffer, or they may have become

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1 A typical example of the latter case concerns the customary principle according to which the land ultimately belongs to the lineage which cleared it for the first time and founded the village built upon it. As it has been amply illustrated by anthropologists, different claimants tend to reconstruct the history of the local community in such a way that their own family appears as the founding lineage (see, e.g., Berry, 1993, Lund, 1998; Bassett and Crummey, 1993). Regarding the former case, we may cite the principle according to which land ought to belong to the family which cultivates it, and no family should be allowed to hold more land than it is able to cultivate by itself. Such a principle is often interpreted in a rather loose way by considering that managing the land and supervising wage workers is equivalent to working the land (Platteau, 1992).

2 Social norms have to be understood in the sense of informal rules which are generally backed by informal sanctions, and the persistence of which crucially depends on expectations. Conformity to them is thus conditional on expectations about other people’s behavior and/or beliefs (Bicchieri, 2006: 8).
inefficient in addition to being inequitable. In the absence of a coordinated move by those who suffer, there is no hope that the harmful norm will change. Moreover, even if they succeed in coordinating their efforts, the elite who have antagonistic preference will refuse to give in unless they receive a compensation that the disadvantaged are likely to be unable or unwilling to pay them. Here is, therefore, a clear case for public action.3

Legal reform suggests itself as the most natural way for a state to combat practices and supersede rules or norms deemed to be harmful for significant population groups. But why should we expect an oppressive, deep-rooted custom to disappear or recede as a result of a legal change when such change is not accompanied by a socio-political transformation susceptible of modifying the prevailing power balance? A dominant view is that formal institutions and rules aimed at protecting the interests of marginal groups are undermined in practice by informal, local rule-based systems and the social norms that underpin them. When statutory laws ignore or try to stamp out conflicting customary practices, they fail to have an impact and remain a ‘dead letter’ (Chirayath et al., 2005: 5; Sage and Woolcock, 2007).

The resistance of informal or customary systems is especially likely to be manifested when the modern law attempts to deal with matters of personal status such as marriage, divorce, succession and land tenure.4 For instance, in countries where the law forbids brideprice payments (e.g., Côte d’Ivoire, Gabon, Central African Republic, India, among others), people often continue to follow the custom as though this law did not exist (Nambo 2005; Ntampaka 2004). The same applies to statutory provisions contained in new Family Codes that aim at ensuring women’s right to inherit from their parents and at protecting them against the practices of early marriage, abrupt and uncompensated repudiation, male tutorship, or levirate (Cooper,

3 An interesting example of a Coasian compensation offered by the government to the elite on behalf of the disadvantaged is the compensation provided by the government of Ghana to traditional chiefs against their agreement for the privatization of the so-called stool lands. Since the (divisional) chiefs were earning substantial incomes from the sale of stool lands under their control, they were granted a regular maintenance allowance throughout the chief’s tenure, as well as a codification of the destoolment procedures fixed by the customary law so as to extend the chiefs’ time horizon (Firmin-Sellers, 1996: 73-83). It is noteworthy that, in this example, the compensation to the loser has been provided by the government acting on behalf of the potential winners of the change in property rights.

4 Leila Chirayath, Caroline Sage and Michael Woolcock (2005) offer us an interesting discussion of the characterictics and historical origins of informal, customary systems in a variety of contexts.
What we argue in the discussion that follows is that such a pessimistic scenario needs not always materialize: even a law which seems to be a ‘dead letter’ may actually spark a change in the custom. The idea is that the modern statutory law could serve as an ‘outside anchor’ or a ‘magnet’ pulling the local custom in a direction more favorable to disadvantaged groups. The underlying mechanism is that the law provides vulnerable people with an exit option which increases their bargaining power vis-à-vis the representatives of the traditional order. For this mechanism to have a chance to work, a number of pre-conditions must be satisfied, in particular: members of marginal groups are sufficiently informed about the law enacted in their favor; they do not perceive the custom as a ‘natural’ rule or a sacred injunction; informal sanctions are not so severe that invoking the modern law and appealing to the formal court are unthinkable actions; and, finally, they must have enough trust in the modern legal system.

A fascinating issue related to our ‘magnet’ theory of legal dualism (a dual system composed of the statutory and the informal laws) is the nature of the optimal law. More precisely, assuming that the modern law compels the custom to evolve along a progressive path, should the former be more or less radical? To put it in another way, is the welfare of the vulnerable sections of the population better advanced when the modern law represents a strong or a moderate departure from the existing custom? Raising this issue leads us to revisit the debate opposing reformists to revolutionaries in situations calling for social change. The view most often expressed by institutional economists may be called ‘gradualist’ and is in line with the characterization given at the beginning of this paper: radical solutions imposed by legislative fiat tend to have dismal results because they inevitably create misunderstandings, uncertainty, and disputes (Cooter, 1991). These problems arise from the fact that customary norms belong to the realm of slow-moving institutions in contrast to political institutions and, to a lesser extent, legal systems which are fast-moving institutions. Far from being instantaneously modifiable or malleable at will, these norms ‘stick’, and attempts to graft new, ‘modern’ fast-moving institutions into social universes shaped by them will fail to take root (Roland 2004).

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5 Michael Walton (2010) has thus stressed the fact that social norms can outlive their usefulness, such as when severe stigmas outlive the abolition of formal barriers to equality of opportunity, or even proactive measures to redress them.
By contrast, formal rules that remain somewhat grounded in customary principles or use them as reference point together with modern objectives or tenets are likely to give rise to a more organic type of development that respects the constraints arising from path dependence (Hayek, 1960; North, 1990). We will argue that a reformist approach to social change may prove more effective than a revolutionary one, yet in conditions that need to be carefully spelt out.

The outline of the paper is as follows. In Section 2, we briefly present a theoretical framework that we have developed elsewhere to address the problem of interaction between the formal law and the custom. The theory is dynamic to allow for the possibility that the custom moves in response to a new statutory law. Yet, it is also possible that the custom remains unchanged implying that the modern law is a ‘dead letter’. Emphasis is thus laid on the key assumptions of the model and its central results regarding the possibility of a ‘magnet’ effect of the statutory law. Section 3 pursues the same line of inquiry by supplying empirical support of the case study type for this effect. In Section 4, we turn our attention to the question of the optimal law, discussing various theoretical arguments calling for moderation. Section 5 provides empirical material to illustrate the analysis proposed in the preceding section. In Section 6, we highlight a new approach to change in social norms that has been recently implemented under the aegis of the United Children’s Fund, and we discuss it in the light of our theory of legal dualism. Section 7 concludes.

2. A Dynamic Theory of Legal Dualism

2.1 Description of the formal model

We begin the theoretical analysis by describing a game-theoretic model of legal dualism (see Aldashev et al., 2010b, for a formal presentation). The next section explains how the different features of the model should be interpreted.

The model consists of a very large number (strictly speaking, a ‘continuum’) of players, simply called ‘individuals’, who make up the population, and an additional player known as the ‘informal judge’. The individuals who make up the population belong to either one of two
groups, denoted by the terms ‘elite’ and ‘marginalized’. The game consists of an infinite number of periods, and in any period, an individual must either ‘belong to the community’ or be ‘outside of the community’. The steps of the game within each period are as follows.

1. A stochastic variable, representing the ‘current state of the economy’, is realized and its value is made known to all players;
2. The ‘informal judge’ declares a ‘custom’, conceived as a continuous variable varying between zero and one;
3. Each individual who belongs to the community decides whether they wish to remain in the community during the period in question or leave the community;
4. Each individual discovers whether they have become ‘embroiled in a dispute’ during the current period, with some other individual in the population; whether this happens or not depends on a realization of some binary stochastic variable; disputes always involve one individual from each of the two groups;
5. For each dispute which involves two individuals belonging to the community (i.e. two community members), the informal judge gives a ‘verdict’ which corresponds to the custom declared in step 2 above; all other disputes are settled in ‘the formal court’;
6. For those disputes settled by the informal judge, the disputants must decide whether to ‘accept’ the verdict or ‘challenge’ it by making an appeal to ‘the formal court’; in the case of appeal, the formal court gives a verdict (also of a value comprised between zero and one) in line with the prescriptions of ‘the formal law’;
7. If there is an appeal, the informal judge imposes a punishment on the community member who has challenged his verdict.

At the beginning of the next period, all existing community members remain within the community and those who left the community in the last period now find themselves outside it. An individual who has exited the community has no possibility of re-entering it.

At the end of each period, the informal judge receives a ‘pay-off’ which is increasing in the size of the community, and decreasing in the proportion of community members who challenge his verdict. Moreover, for each dispute that he arbitrates, his payoff is decreasing in the extent that his verdict deviates from some given ‘preferred verdict’. Each community member receives
a payoff which is also increasing in the size of the community and, if they have been involved in a dispute, increasing in the extent to which they are favored by the verdict (given by the informal judge if it is an intra-community dispute and there is no appeal, or by the formal court otherwise). All those outside of the community (including those who have exited in the current period) receive a payoff which depends on the current state of the economy and on the value of their ‘outside opportunities’. In addition, if they have been involved in a dispute, their payoff is increasing in the extent to which they are favored by the verdict in the formal court. As for the outside opportunities, their value varies across individuals and is observed only by the individual concerned, but it is constant over time. The payoffs, as is usual in game theory, represent the preferences of the players over the different possible outcomes.

This concludes our description of the basic elements of the formal model.

