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Spontaneous norms in law and economics: a sketch typology

ABSTRACT

Anthropologists and legal scholars have long come to the realization that customs, social norms, informal rules, and the like govern societies as much as state-made laws do. Law and economics researchers followed suit, producing a large number of studies on the topic. With the growing amount of scholarship, it is increasingly difficult to navigate in what has now become a complex field. This article responds to said difficulty by offering a concise typology of spontaneous norms. It starts by identifying three features associated with "custom", "private ordering", "extralegal rules" etc.: (i) implicit (or tacit) rulemaking, as opposed to explicit rulemaking; (ii) enforcement through decentralized ("social") sanctions, as opposed to centralized enforcement; (iii) private interpretation of compliance with rules, as opposed to public and institutionalized interpretation. The three criteria are combined to develop a typology of customary governance. The paper also suggests how identified types can be game-theoretically modeled as repeated games. It is argued that structural differences between various forms of spontaneous norms can be best understood as differences in the sequence of play in a stage game. Further, the typology is illustrated with real-world examples from legal history and anthropology. Supposedly dissimilar regulatory systems (e.g., customary international law and primitive law; norms of warfare and domestic social norms) are shown to exhibit structural resemblance.

1. Introduction

Institutional economists and legal scholars have been systematically interested in emergent-in-fact, informal, social, customary, etc. norms at least for several decades. Rules that do not extensively rely on the state's capacity attracted researchers of various paradigms who attempted to deepen the understanding of institutional realities. They presented themselves both as an empirically valuable research topic and as a worthy alternative to normative state-centric depictions of social order. This upsurge of interest has not been missed by law and economics scholars who developed theoretical models of informal norms and documented numerous case studies. Over the years, the relevant literature has grown vast, naturally making navigation within the field increasingly challenging. Many leading concepts and theoretical approaches became blurry, having been used, borrowed, and cross-cited by numerous authors over time.

In light of this motivation, this paper has three objectives. The first is to systematically classify customs, social norms, informal rules, extralegal governance regimes, and the like. This will be done by providing a scheme of Weberian "ideal types" – i.e., idealized, contingency-free, and abstract representations of real-world phenomena (Weber 1949) – based on criteria derived from legal theory and institutional economics.

Further, the paper suggests that the aforementioned types can be given a game-theoretical interpretation: they can be mapped to specific designs of repeated games. Therefore,

the argument continues that the developed typology is not a mere intellectual exercise. It can be used to formally analyze governance by various kinds of spontaneous norms and explore their common features and structural differences. Last but not least, the identified ideal types will be subsequently illustrated with real-world examples derived from the existing dissipated law and economics scholarship as well as from legal history and anthropology. This will highlight the adequacy of the typology for analyzing socio-legal realities.

The contribution of achieving those objectives is twofold. First, by providing a general framework, the paper can improve navigation within the field currently consisting of many loosely related strands of research. The taxonomy developed in the paper divides this field into groups containing structurally similar objects of study. The game-theoretic representation of this framework can illustrate the economic forces operating within each group. Therefore, the article helps to understand how specific types of spontaneous norms arise, evolve, and transform into one another. In this way, it can improve the study of legal history and legal anthropology from the perspectives of institutional economics or law and economics. The paper suggests three applications of the typology to specific research questions in the last section.

The paper is related to two literatures. First of all, it contributes to the broad and interdisciplinary research on social norms, private ordering, customary law, and extralegal governance broadly conceived. This literature encompasses an array of related themes from different epochs and geographies. Various incarnations of spontaneous norms are invoked in the research of legal history (e.g., Maine 1883; Bellomo 1995; Kadens 2012a; Kim 2021);

colonial legal systems (e.g., Hooker 1975; Moore 1986); legal anthropology (e.g., Malinowski 1926; Pospisil 1958; Benda-Beckmann 1981; Worby 1997; Igbokwe 1998; Penal Reform International 2000; Simon 2009; Ndulo 2011); migrant diasporas (e.g., Büchler 2012; Pera 2019; Jaraba 2020); extralegal norms of close-knit neighbor communities (e.g., Ellickson 1986; Engel 1980); business and industry self-governance (e.g., Bernstein 1992; 2001; Ellickson 1989); anarchic or stateless social environments (e.g., Anderson and Hill 1978; Leeson 2009; Lesaffer 2007); international law (e.g., Posner and Goldsmith 1999; Fon and Parisi 2006; Guzman 2008), and numerous others. The paper attempts to conceptually organize this diverse and dissipated field.

Moreover, the article contributes to the long list of formalizations within the broad theory of private ordering. Within this strand of literature, Dixit (2003a; 2003b; 2007 [2004]) formally analyzes several mechanisms that emerge spontaneously in the absence of a conventionally understood legal system. Dixit's focus is mostly on relational contracts, arbitration, for-profit private contract enforcement, and private protection of property rights. In a similar vein, Taylor (1982) uses game theory to describe the conditions necessary to provide social order under anarchy. Sugden (1986) also uses game theory to explain the origin and persistence of spontaneously emergent norms of property, reciprocity, and provision of public goods. Young (e.g., 2001 [1998]; 2015) employs stochastic game theory in the study of social norms, abstractly defined as "customary rules of behavior that coordinate our interactions with others" (Young 2008, p. 647).

However, this paper does not offer novel or deepened modeling techniques compared to the aforementioned ones. Instead, it makes a step back and proposes model design principles suited to representing the identified types of spontaneous norms.

The article is divided into 6 sections. Section 2 identifies three definitional features of spontaneous norms that can be encountered in the literature. On this basis, it proceeds to classify them into Weberian ideal types. Section 3 uses high-level game-theoretical concepts to translate the ideal types into designs of repeated games. It argues that the structural differences between the types of spontaneous norms can be interpreted as differences in the sequence of play in a stage game. Section 4 exemplifies the abstract types with real-life counterparts from legal history and anthropology. Section 5 discusses potential applications of the findings from the earlier sections. In particular, it suggests three research questions that can benefit from the framework developed in the paper. Section 6 concludes.

2. Three approaches to spontaneous norms

The law and economics approach typically conceptualizes laws, customs, and other norms as special types of economic institutions. According to the most common definition, institutions are "humanly devised constraints that structure political, economic and social interaction" (North 1991, p. 97). Such structuring may be needed when the interaction involves high transaction or strategic costs, e.g., agency problems, information asymmetries, opportunism,

or uncertainty. A predictable framework in which an interaction is expected to be carried out can lower transaction costs and alleviate strategic problems. For example, when conflicting claims to ownership of a previously ownerless resource can be made, appropriation-legitimizing norms can reduce the cost of conflict. Likewise, when trading partners face a mismatch between delivery and payment dates, commonly known rules of settlement may decrease the costs of finding a workable solution to the problem of term inconsistency.

The aforementioned depiction of spontaneous norms as a subcategory of institutions is accepted by many scholars who have attempted to define them. According to philosopher Ulmann-Margalit (1977), customary norms "are possible solutions to problems posed by certain types of social interaction situations" (p. vii), i.e., prisoner's dilemma, coordination, and battle-of-sexes games. Legal scholar and economist Parisi (2000) understands customary norms as "a non-contractual solution to game inefficiencies" (p. 2). Sociologist Coleman (1990) depicts social norms as arrangements that emerge to cope with the problem of externalities in social interactions. Legal scholar Kostritsky (2013) claims that social norms "are implicit ways in which people devise solutions to the problems of cooperation, exchange, and maximizing welfare" (p. 469). Further examples of close enough definitions are plenty.

Given those definitions, the naturally occurring question is how to distinguish spontaneous norms within the broader category of economic institutions. In particular, it is crucial to specify the relationship between spontaneous norms and legal norms – an especially significant type of an institution. While the solution to this problem depends on the choice of

legal philosophy, the argument this paper makes is that a combination of existing approaches can result in a compelling classification of spontaneous norms. In other words, various established criteria for identifying spontaneous norms are instrumentally used to construct a taxonomy of customary governance.

Specifically, three such criteria will be used in subsequent parts of the paper: (i) implicit origin of rules of behavior, as opposed to explicit origin; (ii) enforcement by decentralized actions of the community members ("social sanctions" and related methods), as opposed to enforcement by a specialized agent; (iii) private and idiosyncratic standards of compliance, as opposed to a single, public, and institutionalized standard.

2.1 Implicit rulemaking, horizontal sanctions, and private idiosyncratic interpretation

A. Implicit consent: custom versus explicit sources of rules. The commonplace meaning of custom comprises long-standing and well-established practices – a portrayal with which respected dictionaries agree. The Cambridge Dictionary defines custom as a "way of behaving (…) that has been established for a long time". The Macmillan Dictionary defines it as "something that people do that is traditional or usual". Such traditional or usual behavior may become a basis for a legal obligation, thus forming customary law defined as "a set of rights that exist simply because things have always been done that way and have been accepted as

normal practice." This basic concept of custom as a source of legal rules is embedded in legal scholarship which differentiates it from other sources, e.g., legislation or precedent.

The contradistinction between custom and other designs of rulemaking emphasizes the difference in the method in which rules are created. Unlike legislation and contract that are made at a particular moment by an explicit and deliberate act, customs are spontaneously developed within a community "over a period of time by performing certain actions repeatedly in such a way as implicitly to indicate that the members had accepted that they must perform such actions." (Kadens 2012b, p. 1163). Thus, the concept of custom as a source of law requires two constituents: the existence of praxis in a community and the accompanying belief of obligatoriness of this praxis – i.e., *opinio juris* (Parisi 1998; 2001; Bederman 2010).

Of the two constituents, the underlying group behavior represents the objective element of customary law. This objective element can be directly observed in a relevant community of actors. Actors perform actions whose existence (though not necessarily the meaning attached to them) can be objectively verified by an external observer.

