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# Spontaneous institutions: a typology

Karol Bolko Zdybel<sup>1,2,3</sup> 

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## Abstract

The paper offers a concise typology of spontaneous institutions – i.e., institutions formed or sustained through decentralized collective behavior in a community. It combines three commonly encountered criteria for determining what counts as a spontaneous institution: (i) implicit formation of (customary) rules, as opposed to the deliberate design of rules; (ii) lack of third-party enforcement; (iii) lack of third-party assessment of compliance with rules or third-party rule validation, as opposed to third-party interpretation of compliance. The typology is subsequently illustrated with examples derived from legal history, legal anthropology, and international law. Supposedly dissimilar normative systems (e.g., customary international law and primitive law; historically emergent rules of warfare and domestic social norms) are shown to exhibit structural resemblance. Finally, the paper discusses how various types of spontaneous institutions can be represented game-theoretically. In sum, the paper conceptually organizes the dissipated field of research of spontaneous institutions from the law and economics perspective.

**Keywords** Private ordering · Informal institutions · Spontaneous order · Customary law · Social norms

**JEL Classification** B41 · H11 · K00 · N40 · O17

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## 1 Introduction

At least for several decades, institutional economists and law and economics scholars have been systematically interested in complex rules of behavior that emerge spontaneously. In most expositions, such rules are placed in contradistinction to those with a clear element of deliberation, design, or involvement of a third-party authority. Spontaneous institutions present themselves as a valuable empirical research topic in various historical, legal, and anthropological contexts. Moreover, spontaneous institutions are often perceived as an alternative to those normative depictions of social organization that emphasize the organizational role of the state. The field is rich: by employing methods from the economics toolkit, many scholars have strived to demonstrate how social actors may produce and sustain rules through self-organization, without relying on state capacity to impose social order (e.g., Mahoney & Sanchirico, 2001; Young, 2001 [1998]; Parisi, 1995; Knight, 1992; Taylor, 1982, 1987; Sugden, 1986; Ullmann-Margalit, 1977; see also, Powell & Stringham, 2009, for a survey). Over the years, the relevant literature has grown vast, naturally making navigation within the field increasingly challenging. Many leading concepts have become blurry, having been used, borrowed, and cross-cited by numerous authors over time.

In light of this motivation, this paper attempts to systematically classify spontaneous institutions: i.e., those formed or sustained through decentralized collective behavior in a community. This will be done by providing a scheme of Weberian “ideal types”, i.e., idealized and abstract representations of real-world phenomena (Weber, 1949). The classification into ideal types is based on criteria derived from legal theory and institutional economics; it emphasizes structural similarities and differences between the identified types. Thus, this paper contributes to law and economics research by presenting a framework that categorizes spontaneous institutions into groups of structurally similar entities. It suggests a structural isomorphism among various types of spontaneous institutions. As a result, we highlight that seemingly dissimilar institutional regimes (e.g., primitive law, customary international law, and domestic social norms) share structural similarities, which enables cross-fertilization of research from a rational choice perspective.

In more concrete terms, the paper builds on and takes inspiration from 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. Spontaneous institutions, as understood in the paper, are often evoked in the research of legal history (e.g., Bellomo, 1995; Kadens, 2012a; Kim, 2021; Maine, 1883); colonial legal systems (e.g., Hooker, 1975; Moore, 1986); legal anthropology (e.g., Gutmann & Voigt, 2020; Ndulo, 2011; Pospíšil, 1958; Malinowski, 2017 [1926]); extralegal governance of close-knit communities (e.g., Ellickson, 1986); business and industry self-governance (e.g., Bernstein, 1992, 2001; Ellickson, 1989); anarchic or stateless social environments (e.g., Anderson & Hill, 1978; Leeson, 2009; Lesaffer, 2007); international law and cooperation on the international stage (e.g., Fon & Parisi, 2006; Guzman, 2008;

Posner & Goldsmith, 1999), and numerous others. The paper conceptually organizes this diverse and dispersed field.<sup>1</sup>

The paper is divided into six sections. Section 2 surveys the literature to identify three approaches to determining what makes institutions deserving of the label “spontaneous.” On this basis, Sect. 3 proceeds to classify spontaneous institutions into Weberian ideal types. Section 4 illustrates the typology with selected examples from legal history, legal anthropology, and international law, emphasizing structural similarities and differences between various real-world institutions. Section 5 provides a short game-theoretical interpretation of the typology. Section 6 discusses and summarizes the paper.