2.2 Interpretation of the game-theoretic model

In this section, we explain the elements of the formal model in greater detail, and justify the assumptions on the basis of the empirical literature. The ‘informal judge’ is a customary authority who lives in the community. His ‘preferred verdict’ reflects the community’s dominant custom at the present time. The custom is thus conceptualized as a fairness standard which has come to prevail following a long-term evolution. It typically aims at maintaining peace and social cohesion while upholding patriarchal norms of respectability, and is thus often bent towards the interests of the ‘elite’ group. The informal judge is not necessarily a single individual but often consists of a council or assembly composed of influential members of the community (e.g., elders, lineage heads), such as the *shalish* in Bangladesh or the *bagarusi* (courts of elders) among the Haya of Tanzania (Davis, 2009; Chirayath et al., 2005: 10-11). In the law and economics literature that deals with the role of arbitrators conceived as private agents operating in the shadow of the law, those agents are assumed to lack the coercive powers needed to ensure compliance with their verdicts (see, e.g., Dixit, 2004: 10-29). In our framework, by contrast, the informal agent (the customary authority) has the ability to impose punishments on community members who challenge his decisions.

While the informal judge uses the custom as benchmark, the ‘formal court’ makes use of the written law of the state. In order to focus the analysis on the ‘magnet effect’ of the statutory law,
we have assumed, implicitly in the formal model, that people are well informed about its content and have sufficient trust in its enforceability. Prosecutors and judges are fairly independent, judges do not seek or accept bribes, or at least they are not perceived as being more corrupt than the customary authorities, and judicial procedures are relatively transparent (see Weingast, 2010, for an analysis of the resistance of developing countries to the rule of law).

Obviously, our analytical approach does not apply to countries in which the rule of the law is not established, typically because of the pervasive disregard of the law and the subversion of legal institutions: thus, while it matches relatively well the conditions prevailing in Ghana and India, it is quite at odds with the realities of Cambodia and Somalia. Note, on the other hand, that we can easily adapt the model to allow for some fixed (transaction) cost in accessing the formal court (to allow for transportation expenses, the opportunity cost of time spent in going to the court, etc.). This would not affect any of the qualitative results discussed in the next section.

Individuals who ‘belong to the community’ participate in the production of, and enjoy the fruits of, community-level public goods. They have economic and social interactions primarily with other community members, and these interactions may include informal mechanisms of social protection, assistance in house construction, religious celebrations, village meetings and feasts, social events and ceremonies on the occasion of births, marriages, funerals, circumcisions, etc. Their payoffs are assumed to be increasing in community size as the scope of such interactions and the benefits of collective action are likely to be greater when there are more people involved (for example, informal insurance is more effectively provided when the risk-pooling group is larger).

Individuals who choose to leave the community lose these benefits. On the other hand, they are able to participate in the modern economy. The quality of their life then depends on the current state of the economy and on their personal resources which may include their skills, assets and social network.

In the event of a dispute, an individual who has left the community may not have his case settled by the customary authority any more. The modern court is then the only legal framework available for dispute settlement. This assumption is fully consistent with the observation by

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6 See, for example, the discussion of the lack of rule of law in Cambodia in Ghai (2010).
Crook (2004) and Gedzi (2009a, 2009b) that, in Ghana, urban residents seek resolution of litigation cases in the formal courts only, unlike rural residents who are more likely to use indigenous forums such as chiefs or elders’ courts before accessing the formal courts.

By contrast, if there is a conflict between two community members, the customary authority always makes a first attempt to arbitrate their dispute. If either side is unhappy with his ruling, then they may appeal the verdict in a formal court of law. If the dispute reaches the formal court, its ruling overrides that of the local authority. As attested by our own field observations in Senegal and Mali, or by Uwazie (2000: 19) in Ghana, the individual who appeals to the formal court is meted out an informal punishment that may consist of a temporary exclusion from the benefit of communal activities. The sanction is justified on the ground that airing family or community disputes in public stains the image of the family or community, thereby jeopardizing the ongoing relationships and undermining the group’s cohesion (Gedzi, 2009b: 25). In particular, a person who appeals to the official court to seek a settlement of an inheritance dispute may be considered as “a traitor to the community” (Fenrich and Higgins, 2001: 334).

Unlike that of the customary authority, the behavior of the formal judge is conceptualized in the simplest possible manner: he consistently applies the statutory law and his judgment is known in advance with full certainty by the possible litigants. In reality, the verdict of the modern judge cannot be completely predictable since several types of uncertainty plague the judicial process: some arise from verifiability problems, and others from judicial discretion reflected in varying interpretations of the law, caused either by the imprecision of its statutory provisions or by the subjectivity of the judge who has his own preference regarding what the verdict should be. Problems of verifiability and interpretation are especially important when, unlike what is assumed under a situation of legal dualism, the judge does not have one but

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7 For example, the PNDC inheritance Law 111 in Ghana (which we shall discuss in more detail in Section 5) makes a crucial distinction between the assets personally acquired by a deceased man and those inherited from the family. In practice, it may prove difficult to unambiguously decide whether an asset is to be considered as of the former or the latter type. Just to quote one example, how should a judge treat a house built by a man with his own money but on a piece of land belonging to the matri-clan? (see Fenrich and Higgins, 2001). Another source of uncertainty arises when a law protects the (inheritance) rights of a legally married wife but the judge has to settle the case of an illegitimate wife who bore children to the man (Josiah-Aryeh, 2008: 28).
several bodies of law available to him to support his decision. Such a situation is more likely to be observed in countries where several legal systems coexist.\(^8\)

If there is uncertainty about the verdict to be obtained in a formal court of law, and individuals are risk-averse, they would be less inclined to use the formal legal system. Although the formal model abstracts away from these possibilities, this does not affect its qualitative implications: increased uncertainty within the formal legal system is equivalent to a statutory law which is less favorable to the individual who is considering whether to make use of it.

### 2.3 Theoretical results

For the theoretical analysis we assume, without loss of generality, that the formal law is more ‘progressive’ than the dominant custom; i.e. the verdict in the formal court is more favorable to the ‘marginalized’ group than the preferred verdict of the informal judge. In these conditions, community members who belong to the marginalized group would have some incentive to leave the community or to appeal to the formal court if they have been involved in a dispute. If the current state of the economy and its future prospects are sufficiently strong (a high value in the current period and high expected value in future periods), those with the best opportunities outside the community will choose to leave. Those with weaker opportunities will generally remain in the community, but may appeal to the formal court if they have sufficient stake in a particular dispute. Thus, we obtain a situation of legal dualism, where both the formal court and the customary law are actively used by the population.

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\(^8\) In Tanzania, for example, up until recently, inheritance was governed by different laws of succession, including customary, Islamic and statutory laws. The customary law is the most unfavorable to women and the statutory law, which tends towards giving equal recognition to women’s rights, is the most favorable (the Islamic law is somewhere in between). In deciding which law should apply to a particular case, courts tend to base their judgment on what is known as the ‘mode-of-life test’ whereby the ethnicity and religious affiliation of the heir, as well as the intent of the deceased are taken into account. As a matter of principle, customary law is applied to African Christians unless they can prove that the family had abandoned the African mode of life, in which case statutory law applies. For African Muslims, the Islamic law is applied, unless it can be proven that the deceased had other intentions (Hilhorst, 2000: 187). Uncertainty is clearly present in such a situation since it is rather easy for claimants to distort information regarding their ‘mode of life’ or the intent of the deceased. Yet, disagreement about the latter may also be genuine rather than opportunistic. Similar situations have been observed outside of Africa, for example in Indonesia (Bowen, 2003: Chaps. 5-6).
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 in Section 2.1). The informal judge, we assumed, has a ‘preferred verdict’, 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. Also by assumption, he dislikes appeal to the formal court by community members, as this weakens his authority within the community. For these reasons, he may deviate from his preferred judgment, in the direction of the formal law, to discourage exit and appeal 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 the formal courts for the settlement of all their disputes. Similarly, there is likely to be greater appeal to the formal courts by community members. But, more importantly, such a legal reform may incite the informal judge to adapt the custom. In particular, if the loss in the value of the community public good that results from exit by community members, the loss in prestige from appeal, and the psychological loss in declaring a custom that deviates from the preferred verdict of the informal judge, are all greater for higher levels of exit, appeal, and deviation respectively, the custom may move in the direction of the formal law following a legal reform. This is the ‘magnet effect’ alluded to in the introduction.

Using different possible parameter values, we obtain a range of possible ‘outcomes’ in the model which include particular situations (corresponding to so-called corner solutions) in which some variables do not change. These outcomes can be summarized as follows.

If the formal law is sufficiently favorable to the elite group, if the outside options are not very attractive, or if the benefits from the social game are important, all disadvantaged individuals remain within the community and the customary authority pronounces judgments in accordance with his preferred interpretation of the custom. In this ‘conservative’ situation’, no disadvantaged member of the community ventures into appealing against an informal verdict. If the formal law becomes more progressive, the customary authority may adapt the custom in the same direction in order to discourage marginalized villagers from appealing to the formal court but, at least initially, the community should remain intact. If the formal law becomes sufficiently
progressive, or the outside options sufficiently attractive, and bearing in mind that by assumption the cost for the informal judge of deviating from his preferred verdict is convex, the customary authority will find it too costly to persuade all community members to remain and those with the highest outside options will begin to leave. Moreover, since the custom adapts less than proportionally to a change in the formal law, the distance between the two increases as the formal law becomes more favorable to the marginal groups and, as a result, there is an increase in appeals to the formal court from within the community. By contrast, a change in the state of the economy brings the custom closer to the formal law and, therefore, reduces the number of appeals to the formal court by community members. Finally, we cannot rule out the case where the informal judge’s unwillingness to deviate from his preferred interpretation of the custom is so strong 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 appeal to the formal court from within the community, is even greater when this condition obtains.