On the other hand, consent to the action-mandating norm is the subjective element of customary law. It is not apparent from group behavior – the obligatory character of custom that separates it from mere regularities of group conduct cannot be observed and must be indirectly construed. In other words, finding rules in past behavior requires an addition of a sophisticated interpretative capability that extends beyond mere reporting of social or historical facts. In contrast to such backward-looking procedures, legislation is a deliberate and forward-looking

method of establishing rules: norms are intentionally set out to be in force in the future. The contents of the norms can be both known and controlled in the act of deliberate norm-making.

The difference between custom and other designs of rulemaking can also be considered from another standpoint: the method of discovering norms. The cost curve of determining the relevant rules can differ between custom and statute. Reliance on spontaneously emergent norms requires that the relevant actors determine the prevailing practices. In principle, this necessitates an inquiry into the past or present actions of the wider community. Such an inquiry may become increasingly costly with the decreasing number of available historical cases, their inconsistency, the timespan necessary to prove a custom, etc.

Moreover, when the observed patterns of group behavior are inconsistent, the original function of economic institutions – i.e., provision of a predictable structure to an interaction situation – becomes perturbed. On the other hand, explicit sources of rules like a statute, written agreement, or an authoritative religious scripture can be consulted instantly whenever the situation requires. However, the ability to understand the documents containing relevant norms may require a one-off expenditure, especially when they are sophisticated or dissipated. The fixed investment in the capacity to understand explicit rules is mostly absent from the procedure of finding community behavior-based norms (cf. Rossi and Spagano 2018).[1]

[1] In the framework of new institutional economics, every economic institution may be broken down into (i) the rule component and (ii) the enforcement component (Voigt 2019). The rule component stipulates a norm of behavior for a specific type of social interaction, e.g., when and how the deferred payment should be made. The enforcement component determines the method of implementing this rule.
From this perspective, the emphasis on the implicit method of rulemaking touches exclusively upon the rule component of an institution. The conjunction of repeated praxis and belief in its obligatory character provides a method of recognizing a norm embedded in group behavior. However, it does not fully specify the conditions in

B. Horizontal sanctions. While the aforementioned approach to spontaneous norms is indifferent to the enforcement method, economists interested in the operation of real-world institutions cannot altogether ignore it. An approach that emphasizes the structure of enforcement is particularly popular in law and economics and neighboring fields. In this optics, customary (as well as social) norms are equated with norms prevailing in communities characterized by a dissipated distribution of sanctioning power. Such norms are placed in contradistinction to rules enforced by a specialized agent who is in a superior power position *vis-à-vis* other agents.

The emphasis put on the incentives to comply with rules as a factor differentiating various social orders can be found in sociology (e.g., Durkheim 1984 [1893]), legal anthropology (e.g., Ellickson 1991), and political science (e.g., Taylor 1982; Axelrod 1986). Durkheim (1984 [1893]) juxtaposes "diffuse" and "organized" sanctions as two fundamental methods of disciplining society. The former are applied by individual community members in a decentralized fashion whereas the latter are administered by designated persons or well-structured corporate entities. In this approach, the reliance on organized sanctions is seen as a characteristic feature of proper legal orders.

In a similar vein, Ellickson (1991) defines social norms as rules enforced through decentralized pressures exercised by community members, in opposition to legal norms that are enforced by recursion to legal means. Taylor (1982) studies the social order under anarchy

which this behavior develops. To understand its development and evolution in time, it is necessary to take into account the incentives faced by individual agents both in its formative phase and after it becomes established.

by juxtaposing a situation of "a limited concentration of force but no means of enforcing collective decisions" (p. 7) with a situation of a close-to-monopoly of coercion. In the first scenario, power "is dispersed amongst the members of the group; or, the greater the proportion of the group's members involved in solving the collective action problem (e.g. applying sanctions to free riders), the more decentralized the solution. Contrariwise, a solution is centralized to the extent that such involvement is concentrated in the hands of only a few members of the group" (Taylor 1987, p. 23). Similarly, in a game-theoretical study of social norms, Axelrod (1986) models them by introducing the possibility of voluntarily sanctioning defectors in stage games of the supergame.

The exact character of decentralized sanctions depends in part on the actions technologically available to agents in question. Such actions may include, e.g., gossip (Ellickson 1991), shunning (Gruter 1986), refusal to share or reciprocate benefits (Malinowski 1926), cessation of a commercial relationship (Bernstein 1992; 2001), symmetric reciprocation of the offensive act (Barsalou 2010); raiding or feud (MacCormack 1973; Friedman 1979; Leeson 2009), etc. Reputational mechanisms for ensuring compliance (e.g., Guzman 2008) should be also included in this category.

All in all, the key characteristics of horizontal enforcement mechanisms are that an individual agent has only limited capability to incentivize others and that each agent separately decides on the application of a sanction. Since this kind of incentivization structure can be attributed to groups consisting of various types of actors (e.g., humane or corporate), it can be

generically labeled “horizontal” (as opposed to “vertical”, when the incentives to comply are administered top-down by a special social agent).

Philosophically, the juxtaposition of horizontal and vertical sanctioning capabilities relies on the positivist definition of law. In positivist optics, the law is defined as a command of a sovereign backed by a threat of punishment or other adverse consequences. What differentiates law from non-legal (e.g., moral or social) norms is the enforcement by a well-identifiable agent (“sovereign”) (Austin 1832). Consequently, legal sanctions “are systematic, often severe, and highly salient” (Schauer 2015, p. 1), unlike sanctions administered to enforce other types of rules. In other words, the positivist notion sees law as equivalent to the monopolistic application of force in a consistent manner while decentralized collective sanctioning characterizes non-legal (or spontaneous) ordering.

Echoes of the positivist view of the law can be noticed in the predominant law and economics contributions. In popular models, legal rules are seen as exogenous “prices” imposed on economic agents for taking specific actions (cf., Posner 1987; Cooter and Ulen 2016). By entering the utility calculus, the prices influence choices and thus modify social outcomes.

Against this simplified model, horizontal sanctions attracted the attention of scholars who attempted to explain compliance with complex rules in the absence of a central political authority, e.g., in preliterate societies (Rasmusen and Hirshleifer 1989), or under the regime of self-help characteristic for the international scene (Norman and Trachtman 2005). Scholars

have developed multiple models that attempt to specify the conditions under which horizontal sanctions may sustain complex rules of behavior (cf., e.g., Powell and Stringham 2009 for a survey). In a related vein, researchers discussed the question of why actors may engage in costly sanctioning instead of free-riding on the sanctioning efforts of others (e.g., McAdams 1997; Posner 1998; Ellickson 2001).

Finally, law and economics scholars have also debated the relationship between vertical and horizontal sanctions. The discussion is focused on the question of whether horizontal and vertical sanctioning are substitutes or complements. While arguments are made both in favor of substitutability (e.g., Cooter and Porat 2001), complementarity (e.g., Rege 2004) or paint a more nuanced picture (Kahan 2000; Zasu 2007; Acemoglu and Jackson 2017), the key takeaway from the discussion was that vertical and horizontal sanctions must be treated as structurally distinct and thus as potentially translating to non-identical equilibrium outcomes.

C. Private interpretation (No "authoritative stewardship"). Finally, a factor distinguishing spontaneous norms from proper legal norms may be sought in the existence or nonexistence of a public body providing a socially valid interpretation of rules. According to this criterion inspired by legal conventionalism (cf. Postema 1982; Marmor 2001; Basu 2018), non-legal social organization rests upon the private interpretation of compliance. The classification of actions into compliant and non-compliant with rules (e.g., honest and opportunistic; diligent and negligent; culpable and non-culpable, etc.) is performed by individual agents privately, independently, and without external coordination. Put differently,

it is decided by each agent alone whether behavior conforms to the prevailing rules. For example, although there are multiple elaborate norms of politeness in official situations (often written down in savoir-vivre manuals), no tribunal exists to validate the behavior of individuals against those norms.

On the other hand, the same criterion suggests that rules of a proper legal order are characterized by the presence of third-party classification authority. This authority contains "the capacity to articulate, clarify, and adapt the content of a classification system" in the form of public knowledge (Hadfield and Weingast 2012, p. 491). In the Hartian paradigm (Hart 1994 [1961]), such a classification authority is analogous to an "institution of a scorer whose rulings are final" in a sporting game. Unlike players' private and possibly idiosyncratic statements of the score, "the scorer's determinations are given (…) a status which renders them unchallengeable" (p. 142). In other words, the institution in question – i.e., "authoritative steward" (Hadfield and Weingast 2012) – has the capacity to publicly pronounce the socially binding content of the normative system and its application to individual cases.[2]

Importantly, the definitional function of an authoritative steward does not consist in ensuring compliance. Rather, it provides a focal point around which individual agents coordinate their understanding of prevailing rules or interpretation of facts. Such coordination guides both primary behavior, i.e., rule-abiding actions (McAdams 2009), and secondary

[2] Carugati, Hadfield, and Weingast (2015) characterize authoritative stewardship as "an identifiable entity that provides a unique normative classification of behavior. (...) [T]he classification is common knowledge and incentive compatible for enforcers" (p. 295)

behavior, i.e., behavior that follows a transgression event (Hadfield and Weingast 2012; 2016). For example, the public classification body may inform the public which of the possible variants of performing an opportunism-prone commercial transaction is the binding standard. It may also publicly proclaim which agent has violated said standard and authorize specific actions to be taken against the violator.

Reliance on an authoritative steward may become viable when a decentralized initiative would likely produce unpredictable or irregular behavior based on agent-specific principles. This problem is particularly salient in situations characterized by a combination of strong coordination motives, i.e., preferences for diagonal solutions in the game, and idiosyncracies of individual agents. Actors may prefer coordination of actions but struggle to achieve it spontaneously. For example, while preferring any deal to no deal, trading partners may have interests that are not easily understandable to outsiders, making the valuation of different aspects of compliance (e.g., time, quality, and quantity) differ accordingly. This may impose prohibitive transaction costs at each encounter with a new interaction party.

