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From Custom to Law

An Economic Rationale behind the Black Lettering

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Laws and edicts must be promulgated and published in a public venue, through the crier's voice [...] Sometimes with a horn, as in Naples and in the District of Paris [...] At the sound of the horn people gather together, and then the law is published [...] the text of the law is posted up in crossroads and in the main places of the city [...] before everybody's eyes, so to be read out.¹

Abstract: This article employs the number of rule recipients in order to explain the transformation of some customs into laws. The publication of rules may mark the reaching of the threshold number beyond which the spontaneous rule leaves room for the State intervention. In addition, the publication resolves a couple of questions that Hayek left unresolved. Examples are provided from ancient merchant customs and contemporary international law.

Keywords: Spontaneous Rules, Imposed Rules, Hayek

JEL Classification Codes: B25, B41, B52

This article focuses on the imposed rules that reproduce, more or less exactly, the prescriptive contents of pre-existing spontaneous rules. We suggest that the number of rule recipients can contribute to explain the transformation of spontaneous into imposed rules. The argument whereby “numbers matter” is the same that Olson (1971) uses for public goods.

¹ Borrello (1621 413–414, nn. 3–4, 6–7), our translation.

The imposed rules are known as *laws*, and are followed by their recipients due to the authority that issues them, usually the State. Spontaneous rules, which individuals think of as compulsory, are known as *customs*,² and are followed by their recipients even if no authority has formally adopted them. The idea of economic order as an undesigned effect of spontaneous behaviors goes back to Adam Smith; Friederick von Hayek widens the concept to the point that law and legislation must also derive from spontaneous interactions. In the context of the axioms of rational behavior, John Harsanyi (1953, 1955) is the first to deal with spontaneous sprouting of rules of behavior. Robert Axelrod (1981) shows—and Kenneth Binmore (1994, 1996) and H. Peyton Young (1993, 1998) recognize—the possible cooperative nature of spontaneous rules, whereas Herbert Gintis, Eric Smith and Samuel Bowles (2001) trace their emergence back to the solution of coordination problems. From the evolutionary economics point of view, customs were considered social replicators, namely routines, by William McKelvey (1982), Richard Nelson and Sidney Winter (1982) and, more recently, Markus Becker (2008). Robert Ellickson (2001) acknowledges that a close connection exists between custom and law, but only in the case of common law systems. Peter Boettke, Christopher Coyne and Peter Leeson (2008) focuses on those imposed norms that have to be based upon spontaneous rules to be efficient or effective.

This article offers a development in the understanding of the various relationships between spontaneous and imposed rules. In order to do so, we follow the literature (Hodgson 2009) that does not interpret the legal prosecution of the custom in terms of a mere ratification of something which is perfect as it is, and only needs to be sealed. On the contrary, the transition from custom to law implies a qualitative discontinuity even when the law reiterates the same content of the custom. The passage is not spontaneous, but it needs a certain degree of design, which only a State can guarantee. Moreover, the State itself is not a linear prosecution of any spontaneous process, but it is the result of specific, historical circumstances, as the subjection of a group by another (Seagle, 1941). We only consider cases in which the designed legislation can be thought of as the *continuation* of the spontaneous rule (because of their common content). Nevertheless, a qualitative discontinuity intervenes, because it is the State that decides *whether* and *which* custom has to be transformed into law. In the words of John Commons (1924, 372), the authority at least operates an “artificial selection” of good customs and a rejection of bad customs.³ The existence of the State as an essential element of the transformation also emerges from the different nature of the compulsoriness of the prescriptive content: the spontaneous compliance with the rule is an essential element of the custom,⁴ whereby the compliance with the law necessarily relies on the power of the State. In this sense, and in the terms we will see below, reaching a large number of potential recipients must be considered as a possible signal for the State to impose a qualitative change in the evolution of the rule. This change in turn implies a change from persuasion to coercion as made clear by Commons (1899).

In this change, the publication of the rule takes on a decisive, often overlooked, role.

² We are referring here only to customary laws, which bind without any authoritative intervention; from our perspective, indeed, the legal customs that need force by a court fall into the category of the *imposed* rules, because of the authoritative intervention of the court.

³ Specifically, Commons refers to the role of the Courts in the Common Law, whose pronouncements can, however, be considered as good images of “laws,” in the sense of stable and binding decisions, which are operated by a public authority.

⁴ *Opinio juris ac necessitatis* (the belief that the behavior is compulsory or anyway necessary) is the Latin adage that defines the subjective element of the custom.

We cannot establish the exact number of people who has to be involved by the spontaneous rule before the State intervenes. It depends on too many variables: the ways of communication, the uniformity of language, cultural homogeneity, and so on. Consequently such a numerical threshold cannot be established once and for all, but it changes depending on several circumstances. More in general, following Arthur Diamond ([1971] 2013, 4), we cannot expect an “unilinear course of legal development.”