The four cases described above can also be depicted in terms of two outcome variables: whether the custom changes or not (whether the ‘magnet effect’ operates or not), and whether some people leave the community or remain within it (see Table 1). The canonical case is represented by configuration (iv) in which the custom is adapted (less than proportionally) to the statutory law, some marginalized members of the community decide to leave it while some among those who have opted for remaining choose to appeal against the informal verdict if they happen to be involved in a dispute. In the empirical discussion running through the following section, we have to bear in mind that in our ‘magnet’ theory of legal dualism, the effect of an increase in the value of the formal law is equivalent to an improvement of outside opportunities and to a decrease in the benefits of the social game.

Table 1: ‘Magnet’ effect and community size when a ‘progressive’ legal reform is enacted (or equivalent parametric changes occur)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Nobody leaves the community</th>
<th>At least one individual leaves the community</th>
</tr>
</thead>
<tbody>
<tr>
<td>The custom stays unchanged (there is no ‘magnet’ effect)</td>
<td>(i)</td>
<td>(ii)</td>
</tr>
<tr>
<td>The custom evolves (a ‘magnet’ effect is at work)</td>
<td>(iii)</td>
<td>(iv)</td>
</tr>
</tbody>
</table>
3. Case studies: women’s rights in rural West Africa and elsewhere

Example 1

Our main illustration of the above theory, reproduced from Aldashev et al. (2010b), consists of a dynamic story with succeeding stages corresponding to different outcomes in terms of Table 1. The story concerns women’s rights of land inheritance in the Senegal river valley where one of the authors did fieldwork in the late 1990s (Platteau et al., 1999). In this area, the entire population is Muslim and this affiliation dates back to several centuries. As field interviews conducted in a sample of sixteen villages located in the delta area (department of Dagana) and the Middle valley (departments of Podor and Matam) revealed, local inhabitants have a good knowledge of the Qur’an and they are aware that it contains provisions dealing explicitly with inheritance, particularly the prescription according to which women should inherit half of the share of their brothers. Despite this Qur’anic injunction, they have generally and until recently followed the customary principle providing that women ought not to inherit any land from their father. Behind this rule prevailing in patriarchal societies lies the fear that ancestral lands might fall into stranger hands or be excessively split, especially when marriage practices follow the rule of virilocal exogamy (Goody, 1976).

The fact of the matter is that, in this initial situation, the opportunity cost of referring to the formal law (the Qur’an, in this instance) and appealing to the formal judge (the local marabout) is sufficiently high, and the outside options sufficiently unattractive, to prevent any woman from venturing into questioning traditional norms. In other words, the formal law does not confer bargaining power upon rural women as a result of which the custom does not change, the community does not shrink, and there are no appeals to the formal law. The main reason why the opportunity cost of referring to the Qur’an and appealing to the marabout is initially so high for local Senegalese women is that by antagonizing their male relatives they would lose

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9 Islamization was the outcome of the colonization of the (Middle) valley by successive waves of foreign conquerors since the 10th century. Moreover, Maraboutic power used the 1776 revolution in Senegal to assert itself and establish the Almaami regime based on the Islamic law (Minvielle 1977).

10 Incidentally, the persistence of tradition-bound behavior qualifies Timur Kuran’s statement that in a matter such as inheritance that it addresses explicitly, the Qur’an carries an explicitly strong authority (Kuran, 2003, 2004).
important social protections they have traditionally enjoyed under the custom. Under the customary land tenure system, indeed, women are insured against various contingencies, in particular the prospects of separation/divorce and unwed motherhood. When such events occur, the custom typically grants them the right to return to their father’s land where they are allowed to work and subsist till they find a new husband (Platteau et al., 1999; see also Cooper, 1997: 62-63, for similar observations in the case of Niger). Moreover, the psychological cost of taking a land dispute to the (formal) religious authority was also perceived to be large insofar as, in the women’s view, open disputes between close kin “are to be avoided at all cost” (Cooper, 1997: 79; see also Gedzi, 2009b: 27, for Ghana, and Henrysson and Joireman, 2009 for Kenya).

Over the last decades, however, the value attached by women to their participation in the social game of their village community, in particular, the value of the customary system of social protection, has fallen as a result of an increase in female education and an expansion of non-agricultural employment opportunities available to them. As predicted by our theory, under such circumstances of improved outside opportunities, the custom has started to evolve and a number of women are leaving their community. There is no evidence, though, that the custom has gone so far as adopting the above Islamic prescription (daughters should inherit half the share of their brothers). What we observe, instead, 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 evolution has been detected in Niger where women, in recognition of their ownership rights, may receive part of the crop harvested on the family land by their brothers under an arrangement known as aro (Cooper, 1997: 78).

It is also interesting to note that women who have completed their primary schooling and those who have a non-agricultural occupation (even after excluding the marketing of agricultural products) have a tendency to express negative opinions about customary practices such as arranged marriages, brideprice payments, and the levirate system whereby a widow is remarried to a brother of her deceased husband (Gaspart and

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11 When they become widows, they are traditionally entitled to cultivate the land of their deceased husband until their male children reach adult age.
12 True, women’s access to land often remains fragile and difficult to secure: owing to their absence from the native village following marriage, it is hard for them to exercise whichever rights over land might have been granted to them, especially so if their male relatives are ready to exploit the information gap (Cooper, 1997: 81). The existence of problems in securing their rights on land explains why, in fieldwork, it is almost impossible to obtain precise information about the extent of women’s rights as well as about the amount and regularity of unilateral transfers obtained from their brothers.
Platteau, 2010). Such a change of attitudes and beliefs reflects an increasing readiness of these ‘progressive’ women to challenge the custom.

It bears emphasis that, in the above example, the situation of women has improved in spite of the absence of a change in the formal law (as a written code, the Qur’an is immutably fixed): it is thanks to the availability of new outside options for women that the custom is induced to change under the impact of a (constant) law. By serving as a ‘magnet’, the law nevertheless incites the informal judge to bend the custom in a progressive direction lest too many (marginal) members of the community should leave his jurisdiction or challenge his verdicts. In other words, the mutual play of the formal law and the outside options comes into effect when the combination of the two provides a viable alternative to participation in community life, so that women’s bargaining power is enhanced.

Another situation arises when the real benefits drawn from the community-level social game diminish in conditions of constant outside opportunities. This situation is currently observed in areas of acute land pressure, such as parts of Eastern Africa, where women’s customary rights to subsist and work on the father’s farm in distress conditions are under attack, thereby increasing their vulnerability after the death of, or separation from, a husband. In Rwanda and Kenya, for example, the customary right of a daughter to return to her father’s land in the event of separation, divorce or unwed motherhood became increasingly threatened as land pressure grew, giving rise to severe intra-family conflicts (André and Platteau, 1998; Haugerud, 1993: 162-182; Verma, 2001, and Henrysson and Joireman, 2009).

Similarly, their traditional right to continue to cultivate the land of their deceased husband until their male children reach adulthood is threatened. In Uganda, the Federation of Women Lawyers (FIDA) thus reported that 40% of the cases they handled were related to the harassment of widows and property grabbing by their husband’s relatives (Bikaako and Ssenkumba, 2003: 250). In the Luwero and Torero areas, 29% out of a total of 204 widows indicated that property was taken from them following the death of their husbands. In Zambia, 41% of female-headed households with orphans indicated that they had lost all their cattle and 47% had lost all their pigs (Joireman, 2008: 1240). In Niger, half of the women living in the city of Maradi and who
inherited land from their fathers lost that land as a result of some action (sale or appropriation) by their brothers (Cooper, 1997: 81-82).\textsuperscript{13}

To the extent that land pressure has the effect of diminishing the value of the community public good to them, more women are incited to leave the community, as attested by the evidence of migration provided in a study about Niger: women move in growing numbers to cities where they engage in some (trade) business or prostitution and, if they are successful, they will end up purchasing a dwelling and perhaps some farmland (Cooper, 1997: 82-89). Women also have an increased incentive to appeal to the formal court (for a fixed modern law): in Kenya, for example, this means invoking the *Succession Act* (1981) which affords significant protections for women.\textsuperscript{14} These moves spark off a ‘magnet’ effect on the informal law because the women’s appeals negatively affect the prestige of the customary authority. On the other hand, land pressure is likely to make the customary authority become more conservative if powerful groups within the community are now more keen to protect their interests. As a result of these two opposite moves, the custom could go in either direction.

*Example 2*

The gradual transformation in the Sahel of the custom regulating women’s rights to initiate a divorce supplies an insightful illustration of a progressive legal reform that triggers an adaptation of the custom. In the initial situation, divorce was not readily granted to a wife wishing to leave her husband except in the case of proven mistreatment by the latter (Kevane, 2004; Platteau et al., 1999). Over the recent years, however, women have progressively acquired a *de facto* right to leave an unhappy union. The main reasons behind this evolution are twofold. First, social sanctions against leaving an arranged marriage have become less severe, to a large extent as a result of continued migration to neighboring countries such as the Ivory Coast. Second, there is the effect of administrative pressure “as successive regimes continue to push for explicit legal

\textsuperscript{13} As noted by S.F. Joireman (2008), “if land is valuable, or a woman has property left by her husband that is viewed as valuable, she may find herself cast off with no land to farm and her household goods appropriated by members of the lineage” (p. 1240). Note carefully that in these instances not only are the traditional social protections of widows undermined but there is also typically a redistribution of land from the male children of deceased fathers to the uncles and nephews.