Thus, the advantage of authoritative stewardship lies precisely in its uniqueness and public knowledge character, jointly enabling a shared understanding and interpretation of rules and facts (Ginsburg and McAdams 2004). This shared understanding may differ from the situation-specific preferences of individual agents. Nonetheless, it creates expectations that are reproducible in comparable situations, thus decreasing information costs per interaction. For example, the awareness that a specific deviation from perfectly timely delivery is tolerated but

deviation from perfect quality is not can be useful knowledge to transaction parties with divergent views of desirable compliance standards.[3]

Conversely, the same approach considers emergent-in-fact norms "the result of repeat interaction and the confluence of individual decision-making exercised in the absence of external coordination". In this situation, "any normative classification is limited to the classification supplied by individuals acting independently" (Hadfield and Weingast 2012, p. 491). The presence or absence of authoritative stewardship delineates proper legal rules from spontaneous rules.

3. Typology

So far, the discussion revolved around three alternative criteria for identifying spontaneous norms within the broader category of institutions. In the next step, the criteria can be combined into a taxonomy of Weberian "ideal types": abstract, idealized, and simplified notions constructed to represent crucial features of real-world phenomena (Weber 1949). Because ideal types are by design characterized by reduced complexity and model-like simplifications, they may be useful tools for navigating within infinitely complex realities.

[3] Hadfield and Weingast (2012) argue that the uniqueness and public knowledge character, combined with several other characteristics of the decisions of the authoritative steward (i.a., generality, stability, prospectivity, and impersonal reasoning) suffice to incentivize agents to abandon their idiosyncratic compliance classification schemes even in the absence of centralized coercion.

Similar law and economics attempts to classify institutions have typically utilized one or both of the first two of the discussed criteria, i.e., the origin of rules and the method of enforcement (e.g., Voigt and Kiwit 1998; Gutmann and Voigt 2020). The design of these taxonomies was based on the economic definition of an institution as a conjunction of a rule and an enforcement method (cf. Voigt 2019). However, their purpose was more general as they classified a wider class of rules and laws. On the other hand, this paper focuses in-depth on the internal variation of spontaneous norms. The current focus is thus limited and at the same time more nuanced. The purpose is to identify structurally similar clusters in the variety of "customs", "social norms", "informal rules" and the likes represented in the vast literature in the field.

Moreover, the merit of considering the three dimensions *in combination* is that spontaneous norms, being an outcome of ongoing practices, incorporate a self-reinforcing feedback mechanism. Past compliance with spontaneous norms magnifies the social expectation of future compliance. However, the degree to which they are obeyed depends on the enforcement method, which in turn depends on available information and the methods of social coordination. Thus, in the attempts to classify spontaneous norms, the rule-creation method, the enforcement method, and the operation of authoritative stewardship should be considered an integrated whole.[4]

[4] It should be emphasized that the definitions considered in this paragraph, like in the entirety of the paper, refer only to norms understood as observable outcomes of agents' actions, as was indicated in the opening paragraph of this section. "Norms" can be alternatively defined in terms of agents' preferences as "emotional and behavioral propensities of individuals" (Elster 1989). This notion of norms-as-preferences has extensive literature in behavioral economics (e.g., Cardenas 2011; Czajkowski, Hanley, and Nyborg 2017) and

3.1 Classification matrix

The three aforementioned criteria: (i) implicit or explicit rule-creation; (ii) vertical or horizontal sanctions, and (iii) presence or absence of authoritative stewardship, can be used as dimensions of a classification matrix. Such a matrix has a total of eight hypothetical items that correspond to ideal types of spontaneous norms.

However, logical dependencies between two or more criteria would limit the total number of items in the matrix. It seems that one such dependency exists between the sanctioning method and authoritative stewardship: vertical sanctions necessitate a "stewarded" system of rules.

It is safe to assume that the actions of the designated enforcement agent are public in the sense of being observable by all other legal actors. Like the coordinative interpretative announcements of an authoritative steward, publicly observable acts of vertical sanctioning communicate the interpretation of rules of the normative system. Put differently, even if the coordinative function of legal norms may be sustained without a monopolistic enforcement apparatus, the opposite implication does not hold: centralized enforcement entails authoritative stewardship.

evolutionary biology (e.g., Boyd and Richerson 2009; Gavrilets and Richerson 2017). However, norms in this sense are not in the scope of this article.

With this exception, other possible configurations of the three criteria seem logically plausible, resulting in a total of six possibilities summarized in Figure 1. The residual type aside, they will be now concisely discussed.

Implicit creation of norms		
	No authoritative steward	Authoritative steward present
Horizontal sanctions only	(1Aa) Ambient norm	(1Ab) Pure custom
Vertical sanctions in place		(1Bb) Legally enforceable custom

Explicit creation of norms		
	No authoritative steward	Authoritative steward present
Horizontal sanctions only	(2Aa) Fixed relational rule	(2Ab) Arbitrated fixed relational rule (Purely expressive law)
Vertical sanctions in place		(2Bb) No-custom (residual type – most of the contemporary domestic law)

Figure 1. Typology of spontaneous norms

Spontaneous norms proper (I): Ambient norms and Pure customs. The upper panel of Figure 1 includes possible institutional arrangements that correspond with the dictionary definition of custom – i.e., a norm whose content emerges from spontaneous behavior in the community. Within this broader category, the panel contains three ideal types of an institution: ambient norms, pure customs, and legally enforceable customs.

Ambient norms (1Aa) exhibit all three features associated with spontaneous norms. Their rule component is derived from the usual pattern of action in the wider social environment ("When in Rome, do as Romans do"). They are enforced through decentralized peer pressures, ridicule, shunning, boycotts, retaliation, ostracism, and the like, in a situation of far-reaching dispersion of agents' power. Finally, ambient norms are interpreted and articulated privately by the relevant agents. These three properties jointly make ambient norms fully "emergent" in the sense of all deliberate rulemaking, centralized enforcement, or steered interpretation being absent.

Further, the ideal type of pure custom (1Ab) is equated with a triad consisting of implicit rulemaking, an "anarchic" environment of horizontal sanctions that incentivize compliance, and the presence of an authoritative steward. The introduction of an authoritative steward can be understood as the "legalization" of ambient norms: compliance is assessed by a specialized social agent (e.g., a court, tribunal, council of elders, authorized group of go-betweens, etc.). Contrariwise, ambient norms lack such a public assessment.

In building definitions of customary law, legal scholars routinely notice the conjunction of the sociological fact of norm-driven behavior and the corresponding elevation of this fact to the status of law. For example, Parisi describes customary law as "a spontaneous norm which is recognized by the legal system (…) as a proper legal rule" (Parisi 1998, p. 672). Kadens (2013) systematically distinguishes norms emergent from the spontaneous activity and legally binding customary rules proclaimed by an authorized agent. According to this approach,

customary law consists of two counterparts: factual behavior-custom and legalistic rule-custom. Behavior-custom is a repeat, norm-driven behavior in the community. Rule-custom is the variant of said behavior endorsed and authoritatively communicated as a normative standard.

When legal rules are not explicitly stated but need to be inferred from sociological facts, the identification of rules of so-defined customary law presents a natural problem. The standard doctrine that originated in late Roman law (cf. Schiller 1938; Bederman 2010) responds to this difficulty by citing two joint conditions. A pattern of behavior must meet the objective requirement of commonness (e.g., must be observed in a predefined period with a certain frequency) and the subjective requirement of *opinio juris* (i.e., must be perceived as legally binding) to be recognized as customary law. However, historical and empirical research on the strategies employed by courts to identify customary norms suggests that those two criteria, even when declaratively accepted, are frequently not adhered to (Kadens 2013; Petersen 2017).

Spontaneous norms proper (II): Legally enforceable customs. The discussion of customary law as a rule derived from sociological facts by the legal system is mute to the method of enforcement. This definition seems compatible with all conceivable methods of incentivizing compliance. In particular, both ideal types of pure and legally enforceable (1Bb) customs from Figure 1 fit into said definition.

The difference between the two may be specified in terms of Hohfeldian analysis (Hohfeld 1917). Normally, in a social environment that lacks the monopoly of coercion, a

proclamation that a norm has been breached gives a subgroup of legal agents (e.g., the offended party, the kin group, the clan, or all agents) a liberty right to undertake steps towards legal redress. The role of an authoritative steward consists in authorizing and legitimizing the subsequent use of private means of enforcement. In contrast, a breach of an enforceable custom gives the offended party a claim right to the enforcement agent's action *vis-à-vis* the transgressor (Hoebel 1967).

Fixed relational rules. The bottom panel of Figure 1 contains institutions that do not fit the commonplace definition of a customary norm as a norm derived from past behavior. Nonetheless, two of them exhibit at least one trait of spontaneous norms. For this reason, they are often discussed in the literature on private ordering and non-legal norms (e.g., Dixit 2007 [2004]; McAdams and Rasmusen 2007).

A fixed relational rule (2Aa) represents a situation in which explicitly made or adopt rules (e.g., by making a pact, exchanging promises, or invoking an authoritative religious text) are sustained entirely *via* in-group enforcement mechanisms. As a result, the viability of keeping the norms alive depends on the parties' voluntary contributions to enforcement for the anticipated benefit of a continued relationship or out of fear of the breakup of this relationship. As noted by Li (1999), explicit formulation of a relation-based agreement is redundant when parties have shared expectations. This is likely the case with two-party relational contracts enforced exclusively through second-party mechanisms, e.g., threats of suspending cooperation in the future. However, when enforcement through the actions of the members of

the broader community is a viable option (e.g., by ostracizing, shunning, expulsion, etc.), the explicit formulation of a rule may serve the purpose of third-party verification.

When explicitly designed or formulated norms are adjudicated by an authorized social agent, they can be labeled arbitrated fixed relational rules (2Ba). In general, they represent an abstract model of a purely "expressive adjudication", i.e., rules with third-party public communication of compliance but without third-party enforcement (McAdams 2000; McAdams and Nadler 2008).

