



Formal law and customary change: A lab-in-field experiment in Ethiopia



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ABSTRACT

Do customary courts strategically adapt arbitration outcomes if they face increased competition by the formal law? Through a lab-in-field experiment with villagers and real customary judges in rural Ethiopia, we show that post-arbitration payouts to agents disfavored by the customary system are downwardly biased. Introducing a costly formal law reduces these biases and draws the decisions of customary judges significantly closer to the law. At the same time agents advantaged by the law do not exploit their increased bargaining power. Instead, they make offers that are less advantageous to themselves and, in equilibrium, only a fraction of them make direct use of the formal law. Our results suggest that local customary dispute resolution institutions may have a role to play in shifting pre-existing customs toward a desired outcome. In areas where formal legal institutions have limited outreach, the effects of increased competition between formal law and customary legal institutions may rise from changes in the latter, rather than from plaintiffs seeking justice under the rule of law.

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1. Introduction

Formal laws play a marginal role in governing the lives of many African citizens, particularly those residing in rural areas (Chirayath et al., 2006). Instead, customary legal systems provide prompt, accessible, and culturally coherent justice services (Wojkowska, 2006). Customary courts oversee and enforce customs and informal rules of behavior, typically taking into account local egalitarian and redistributive norms (Platteau, 2000). Their adherence to minimum standards of justice and human rights remains nevertheless disputed. Customary courts may persistently discriminate against the underprivileged, entrenching mechanisms that perpetuate local power structures (e.g. Ordioni, 2005; Asfaw and Satterfield, 2010; Pimentel, 2010). Local gender biases, for instance, may affect the distributional decisions of customary dispute resolution institutions (Asfaw and Satterfield, 2010). Understanding the effects of increased competitiveness of formal law in predominantly customary institutional environments is therefore central to achieving fair and functional legal systems – a primary driver of economic development (Acemoglu et al., 2001; Rodrik et al., 2004). Yet, data on extrajudicial and customary disputes are

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rarely available (Landeo et al., 2007), and the interaction between customary legal institutions and formal law has been subjected to little rigorous empirical analysis so far.

The work of Sandefur and Siddiqi (2013) in Liberia is a notable exception. They find that the demand for mediation by paralegals trained in formal law is greater for plaintiffs disadvantaged by the customary system, and that direct access to the formal law results in strong socioeconomic gains for the underprivileged. On the other hand, if those disadvantaged by the customary system face strong social disincentives to appeal to formal legal institutions, they may continue to use them even when the law is available and individually preferred. In this case increased competition of the formal law may provide no clear benefit. In non-corner scenarios customary judges may fear defections and appeals to alternative forums, fostering changes in customary outcomes, even if in equilibrium nobody uses the formal law. Aldashev et al. (2012a,b) provide clear theoretical predictions on the evolution of customary legal outcomes induced by the introduction or empowerment of formal laws. If customary authorities fear jurisdictional and reputational erosion,² they may strategically adapt arbitration outcomes in response.

In this paper we empirically investigate the effects of introducing a legal fallback on the arbitration decisions of local customary judges and the behavior of plaintiffs. Through a lab-in-field experiment in rural Ethiopia – where controversies are habitually settled through customary courts – we randomly select 60 customary judges, known among the local Amhara people as *Shimagelle*, to rule over controversies born from an ultimatum game with outside option, played by 532 villagers. For a random subsample, we allow participants to further appeal the arbitration through a costly fixed law. While some studies have looked at the influence of extraneous factors on formal judicial rulings (e.g. Danziger et al., 2011), the relative scarcity of naturally occurring data on customary rulings has limited their analysis. By bringing the lab into the field (see List, 2007), this work is the first to bridge this gap, studying the arbitration decisions of real customary judges.

In line with previous literature, we find evidence of significant arbitration bias against female participants, and in favor of plaintiffs known by the customary judge and advantaged by the custom. Our main finding is that introducing a legal fallback reduces such biases, and that customary arbitration outcomes are drawn significantly closer to the formal law. At the same time we find that agents favored by the law do not take direct advantage of the increased bargaining power offered by the legal fallback. Instead, they make offers that are less advantageous to themselves.³ In equilibrium only a fraction of them make direct use of the formal law, and women are less likely to apply the law than men. These findings are coherent with the presence of social sanctioning against norm-deviating behavior, and complement the work of Sandefur and Siddiqi (2013) by highlighting the importance of indirect customary responses to the increased competitiveness of the formal law. The “threat of law” may induce significant gains for those disfavored by the custom, even if they do not actively seek justice under the rule of law.

The rest of the paper is organized as follows. Section 2 discusses the literature on formal law and customary institutions. Section 3 provides a brief account of the Ethiopian institutional context and legal system. Section 4 outlines the experimental design. Section 5 discusses the empirical strategy. Section 6 illustrates the results, and Section 7 concludes.

2. Customs, legal institutions, and the law

Legal institutions encompass both formal and informal structures, and are central to enforcing the “rules of the game” that govern everyday life (North, 1990). Formal legal institutions typically preside over written constraints, such as formal laws and constitutions – prescribed and enforced by exogenous legislative authorities. Customary legal institutions, instead, oversee the ‘codes of conduct, norms of behavior, and conventions’ that take form in a particular social setting (North, 1990: 36). Yet, formal and informal legal systems are not necessarily mutually exclusive, and often coexist and overlap to a considerable extent. Legal pluralism is thus prevalent in numerous countries and regions worldwide, including large portions of sub-Saharan Africa (Merry, 1988; Bennett, 2006; Tamanaha, 2008).

The norms upheld by customary legal institution typically represent fairness standards intended at maintaining peace and social cohesion, but may also result in systematic discrimination against certain disadvantaged categories. In either case, they may have substantial consequences on investment decisions and long-run growth (Platteau, 2009; Baland et al., 2011).⁴ Replacing undesired customary norms with the rule of law has proven to be a complex and daunting exercise (e.g. Andre and Platteau, 1998; Kuyu, 2005; Sacco, 2008). Formal legal institutions will not successfully replace incompatible or unwanted customary norms, unless they become a “focal point” of convergence in the expectations of agents (Basu, 2000;

² Jurisdiction erodes as plaintiffs begin to use formal courts instead of customary forums. In so far as customary judges face a positive utility in ruling over a controversy, jurisdictional erosion will reduce their utility. Moreover, customary judges may face an intrinsic disutility in seeing their decision overruled. Reputation thus erodes when plaintiffs reject the customary arbitration decision and appeal to formal legislation.

³ While this cannot be explained by standard models of social sanctioning of norm-deviating behavior, it is in line with costly signaling theories (Iannaccone, 1992; Gintis et al., 2001; Schultz et al., 2007), in which a threat to customs triggers a greater need to signal compliance to norms. At least to some extent this mechanism may be behind the rapid rise in female genital mutilation (FGM) in Burkina Faso among girls under the age of five, after the introduction of an anti-FGM law in 1996 (Chikhungu and Madise, 2015). If mothers face strong societal pressures to perform FGM on their daughters, they may be anticipating the practice to send a strong signal of compliance to the community in response to prohibition.

⁴ Customary norms may also add to the uncertainty over property rights, in turn affecting the investment decisions of individuals. Goldstein and Udry (2008), for instance, find that competing claims and higher insecurity of tenure over specific plots cultivated by a given individual correspond to minority intensity of investments on those plots.

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