\textsuperscript{14} Such a trend is reinforced thanks to the work of organizations aimed at defending women’s rights and active in advocating legal reforms favorable to women, raising awareness among them, and supporting their efforts to appeal to the formal law.
rules and rights for women in marriage” (Kevane, 2004: 75; Jewsiewicki, 1993). As pointed out by Hilhorst (2000): “A stronger legal status does not automatically afford women more independence but it may provide a strong bargaining position” (Hilhorst, 2000: 195). Other illustrations of the operation of the magnet effect will be presented in Section 5 when we provide empirical material in relation to the issue of the optimal law.

Before turning to this issue, we wish to draw attention to the fact that the notion of customary authority or informal judge allows for wide interpretations. It may thus consist of family heads (or a coalition of them) to the extent that they perform functions akin to pronouncing judgments and deciding who can participate in the local social game.

**Example 3**

The story of the Berber village of Tassali in the region of Ouarzazate (Morocco) is illustrative in this regard. The case of Morocco is particularly interesting because a new Family Code was enacted in February 2004. While the pre-reform prevailing rules were largely founded on a combination of religious values and customary tribal norms, the new Family Code aims at improving woman’s status by assigning her a new role in the family (on an equal footing with her husband in matters of family responsibility) and granting her new rights (such as the right to initiate a divorce without being required to adduce evidence of ill-treatment or to produce witnesses). Field observations conducted in 2008 in Tassali reveal that male villagers tend to view the new Family Code as a threat. Responding to this challenge, most of the local household heads have modified their attitude towards certain aspects of family life. In particular, they do not anymore compel their daughters to marry a man chosen by the parents, and they have softened their behavior vis-à-vis their wife because of the fear of triggering a divorce and damaging the honor of the family (Chaara, 2010). As for the women who are aware of the provisions contained in the new Code, they feel that they have acquired more bargaining power enabling them to demand greater participation in the decisions of the household.

4. **The optimal law: theoretical considerations**

4.1 **Radical versus moderate changes in doctrines of legal development**
The problem of choosing radical or moderate reforms, legal or otherwise, is particularly salient in developing countries where the conflict between modernity and tradition has often held the center stage (Platteau, 2000: Chap. 1; 2010). During the decades immediately following the second world war, a group of influential economists viewed development as the outcome of a Big Push driving traditional societies out of secular stagnation into the era of self-sustaining growth (Rostow, 1960, 1963; Enke, 1963; Kuznets, 1966, 1968; Bruton, 1965; Higgins, 1968). Typical of their writings was a good amount of optimism concerning the pace at which traditional culture and institutions, which are ill-suited to the new system of growth, can adjust to its requirements. Other contemporary economists, however, envisioned institutional and socio-cultural change in pre-modern societies as a much less radical step (Meier and Baldwin, 1957; Bauer and Yamey, 1957; Hirschman, 1958). For example, Gerald Meier and Robert Baldwin adopted a resolutely gradual approach to socio-cultural change:

“Not only must economic organization be transformed, but social organization ... must also be modified so that the basic complex of values and motivations may be more favourable for development (...) To avoid human discontent, [however], changes should be introduced in ways that will disrupt the existing culture as little as possible: the cultural change should be selective (...) more rapid progress will come by utilizing as much as possible existing attitudes and institutions rather than by attempting a frontal breakdown of the culture” (Meier and Baldwin, 1957: 356, 359).

In addition, Meier and Baldwin explicitly warned against the danger of ethnocentrism in discussions of socio-cultural problems: “In considering the social and cultural requirements for development, a Western student should not make the mistake of ethnocentrism, that is, assuming that, because the West is developed, Western values and institutions are therefore necessary for development ...” (p. 355). Close to the ‘gradualist’ doctrine, a group of economists chose to emphasize the co-evolutionary nature of cultural and economic development. Thus, Peter Bauer and B.S. Yamey (1957) did not seem to believe that traditional culture ought to be seriously undermined before growth may become possible. Revealingly, they pointed out that “the economic history of Japan demonstrates the compatibility of rapid economic change and growth with the preservation of traditional attitudes and social relationships, recast or re-emphasized as these may be to suit the needs of a new economic order” (p. 68). In the same vein, Arthur Lewis (1955) was of the opinion that religious beliefs, for example, may evolve and be reinterpreted depending on the economic environment confronting societies. In other words, traditional values
and attitudes, whenever they are hostile to economic advancement, will eventually adapt themselves to new economic opportunities (p. 106; see also Hirschman, 1958).15

Of more direct relevance to our topic is the destiny of the Law and Development (L&D) movement which was born in the early days of the 1960s to end abruptly in the course of the 1970s. Guided by the ambitious goal of reforming the substantive laws and legal frameworks of developing countries through the privileged channel of legal education, and inspired by the belief that law could be used to change society (law is an engine for change), the programme of the L&D movement led to disappointing results directly attributable to its questionable premises. In particular, many efforts at legal transplantation went awry and, not infrequently, transplants did not take roots: in some cases the new laws promoted by the reformers remained on the books but were ignored in action while in other cases they were captured by local elites and put to uses different from those the reformers intended (Trubek, 2006: 78-9; Messick, 1999).

Succeeding the L&D movement and calling into question its most naïve implicit assumptions –in particular, that Western law was the higher evolutionary stage towards which all systems were moving–, the Legal and Judicial Reform (LJR) movement (sometimes called the Rule of the Law movement) emerged in the late 1980s with the explicit aim to undertake comprehensive legal reforms that would go much beyond the limited approach of changing the ‘formalist’ legal culture of developing countries through legal education.16 Members of the new movement strongly believed in the possibility of legal transplantation, in the willingness to

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15 The diversity of views among development economists mirrored the even wider spectrum of opinions and perspectives offered by other social scientists. At one extreme, we encounter the “hypermmoderst perspective” (Rao and Walton, 2004: 10) exemplified most recently by the works of Lawrence Harrison (2000), Samuel Huntington (2000), and David Landes (2000). Through the lens of this approach, laggard countries appear as societies deeply immersed in traditional cultures that are unsuited to market-oriented development. Without a profound reform of their cultural characteristics, typically initiated from without, no change in their people’s behavior, norms, habits and collective rules will be possible so that the challenge of modernity will not be met. At the other extreme are the cultural critics of development for whom the modernization perspective overlooks the fact that culture, far from being a set of external constraints, is an endogenous product of neo-colonial conceptions and praxis (see, e.g., Escobar 1995). In between these two extremes positions, more nuanced approaches have been proposed by, for example, Clifford Geertz (1973), Jan Breman (1974), James Scott (1976, 1985), Pierre Bourdieu (1990) and others. Resting on the holistic methodology that is the landmark of sociology and cultural anthropology, their approach treats culture as “one of the realms of everyday life” (Rao and Walton, 2004: 11), and offers the advantage of shedding interesting light on concrete issues that arise in the course of development (see Plateau, 2010).

16 By ‘formalist’ legal culture, what is meant is the tendency of judges to apply the law in a rigid and mechanical fashion without concern for policy relevance and social context.
conduct reforms at once in all parts and levels of the legal order, and they held the view that there was one model applicable to all countries. Furthermore, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted (Trubek, 2006: 74-80). Given these beliefs, it is not really surprising that many of the errors of the past were repeated and little had actually been learned from prior experiences. In particular, stress continued to be placed on the role of the law in making the economy more efficient, while hardly any attention was paid to equity issues (Pistor and Wellons, 1999; Trubek, 2006: 89). Moreover, the need for adaptation to local contexts, the risk that reforms could be captured by greedy elites, and the gap between law on the books and law in action continued to be largely overlooked (Messick, 1999; Trubek, 2006; Sage and Woolcock, 2007).

The L&D and the LJR movements shared two important characteristics that account for their disappointing results. On the one hand, no sound theories highlighting the role and functions of justice systems and the effect of law on development were developed to guide thinking about reforms. On the other hand, there was a marked ignorance of the local level context and the systems of justice actually operating on the ground. In the words of Leila Chirayath, Caroline Sage and Michael Woolcock (2005): “As such, justice sector reformers have failed to acknowledge, and thus comprehend, how the systems –which, at least in rural areas, are predominantly customary, idiosyncratic to specific sub-regional and cultural contexts, and residing only in oral form– by which many people (if not most poor people) in developing countries order their lives function” (p. 1).

4.2 Lessons from the ‘magnet’ theory of legal dualism and possible extensions

We claim that our magnet theory of legal dualism provides us with an analytical framework that can be used to clarify the issue of legal reform. Although it is highly stylized, it takes explicit account of the role of the informal judicial system, the domain of the custom, while allowing for strategic interactions between this system and the formal law. Moreover, it can lend itself to an informed discussion of the issue of how radical a law should be to further the interests of its intended beneficiaries.

The ‘magnet’ effect argument seems to suggest that when this effect operates a more radical statutory law better protects the interests of marginal groups. This goes against the view sometimes aired that attempts to override the customary system may lead to further ostracism
from the community against the marginal sections of the population which the lawmaker wants to protect (Sage and Woolcock, 2007: 7). What we argue below is that as generalized statements both views are unwarranted. To hold true, the latter view requires that marginalized people have no or very poor outside options and that punishments meted out by customary authorities are extremely severe. As for the former view, a correct interpretation of the model underpinning our theory does not provide unambiguous support for radical progressive legislations. The need for caution in this regard becomes even more evident if our analytical framework is refined by making the application of the formal law less mechanical, by allowing for its unpredictable enforcement, and by assuming that dominant values may be internalized by marginalized people. In the ensuing discussion, we present four different strands of argument pointing to the possible desirability of moderately progressive laws. The first of them follows from the theory expounded in Section 2 while the last three are an elaboration of the aforementioned refinements.