Arbitrated fixed relational rules may be envisioned as societies, like professional organizations or friendly associations, in which the leadership is fully in charge of the rules and the threat of "social" consequences of exit is the ultimate constraint against leaving. For this reason, McAdams and Rasmusen (2007) label such governance structures "organization norms".

3.2 Game-theoretic interpretation of the typology

Scholars studying economic institutions have developed multiple formal models of social norms, customary law, relation-based governance, and other phenomena relevant to this paper. With some exceptions (notably Dixit 2003a), the modeling techniques involve the use of repeated games with an infinite time horizon to represent spontaneous norms.[5] The repeated

[5] The techniques of representing various kinds of spontaneous norms differ from subject to subject. Within this variety, two aspects stand out as the key model design features: informational assumptions and the solution

game design reflects the recurring nature of social interaction, e.g., a commercial transaction or a conflict over the ownership of a resource. An equilibrium of the game corresponds to an emergent self-enforcing method of solving the problems resulting from this interaction.

Because game theory is the dominant tool for studying spontaneous norms, it is natural to seek a game-theoretical interpretation of the taxonomy developed in this section. This subsection will suggest such an interpretation. While it rejects the pretense to build an all-encompassing model, it uses game theory to highlight the structural similarities and differences between the identified ideal types.

Representing implicit norm creation, horizontal sanctions, and authoritative stewardship. In game-theoretical terms, implicit norm creation can be interpreted as the emergence of norms entirely from players' actions in the game. This can be understood as the absence of a preceding "constitutional" stage (Buchanan and Tullock 1962) at which rules are

concepts. Depending on the subject and context, researchers of spontaneous norms use games with perfect information (in which players know the full structure of the game) and imperfect information (in which players lack some of this knowledge). The assumption of imperfect information corresponds to the observation that true intentions or preferences of interaction partners in most social settings are not explicitly given to others but need to be discovered in the through interacting. In other words, imperfect information allows for the introduction of idiosyncrasies, i.e., private player-specific characteristics, into the game.
Likewise, researchers use games with complete information (in which players have full knowledge of the past events in the game) and incomplete information (in which the knowledge of the past events is limited). The assumption of incomplete information reflects the idea that episodes from the distant past are unknown or doubtful and only recent events can be recalled with certainty.
For example, repeated games with perfect and complete information have been used to study customary international law (e.g., Norman and Trachtman 2005); with perfect but incomplete information have been used to study the development of rules governing medieval trade (Milgrom, North, and Weingast 1990); with imperfect but complete information, to study the possibility of a legal order without centralized enforcement (Hadfield and Weingast 2012).
The solution concepts employed in the research of spontaneous norms can be grouped into two categories: perfectly rational and boundedly rational. Under perfectly rational solution concepts, players' ability to design a strategy is limited by the condition of subgame rationality, meaning that at every node of the supergame, a player must choose a locally optimal action given his rationally conctructed beliefs about the past events in the game. On the other hand, in the evolutionary setting, such requirements do not typically apply. Players simply imitate strategies that proved successful in the preceding period (e.g., Axelrod 1986; Sugden 1986; Skyrms 1996; Mahoney and Sanchirico 2001; Young 2001 [1998]; 2015). Both approaches have been used to study various types of governance by spontaneous norms, with the perfectly rational concept prevailing.

deliberately developed or enunciated. Rules are established through the unintended confluence of agents' actions throughout the course of the game.

Horizontal sanctions can be understood as strategic action choices of individual players made in response to perceived infringements. For example, the famous tit-for-tat strategy in prisoner dilemma games requires that a player responds with a single period of defection to a defection in the preceding period. In general, horizontal sanctions are sanctions that are technologically built into the interaction. For example, the possibility to refuse trade with a specific trading partner is already available in the trade opportunity itself. A general commercial boycott is equivalent to such a refusal from all traders. On the other hand, vertical sanctioning requires an addition of an artificial social agent, i.e., an enforcement agency, that can interfere with other players' payoffs.

Finally, an authoritative steward may be again understood as an artificial social agent. However, in contradistinction to the enforcer, the actions of an authoritative steward are payoff-irrelevant announcements disseminated to all other agents. The announcements can potentially affect the equilibrium path of the game only because of being information-relevant, i.e., being common knowledge to all players.[6]

Structure of spontaneous norms as the design of stage games. Drawing on a simplified variant of the comparative institutional analysis (Aoki 2001), economic institutions can be represented with the model that includes:

[6] X is common knowledge if all players know X, know that others know X, know that others know that others know X, etc. *ad infinitum*.

(i) $N = \{1, \ldots, n\}$ = set of agents,

(ii) $A_i = \{a_i\}$ = set of all technologically feasible actions of agent i ($i \in N$)

(iii) $A = \{\mathbf{a}\} = \{a_1, \ldots, a_n\}$ = set of all technologically feasible action profiles,

(iv) $U = \{u_1, \ldots, u_n\}$ = set of utility functions $u_i: A \rightarrow R$, specific to agent i ($i \in N$), assigning a real-numbered utility value to an action profile in A.[7]

The pair <N, A> can be said to define a "simplified game form". It represents the objective structure of a one-off social interaction by specifying the participants of the interaction (e.g., traders, firms, states, etc.) and the combinations of actions they can take.[8] Said interaction can be anything that involves a group (or a randomly selected subset) of agents making interdependent choices. For example, traders may randomly meet, make an agreement or not, and subsequently decide how to perform it.

By fixing a specific game form <N', A'> and treating it as a building block of an infinitely repeated supergame, it is possible to illustrate the variety of spontaneous norms classified in the earlier subsection. Such an approach reflects the basic idea that the same recurring social interaction (like trading performance, conflict over unowned resources, etc.)

[7] It will be assumed below that the utility functions $u_1, ..., u_n$ are private knowledge of agents 1, ... , n, and therefore that the entire supergame is a game with imperfect knowledge. This approach has a few rationales. First, it is consistent with the approach of the comparative instutional analysis, where economic institutions are defined as a subset of agents' beliefs. This reflects the idea that institutions are belief-dependent (and thus path-dependent) socially devised "methods" of playing the same "objective" game.
Moreover, making utility functions private knowledge better illustrates of the role of an authoritative steward. Finally, this assumption is simply more realistic than its opposite in most contexts.

[8] The function associating the action profiles with objectively observable outcomes, originally present in Aoki (2001), is omitted in this simplified variant. A utility function is defined directly over the action profiles, not over the outcomes generated by the profiles.

may be hypothetically solved through different kinds of rule-based institutions.[9] This conclusion is summarized in Figure 2 and discussed below.

	Players	**"Constitutional" first period**	**Sequence of play in each subsequent period (stage game)**
Ambient norm	N'	No	(1) Game in the form <N', A'>
Pure custom	N' ∪ {A. Steward}	No	(1) Game in the form <N', A'> (2) Payoff-irrelevant announcement by A. Steward – common knowledge
Legally enforceable custom	N' ∪ {Enforcer}	No	(1) Game in the form <N', A'> (2) Payoff-relevant action by Enforcer – common knowledge
Fixed relational rule	N'	Yes	(1) Game in the form <N', A'>
Arbitrated fixed relational rule	N' ∪ {A. Steward}	Yes	(1) Game in the form <N', A'> (2) Payoff-irrelevant announcement by A. Steward – common knowledge

Figure 2: Stage game designs corresponding to the items of the spontaneous norms typology

Ambient norms, pure customs, and legally enforceable customs. Ambient norms are the easiest type to represent in the game-theoretical framework. They can be envisioned as an infinite string of indistinguishable underlying game forms <N', A'>. The absence of a distinguished "formative" period of ambient norms design accentuates their unplanned emergence and thus

[9] Importantly, treating economic institutions as infinite repeated games and differentiating between them only at the stage game level does not preordain any specific solution concept. For example, it is equally consistent, e.g., with the subgame perfect Bayesian equilibrium concept and with such refinements of equilibrium like the rational evolutionary stable strategy(-ies).

path-dependence. Formal analyses of spontaneous norms that utilize comparable model designs are plenty (e.g., Axelrod 1986; Sugden 1986; Young 2001 [1998]; 2015).[10]

In turn, pure custom by definition embodies a spontaneous norm explicitly recognized as a proper legal rule. In a game-theoretical setting, the event of recognition can be represented through the introduction of an additional player – i.e., Authorititave Steward – that moves alternately with all other players. This gives rise to an infinite alternating chain of social interaction <N', A'> and payoff-irrelevant assessment of compliance by Authoritative Steward.

The actions available to this artificial agent are limited to (payoff-irrelevant) opinioning the compliance of agents in the preceding iteration. The decision rule used to formulate opinions corresponds to a method of "finding" customary norms among the previous iterations of the supergame. While the decision rule may remain private knowledge of Authoritative Steward, the public character of the assessment might enable a rational reconstruction, making the future decisions, at least to a certain extent, predictable in the eyes of other players (cf. Hadfield and Weingast 2012; 2013; 2019).

[10] The relative simplicity of such models is often counterbalanced by realistic assumptions about the process through which players select their actions or, especially, information available to players. For example, a typical element of a model design treats the discount factor of individual players as their private information. Differences in discount factors reflect varying degrees of cooperativeness among agents. The higher the player's discount factor, the more valuable the cooperation in the future becomes relative to the immediate gains from opportunistic behavior. Given this background, Posner's signaling theory of social norms (Posner 1998) suggests that by complying with social norms and engaging in costly punishment of violators, individuals attempt to signal their cooperativeness.
Moreover, several models assume incomplete information by limiting the players' awareness of the past events in the supergame (e.g., Young 2001 [1998]). This assumption emphasizes the limited cognitive capacity of agents and thus underlies the importance of relatively recent history in shaping expectations about the future behavior of others. For example, Acemoglu and Jackson (2014) study the importance of historically prominent figures by assuming that, unlike ordinary events, their actions can be observed by *all* future agents. In their overlapping generations model, such figures can divert the pattern of development of social norms driven by the recent past.