The underlying intuition is straightforward: a larger population involved in a spontaneous norm raises transaction costs. A rule with the same prescriptive content, but formally imposed and enforced by the State, replaces those transaction costs with the costs of introduction and implementation; therefore, the costs deriving from the imposed rule may be lower than those of the spontaneous rule. For example, the number of exchanges may increase when all people belonging to a community operate under the same rule, since they do not have to face different conditions and situations to interact with people obeying different rules. So, the authoritative imposition of the rule on a larger number of people can increase the net value of their whole economic activity. The dominant portion of people, which (according to the definition of Commons, 1934) leads the State, can then decide whether to extract and appropriate those additional benefits, or redistribute them. In any case, the transformation process of customs into laws remains a powerful instrument that ensures “vested interests” (Veblen, 1919) for the dominant portion of the society.

Only spontaneous and imposed rules with the same prescriptive contents are considered in this article. Such a choice allows us to isolate the mere change in the *form* of the rule. At the same time, it prevents us from saying anything about the relationships between imposed laws, which modify the content of pre-existing spontaneous rules, and spontaneous rules, which systematically ignore some prescriptions of the law. Of course, these kinds of relationships deserve to be studied separately. Some insights of the article could be useful to future investigations, which compare imposed rules with spontaneous rules when they have highly dissimilar contents.

The remainder of the article is organized as follows. The next section focuses on an unforeseeable Hayek’s warning about the impasses that spontaneous rules can run into. The section “Plurality of Rules and Slow Spread” introduces the number of individuals involved by the rule as a variable of the shift from custom to law, and suggests deeming its publication as the watershed between the two forms of regulation. The last two sections present some historical and legal instances of transition from custom to law as related to the growth in the number of recipients. Some conclusions follow.

Hayek and the Impasse of the Spontaneous Rule

In *Law, Legislation and Liberty* (1983) Hayek reveals himself as a champion of the regulatory autopoiesis. His idea is that any kind of order has to be “the result of human action but not of human design,”⁵ as a sort of invisible hand for the rules. More in general, Hayekian criticism towards any kind of “made orders” stems from his refusal to explain the behavioral regularities in terms of a “mind at work.” On the differences between the Hayekian

⁵ Hayek (1967).

refusal of a centralized intervention and the principle of the laissez-faire, see Rodrigues (2012). (Hayek 1988, 87):

We have never designed our economic system. We were not intelligent enough for that. We have stumbled into it and it has carried us to unforeseen heights and given rise to ambitions which may yet lead us to destroy it.

He rejects any possible mold of centralized regulation due to his more general skepticism on the ability of a single human mind to design and, more in general run, complex systems.⁶ So, his juridical theory replicates his aversion to any economic design of the Governments. At most, he admits that the deliberate legislation could intervene later, to ensure the mere enforcement of a rule already in force: “Factual observance of some rules no doubt preceded any deliberate enforcement” (Hayek 1982, 96).

Oddly enough, however, he grants imposed regulation the role of *deus ex machina* in order to ensure an escape route from *spontaneous* stalemates:

For a variety of reasons the spontaneous process of growth may lead into an *impasse* from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. [...] The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation.⁷

This passage appears somewhat perfunctory. Therein, Hayek suddenly introduces the possible appearance of impasses in the path to the spontaneous rise of legal order and the consequent need of “legislation.” Furthermore, he does not explain what exactly such an “impasse” is, or how likely it could be. Above all, he explains neither its causes nor does he propose a solution. Hayek is also silent about what prevents the spontaneous process “extricat[ing] itself by its own” from the impasse, and about which correction may be “quick enough.” This silence may depend upon his reluctance to admit the need for *interfering systematically* in the spontaneous phenomena, and so he prefers to consider such cases as marginal hypotheses, which have to be regarded as innocuous exceptions. The fact remains that he called for an imposed intervention when the spontaneous rule failed. Our examination of the imposed rule, which reproduces the same prescriptive contents of the spontaneous one, is a special case of the general one illustrated by Hayek.

Note that he, by admitting the existence of such an impasse, also admitted the existence of an undesirable outcome of the evolutionary process. As far as he was concerned, in fact, the normative autopoiesis is the re-interpretation of behavioral regularities in light of Darwinian principles (Hayek 1982, 23–24). So, it is our opinion that his forced concession proves to be an illuminating exception in the following terms.

Assume that it is possible to benefit from the fact that all the individuals of a certain population, involved in the same economic activity, use the same rule when attending to that activity. As we said above, it can be thought that such uniformity increases the overall value deriving from carrying out that activity, regardless of

⁷ Hayek (1982, 88), emphasis added. It is not a solitary instance: Angner (2004) enumerates several passages in which Hayek mitigates his proverbial support for the quintessential *laissez faire*.

who will appropriate the generated surplus. Imagine now, that a rule which has spontaneously appeared and spontaneously spread, presides over that activity. If it spreads very slowly, it could happen that not all the people, who are its potential recipients, have yet learned such a rule. If the time needed to reach the last recipient was too much time, the whole related potential advantage might be obtained at a much later stage. So, the result could be one of the two failures of the spontaneous normative evolution, which Hayek describes as the case of the rule that does “not correct quickly enough.”

Now, keep the assumption about the advantage deriving from the uniformity of regulation, and think that two different rules, which have spontaneously appeared, preside over the same activity in two different ways, that is to say imposing different contents. If neither of the two spontaneously turns out to prevail over the other, the whole potential advantage can never be reached. So, the result could be the second of the two failures, which Hayek (1983, 88) describes as the case of the rule that “cannot extricate itself [from the impasse] by its own forces.”