(a) The welfare argument

To begin with, let us assume the existence of a social planner whose objective function consists of maximizing the aggregate welfare of all members belonging to marginal groups. A statutory law exists and the planner asks himself whether he should enact a new law more favourable to these groups and, by assumption, therefore more distant from the prevailing custom. He also wonders how radical this new legislation should be. From the comparative statics analysis applied to our model, it is evident that a positive effect of a ‘progressive’ legal reform is the induced adaptation of the custom in the direction of the modern law (provided that we are in the conditions where the magnet effect operates). Such a reform also has a direct impact on the welfare of those who find themselves outside of the community, and on those within the community who are embroiled in disputes severe enough to prompt them to challenge the authority of the informal judge. These two effects would suggest that the marginalized section of the population would always benefit from a legal reform that renders the formal law more favorable to them. However, this reasoning ignores the additional fact that the reform encourages exit from the community, thus lowering the value of the community public good for those who remain behind (since this value depends on the size of the community).

Define a ‘progressive’ shift in the formal legal system as an increase in the value of the formal law, bearing in mind that the law most favorable to the elite is equal to zero while the law
most favorable to the marginalized people is equal to one. Whether such an increase will lead to an improved welfare of the disadvantaged section of the population depends on the relative importance of the three above effects. Nevertheless, we can establish two important facts about the social impact of a legal reform that generally hold true. The first is that the social impact of an increase in the value of the formal law is more likely to be positive in a more ‘modern’ economy, where ‘modern’ means that individuals have relatively strong alternative options outside of the community. In this instance, indeed, a large fraction of the population will already have exited the community and the negative impact of a ‘progressive’ legal reform on the community public good will be felt by only a small number of individuals. Furthermore, the positive impact of a higher value of the formal law will be felt by a large number of individuals who have joined the modern segment of the economy, and therefore resort to the formal legal system to resolve their disputes.

The second fact is that, among the disadvantaged, a ‘progressive’ legal reform will not affect all individuals in the same way. For those who are already in the modern economy, the effect is unambiguously positive because they benefit directly from the new, more ‘progressive’ law whereas they do not suffer from a possibly weakened community system. Those who switch to the modern economy in response to the legal reform are, in fact, exchanging the value of the community public good for their outside option. Those with the highest values of the heterogeneous component of the outside option within this group are, therefore, most likely to benefit from the switch. On the other hand, those who remain within the community benefit the least since they hold onto an option that has been rejected by the others. If the customary authority is reluctant to respond to the change in the formal law (behavior which can be determined by a sharply increasing cost of deviating from its preferred judgment), this last group of individuals may be adversely affected by the reform owing to reduced provision of the community public good that follows the others’ exit.

It follows from this discussion that, if the social planner assigns greater weight to the individuals who have the most limited options (as opposed to the equal-weight approach taken in the exposition above), a moderate reform may be superior to a radical reform. This is a direct implication of the fact that those individuals who have no realistic alternatives to community benefit from a legal reform only to the extent that the custom evolves in the same direction as the
formal law, while they suffer a loss commensurate to the decrease in the provision of the community-level public good.

(b) Law abidingness versus preferred judgment of formal judges

In our model, the modern judge is depicted in a simplistic manner since he is assumed to apply the statutory law mechanically and unflinchingly. That this is not true is evident from the application of the ‘mode-of-life test’ described in footnote 8, for example. If we depart from this assumption, we uncover a second reason why the law may better be moderate than radical. As a matter of fact, too radical a law may deter a significant proportion of the modern judges from applying it strictly, thus making the legal reform self-defeating.

To conceptualize this second argument, we follow the idea that like the informal authority, the modern judge has a preferred judgement and that his utility decreases as the distance between this judgement and his actual verdict increases. Moreover, he is sensitive to law abidingness, meaning that he earns a positive utility by strictly implementing the law because he then does what he is committed to (see Aldashev et al., 2010a, for more details). In other words, each modern judge receives a benefit from law abiding behavior yet, because he has his own ethics, if his verdict deviates from his preferred judgment, he also incurs a disutility proportional to the magnitude of this deviation. In this setting, there exists a threshold value of the formal law (comprised between zero and one) above which a judge with a certain preferred judgment will stop passing judgments corresponding to the law and follow his own preferred judgment. There are obviously as many such thresholds as there are values of the preferred judgment.

Preferred verdicts of the modern judge are assumed to be unobservable to the members of the community and the social planner, which is tantamount to assuming a probability distribution of such preferred verdicts over the population of modern judges. The expected utility of a marginalized individual from pursuing a case in the formal court therefore depends upon the probability that he or she faces a modern judge whose preferred judgment is sufficiently ‘progressive’ to incite him to strictly enforce the law. It is evident that the more radical the legal reform the lower the fraction of law-abiding judges and the higher the probability of meeting a judge who has chosen to enforce his preferred judgment rather than the new law. To put it in another way, as the value of the formal law marginally increases, the modern judge with the
critical value of the preferred judgment switches from applying the law strictly to following his own preferences.

It is then easily shown that, if there is a large proportion of modern judges on the threshold, the net effect of an increase in the value of the formal law can be a decrease in the expected utility that all marginalized individuals can obtain from seeking recourse in the formal court. In other words, a more radical law necessarily makes its strict implementation too costly for a certain fraction of modern judges for whom it deviates too far from their preferred judgment. They respond by ceasing to follow the written law and, instead, shift to their preferred judgment. If the proportion of such judges is large enough, their response outweighs that of the more ‘progressive’ judges who do follow the more radical prescription of the revised law. If so, the enactment of such a law eventually hurts the interests of the intended beneficiaries, i.e. the expected value of the formal judgment decreases. As a consequence, a number of them will no more find it worthwhile to appeal to the formal court.

(c) Unpredictable enforcement of the formal law

According to the above argument, marginalized individuals entertain doubts about whether the new law will be actually applied by the formal judge who may hear their case. An additional source of uncertainty concerns the extent to which the verdict is enforced. If there are enforcement problems, even a law that is strictly followed by the courts may be deemed unreliable by the claimants. Our theory which has been built on the assumption of perfect enforcement of the statutory law thus needs to be adapted: any pronounced judgment is now a stochastic variable with a finite variance and community members are risk averse. Moreover, the variance of the verdict may be thought as being dependent on the level of ‘progressiveness’ of the law. More precisely, the verdict’s unpredictability is likely to increase as the law becomes more radically ‘progressive’, especially so if the enforcement of the formal judgment requires the effective cooperation of local customary authorities. In the case of land conflicts, for example, since land is an immobile asset that belongs to a given community space, there is a relatively high risk that the judgment of the formal court will not be properly enforced if is too different from the prevailing custom.
In terms of our model, as we have been pointed out in Section 2, a decrease (increase) in the variance of the formal verdict yields the same (magnet) effect as an increase (decrease) in its mean value. As a consequence, if the values of these two statistics rise together (since they are interdependent in the above-suggested manner), a more ‘progressive’ law may well turn out to be innocuous and even harmful for the marginalized groups of the population. The latter eventuality will materialize if enforcement problems become proportionally more serious as the statutory law becomes more ‘progressive’ (that is, if the variance of the formal law rises proportionally more than its mean value as the latter is raised). In this instance, the possibility again arises that a moderate legal reform is superior to a radical reform.

An alternative way to model the effect of legal ‘progressiveness’ on the reliability of enforcement is to adopt the same assumptions as those used above regarding the behavior of the judges. Legal enforcers have a preference for enforcing the legal verdict, which is their formal duty, but suffer a loss of utility increasing in the distance between this verdict and their preferred outcome. If the distance becomes too large, they stop enforcing the law. Since legal enforcers are heterogeneous in their preference, a more radical law is likely to induce a fall in the proportion of them who enforce the law strictly, thus counteracting the effect of legal reform.

In this last form, it may be noted, our argument here is close to that made by Kahan (2000) on the basis of US evidence. According to him, indeed, the resistance of law enforcers sometimes confounds the efforts of law makers to change social norms. For example, as legislators (in the United States) expand liability for date rape, domestic violence, sexual harassment, drugs, and drunk driving, not only do prosecutors become more likely to charge, jurors to convict, and judges to sentence severely (our second line of argument) but also the police become less likely to arrest the culprits and enforce the legal verdicts. The conspicuous resistance of these decision-makers in turn reinforces the norms that law makers intended to change. With the help of a theoretical graphic argument, Kahan argues that this pathology of ‘sticky norms’ can be surmounted if law makers apply ‘gentle nudges’ rather than ‘hard shoves’. When the law embodies a relatively mild degree of condemnation, the desire of most decision-makers to discharge their civic duties will override their reluctance to enforce a law that attacks a widespread social norm.17

17 In Kahan’s setting of the problem, the utility of the law enforcer is the sum of three components. The first one represents his personal opinion of how severely the particular conduct at stake should be
Internalization of dominant values and legitimization of traditional authority systems

Until now, we have assumed that members of marginal groups fully identify themselves with the statutory law and the state authority system in the following sense: they believe that a relatively ‘progressive’ law—a comparatively high value of the formal law in the interval [0,1]—unambiguously ‘represents’ their interests. In other words, their perception of the law coincides with the intent of the lawmaker. This needs not be so, however. An oft-observed characteristic of dominated people is, indeed, that they internalize the dominant values shaped by the elites and legitimize the authority systems established by the latter. This leads them to unknowingly adopt attitudes and defend opinions contrary to their own interests. The distorted perception of what constitute their genuine interests typically results from a deep attachment to a tradition they are reluctant to call into question (the elites do not have such a problem insofar as the tradition protects their interests), especially so if the tradition is naturalized or sacralized, for example because it is embodied in religious tenets.