The public assessment by Authoritative Steward plays two important roles: interpretative and informative. Its common knowledge characteristic allows for coordination of actions and, if future decisions are predicted with certain accuracy, coordination of expectations. Thus, considering that individual utility functions are private, public announcements associating compliance with objectively verifiable outcomes can be critical for coordinating behavior around predictable norms. In other words, public messages can turn otherwise idiosyncratic preferences into an objective body of rules.

Game-theoretical models that emphasize the interpretative role in detail and resemble the design proposed in this subsection can be found, e.g., in papers by Aldashev, Chaara, Platteau, and Wahhaj (2012), and Hadfield and Weingast (2012). Crucially, the argument developed in the second paper is that, if payoff-irrelevant announcements of an authoritative steward possess certain desirable characteristics (i.e., universality, generality, stability, prospectivity, congruence, and uniqueness) and do not diverge significantly from the idiosyncratic preferences of players, they can support a perfect Bayesian equilibrium in which players obey the rules because violation would be followed by coordinated social sanctions. Thus, the model suggests that under specific conditions, authoritative stewardship can overcome the hurdles caused by individual idiosyncrasies in the understanding of compliance.

In turn, the informative role of authoritative stewardship is key for the operation of reputation-based enforcement mechanisms. The informative role is theorized in a model by Milgrom, North, and Weingast (1990), in which the only function of the artificial agent lies in

informing agents about others' past behavior. According to this approach, the transmission of information about the past performance of agents is a substitute for a long-term bond between parties. The awareness of the track record allows for the formation of correct beliefs about the intended behavior of trading partners, and thus for engaging only with those who are likely to refrain from opportunism. Although careful historical examination suggests that the assumptions of the model do not correspond with the historical realities of medieval trade (e.g., Mangels and Volckart 1999; Kadens 2012b; 2015), it still can be treated as a generic formal representation of reputational enforcement aided by a centralized information repository.

Legally enforceable custom. In the setting of game theory, enforceable customs can be treated as a structural extension of pure custom in which the artificial agent not only assesses compliance but also administers punishments (or other payoff-relevant incentives). Thus, the stage game sequence of a model enforceable custom can be obtained by alternating the underlying interaction <N', A'> and a payoff-relevant action of Enforcer, as illustrated in Figure 2. Such a design reflects the idea that compliance is periodically assessed by courts whose decisions are in consequence enforced by government agencies or some other specialized entity.

Although not based on formal models, the arguments against the enforcement of immanent business norms developed by Bernstein (1996), Ben-Shahar (1999), and Kostritsky (2006) highlight the singularities of legally enforceable spontaneous norms. Vertical

enforcement strategically influences the norm-making process, making implausible the ambition to enforce such norms without affecting their substantive content.

For example, if consistently accepted payments below the contractual price may ultimately override the contractual terms by lowering the price, the receiver of the payment would be more cautious to disallow payment deviations, even by the means of costly litigation. However, if such deviations do not affect the enforceable terms of the written contract, the flexibility would be higher (Ben-Shahar 1999). In this and similar scenario, the equilibrium path of enforceable customs will likely differ from other types of spontaneous norms.

Fixed relational rules. Finally, the two "degenerated" ideal types of spontaneous norms can be understood as ambient norms or pure customs with an addition of a "constitutional" period at the start of the game. The constitutional period corresponds to the time in which the rules are established or otherwise presented to the players, e.g., in the form of a written sacrosanct text. For example, a village community may meet to decide how to exploit a commons (like in the case of Indian *panchayat* forests, see Agrawal 1994) or an assembly may decide on how to keep the peace in anarchic conditions (like in the case of social organization devised in the American Wild West, see Anderson and Hill 1979). Since by definition the initial agreement does not entail centralized enforcement, the further course of the game does not differ from the ambient norms or pure custom games.

In the framework of repeated games with imperfect information, the "constitutive" period can be interpreted as a selection of players' initial beliefs, or a "Schelling point"

(Anderson and Hill 1979, p. 12). An equilibrium concept in games with imperfect information consists of a set of players' strategies and a set of players' beliefs. When the rational choice of action depends on the beliefs about the behavior of other agents, differences in beliefs will transfer to different equilibrium behavior. For example, in a two-player trust dilemma (i.e., stag hunt), the choice faced by every player is the alternative between cooperation and safety. Cooperation is more beneficial when the other player cooperates but is non-rewarding when he selects safety instead. On the other hand, choosing safety guarantees a minimum payoff regardless of the other's strategy. In such a scenario, the alignment of expectations about the future course of action attained in the initial period of the game may prevent a socially inferior safety-safety equilibrium.[11] More generally, when the social interaction involves strategic complementarities, the "constitutional" phase can serve as a tool for a deliberate selection of one of the possible equilibria at the beginning of the game.

4. Filling the matrix: real-world examples

The previous section developed a taxonomy of spontaneous norm-based governance. Its purpose was to use the existing legal and economic scholarship in the field to distill abstract notions of spontaneous norms that can be formally represented and analyzed. By design, the

[11] Because pre-game communication is by definition payoff-relevant, its potential for influencing the outcomes of the game is limited. However, it is not non-existent. Game-theoretical models suggest that, under several conditions, pre-game communication may Pareto-improve the equilibrium of the game (Rabin 1994; Kim and Sobel 1995). Experimental studies point to a similar effect (Balliet 2010 for a meta-analysis).

ideal types summarized in Figure 1 were intended as conceptual shells that ignore contingencies but capture key structural features of real-world phenomena.

In turn, the current section intends to make the taxonomy more comprehensible by assigning real-world examples to the classification categories. While the correspondence between ideal types and actual institutions can never be perfect, the purpose of providing real-world illustrations is to demonstrate that the taxonomy can be a useful classification tool. Equally important is the fact that such a mapping can reveal structural similarities between various forms of law and social organization that are assigned to a single category.

Figure 3 summarizes the findings of the present section. Individual items of the matrix in Figure 3 are subsequently discussed below.

Implicit creation of norms		
	No authoritative steward	Authoritative steward present
Horizontal sanctions only	(1Aa) Social norms; Primitive law with no public adjudication (e.g., Trobrianders studied by Malinowski); Customs of warfare; Customary international law in the pre-international dispute resolution era	(1Ab) Primitive law with public adjudication (e.g., Yurok people); Customary international law in the international dispute resolution era; Anglo-Scottish borderland customs until the 16th century
Vertical sanctions in place		(1Bb) Custom as a source of standards in torts (e.g., medical malpractice); Commercial custom, when incorporated into the law; Colonial "customary law"

Explicit creation of norms		
	No authoritative steward	Authoritative steward present
Horizontal sanctions only	(2Aa) International agreements in the pre-international dispute resolution era	(2Ab) International agreements in the international dispute resolution era; Religious law in the diaspora (e.g., among Mennonites); social order of medieval Iceland
Vertical sanctions in place		(2Bb) No-custom (residual type)

Figure 3. Examples corresponding to the ideal types from Figure 1

4.1 Ambient norms: social norms, primitive law without adjudication, international law in the pre-international dispute resolution era.

As emphasized previously, ambient norms represent rules that are emergent-in-fact and function in a fully unsupervised, decentralized, and uncoordinated setting. As such, they can be best exemplified in social norms. Social norms are self-enforcing at the group level and history-dependent (Young 2015). The rationale for conforming to social norms stems from the fact that they have been established in the past in a specific form and are being shared in the wider society. Moreover, their continuing existence depends on decentralized incentivization by group members and decentralized expectation-making processes. They are transmitted and interpreted privately by individuals, families, or other organic social units. Similar characteristics of social norms have been acknowledged by researchers who attempted to understand them through the lenses of evolutionary game theory as emergent and evolutionary phenomena (e.g., Sugden 1986; Young 2001 [1998]; 2015).[12]

Scholars have also extensively studied empirical cases of norms in various contexts from the rational choice perspective. Such studies often considered social norms substitutes for

[12] Naturally, alternative approaches also exist in the law and economics literature. For example, in their extensive survey paper on social norms in the perspective of law and economics, McAdams and Rasmusen (2007) do not require that social norms are implicitly created by repeated actions of individual agents, nor that they are privately interpreted. Such centrally devised or created norms (e.g., by a professional association) are given the name "organization norms". However, the additional requirement stipulated by McAdams and Rasmusen is that social norms are obeyed because they are at least in part supported by "normative attitudes". These attitudes differentiate social norms from "conventions" that are abided by because of the interplay of purely external incentives, e.g., threats of sanctions by others or preexisting equilibrium-supporting beliefs in the society.

legal rules when these are too costly or otherwise infeasible to establish. Examples include norms of liability for animal-caused property damage developed among cattlemen and ranchers in Shasta County, California (Ellickson 1991); norms of property in hunted animals among whale fishers on the North Atlantic Ocean (Ellickson 1989); norms of performing, communicating, and responding to a breakdown of the marriage in one of the Illinois counties (Engel 1980); norms regulating inheritance of real property in rural Catalonia (Assier-Andrieu 1983); footbinding norms in Imperial China (Mackie 1996).

Beyond contemporary social norms in the domestic context, other exemplifications of norms combining backward-looking rule-creation, horizontal sanctioning, and the lack of public interpretative authority may be sought in legal anthropology. Scholars routinely notice that the widespread trait of non-literate communities is the prevalence of rules embedded in flexible oral traditions or commonly followed practices – in other words, "whatever is regularly or generally done is considered rightly done" (Diamond 1971, p. page). With the art of writing absent, legislation and precedent are unlikely to emerge as socially approvable sources of rules, and thus "the remaining source of law, and the one that dominates primitive law, is custom" (Posner 1980, p. 31). Concomitantly, the egalitarian social structure prevents a single individual or a small group of individuals from amassing sufficient power or wealth to dominate the community (cf., e.g., Hoebel 1967; Taylor 1982). Therefore, enforcing norms typically requires collective participation (e.g., in ostracism, ex-communication) or at least tolerance for legitimate (i.e., legally privileged) violence against one's kin- or clansmen.