In short, the hypothesis of the excessive time can be interpreted as a special case of the spontaneous rules that cannot “correct quickly enough,” and the hypothesis of plurality of rules can be interpreted as a special case of the spontaneous rule which “cannot extricate itself by its own.”

So an element exists, which can be considered in common to the two failures: the number of potential recipients of the rule. In the first case, *ceteris paribus*, the larger the population, the longer the time needed for the rule to reach all the people. Therefore, the larger the population, the greater the risk that the time required is too long. In the second case, the larger the population, the higher the probability that more rules spontaneously emerge, which regulate the same matter. The higher such a probability, the bigger the risk of conflict among rules. The bigger this risk, the higher the probability that no rule prevails. Ergo, as the population grows, so does the risk for the rule to fall in those failures for which Hayek admitted a legislative intervention.

Plurality of Rules and Slow Spread: the Room for Publication

It is clear from what we have said that two failures of the spontaneous rules evolution have the number of individuals in common. This does not imply that a small community can always avoid that outcome. Instead, an increase in the size of the group also increases the risk of failure. Therefore, in general, a very small group runs a very low risk. The more the people, the higher the probability for the spontaneous rules to fall into the Hayekian impasses.

We have argued that the number of people in a group may affect the economic outcomes of the activities, which are disciplined by spontaneous rules, in two different ways.

First of all, it is possible that, in a given group, more than one rule appears to discipline the same reality (the argument is solid in general, although here we consider only that kind of “reality” which coincides with economic activity). Reasonably, this will more likely happen when the group is more numerous. More specifically, Bruce Kobayashi and Larry Ribstein (1996) connect the lack of uniformity of the regulation to the emergence of inconsistency and informational costs. In wider terms, David Dequech (2013) notes that when

institutions enter into conflict, the need for conscious deliberation emerges. Imagine a group of people divided in as many subsets as the spontaneous rules governing the same economic activity. Whenever members of different subsets interact in such an activity, they will have to take out an additional coordination cost from the income deriving from that interaction. For all the interactions among individuals belonging to different subsets this happens until the plurality of rules persists. Here, the intervention by command (which selects one of the norms and imposes that on the entire community) may be worthwhile if the total amount of the costs of selection and implementation of the unique rule were lower than the total amount of the additional costs deriving from the plurality of the spontaneous norms.

In the second place, the larger the number of members of the community, the longer the time the norm needs to reach the last recipient. This happens since each individual needs a certain time to observe, learn and replicate the behavior that a spontaneous norm has prescribed. Moreover, the spread of the spontaneous rules is not linear (see, for example, Banerjee, 1992; Bikhchandani, Hirshleifer and Welch, 1992) and depends on the overall homogeneity of a given group. In fact, a huge number of variables exists that can both facilitate or delay the spread of the spontaneous rule. The first issue to take into account is the communication code, which the replication of the behavioral routine is entrusted to. A unique code makes, *ceteris paribus*, the spreading of the rule easier, but the question is not only about the number of codes. Instead, it concerns the aptitude of the single code components to cause ambiguity or clarity of the interpretation. Not all the codes are indeed entirely unambiguous as the mathematical code can be. As Radu Bogdan (2000) points out, the ambiguity degree may depend on the different meaning that each one attributes to the elements of a communication code and to their combinations, as in the case of the linguistic codes. Other than the code, other issues have to be taken into account: the availability of effective means of communication, the presence of conflicts within the group, its social cohesion, the spatial distribution of people on the territory, and even the very shape of that territory. So, for example, Douglass North (1987) finds an inverse relation between cultural homogeneity and trading costs. Ultimately, it depends on the different cognitive and cultural substratum with which people are provided.

In any case, there will be activities which cannot be carried out until the spontaneous rule reaches the last recipient. As a consequence, it will be impossible to reach the whole potential advantage deriving from the uniformity of the regulation. So, if the selection and enforcement costs were lower than the entire forgone income, an imposed intervention could allow the reaching of the whole potential advantage beforehand. It would be a matter, in this case, of extending the spontaneous rule to those individuals who are not yet involved, thus accelerating its diffusion: the imposed intervention would therefore consist in altering the—too slow—signal which conveys the due behavior. As we already noted above, the additional benefit could be redistributed by a benevolent Government or extracted by a self-interested one, but what matters here is that a State intervention is needed in order to force the spontaneous rule out of the impasse.

Furthermore, the two cases may overlap. For instance, it is possible that two (or more) rules exist, governing the same matter, each in a distinct subset of the population, and no rule in a further subset. Here, the State intervention would be twofold: selection and imposition of the same rule on the first two subsets—as in

the case of conflicting norms, —and compulsory acceleration of the selected rule on the remaining subset, as in the case of the norm that did not yet cover the entire community.

It must be clearly specified here, that the simple existence of a potential advantage deriving from the intervention of the State does not imply necessarily that the State will actually intervene. This simply means that the potential advantage will not be reached without the State intervention. Specifically, deciding whether or not to intervene depends on that dominant portion of people, as we will see below, in charge of the State at that specific time. Clarence Ayres (1949, 294) even doubts that the adoption of the rule of law principle always results in advantages for the population.