A remarkable illustration of such a possibility has been provided by Ashok Rudra (1981) when he described the resistance of Bengali sharecroppers (the Bargadars) against a land reform enacted by the (communist) government to transform their precarious rights into full ownership rights. The root cause of their resistance, as he documented, was their deep-seated belief that it would be wrong and illegitimate to acquire assets that had always belonged to their benevolent masters (in a similar vein, see Scott, 1976: 41-51). To take another example, an Indonesian Muslim woman who was the only surviving child in her family did not dare claim all the inheritance when the judge was ready to grant it to her. As a justification for her decision to let a

condemned (the equivalent of the distance between the law and the preferred outcome in our model). The second one represents his commitment to discharging his civic duties in general (the equivalent of law abidingness in our model). As for the third one (absent in our model), it represents his propensity to conform his enforcement decisions to the decisions of other law enforcers considered as a group. The presence of the last component enables the author to show that the willingness of most decision-makers to enforce can initiate a self-reinforcing wave of condemnation, thereby allowing lawmakers to increase the severity of the law in the future without prompting resistance from most decision-makers.

18 Here is the clearest expression of what Marxists see as false consciousness: “No, we have not registered ourselves! We have not done any such Adharma [immoral act]! Why should we take away the lands belonging to the masters? They have been good to us from our fathers’ time. It is to them that we turn whenever we are in any difficulty. It is thanks to them that we survive” (Rudra, 1981: A-65).
cousin have a share of the parental wealth, she referred to a desire to act righteously, according to the Islamic customary prescription (Bowen, 2003: 195-99). To take a last example, in societies where marriages are traditionally arranged by parents, children often justify this practice by arguing that since they love them their parents are the persons best able to find a suitable partner for them.

Upon careful thinking, however, there are two distinct ways in which disadvantaged people may fail to fully identify with the modern law. First, their preference over legal outcomes is shaped by the elite’s values which they have internalized through their socialization process. Second, they have a loyalty feeling toward the customary institution, so that resorting to an alternative institution sparks a painful internal conflict in them. In the first case, the ‘magnet’ effect is obviously prevented from operating, while the mechanism at work in the second case requires that we refine the argument that runs through our basic model. We can thus think of a new variant in which the following assumption is made: whenever a ‘progressive’ shift towards a better protection of their interests occurs through a change in the custom, marginalized people fully value the move, implying that any increase in the value of the custom is fully accounted for in their utility calculus. By contrast, any such change effected through the official legal order is discounted. In other words, valuation of an increase in the value of the formal law in their utility function is imperfect, being weighed down by a discount factor comprised between zero and unity. As a result, the size of the ‘magnet effect’ is mitigated in proportion to the magnitude of the discount factor.

It may help to think of the discount as an internal punishment, caused by some sort of guilt, inflicted by a marginal person on himself (herself) for shifting loyalty to the modern legal order. When this interpretation is adopted, the following relationship becomes more plausible: the more the statutory law differs from the custom, the more significant the loyalty shift of the community members seeking recourse to the formal court, and the greater the guilt feeling or the associated utility loss experienced by them. An inverse relationship between the discount factor and the level of ‘progressiveness’ of the statutory law is thus suggested. Clearly, we may encounter situations in which the discounting of the rising value of the formal law becomes so important that the variation in the utility value of the formal law becomes nil or negative. To emancipate marginalized people, a radical law would then be less effective than a more moderate one.
There are thus several strong reasons which may call for moderate rather than radical legal reforms. To sum up our analysis, moderate reforms are more likely to be effective if:

- Alternative options outside of the community are more scarce, the benefits from local public goods are more sensitive to community size, and the customary authority is more reluctant to respond to a change in the formal law by adjusting the custom −mechanism (a).

- The proportion of modern judges close to the threshold beyond which law abidingness becomes less important than following own preferences is larger −mechanism (b).

- Enforcement problems become more serious as a result of a ‘progressive’ legal reform −mechanism (c).

- Marginalized people are more prone to internalize dominant values and legitimize customary authority systems −mechanism (d).

In the light of the above theoretical considerations and predictions, we may now embark upon a discussion of some interesting empirical material gleaned from social and legal studies conducted in different contexts and countries. Before addressing this task, however, it is important to stress that our analysis leaves aside a crucial factor that may make radical steps undesirable. As a matter of fact, the customary authority may be embedded into a powerful institution that has the ability to resist legal changes that it dislikes through violent means if needed. An example that springs to mind here is the chieftaincy in Ghana that President Nkrumah confronted directly even before national independence was won (Firmin-Sellers, 1996: Chap. 6). This tactic was later called into question and replaced by a more conciliatory approach when Nkrumah was overthrown by a military regime which took due note of the persisting popularity of Ghanaian traditional chiefs (Brempong, 2001; Abotchie et al., 2003). Another example is the customary authority embedded in the erstwhile kingdom of Buganda, today a part of Uganda that the central state has always found difficult to handle.

5. Radicalism versus reformism: empirical evidence

5.1 Mitigating radical laws
It is an oft-noted fact that in many developing countries the modern law remains ‘a dead letter’, especially in delicate matters of personal status and civil rights. It is hardly pointed out, however, that in some remarkable cases the state has actually stepped back by amending the law so as to get it closer to the custom. Such reversals reflect an understanding based on experience that too radical laws fail to spark sufficient change in customary behavior and practice. This is particularly evident in the following example. In Gabon and Senegal, the state realized after a while that it was pointless to prohibit polygamy altogether since the practice was deeply rooted in African tradition. Instead, it decided to make polygamy an optional choice to be explicitly mentioned in the marriage contract (Article 177 of the Gabonese Civil Code). Moreover, the law provides that violation of the commitment to either monogamy or polygamy is a legitimate cause for divorce, and in Senegal, violation of the monogamous option can be invoked to declare the marriage void. However, the code’s prescription has been continuously ignored by husbands who renege on their commitment to monogamy whenever it suits them. In Gabon (although not in Senegal), the reaction of the state has consisted of promulgating a new law (Law 18/89 of 30 December 1989) that allows much more flexibility than the previous ruling: spouses are now authorized to rescind their commitment to monogamy in the course of marriage life (Nambo 2005; Coulibaly 2005; Sacco 2008). For women, the benefit nevertheless remains that they may more easily motivate a divorce than before.19

An important domain in which attempts to rule through central legislation have proved problematic from colonial times onwards is the sphere of land relations. State provisions intended to regulate the allocation of rural lands frequently ran counter to local informal rules (which are not necessarily static) and to the widespread belief that such a prerogative belongs to customary authorities and not to the central state. Thus, the law prohibiting excessive land fragmentation in Rwanda (no property of less than one hectare can be further divided) has never been taken seriously on the ground because it runs against the deep-rooted custom according to

19 It is interesting to note that European colonizers had also gone through the same painful experience as modern African states. For instance, colonial officials in direct contact with West African rural populations quickly came to the conclusion that it was vain to enact a law raising the age at marriage for girls. Early conclusion of marriage for girls was a practice so embedded in the cultural complex of these societies that a central state had no possibility of modifying it radically through legal means at its disposal (Colin, 2004).
which every male member of the family is entitled to inherit an equal share of the family property (André and Platteau, 1998).

When the government of Kenya, in the wake of reforms initiated by Lord Swynnerton before independence, introduced the systematic, formal registration of land rights, the ineffectiveness of such a bold step soon became plain. In the words of Ruth Barrows and Michael Roth (1989), customary law “in fact continues to govern the way in which most people deal with their land, making tenure rights ambiguous. The land law failed to gain popular understanding or acceptance, individuals continued to convey rights to land according to customary law, and a gap developed between the control of rights as reflected in the land register and control of land rights as recognized by most local communities” (Barrows and Roth 1989: 7; see also Shipton, 1988). Still, the new law was biting enough to spark serious conflicts which forced the Kenyan state to backtrack and reduce the distance between the formal law and the custom. This was done by requiring that any alienation of land by a title holder be subject to prior approval of other lineage members or witnessing by elders. And District Land Boards can hear complaints filed by wives or sons to prevent a man from selling land essential to a family’s subsistence, or land promised for sons to inherit (Haugerud, 1993: 162-75; see also Berry, 1993: 126-27; Mackenzie, 1993; Pinckney and Kimuyu, 1994).

5.2 Enacting moderate laws

States do not always opt for moderate reforms through backtracking on initially bolder initiatives. There are examples showing that they may well understand the need for moderate reforms right from the beginning. This ability actually characterizes those leaders who follow a reformist rather than a revolutionary approach to social change. One such leader is the reformist ulema Ibnou Zakri who, toward the beginning of the 20th century, stood up against the archaism of rural Islam in Kabylia, denouncing, in particular, the ignorance of the Islamic law of inheritance. Unlike other radical reformers, however, he was convinced that any change in the law had to be at least partly approved by the customary authorities. In the case of Kabylia, this meant that the village zawaya (local council), considered as a ‘furnace of heresy’, had to evolve so as to gradually accommodate a more progressive and Islamic approach to women’s rights (Chachoua 2001: 176, 180-187).
In the remainder of this section, we present three illustrations of a reformist attitude of the lawmaker: in relation to immigrant’s rights of access to land (in Sub-Saharan Africa), and in relation to inheritance rights (first, in India and, second, in Africa). The third illustration, drawn from Aldashev et al. (2010a), is more elaborated than the first two (reproduced from Aldashev et al., 2010b), thanks to the availability of more detailed information.