On the other hand, the existence of public adjudication is a well-known source of variety in primitive law. Organized and ritualized dispute resolution is observed in some of the non-literate societies (typically those more economically advanced), being absent in others (Diamond 1971; MacCormack 1973).[13] It is precisely those regimes of primitive law lacking public adjudication (in other words, systems of sophisticated social norms in non-literate communities) that can be considered real-world exemplifications of the ideal type of ambient norms.

Regimes of primitive law without public dispute resolution methods have been long studied by anthropologists. For example, in the pioneering work on the "savage society" of the Melanesian people in the Trobriand Archipelago, Malinowski (1926) denies the existence of an institution resembling a tribe court. Tribe members would self-willingly resort to reciprocal sanctioning to enact punishment after a perceived transgression of a community norm. They would also refuse to share the means of subsistence, cooperate, or associate with someone they consider a wrongdoer.

Likewise, MacCormack (1973) observes that many African peoples like the Nuer, the Dinka, the Tiv, the Amba, the Konkomba, and the Lugbara had "no chiefs and no courts and not even village headmen" capable of deciding disputes (p. 77). However, he nonetheless reports on complex systems of unwritten rules regulating behavior within a single tribe and

[13] Diamond (1971) generalizes his extensive case studies of preliterate legal institutions by suggesting that societies of food gatherers and those in "lower grades" of agriculture or pastoralism typically have no recognizable adjudication institutions. Mechanisms of public dispute settlement are present only in more economically developed primitive societies (e.g., among cattle keepers or advanced agriculturalists), yet even in those cases, their emergence is not universally observable.

relationships between different tribes. Diamond emphasizes that among the Nuer, "there are no governmental or judicial organs of people, tribe, tribal sections, village or settlement and nowhere developed leadership except on the part of the lineage head (…)" (Diamond 1971, p. page).[14]

Finally, another locus of ambient norms may be found in the international realm. Derivation of rules from past behavior in the international community, dispersion of power, and lack of external coordination are the conditions historically prevalent among the states and other relevant international actors. In this sense, customary norms governing international relations seem structurally similar to social norms in the domestic context (cf. Norman and Trachtman 2005) and primitive law (cf. Barkun 1968), and thus, more generally, ambient norms. Indeed, the fundamental features of customary international law regularly emphasized in the literature are the derivation of normative content from the established behavior of states and horizontal enforcement, i.e., through actions of individual states taken in response to perceived infringements (e.g., Roberts 2001; Guzman 2008; Shaw 2017). According to Guzman (2008), absent a hierarchy in the international system, the enforcement mechanisms decisive for the operation of international law in the conditions of anarchy between states are "the three Rs of compliance": reputation, reciprocity, and retaliation.

[14] Although the Nuer recognized figures of go-betweens (called leopard-skin chiefs) that alleviate inter-group disputes, they are mere assistants of the conflicted parties. Gruel (1971) argues that the authority of leopard-skin chiefs is founded on the ability to build large coalitions on the case-by-case basis and thus channel the threats of social sanctions against those refusing to make peace with other tribe members.

Like in the case of primitive law, the derivation of norms from the behavior of states and the horizontal method of sanctioning suffice to classify customary international law in two out of three dimensions. The presence of authoritative stewardship presents a more complicated issue. Contemporary customary international law relies on a set of broadly recognized international dispute resolution authorities (e.g., The International Court of Justice) that seem to satisfy the definition of an authoritative steward but are historically novel. For example, the ICJ was established in 1945 and its predecessor, The Permanent Court of International Justice attached to the League of Nations, in 1920. The claim about the structural parallel between domestic social norms, primitive law, and customary international law is limited to the period before their creation, or to situations in which parties would typically unilaterally reject the authority of international dispute resolution authorities.

This is particularly applicable to the customs regulating warfare. By definition, belligerents normally reject any possibility of external coordination of actions, nor are they subject to a single superior force. However, this does not entirely preclude the development of spontaneous norms of war. For example, customs that specified the acceptable ways of conducting siege in the early modern era (i.e., in the 16^{th} – 17^{th} century) were created through a learning-by-doing process as a byproduct of siege operations, enforced by the warring parties through adjustments to their future siege tactics *vis-à-vis* the opposing party (in a manner similar to tit-for-tat), and required individual interpretative abilities of the field commanders to be applied consistently and understandably to others (Lesaffer 2007).

4.2 Pure customs: primitive law with adjudicative mechanisms, present-day customary international law

As suggested in the previous section, the ideal type of pure custom represents an ambient norm that is given an organized legalistic frame: it is articulated and interpreted in a public process carried out by a special social agent. In this context, it should be expected that many of the real-world institutions exemplifying the ambient norm type may have a corresponding variant falling under the pure custom type.

Indeed, it has been already mentioned that the legal systems of non-literate men are diversified with respect to the existence of public dispute resolution procedures. Since sociological facts normally constitute the basis for legal rules in primitive law, and since power in non-literate communities is typically dissipated within a large group, stewarded systems of primitive law can be considered examples of pure custom.

To illustrate, the Indian Yurok tribe combined traditionalist rules, self-help as the key enforcement method, and well-recognized public adjudication procedures that authorized the use of this method in the eyes of the public (Hoebel 1967; Benson 1989). According to Hoebel (1967), Yurok people “did not themselves (…) arraign the offender or determine the extent of the damages to be assessed. This was done by the informal court of go-betweens, or "crossers," who were chosen from among nonrelatives living in different communities than those occupied

by parties to the litigation." (p. 52). The procedure of a Yurok was structured, evidence-based, and resulted in an unequivocal announcement of a verdict binding to the parties of a dispute. If the go-betweens "found the defendant guilty, [they] declared an explicit judgment against him. (…) [T]he judgment assessed the customary damages against him, which he had to pay over to the plaintiff." (p. 52-53)

Importantly, the Yurok procedure could not be followed by action by organized enforcement authorities because there were none. Instead, the verdict gave the offended party and his allies the liberty to seek redress on their own. "In default, the defendant normally became the plaintiff's debtor-slave; otherwise, his execution by the plaintiff and his kin was warranted, although there was risk of engendering feud in this kind of action even though public opinion supported the plaintiff." (p. 53). In other words, although imperfect, the procedure served as a coordinative device that endues private (i.e., horizontal) sanctioning efforts with social legitimacy.

Similar examples of publicly adjudicated systems of spontaneous norms have been extensively reported in legal anthropology. For example, among the Lango people of northern Uganda, "the only administrative or judicial bodies were the informal gatherings of the village elders to settle intra-village and intervillage disputes (…). But there was no power to enforce their decisions except public opinion" (Diamond 1971, p. page). Likewise, in the Vogusu and Logoli Bantu tribes, "the main judicial authority is exercised by the old men of the sub-clan, but there is no organized judicial assembly and no means of enforcing a judgment except public

opinion" (Diamond 1971, p. page). In a similar vein, the contemporary research on "legal pluralism" in developing countries reports numerous other case studies of "unofficial" adjudication according to customary norms, e.g., from Zimbabwe and Nigeria (Worby 1997; Igbokwe 1998). Typically in those cases, centralized procedures of adjudication serve a coordinative purpose by funneling the execution of social sanctions by group members.

Moreover, present-day customary international law adjudicated in international tribunals may represent another example of ambient norms enhanced by a coordinative mechanism. While the derivation of rules from the regular behavior of states and reliance on self-help as the only available enforcement tool both remain the constant features of the international legal order, the 20th-century novelty lies in the prominence of permanent international dispute resolution bodies, like the ICJ or the International Tribunal for the Law of the Sea.[15]

The functions of international dispute resolution organizations emphasized in the law and economics literature overlap with the characteristics of an authoritative steward silhouetted in the preceding section. Firstly, international courts interpret, clarify, and articulate norms of customary international law, and thereby "assist the states to come to a common understanding regarding relevant (…) law" (Guzman 2008, p. 51-52). Thus, they provide focal points within

[15] International dispute resolution originated in Greek antiquity. Its modern roots can be traced to the 2nd half of the 19th century, or more precisely to the so-called Alabama arbitration between Great Britain and the United States. However, the period of heavy institutionalization of international dispute resolution began only with the Hague Peace Conferences in 1899 and 1907, with its culmination in 1922 marked by the establishment of the Permanent Court of International Justice (cf. Ginsburg and McAdams 2004, p. 1288-1291; Bederman 2001, p. 82-85).

the set of possible interpretations of norms without affecting objective payoffs (Ginsburg and McAdams 2004), potentially reducing the effects of states' idiosyncrasies. In the specific case of custom as a source of international law, the courts' role boils down to finding the relevant behavior, examining its binding status, and proclaiming an unequivocal announcement of how it translates to a binding rule.

Moreover, by publicly announcing the outcome, international dispute resolution bodies disseminate information about the objective state of the world (e.g., past performance of states) among the interested actors. As suggested by some scholars (Norman and Trachtman 2005; Guzman 2008), the facilitative role of international courts in spreading information can be vital for the effective administration of responses by individual states in the system. For example, it makes the coordination of sanctions more likely or decreases the cost of developing a track record of a state's performance, thereby contributing to more veracious reputation-building. Alternatively, if international courts are considered unbiased, their assessment of the facts may cause an update of states' beliefs about uncertain facts and thus contribute to solving a pure coordinative problem (Ginsburg and McAdams 2004).

An early case study of a stewarded system of customary international law may be found in the borderland norms of 16th-century England and Scotland, known after its eventual writing down under the name *Leges Marchiarum*. Inhabitants of both sides of the border have been grave enemies, routinely engaging in raiding, pillaging, and plundering of each other's territory. Yet even such warlike conditions did not prevent the emergence of unwritten norms

that "developed organically from cross-border interactions" (Leeson 2009, p. 481). Like in the anthropological accounts of primitive law, the enforcement of borderland customs relied on regulated private violence or threats thereof – in this case, typically in the form of private raiding and exchange of hostages.