Ultimately, the normative autopoiesis may be inefficient as compared to an imposition that (a) selects one rule among those which appeared spontaneously, (b) accelerates the spread of the only rule which spontaneously appeared, and (c) somehow puts the two remedies together. Such interventions, indeed, could theoretically increase the net value deriving from the economic activities if the related costs were lower than the costs (or the foregoing incomes) deriving from the spontaneous regulation.

Differently from the customs, the imposed regulation requires an artificial vehicle, which is able to ensure the spread of knowledge of the rule and to serve as a precondition for a subsequent potential enforcement. Such a vehicle is the publication of the rule. By this mechanism, the State (a) puts the rule down in black and white and (b) makes it known to the whole community.

Although we talk about publication essentially as the drafting of a written document, the related concept may include any other form or means that allow the rule to be unambiguously known, from ancient Greek *nomodos* (Varga, 2012, 26) and town criers to modern official journals. Even though its function is generally neglected, the publication is a crucial element to understand the discontinuity between deliberate legislation and spontaneous regulation. As we said before, the essential aims of the publication are to make the rule to be followed unique, instantaneously known to everybody—or that can at least be known by everyone—and enforceable. The fact that everybody knows the rule is an obvious pretense, but it is essential to ensure the certainty of the law. Usually a tangible document exists, which reproduces the rule, and the people can view it, but its contents will also be applied to those who do not know it. This is the sense of the Latin expression *ignorantia legis non excusat*: the State presumes that (and acts as if) everyone knows the rule from the moment it was published.

In so doing, the publication also works as a remedy for the two failures by Hayek, in the terms in which we have exemplified them. Indeed, the publication (a) lets the choice of a rule among others be known, and (b) is designed to reach all the potential recipients instantaneously.

The court's decision carries out a similar role in those systems in which the precedent is legally binding. It is the same mechanism that we considered before: the court chooses that rule which will be applied, from that moment on, to everybody else, including those who know nothing about it. In this sense, the court *is* the State.

Moreover, the publication decreases the intrinsic interpretative ambiguity by selecting one linguistic code and opting for an adequately technical and qualified linguistic subset. Obviously, the publication cannot ensure, *per se*, the compliance with the rule, since everyone can still break it—especially, the people who did not already

follow it spontaneously. This is another reason why the intervention of the State is needed, with its power of imposing the rule to individuals who do not spontaneously abide by it.

Ultimately, the advantages deriving from the publication do not entail that regulation by command is always better than that which spontaneously appears. Simply, they suggest looking at the legislation in the terms of a feasible continuation of the customs, realized by the intervention of the State, when the environment is (in terms of number of people) too large for them. Similarly, it is possible to look at the publication as an ideal watershed between the undesigned regulation and the imposed legislation. That watershed could be a useful *ex-post* index, potentially able to signal the excess of the threshold number, beyond which the authority intervenes. In the next section, we will show some examples where the publication of rules coincides with the large number of the related recipients.

Custom in State and International Law

In legal terms, Hayekian spontaneous order is nothing but customary law. Custom is the only source of rights that lawmakers do not produce but simply acknowledge and introduce in the legal system. From when this insertion takes place, the compliance with the rule no longer depends on its spontaneous observance, but becomes compulsory, in the sense that the State will react to its violations. National legal orders allowing custom as such—and not by transforming that in a law—place that into a residual category, which corresponds to the lowest grade of the legal hierarchy.⁸

As customs develop without the control of the authority, modern legal systems seek to limit their scope.⁹ So, customs just apply to situations in which no legal command (either of statutory or jurisprudential nature) can be found. What is important to our purposes is that such customs are acknowledged by the legal system *after* their emergence. So, as in the above-mentioned Hayekian “factual observance,” their usage pre-exists to the intervention of the State, which simply accepts only those customs as being of service to its own goals.

Marginalized by the State, customs enjoy a pre-eminent rank when they come to regulating the interaction between different States—that is, in public international law, where they constitute the apex of the hierarchical pyramid of sources of rights.¹⁰ International custom, as unwritten law, is often opposed to the “law of the treaties,” which is the hierarchically lower source of international law.

⁸ Apparently, such a statement begs the question about the customary nature of common law. The issue is too complex to be dealt with in the present essay. Suffice it to say, to our purposes, that the association common law—customary law—is ambiguous at best, if not just wrong. For a first introduction on this centuries-old ambiguity see Alan Cromartie (2007), David Ibbetson (2007) and John Baker (2001).

⁹ For the role of custom in primitive legal systems see Taslim Elias (1956) and Edward Hoebel (2009). Even though they apply the term “custom” in a very different context, these studies seem to strengthen the impression that the scope of custom is inversely proportional to the advancement of a legal system. The less sophisticated the legal system, in other words, the more the room for custom, and vice-versa.

¹⁰ For instance, Article 38(1) of the Statute of the International Court of Justice states that “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom, as evidence of a general practice accepted as law.” See further David Bederman (2010,135–167).