**Example 1: Protecting land access for immigrant and stranger farmers in Africa**

All throughout Sub-Saharan Africa, immigrant farmers in lineage-based societies traditionally enjoyed long-term use rights over the land granted by local customary authorities. As land pressure increases, however, these rights become increasingly precarious and immigrant farmers even face a serious risk of eviction, leading to socially explosive situations. Original settlers, indeed, come to realize that land may be lacking for their children or grandchildren, or they simply want to re-appropriate land that has become more valuable as a result of improvements made by their occupants (Laurent, 1998). The state may then choose to intervene with a view to counteracting exclusionary practices and reducing opportunities for conflict. In Côte d’Ivoire, for example, land scarcity had sparked acute tensions which eventually degenerated into the wild expulsion of foreign immigrants (mainly from Burkina Faso). It is in this context that in December 1998 the Ivorian government passed a law (Law N° 98-750) providing that all landholdings cultivated by immigrants henceforth become state lands leased to them for a period of 99 years (Aka, 2007).

Here is a vivid illustration of how the formal law can compel customary practices to evolve in conditions where they are, or have become, inefficient (immigrants are typically dynamic farmers) and inequitable (immigrants have occupied Ivorian land for several generations). Public intervention has proved successful because the state was clever enough not to opt for a radical solution: stopping short of granting full ownership rights to immigrants, it conferred upon them a transitory status more acceptable to indigenous village communities. Following a tradition inherited from colonial and post-independence times, the state actually re-asserted its own right of bare ownership of the country’s rural lands, which entitles it to grant use rights to individuals or communities. The ire of the original inhabitants was thus placated and land relations stabilized thanks to the effective enforcement of the new law which ultimately depends on the cooperation of local informal authorities. A more radical pro-immigrant law would have
harm to this vulnerable group since it would have stirred up resentful and antagonistic feelings within the host communities. In this instance, therefore, mechanism (c) appears to be the main justification for a moderate legislation.

Example 2: Women’s inheritance rights in India

In Jharkhand, a tribal state of India, a law known as the Santal Pargana Tenancy Act (1949) recognizes women’s inheritance rights through marriage to a resident son-in-law (gharjawai), but only in the absence of a male heir in the woman’s family (Rao, 2007). The SPTA law was intended to protect these women against harassment and acts of violence by male kin eager to appropriate the land which has fallen into their hands. Registering a gharjawai marriage with the authorities affords a woman an effective protection against such aggressive moves. Two lessons from the SPTA initiative deserve special attention. First, as a consequence of the law, customary authorities have modified the custom in a direction favorable to women. It is apparently because of some sort of prestige considerations—they want “to present themselves as fair and just” (p. 310)—that village elders have responded to the new legislation by adopting a more gender-progressive stance: in terms of our model, the ‘magnet’ effect of the law is triggered by the preoccupation of village elders to maintain their authority and to retain enough potential claimants within the purview of their informal jurisdiction.

Second, the new law does not represent a radical departure from the existing practice, and this appears to be an important reason why it has had a real impact. To understand this point, it must be borne in mind that the SPTA represents the gharjawai as an adopted son who inherits the land of his in-law family, thereby avoiding to suggest that land may be bequeathed to daughters. It is thus far away from the Hindu Succession Act (1956) which provides equal inheritance rights to both sons and daughters (Rao, 2007: 310-311; in the same vein, see Fafchamps and Quisumbing, 2002 for Ethiopia). Even more revealingly, the SPTA was inspired by a practice born in the area itself of the fathers’ desire to keep the land of the family in the hands of their children even in the absence of male heirs. Under conditions of growing scarcity of land, however, the practice of the gharjawai marriage was increasingly contested by male kin (standing for the elite in our model) who struggled to bend decisions of village elders in their favor. The enactment of the Act and the registering procedure that it provides have thus had the
effect of counteracting a regressive evolution of the custom in favor of men’s interests. Such regression was itself induced by a change in the economic environment (resource endowment).

In this specific instance, the case for a moderate reform rests very much on the above-explained mechanisms (a), (c), and (d).

*Example 3: Women's inheritance rights in Ghana*

The PNDC (Provisional National Defense Council) government which succeeded Nkrumah at the head of Ghana in December 1981 adopted a reformist approach to many issues, in contrast to the radical policies of its predecessor. Such a stance deserves to be stressed as the PNDC was genuinely intent on bringing significant changes to the society and economy. Interestingly, one of its goals was to raise women’s status and participation in the socio-economic development of the country, partly by supporting a strong feminist movement.

The achievement that we want to draw attention to here is 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 people (the Akans) governed by a matrilineal system. In the words of the chairman of the Inheritance Commission (known as the Ollennu Commission by the name of his chairman), the new law is aimed at modifying the matrilineal family system “in such a way as to give the wife and children of a deceased person interest in a definite portion of his estate since it is felt that the right to maintenance and training of the children and support for the wife out of the estate, though legally enforceable, is not generally recognized as sufficiently substantial” (cited from Josiah-Aryeh, 2008: 20). By deciding that the nuclear family should become the focus of succession, the PNDC Law 111 “appears to be an attack on customary law” (Josiah-Aryeh, 2008: 29). Under the matrilineal system, indeed, the brothers and sisters born of the same mother occupy a more important place than the spouse inside the family sphere. A person is not entitled, therefore, to inherit from his or her spouse or from his or her father: membership of the matri-clan determines all succession rules and it is typically the maternal uncle of a child who is in charge of managing the assets of the deceased father (Woodman, 1985; Quansah, 1987; Gedzi, 2009a, 2009b). Matrilineal societies are thus characterized by a weaker relationship between father and son than patrilineal societies (La Ferrara, 2007).
Upon careful look, the PNDC Law 111 is not as radical as it is sometimes purported to be. It thus makes a pivotal distinction between the family assets (the assets inherited from the matri-clan) and the assets personally acquired by a deceased person. While the former continue to be regulated by the custom, the latter are to be divided according to a rule that earmarks the highest share of the deceased’s personal assets to the nuclear family (surviving spouse and children) and a smaller one to the extended family. For example, when a man dies and his own parents are dead, the share accruing to the spouse is 3/16, that accruing to the children is 9/16, and the customary heir receives 1/4. When there are no children, personal assets are divided equally between the surviving spouse and the customary heir (Josiah-Aryeh, 2008: 21-25). A colonial law, the Marriage Ordinance (1884), was even more favorable to the nuclear family (with 1/3 of the deceased’s personal assets devolved to the surviving spouse and 2/3 to the children), yet it applied only in cases of officially registered marriages. Following passionate protestations by traditional chiefs, the law was amended in 1909, awarding a 1/3 share to the extended family, and a 2/3 share to the spouse and children, but the application was again restricted to officially registered marriages (Woodman, 1985; Awusabo-Asare, 1990; Manuh, 1997).

Although empirical evidence is sparse, it is still sufficient to enable us to somehow figure out the impact made by the PNDC Law 111, and a number of findings can be usefully interpreted in the light of our theory. First, 22 percent of a sample of about 250 household heads (around the city of Kumasi), a significant minority, have declared a preference for following the prescriptions of the law. By contrast, 37 percent have expressed a preference for the customary inheritance practice, while 25 percent confessed 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 (Gedzi, 2009a).

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 option mention a number of reasons. They think that the court is impartial to women and capable of enforcing its decisions. The court, they believe, has the ability to give necessary protection to those who need it, whereas chiefs’ courts are mainly concerned with maintaining or re-establishing existing or pre-existing relationships between disputants. As a consequence, the informal judges may not assess the case brought to them in a rightful manner. In a consistent manner, 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, ejection from their house, and loss of valuable family and clan relationships (Gedzi, 2009b: 15-7; see also Benneh et al., 1997; Fenrich and Higgins, 2001). 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 (Gedzi, 2009: 27). In short, most disputants prefer to solve their cases in the traditional setting of local informal courts where the procedure is less adversarial than in the formal court. Conversely, the few women who seek formal litigation to claim their rights are strong characters, often with a comparatively high level of education (and outside option), who dare defy the social pressure and threats emanating from the extended family.20

Third, from another field study (Quisumbing et al., 2001), it appears that a widespread practice followed by Akan household heads –40 percent of them when they are males, and 48 percent when they are female—consists of dividing the personal assets of the deceased person into three equal parts: 1/3 for the surviving spouse, 1/3 for the children, and 1/3 for the extended family. This practice, which actually coincides with the prescription of the succession law of 1909, is more favorable for the members of the nuclear family than the custom, yet at the same time more favorable for the extended family than the statutory provisions of the PNDC Law 111.