Importantly, despite the hostility of both nations, *Leges Marchiarum* saw a development of an organized public adjudication forum. This institution was meant to prevent arbitrary exercise of vengeance that could potentially escalate into chaos and full-scale war. The dispute resolution assembly met periodically (but only during the periods of truce between both monarchies) and supervised the compliance with meta-rules of raiding and revenge, thereby seeing to it that the borderland customs do not slip into a spiral of increasing alternate violence.[16]

4.3 Legally enforceable customs: customary standards of diligence, commercial practices, colonial and post-colonial "customary law"

As previously elaborated, legally enforceable customs can be understood as sociological facts that are officially recognized as foundational for legally binding rules and enforced by a

[16] The case of *Leges Marchiarum* suggests that the role of authoritative stewardship may extend beyond providing focal points in games that represent pure coordination problems with little conflict of interest. On the contrary, it can support complex equilibria in repeated games in which conflicting motives are prevalent but possibilities of avoiding deadweight loss are nonetheless present.

specialized enforcement agent (e.g., by state agencies).[17] In contemporary Western legal systems, legally enforceable custom can be exemplified by those rules of domestic law that reflect community practices. Customary standards of diligence in torts in the United States, e.g., in boating accidents or medical malpractice, are one natural example, even though researchers observe gradual departure from custom in both areas (Epstein 1992; Peters 2000). Business practices incorporated into American commercial law are another example (Bernstein 1999).

The rationale for invoking custom in such cases is the conviction that the community of specialized agents can, *via* learning-by-doing, develop knowledge and consciousness of appropriate norms of behavior that are superior to the knowledge legislators or courts can possess. This can be due to both their advantage in technical or craftsmanship expertise and their awareness of specific circumstances of time and place.

Historically, the category of legally enforceable custom conceptually squares also with the colonial construct of "customary law". Colonial customary law amounted to practices of indigenous peoples admitted by the colonial authorities as substantive legal rules for respective indigenous communities and granted enforcement in courts (Hooker 1975). The admission was normally conditioned on non-contradiction with the colonizer's vision of decent morals ("repugnancy clause") and with broader political order. Similar approaches to customary law

[17] Kim (2007; 2009) argues that this concept of custom is specific to the broadly understood Western legal tradition and thus absent from other legal cultures, e.g., Far Eastern, that were able to develop well-organized legal systems with strong hierarchical enforcement.

continue today in many post-colonial countries, mostly in Sub-Saharian Africa (Zenker and Hoehne 2018).

However, the translation of indigenous practices into legal frameworks foreign to their originators frequently transformed the meaning and functions of said practices. Therefore, researchers studying colonial and post-colonial legal systems have often found a significant divergence between the pre-colonial social arrangements and the technocratic customary law manufactured in the process of colonization (Snyder 1981; Moore 1986; Kim 2009). This finding led them to distinguish custom "pronounced in court judgments, textbooks, and codifications" on the one hand and "living customary law" that consists of "norms that regulate people's daily lives" on the other (Diala 2017, p. 143). The distinction arguably reflects the forced institutional transition of ambient norms or pure customs that have been products of a long *durée* into a structurally different enforceable custom.

4.3 Fixed relational rules and Arbitrated fixed relational rules: international agreements and other agreements under anarchy, self-governance of religious diasporas

The previous section suggested that fixed relational rules constitute a "degenerate" type of spontaneous norms. Rules stipulated in such agreements are constructed or brought forward beforehand and proclaimed with a forward-looking intention. Yet fixed relational rules still exhibit the other two features associated with governance by spontaneous norms: horizontal

sanctioning and the lack of authoritative stewardship. They exist in an environment of self-help and no interpretative coordination.

Such a combination of conditions is typical for international agreements. Agreements between international actors are deliberately formulated and almost always put down in writing. However, the anarchy of equivalent states is the ever-present feature of the contemporary international order, naturally precluding the emergence of a distinguished enforcement agent in the system. Moreover, as noticed by Guzman, "most international agreements exist without any form of dispute resolution. Agreements might be entirely silent on the question of dispute resolution or might include the singularly unhelpful command that the parties work together to resolve the dispute" (Guzman 2008, p. 50). Of course, in present-day realities, the possibility to use an external dispute resolution mechanism is open to states, even if it is not generally used.[18] In such a case, the international agreement would take the form of an *arbitrated* fixed relational rule – i.e., the final category in the classification of spontaneous norms.

Other real-world counterparts of arbitrated fixed relational rules might be sought outside of the realm of international relations. For example, certain religious diasporas constitute an interesting case. Communities bound together by confession may be subject to a

[18] The Statute of the ICJ in article 36 stipulates that "The states parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
(…)
d. the nature or extent of the reparation to be made for the breach of an international obligation."

foreign or secular law that does recognize their rights and duties of religious nature. In such cases, it is often observed that religious doctrine provides normative guidance while its socially binding interpretation rests in the hands of religious leaders.

Examples may include American Mennonites that follow the Dordrecht Confession of Faith or several Muslim diasporas in Europe. Mennonites are obligated by their faith to live in strict accordance with the Dordrecht Confession. Mennonite religious leaders possess supreme authority in the matters of interpreting the document and also the authority to identify and announce the events in which infringements have occurred. While they possess no ability to forcibly subordinate their fellow believers to their will, the special position of religious leaders in Mennonite communities allows them to effectively coordinate social sanctions against transgressors (Gruter 1986). A similar phenomenon can be observed among parts of the contemporary Muslim diasporas in England and Germany (The British Home Office – Siddiqui et al. 2018; Jaraba 2020).

Finally, one more real-world instance representing an arbitrated fixed relational rule can be found in the well-studied social system of early medieval Iceland. Iceland in the period between the 9th century, when the Vikings arrived on the island, and 1262, when they pledged loyalty to Norwegian king Hakon, is often considered an example of a "stateless society" (e.g., Friedman 1979; Miller 1996; Geloso and Leeson 2020). The country at that time was a loose confederation of small chieftaincies that were themselves internally divided. Even by the

standards of feudal Europe, Icelanders were devoid of political authority and organized force, having neither dukes nor any equivalent (individual or corporate) of a similar figure.[19]

Despite these anarchic conditions, inhabitants of the island developed a sophisticated system of both legislation and organized adjudication. Laws of Iceland were discussed and legislated during annual assemblies of freemen (*Allthing*) held at a designated place, the Law Rock, and subsequentially memorized by a special public officer called a lawspeaker. The sole role of the lawspeaker was to accumulate knowledge of Iceland's laws and recite them at request – in particular, during each Law Rock assembly.

Beyond their legislative function, The Law Rock meetings decided disputes between individual Vikings or families and could in effect impose obligations onto parties. The outcomes of the disputes settled during the Law Rock meetings were enforced through a sophisticated system of private vigilantism authorized and regulated by the *Allthing*. Icelandic laws attempted "to limit the permissible range of self-help, but it did not try to prohibit altogether. It sought to limit the class of expiators and the time and place where self-help could be legitimately taken" (Miller 1996, p. 232). Compliance with a decision made in one year could be verified during the following assembly. Persistent refusals to comply would result in

[19] Stein-Wilkeshuis (1986) elegantly summarizes the consequences of the anarchic conditions for the maintanance of a legal order: "From the very beginning the Icelanders were well aware of the fact that a well-functioning society could not be attained without the existence and observation of laws, even more so since there was no central authority with an executive power. Every legal action, be it a summons, prosecution or punishment, entirely depended on private initiative, and therefore it was very necessary that everybody knew exactly what were his rights and duties." (p. 40)

declaring the transgressor an outlaw to whom no one was allowed to offer help or shelter (Friedman 1979).

In sum, medieval Iceland combined the three characteristics of the ideal type of arbitrated fixed relational rule: explicit rulemaking in the form of *Allthing* with a legal knowledge repository in the figure of the lawspeaker; authoritative stewardship in the form of dispute resolution meetings during the *Allthing*; and exclusive reliance on horizontal sanctions for enforcement.

5. Discussion

The primary ambition of this paper was to conceptually organize the mosaic of law and economics research of spontaneous norms, extralegal governance, custom, and the like. The volume of existing literature makes it implausible to deliver an all-encompassing picture of the field. Still, it seems fair to believe that the classifications outlined in the previous sections may help identify further research questions and better understand the existing ones from the law and economics standpoint.

This section proposes three research questions that can be accurately addressed with the help of the theoretical framework developed in the paper. The first touches upon the phenomenon of the declining role of spontaneous norms in legal history and their supersedure with more “rigid” or “formal” modes of social organization. The second, and related, deals

with the question of why customary and traditional law continues today in some societies while having declined in others. Finally, the framework can be used to address the problem of the viability of governance by spontaneous, or bottom-up rules, instead of state-made and state-administered laws. The three applications of the classification scheme will be now discussed one by one.

A. Why have spontaneous norms declined throughout legal history? Many legal historians have emphasized a transition from spontaneous, unwritten, and by contemporary standards informal forms of social control toward more formalized, exact, and professionalized legal mechanisms. Researchers of archaic law also pay careful attention to the evidence of social norms available in documents like the Bible (e.g., Parisi, Pi, Luppi, and Fargnoli 2020). They assume that subsequent forms of early law bear a structural resemblance to the social norms from which they supposedly developed. Custom is also recognized as the most important source of law at the beginning of European legal development.