International law is a good example of what is argued in this article. Because of the limited number of agents (a small number of sovereign States and a few other institutions), the initial relations between States have developed spontaneously, flowing into customary rules. As such, they can work just if—and until—the single State decides to respect them, since no formal authority exists which is superior to the State and can claim their observance. It happens due to the sovereign nature of the State, which *superiorem non recognoscat*, that is to say that it does not recognize anything higher than itself. Therefore, international law is in that situation in which a small number of agents exists, and no higher formal authority. In this sense, Eugene Kontorovich (2006) doubts that customary international law may produce efficient rules among a large number of heterogeneous states. Consequently, until a supranational entity appears, the relations among states will continue to depend on the spontaneous obedience to customs. Due to the low number of agents, no great pressure exists in order to constitute a genuine, formal, supranational design of rules. In any case, no pressure will be exerted until only one or two world powers exist that can informally rule the behaviors of the remaining countries.

Even if there was a little growth in the number of international treaties over the last century, which seems to reflect the growth in the number of international relations and testifies a certain degree of design, we are obviously very far away from the constitution of a supranational designed legislation.

Mercantile Custom: London and Antwerp in the Sixteenth Century

Whereas contemporary examples of customary law that are used by large groups are relatively few, it is easier to find examples in support of the primacy (in time) of spontaneous legislative process, going back in time. Our examples date back to the ancient insurance legislation in Europe.

The late fifteenth century signaled the beginning of the great codification of customary law.¹¹ During the late Middle Ages customs were progressively written down. Writing down customs meant crystallizing rules so far held as compulsory, but never properly formalized. Commercial customs were usually written down by mercantile corporations, the *universitates mercatorum*. Public authority often ratified such transcriptions.¹² Note that, in these cases, the real power does not belong to the public authority but to the *universitates mercatorum*, which are therefore in such a context a powerful, deciding minority, as we explain below. Insurance customs, however, had been in use for centuries. Why were so many of them transcribed in that specific period? As in the case of international law we may offer a conjecture. The rapid increase in publication of mercantile customs starts with the intensifying of mercantile (particularly maritime) exchanges and the increase in the route's length.¹³ The reason why the authorities decided to write down spontaneous customs and enforce them as imposed law was the same reason for which Hayek admitted the legislative intervention: on the one side, the

¹¹ The most famous case is that of northern France, which started with the *Ordonnance of Montillez-tours* of 1454 (though it was completed only at the end of the next century).

¹² See for instance the Ordinances of the Consulate of Burgos (1538, 1546 and 1582), of Seville (1556), and of Bilbao (1520, 1531 and 1560). For Burgos see respectively García de Quevedo and Evoy Concellón (1995) and Bruno Aguilera-Brachet (1987). For Seville see Jean-Marie Pardessus (1845). For Bilbao see Teófilo Guiard y Larrauri (1972).

¹³ Cf. first of all Fernand Braudel (1966).

time for all the agents to become aware of a rule was becoming too long—as in the case of the code of the Spanish Consulate in Bruges—and, on the other, the plurality of rules that was emerging for the same kind of transaction.

From the late fifteenth century Antwerp grew exponentially, to the point of becoming the main commercial gateway of northern Europe during the sixteenth century. Antwerp's growth attracted an increasing number of merchants from many different areas—and so applying different customary rules. In a short while, the presence of several customs incompatible among themselves became progressively less sustainable.¹⁴ The above-mentioned insurance code of the Spanish Consulate of Bruges (whose members were mostly resident in Antwerp) explained that:¹⁵

The policies stipulated so far stated that the insurance was made according to the usage and customs of [...] the Bourse of Antwerp. However, such usage and customs are not written, and there is no-one who knows them.

In writing down their customs, merchants had the chance to select them, so to decide which one to abide by. A typical selecting device was the *enquête par turbe* (Waelkens 1985, 337–346). The *turbe* was a gathering of the most representative members of a community (originally, the elders), summoned to ascertain some particular facts so as to solve a legal dispute. In other terms, they were the “dominant portion of the people at the time” (Commons 1934, 94). The *turbe* is a very ancient practice, and its link with the modern jury is quite probable (Bloch (1977, 121–122)). When a controversy focused on the applicable rule to a particular transaction, the court asked a group of merchants what rule they customarily applied to that kind of transaction. Finding out the custom often, in fact, meant choosing among the customs invoked by the parties. Thus, often the merchants who gathered in the *turbe* ended up deciding whether, according to their own experience, the applicable rule was the one invoked by the plaintiff or the rule supported by the defendant. This way the conflict among customs was resolved by applying a majority rule, which allowed the application of the selected norm to be forced on all members of the community—including those who followed the other.¹⁶

This is an evident case of artificial selection of the rule in the terms that Commons (1934) has depicted. In this sense, the majority rule appears to be the way for the various dominant sub-portions to measure their own relative strengths against each other. In turn, the different (larger) qualified majority that sometimes was required, can be interpreted as the cohesion degree, inner to such a dominant portion, which was, at any different time, required in order to avoid that the dominant role could be jeopardized by an internal conflict. The borderline case of the unanimity vote would correspond, in such an interpretation, to those cases in which the dominant portion preferred not to take a decision rather than to exclude even only one of its members.

¹⁴ Joannes Goris (1925, 59–67; 178–184); Pierre Genard (1882, 195–196); Teofilo Guiard y Larrauri (1972, 1:121–127). Already in 1550–51 the Spanish merchants residing in Antwerp sought to separate themselves from the general Consulate of Bruges in order to publish their own customs and solve (by contractual means) the growing impasse. Archivo General de Simancas, Estado, leg. 536, transcription in Gonzalez (1984, 388).