Many elements of our theoretical discussion are well reflected in the above-presented evidence. In particular, a ‘magnet’ effect is apparently at work since the custom has evolved in the direction of the new law, and it is difficult to view the whole transformation of the custom as an endogenous adaptation to rising land pressure. According to this evolutionary argument, population growth and market integration make investments for land improvement and

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20 A woman interviewed by Victor Gedzi confessed that she decided not to contest her right of a share in her deceased spouse’s estate because:

“There can be danger there since some family members may take the issue personally and may use spiritual or physical means to terminate my life. This is why I prefer to live in peace with the family members” (Gedzi, 2009b: 13).
conservation more necessary, yet these investments require a proper incentive structure which the matrilineal succession system cannot provide. A change in the rule is therefore induced. Two findings nonetheless suggest that the formal law has also played a role in the transformation of inheritance practices. On the one hand, the main mechanism behind the endogenous evolution of this system, which consists of the practice of *inter vivos* gifts to children, has been increasingly resisted by the extended family under conditions of land scarcity. On the other hand, the facts that (i) a significant minority of household heads claim to follow the statutory provisions of the PNDC Intestate Succession Law and (ii) some women appeal to the modern court to settle their case suggest that this law has a genuine impact.

Law 111 is a moderate law compared to the Marriage Ordinance (1884) which deprived the extended family of any share in the personal wealth of the deceased person. That the latter Ordinance aroused serious tensions in Ghanaian matrilineal groups suggests that a radical legal reform is probably less effective and desirable than a more moderate one. It is revealing, in this regard, that under the impact of Law 111, the custom has been driven to evolve toward the prescription of the 1909 law, which for the extended family (whose authority represents the elite in our theory) is less favorable than the custom yet more favorable than Law 111. It is thus as though the 1909 law acted as a focal point at which a new (probably transitory) equilibrium could be established.

That a comparatively small number of women dare seek the assistance of the modern court system to advance their interests is in keeping 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 conferred upon women an added bargaining power which they can use effectively against the upholders of the matrilineal custom.

This is not true everywhere, however. In some remote areas, the custom has not changed because people, and the marginal group (women) in particular, are not or not well informed about the new law (Fenrich and Higgins, 2001). A basic assumption on which our ‘magnet’ effect theory rests is therefore violated. Moreover, in Muslim communities (which are governed by a patriarchal social system), opinion leaders including chiefs insist that Islamic principles determine the rules of intestate succession. Any plaintiff who would dare challenge these
principles would face very serious sanctions: according to the chief imam of the Volta region, any Muslim woman who wants to enforce her rights under Law 111 would face stronger sanctions from the community than a woman who does not profess the Islamic faith (Gedzi, 2009b: 14). In the latter instance, the ‘magnet effect’ is not working – see situation (i) in Table 1 – because the cost of appealing to the formal court is prohibitively high and the customary authority is highly reluctant to adapt the local rule. Yet, we need to emphasize that in Muslim communities the ‘local rule’ invoked by religious authorities is not the custom proper, but an alternative law, the *sharia*. The custom actually followed in these communities is generally the result of a blending of Islamic principles with indigenous, pre-Islamic practices. As such, it is therefore susceptible of adapting to changing circumstances (Lapidus, 1988; Bowen, 2003).

6. Community-based change as a complement to legal reform

Our theory of legal dualism does not predict that the ‘magnet’ effect is always in operation. This suggests that other approaches than pure legal reform may be needed when unfavorable conditions prevail. One approach that has recently met with success in fighting against harmful practices such as female genital mutilation (FGM) in SubSaharan Africa, footbinding in China, and child marriage in Ethiopia, deserves to be mentioned in the context of this paper. It is the community-based change of social norms advocated by the United Nations Children’s Fund (Mackie, 1996; Mackie and LeJeune, 2009; UNICEF, 2007, 2010; NCTPE, 2003). This is a bottom-up approach that calls for the intervention of external facilitators or catalysts typically provided by Non-Governmental Organizations. Their role consists of initiating, among a core group of disadvantaged people, an explicit deliberation of local habits and customary rules so that they become aware of the existence of an alternative view of their rights which nevertheless respects their traditional moral values and culture. When the alternative view is embedded in existing statutory laws or in a broader, more universal discourse (e.g., human rights discourse), this aspect is emphasized. Thereafter, with the help of extensive media coverage, the catalysts facilitate the diffusion of the new concept of rights among all the disadvantaged people (at local and supra-local levels), encourage consensus-building (rather than an adversarial approach), and help build a momentum susceptible of leading to a declaration that will publicly declare the abandonment of the harmful practice.
Revealingly, as attested by the experience of the women’s movement against FGM in Senegal, the public declaration represents a significant moment in the decision-making process for the community: large-scale abandonment occurs following demonstrations of collective commitment (UNICEF, 2010: 15). In fact, the public declaration is nothing else than the proclamation of the new practice that a critical mass of disadvantaged people have started, or intend to follow. It serves the function of making the change of behavior common knowledge, while its official character allows the members of the disadvantaged group to commit. Not only do elite groups take due notice of the ‘change of winds’ and adjust their behavior accordingly (without asking for any compensation), but the government may also become more determined to implement the existing law. Enacted in January 1999, the law banning FGM was only sporadically enforced before the women’s public declaration compelled the government to make a bolder move in 2009, meaning that it itself made a public statement to the effect that the law is to be taken seriously. In the community-based approach to norm change, therefore, the statutory law ends up backing, and being backed by, a declaration of intent professed by the beneficiaries themselves, following a sustained external intervention.

In the setting of our theory, the activation of the modern law/court system in response to the public declaration can result from two different mechanisms. First, more women are ready to go over to the modern court to have what they perceive as their rights duly enforced. Second, following the pressure exerted by the women’s movement, a larger proportion of modern judges is willing to strictly abide by the law. That this second mechanism is also at work is evident from the fact that prior to the declaration, the punishments meted out on law-breakers by most judges were much milder than those prescribed by the law. This observation suggests that in the pre-declaration environment the law was too radical.

7. Conclusion

21 The anti-FGM law is not a dichotomous variable, not only because punishments against law-breaking can vary but also because the actions banned by the law may be of varying seriousness.
22 We are very thankful to Molly Melching, Director of the Tostan, for having taken the time to explain to one of us (J.P. Platteau) the history of the anti-FGM movement and the experience of her NGO in Senegal.
When we adopt an analytical framework in which there exists a strategic interaction between the custom and the modern law represented, respectively, by an informal arbitrator and a formal court, a range of possible outcomes emerge. The modern law, which is designed to improve the lot of some disadvantaged groups (it is ‘progressive’), may turn out to be a ‘dead letter’, implying that it is not referred to in the settlement of disputes. Assuming that the people concerned are well informed about the main statutory provisions of the law, this situation is more likely to arise if these provisions do not represent a big departure from the prevailing custom, the informal authority is reluctant to call erstwhile practices into question, outside options for disadvantaged groups are not attractive, social sanctions against norm breakers are strong, and benefits from community-level public good are important. Such conditions do not necessarily obtain, however, and if they do not, the modern law induces the custom to change into the desired direction creating what we have called a ‘magnet’ effect. Since the custom is predicted to adapt less than proportionally to a change in the formal law, the distance between the two increases as the formal law becomes more favorable to the marginal groups and, as a result, there is an increase in appeals to the formal court from within the community. By contrast, a change in the state of the economy brings the custom closer to the formal law and, therefore, reduces the number of appeals to the formal court by community members.

Using the above framework allows us to see the old controversy between reformists and revolutionaries in a new light. In particular, it helps us understand a number of important reasons why a moderate legal reform may be more effective than a radical one: the loss of benefits from public goods produced at community level may seriously hurt those marginalized people who remain in their native location; there may be significant uncertainty about whether formal judges will continue to apply a law that may differ too much from their preferred judgment; enforcement of the law may itself be especially uncertain when the statutory law becomes too antagonistic to the custom; and, finally, marginalized people may have internalized the values shaped by the elite and legitimized traditional systems of authority so that hard loyalty conflicts arise when these values and authorities are seriously called into question by the legal reform.

The empirical evidence discussed in this paper, although rather scattered and non-systematic, suggests that the possibility of a ‘magnet effect’ is not purely theoretical. Therefore,
the view according to which, because they ignore informal institutions, legal reforms in the modern system of law may mean that ongoing discriminatory practices and the oppression of marginalized groups at local level “will go unchallenged”, seems to be unduly pessimistic (see, e.g., Sage and Woolcock, 2007: 11). The examples reviewed in this paper also give serious hints that moderate legal reforms often work better than radical ones. The latter finding should not be taken to imply that radical laws are generally worse than moderate ones, since legal reforms used in our examples are all concerned with personal status matters which are influenced by the ‘deep culture’ of a society. Such matters are therefore highly sensitive issues, and it is not really surprising that reforms aimed at radically changing inequitable practices involving status considerations are easily counter-productive. It is not coincidental that we have focused on these issues, however. We indeed believe that our framework is especially well suited to handle aspects of social life that are largely fashioned by the custom and subject to informal pressures from the community.

These aspects, it must be noted, may stretch beyond strictly personal matters and even reach the sphere of criminal law, such as in matters of honour killings. Indeed, whereas the statute of limitations is a fundamental principle that can be invoked by a defendant under the formal law, no such statute is admissible under the customary law. This is because “however long the time elapsed, the author of an offence, as soon as identified, must pay for his (her) infringement which has harmed social cohesion. No amount of time elapsed since the offence was committed can excuse or absolve the offender under the customary system of criminal law” (Boshab 2007:165-66 –our translation). The disturbed social equilibrium must be restored not through a mechanism of exclusion but through a process of reconciliation, compensation, and face-saving negotiation. The discrepancy between the custom and the statutory law here arises from the fact that criminal law is not separated from civil law in customary environments (Bates, 2001: 64-65).
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