However, the role of social norms and custom declined over time, giving way to other sources of rules (e.g., Van Caenegem 1988). This transition has been documented in many case studies (e.g., Kadens 2019; Masferrer 2019; Rossi and Spagano 2018; Thompson 2015 [1992]; Zasu 2007; Harding 2001; Assier-Andrieu 1983; Weber 1978 [1921]), and the process continues even today. As Epstein (1998) notes, “It seems clear that the dominant trend of the

past century has been towards the demotion of customary norms and to the rise of what has been called legal centrism" (p. 579).[20]

The gradual qualitative transformation of law has not been limited to sources of rules (custom *versus* explicit sources). More broadly, the process comprises the departure from "spontaneous" social regulation in all three dimensions identified in the preceding sections. For example, Schauer (2015) notices that the past two centuries have been marked by a conspicuous centralization of law enforcement capabilities.[21] In turn, Harding (2001), Hadfield and Weingast (2013), Carugati, Hadfield, and Weingast (2015), and, in the international context, Ginsburg and McAdams (2004) describe historical case studies of the emergence of centralized rule-interpreting institutions from environments of loose and ambiguous *de facto* norms.

Depending on their background and preferred legal theory, scholars offer several explanations for the decline of spontaneous norms. Conventional explanations typically focus on factors such as political changes and developments in the legal culture (e.g., Bellomo 1995; Brundage 2008). On the other hand, likely because of insufficient conceptual clarity, the

[20] In the European context, the gradual displacement of spontaneous norms in legal history was a process comprising multiple substeps. Their list includes, but is not limited to, black-lettering (i.e., putting orally transmitting rules into a written form), "homologation" (i.e., standardization of customary norms in a single official document), doctrinal marginalization, and monopolization of lawmaking (cf., e.g., Glenn 1997; Dalhuisen 2008; Rossi and Spagano 2018; Masferrer 2019).

[21] Schauer (2015) points out that "[t]oday, individuals, businesses, and associations operate within the constraints of the administrative state to a much greater extent than Bentham and Austin could ever have imagined in the nineteenth century. And, importantly, the modern administrative state is an environment of pervasive regulation, with a mass of detailed regulations being enforced by the threat of criminal fines, civil liability, loss of privileges, and a panoply of other sanctions. Moreover, much of the contemporary regulatory environment, although often effective in implementing worthwhile environmental, health, safety, consumer protection, financial stability, and other policy goals, rarely inspires voluntary compliance." (p. 43-44)
In the same vein, Friedman (1995) emphasizes that in 18th century England, "[p]rosecution of almost all criminal offenses was private, usually by the victim" (p. 475). The shift toward law enforcement by "paid police" occurred only in the beginning of the next century.

problem has attracted only limited attention in law and economics (Rossi and Spagano 2018 and De Geest 2020 are exceptions to this rule).

The suggested law and economics interpretation of this problem developed in this paper is relatively simple. The journey from spontaneous norms to contemporary legal centrism can be separated into three parts: (i) the demise of "implicit" rules, (ii) centralization of enforcement, and (iii) the solidification of authoritative stewardship. The explanation for the qualitative changes in the dominant forms of social control should take into account, and attempt to elucidate, these three conceptually distinct phenomena.

This interpretation may be helpful for understanding the economic forces behind each of said transitions. As suggested in the earlier sections, the alternative between backward-looking and forward-looking rulemaking regimes can be portrayed as a tradeoff between higher flexibility of rules on the one hand and a higher level of certainty on the other.[22] Likewise, the centralization of enforcement presents a natural tradeoff between the advantages of the division of labor and the risk of the misuse of concentrated enforcement power. Finally, the introduction of an authoritative steward should also be seen as a tradeoff between coordination and decentralized idiosyncratic interpretation of norms.

[22] Unwritten common norms are generally considered more adaptable to ever-changing circumstances and, by their very nature, less prone to capture by vested interest. However, the procedures required to become acquainted with such norms can be prohibitively costly compared to rules reduced to an easily accessible writing form (Rossi and Spagano 2018). Moreover, historically enrooted norms may be prone to evolutionary traps and difficult to reform. The introduction of a set of explicit norms that abrogate and replace them can be one of few viable solutions to an evolutionary dead end.

B. What is the role of customary, traditional, etc. laws in contemporary domestic legal systems? The breakdown of spontaneous norms into three dimensions may facilitate an analysis of such norms in law and economics terms. In turn, this may prove helpful in understanding present-day legal and extralegal realities. Indeed, extralegal and semi-legal governance mechanisms operating in contemporary societies have attracted researchers' attention in the past decades. In legal anthropology, the interest in the operation of traditional law in parallel with modern-day legal systems gave rise to the entire subfield of "legal pluralism".

As already hinted in the previous sections, researchers described many case studies that emphasize the important role played by indigenous law in present-day developing countries, mostly in Africa (e.g., Worby 1997; Igbokwe 1998) and South Asia (e.g., Chiba 1993). Moreover, since the 1990s, sociologists study the "informal" administration of justice by bottom-up emergent bodies within migrant communities in Europe (e.g., Jaraba 2020). In Great Britain, the concerns over the consistency between the unofficial Sharia councils and the principles of the rule of law caused the launch of an investigation by the British Home Department (The British Home Office – Siddiqui et al. 2018). However, the contemporary role of traditional law has not lived to see many cross-sectional empirical works or theoretical inquiries from the law and economics perspective. As an exception, Gutmann and Voigt (2020) have made one cross-country study.[23]

[23] The evidence from the study suggests that reliance on what the authors label "traditional law" is statistically associated with lower per capita income and lower levels of rule of law. Moreover, historical and socio-geographical factors also play a role in its prevalence: it is reduced by a longer history of statehood and a higher share of descendants of European ancestry.

The typology presented in the paper may contribute to clarifying the problem of the ongoing importance of spontaneous norms in several ways. First, it allows for setting clearer boundaries between various rule-based methods of social organization and also highlights their similarities and dissimilarities. The typology differentiates between entirely non-legal norms (i.e., ambient norms) and various semi-legal norms that exhibit only some features of contemporary state law while lacking others. Thus, it may give a more precise formulation to the research problem in question.

For example, the continuing reliance on Islamic law in family matters among Muslims in Europe is arguably based on explicit rules of religious origin, enforced non-legally through social sanctions, and often administered by local leaders who enjoy high esteem in the community. As suggested in the previous section, it should be thus considered a case of arbitrated fixed relational rule. In contradistinction, customary justice in central Africa often uses non-written substantive rules and thus belongs to the pure custom type.

C. Under which conditions is governance by spontaneous rules viable? Many classically liberal or libertarian political philosophers consider governance by spontaneous norms a worthy alternative to state-centric legal order. They maintain that a social system with a minimum or outright nonexistent role of government in making, administering, and enforcing

However, the study has several limitations. First, it blends several dissimilar types of spontaneous norms (e.g., ambient norms, pure customs, and those fixed relational rules whose substantive part is of religious nature). Second, due to data availability, it relies heavily on the data on recognition of customary and traditional law by state authorities, and therefore risks overrepresenting legally enforceable customs.

the law is viable and desirable.[24] While opposing the coercive and one-size-fits-all nature of contemporary state-run legal systems, these authors believe that privately created or spontaneously emergent rules may be at least equally efficacious in ordering behavior (e.g., Friedman 1989 [1973]; Benson 1990; Kinsella 1995).[25] When justifying this position from the law and economics perspective, researchers rely on theoretical models and invoke numerous case studies, both historical and contemporary (cf. Powell and Stringham 2009 for an extensive survey).

However, the attempts to undermine the state-centric view of the law often lack due clarity. It is not always certain what kind of alternative the critics envision and where the emphasis of their arguments lies. This ambiguity is also reflected in the fact that the umbrella term "private ordering" used to denote such alternatives covers a broad array of phenomena like "rancher/farmer relations, (…) extralegal contractual relations among wholesale diamond traders, (…) aboriginal customs in Papua New Guinea, (…) the rulemaking procedures of the American Law Institute" (Katz 1995, p. 1745). It is far from obvious how they are related to each other and why they should be considered a single category. Yet they all, alongside many others, are used by the critics of state-centric legal systems to illustrate their argument.

[24] The fascination with stateless law is often visible already in the titles of books, papers, or chapters: "Private Creation and Enforcement of Law: A Historical Case" (Friedman 1979); "The Enterprise of Law: Justice without the State" (Benson 1990); "Law without the State" (Murphy 2002; Hadfield and Weingast 2013); "The Laws of Lawlessness." (Leeson 2009)

[25] This statement is sometimes qualified. For example, Taylor (1982) claims that the provision of social order under anarchy requires the existence of a "community", i.e., a multi-faced network of dependencies (e.g., familial, religious, and professional) between individuals.

Against this unstructured picture, this paper suggests a refinement of the normative claim in question. It proposes a fine-grained theoretical framework that decomposes the notion of "legal centrism" into three elements: rulemaking, enforcement, and interpretation. By rephrasing the argument in this framework, the discussion about the possibility of private provision of rule-based governance can gain the clarity that it is currently missing. Moreover, such a step can more precisely indicate socioeconomic preconditions of the envisioned legal order. In other words, the typology developed in the paper can be a useful tool in future normative debates, both constructive and critical, on law from the classical liberal or libertarian standpoint.

6. Concluding remarks

This paper has made a simple claim: the dissipated research field of "extralegal", law-like, spontaneous norms and institutions can be organized according to three well-known principles. The proposed organization results in the development of a scheme of ideal types of spontaneous norms. The typology allows for a convenient classification of governance by norms that lack at least some characteristics associated with the legal rules of contemporary domestic legal systems.

However, the advantages of the typology extend beyond mere convenience. The paper further does two things. First, it attempted to suggest how the identified ideal types of

spontaneous norms can be represented game-theoretically. While the detailed modeling solutions depend on the specific features of the represented object, the suggestions emphasize the structural differences between the ideal types and allow for an economically informed interpretation of the typology. Second, the paper illustrates the classification with real-life counterparts. By so doing, it points out that seemingly dissimilar normative regimes (e.g., primitive law and customary international law; war-waging norms and domestic social norms) bear structural similarities. While such suggestions have occasionally appeared in earlier scholarship, they are given a more substantiated formulation in the paper.

Finally, the paper indicates several applications of the classification in investigating specific research problems in legal history, institutional economics, and political philosophy.

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