¹⁵ Prologue to the Ordinances of the Spanish Consulate in Bruges of 1570, transcription in Verlinden (1949, 60), our translation. Spanish text transcribed in Verlinden (1947a, 162).

¹⁶ Such a majority could be a simple majority, a qualified majority or even unanimity according to time and place. Although *prima facie* not strictly necessary, it would seem that the *turbe* procedure could be invoked by the party even in case of notorious custom. Poudret (1987, 71).

In Antwerp, the first evidence of mercantile *turben* dates back to the late fifteenth century, and so right at the beginning of the great expansion of the city (de Ruysscher 2012, 7; 12–13). This seems hardly fortuitous: attracting merchants of different regions and nationalities meant also attracting different and often opposite customs.

As *Turben* were expensive, it was not always possible to gather a turbe for each single dispute. So, another means to achieve the same result was related to the interest of the parties to prove their case. In this case it was up to the parties to gather evidence about the applicability of a custom within the community, not to the community itself. In 1570s London, such a means was called *perrera*. *Perrera* was a different procedure to reach the same end as the turbe: coordination by command of conflicting usages. In case of dispute on the (customary) applicability of a certain clause in a mercantile contract, each party sought to obtain the highest possible number of underwritings from fellow merchants declaring that they knew of the clause and used it routinely (that is, customarily), or that they had never heard of it.¹⁷ Obviously enough, the *perrera* shows the most common downside of any contractual approach: self-interest. Sometimes, a merchant underwrote a *perrera* not because he was truly familiar with the clause and used it himself, but just to help out a colleague who would then owe him a favor. It was possible that the underwriter may have needed some signatures in support of his own contract later on. Signing a false *perrera* was therefore a good way to ensure support for one's own future disputes.¹⁸ This "exchange of favors" verged into the absurd when the same merchant underwrote in favor of both parties' *perreras*, this way stating something and its opposite at the same time (British Library, MS Additional 48020, fol. 348v). Again, this appears highly compatible both with the artificial selection of the rule and with the fact that such a selection was operated by a powerful, dominant, minority portion of the entire community: that portion which had enough available resources and interests in order to obtain more underwritings from the other members of the same subset of people.

If turbe and *perrera* carried out a selection, which can be considered an answer to the plurality of spontaneous rules, publication *per se* can be considered an answer to the slowness of the spontaneous spread of the rules. "Publication" originally meant exactly what the word suggests: making something public. As such, it required just printing and making a document be known to the people, reading aloud its content in a crowded square, or posting it up in busy venues so that anyone could learn about its existence. An interesting example of early legislative publication is the insurance code of the Spanish Consulate in Bruges. The code was published (that is, printed *and* circulated) in 1569, and it was written both in Spanish and in French so as to ensure a wider audience. At the end of its 147 articles, the code read:¹⁹

¹⁷ The procedure of *perrera* is minutely described by an anonymous London merchant: British Library, MS Additional 48020, fol. 348r–348v (very probably written in January–February 1577).

¹⁸ "These days men are ever assured who use always do for me and I will do for thee," British Library, MS Additional 48020, fol. 348v. The same problem is attested in the insurance Ordinances of the Consulate of Bilbao of 1560, ord. 56, text in Guiard y Larrauri (1972, 615).

¹⁹ Verlinden (1949, 126), our translation, emphasis added. The Spanish text, identical to the French, is published by the same Verlinden (1947b, 179–180). See also the Preamble to the Ordinances: "We, the Consuls, desiring that our subjects suffer no more frauds or abuses for lack of understanding of those usages and customs, have deemed good [...] to establish and write down the above ordinances and institutes, so that from now on our subjects may know and understand how insurances work, both when they underwrite and when they take out a policy in this city of Bruges," transcription in Verlinden (1949, 60), our translation; Spanish text in Verlinden (1947a, 162).

in order that our subjects and any other who want to know the content of such ordinances may know, read and understand them, it is ordered that the above ordinances be printed in our Spanish language and be translated and published in the French language at the same time. Upon printing the ordinances, they shall be at disposal of this nation [i.e. the Spanish merchants within the Consulate], so that anyone may ask me, the Secretary, or my successor, for a copy thereof [...]. To make sure that our subjects have time enough to be aware and be duly informed, it is ordered that these ordinances will be in force on the first day of January of the year of our Lord Jesus Christ's Nativity 1569 [1 January 1570].

The publication aimed at divulging the rule among the people who were supposed to use it, no matter whether they were already using it or not. The period allowed for its recipient to become aware of it imposed acceleration in the otherwise longer natural spreading of its knowledge. Note the care that was reserved for the different languages of the possible followers: along with the *vacatio legis* (i.e., the time which was presumptively believed sufficient so that everybody was aware of the rule), it fulfilled the presumption of knowledge, which is legally essential for the State to demand its compliance. In this way publication of a previous existent rule could shorten the time, which was needed for the spontaneous rule to reach all the potential recipients.

Conclusions

This article argues that the reaching of a large number of potential recipients may be viewed as a signal of the qualitative change from custom to law. Two circumstances can arise when a community is large: (a) too much time could be needed for the spontaneous rule to reach each and every last person within the community, and (b) the probability increases that more than just one spontaneous rule appears. Then a threshold number exists, which is different for different places and times, beyond which such circumstances may appear and leave room for State intervention. In turn, this intervention gives rise to a qualitative change in the evolution of the rule, where minority interests may prevail. The publication of the rules can be interpreted as a signal of such a qualitative transformation.

The plurality of rules and the slowness of their spread can also be viewed as examples of two facts for which the reluctant Hayek concedes legislative intervention. Some empirical evidence seemingly in favor of our thesis was found in both contemporary and historical legal systems. Many other efforts are needed to understand the different circumstances that potentially (or historically) may influence (or already influenced) the different dimensions of that threshold. Also, more research is desirable to compare spontaneous and imposed rules when they have different contents.

References

- Aguilera-Brachet, Bruno. 1987. "Un Formulario de Contrato de Seguro de 1546. Contribució al Estudio del Derecho Marítimo Consular Buralés". In *Derecho Marítimo Europeo*, edited by Manuel J. Pelàez, 1135–1176. Barcellona: Promociones Publicaciones Universitarias.
- Angner, Erik. 2004. "Did Hayek Commit the Naturalistic Fallacy?" *Journal of the History of Economic Thought*. 26 (3): 349–361.
- Axelrod, Robert. 1981. "The Emergence of Cooperation among Egoists." *American Political Science Review*. 75 (2): 306–318.
- Ayres, Clarence E. 1949. "The Industrial Way of Life." *American Quarterly*. 1 (4): 291–301.
- Baker, John H. and Gary M. Hardegree. 2001. *The Law's Two Bodies: Some Evidential Problems in English Legal History*. Oxford: Oxford University Press.

- Banerjee, Abhijit V. 1992. "A Simple Model of Herd Behavior." *The Quarterly Journal of Economics*. 107 (3): 797–817.
- Becker, Markus C. 2008. "The Past, Present and Future of Organizational Routines: Introduction to the Handbook of Organizational Routines." In *Handbook of Organizational Routines*, edited by Markus C. Becker, 3–14. Cheltenham and Northampton: Edward Elgar Publishing.
- Bederman, David J. 2010. *Custom as a Source of Law*. Cambridge: Cambridge University Press.
- Bikhchandani, Sushil, David Hirshleifer and Ivo Welch. 1992. "A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades." *Journal of Political Economy*. 100 (5): 992–1026.
- Binmore Kenneth G. 1994. *Playing Fair: Game Theory and the Social Contract*, I. Cambridge (MA): MIT Press.
- Binmore Kenneth G. 1996. *Just Playing: Game Theory and the Social Contract*, II. Cambridge (MA): MIT Press.
- Bloch, Ruth H. 1977. *Medieval French Literature and Law*. Berkeley: University of California Press.
- Boettke, Peter J., Christopher J. Coyne, and Peter T. Leeson. 2008. "Institutional Stickiness and the New Development Economics." *American Journal of Economics and Sociology*. 67 (2): 331–358.
- Bogdan, Radu J. 2000. *Minding Minds: Evolving a Reflexive Mind by Interpreting Others*. Cambridge (MA): MIT Press.
- Borrello, Camillo. 1621. *De Magistratum edictis, Francofurti ad Moenum, typis Hartmanni Palthenii, sumptibus haeredum Zachariae Palthenii*.
- Braudel, Fernand. 1966. *La Méditerranée et le Monde Méditerranéen à l'Époque de Philippe II*. Paris: Colin.
- British Library, MS Additional 48020, fol. 348r
- British Library, MS Additional 48020, fol. 348v
- Commons, John R. 1899. "A Sociological View of Sovereignty. II." *American Journal of Sociology*. 5 (2): 155–171.
- Commons, John R. 1925. "Law and Economics." *Yale Law Journal*. 34 (4): 371–382.
- Commons, John R. 1934. *Institutional Economics: Its Place in Political Economy*. Madison: University of Wisconsin Press.
- Consulado of Burgos. 1988. *Ordenanzas del Consulado de Burgos*. Valladolid: Lex Nova. Anastatic reprint of the 1572 edition.
- Cromartie, Alan. 2007. "The Idea of Common Law as Custom." In *The Nature of Customary Law* edited by Amanda Perreau-Saussine and James Bernard Murphy, 203–227. Cambridge: Cambridge University Press.
- de Quevedo, García and Eloy Concellón (ed). 1995. *Las Ordenanzas del Consulado de Burgos de 1538* (2nd edn) Burgos: Institución Fernán González.
- de Ruysscher, Dave. 2012. "From Usages of Merchants to Default Rules: Practices of Trade, Ius Commune and Urban Law in Early Modern Antwerp." *Journal of Legal History*. 33 (1): 3–29.
- Dequech, David. 2013. "Economic Institutions: Explanations for Conformity and Room for Deviation." *Journal of Institutional Economics*. 9 (1): 81–108.
- Diamond, Arthur S. [1971] 2013. *Primitive law, Past and Present*. London: Routledge.
- Elias, Taslim O. 1956. *The Nature of African Customary Law*. Manchester: Manchester University Press.
- Ellickson, Robert C. 2001. "The Market for Social Norms." *American Law and Economics Review*. 3 (1): 1–49.
- Genard, Pierre. 1882. "Jean-Baptiste Ferufini et les Assurances Maritimes à Anvers." *Bulletin de la Société de Géographie d'Anvers*. 7: 193–268.
- Gintis, Herbert, Eric A. Smith and Samuel Bowles. 2001. "Costly Signaling and Cooperation." *Journal of Theoretical Biology*. 213 (1): 103–119.
- Gonzalez, Santos M. C. 1984. "La Ordenanza de Seguros Marítimos del Consulado de la Nación de España en Brujas." *Anuario de Historia del Derecho Español*. 54: 385–408.
- Goris, Joannes A. 1925. *Etude sur les Colonies Marchand es Meridionales à Anvers de 1488 à 1567*. Louvain: Uystpruyst.
- Guiard y Larrauri, Teofilo (ed.). 1972. *Historia del Consulado y Casa de Contratacion de la Villa de Bilbao*, I. Bilbao: La Gran Enciclopedia Vasca.
- Harsanyi, John C. 1953. "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking." *The Journal of Political Economy*. 61 (5): 434–435.
- Harsanyi, John C. 1955. "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility." *Journal of Political Economy*. 63 (4): 309–321.
- Hayek, Friederich A. 1967. "The Results of Human Action but not of Human Design." In his own *Studies in Philosophy: Politics and Economics*, 96–105. London: Routledge and Kegan Paul.
- Hayek, Friedrich A. 1982. *Law, Legislation and Liberty*. London: Routledge & Kegan Paul Ltd.
- Hayek, Friedrich A. 1988. *The Fatal Conceit: The Errors of Socialism*. In *The Collected Works of FA Hayek*. Chicago: WW Bartley, ed. Chicago: University of Chicago..
- Hodgson, Geoffrey M. 2009. "On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering." *Journal of Economic Issues*. 43 (1): 143–166.
- Hoebel, Edward A. 2009. *The Law of Primitive Man: A Study in Comparative Legal Dynamics*. Cambridge (MA): Harvard University Press.
- Ibbetson, David. 2007. "Custom in Medieval Law." In *The Nature of Customary Law*, edited by Amanda Perreau-Saussine, and James Bernard Murphy, 151–175. Cambridge: Cambridge University Press.
- Kobayashi, Bruce H., and Larry E. Ribstein. 1996. "Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company." *Economic Inquiry*. 34 (3): 464–483.
- Kontorovich, Eugene. 2006. "Inefficient Customs in International Law." *William and Mary Law Review*. 48 (3): 859–922.

- McKelvey, William. 1982. *Organizational Systematics: Taxonomy, Evolution, Classification*. Berkeley: University of California Press.
- Nelson, Richard R. and Sidney L. Winter. 1982. *An Evolutionary Theory of Economic Change*. Cambridge (MA): Harvard University Press.
- North, Douglass C. 1987. "Institutions, Transaction Costs and Economic Growth." *Economic Inquiry*. 25 (3): 419–428.
- Olson, Mancur. 1971. *The Logic of Collective Action: Public Goods and Theory of Groups*. Cambridge (MA): Harvard University Press.
- Pardessus, Jean-Marie (ed.). 1845. *Collection de Lois, Maritimes Antérieures au XVIIIe Siècle*. VI. Paris: L'Imprimerie Royale.
- Poudret, Jean-Francois. 1987. "Réflexions sur la Preuve de la Coutume devant les Juridictions Royales Françaises aux XIIIe et XIVe Siècles, notamment le Rôle de l'Enquête par Turbe." *Revue Historique de Droit Français et Étranger (4th series)*. 65 (1): 71–86.
- Rodrigues, João. 2012. "Where to Draw the Line between the State and Markets? Institutional Elements in Hayek's Neoliberal Political Economy." *Journal of Economic Issues*. 46 (4): 1007–1034.
- Seagle, William. 1941. *The Quest for Law*. New York: Knopf.
- Varga, Csaba. 2012. *The Paradigms of Legal Thinking*. Budapest: Szent István Társulat.
- Veblen, Thorstein. 1919. *The Vested Interests and the Common Man: ("The Modern Point of View and the New Order")*. New York: BW Huebsch.
- Verlinden, Charles. 1947a. "Codigo de Seguros Maritimos segun la Costumbre de Amberes, Promulgado por el Consulado Español de Brujas en 1569." *Quadernos de Historia de Hispaña*. 7: 146–193.
- Verlinden, Charles. 1947b. "Codigo de Seguros Maritimos segun la Costumbre de Amberes, Promulgado por el Consulado Español de Brujas en 1569." *Quadernos de Historia de Hispaña*. 8: 159–193.
- Verlinden, Charles. 1949. "Code d'Assurance Maritimes selon le Coutume d'Anvers, Promulgué par le Consulat Espagnol de Bruges en 1569." *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique*. 16 (1): 38–142.
- Waelkens, Laurent. 1985. "L'Origine de l'Enquête par Turbe" *Tijdschrift voor Rechtsgeschiedenis*. 53 (3-4): 337–346.
- Young, H. Peyton. 1993. "The Evolution of Conventions." *Econometrica*. 61 (1): 57–84.
- Young, H. Peyton. 1998. *Individual Strategy and Social Structure*. Princeton: Princeton University Press.