## 2 Three approaches to delineating spontaneous institutions

Since “institutions” will be in the spotlight throughout the entire text, this concept should be at least provisionally defined. In institutional economics, institutions are typically understood as shared rules governing social behavior (e.g., Knight, 1992; North, 1991). Importantly, institutions are rules in action. They are more than ethical postulates, guidelines stipulating desirable acts, or personal rules of thumb. In the institutional economics framework, rules are considered institutions insofar as they are expected to be effective in the social realm, thus constraining the behavior of agents. In other words, what qualifies as institutions are “rules in actual or potential use in a community, and not merely rules in form.” (Hodgson, 2015:7).

This role of institutions makes it convenient to distinguish their two major components: an abstract normative rule and an enforcement mechanism by which compliance with the rule is achieved in social realities (Voigt, 2019). The normative rule

<sup>1</sup>The paper is also related to the often-discussed topic of informal institutions. Several authors have recently attempted to conceptually delineate formal and informal institutions (Hodgson, 2025; Voigt, 2018). Others studied the relative importance of formal and informal institutions in achieving specific economic outcomes, such as secure protection of private property (Williamson and Kerekes, 2011).

Defining informal (and, by extension, formal) institutions presents a challenge in its own right, similar to the difficulties this paper will address regarding spontaneous institutions. The two topics – informal and spontaneous institutions – are largely co-extensive. They frequently involve the same objects of study, such as customary rules, social norms, spontaneously emergent conventions of behavior, etc. The distinction between them, however, lies in what philosophers call intension: the reasons for classifying an institution as informal or as spontaneous. Scholars of informal institutions typically focus on the non-involvement of state authorities, which is consistent with the definition of “formal” as “public or official” in the Cambridge Dictionary. For instance, Helmke and Levitsky (2004:727) define informal institutions as “socially shared rules (...) that are created, communicated, and enforced outside of officially sanctioned channels” – in short, outside the state. Similarly, Hodgson (2005) describes informal institutions as those that are not potentially enforceable by the state-backed legal system.

In contrast, scholars of spontaneous institutions, while often also concerned with the state versus non-state dichotomy, focus primarily on the structural qualities of institutions and the processes that create or sustain them. These processes need to be “spontaneous,” which, according to the Cambridge Dictionary again, means “happening or done in a natural, often sudden way, without any planning or without being forced.” Consequently, many institutions can, at least *prima facie*, be regarded as both informal and spontaneous. Arguments can even be made for one category being included in the other, or both categories including the same things. Nevertheless, they are intensionally distinct: the criteria for placing an institution in the “informal” category differ from those for placing it in the “spontaneous” category.

specifies an action that is permitted, required, or forbidden in given circumstances (Hodgson, 2006). To use the landmark example where cattle may damage crops, the normative part may read “If you are a rancher and your cattle destroyed crops on farmer’s land, pay liability damages amounting to X to the farmer.” In turn, the enforcement mechanism consists of incentives that motivate agents to comply with the normative rule. Enforcement mechanisms may take various forms, such as penalties imposed by the state, reputational sanctions, or ostracizing ranchers who refuse to abide by the liability rules for cattle trespass. All in all, enforcement mechanisms may generally be interpreted as actions and expectations about actions taken by others that jointly produce compliance with a given rule (Aoki, 2001).

Within the broad category of institutions, social scientists have been particularly interested in those where deliberation, design, or centralization is minimal or none. There are many reasons why such institutions become objects of scholarly interest. For example, several authors are enthusiastic about spontaneous institutions because of their alleged efficiency (e.g., Kinsella, 1995; Benson, 1990; Friedman, 1989 [1973]). Others focus on spontaneous institutions to countervail what they consider to be the “centrist” view of domestic law, which claims that the organized modern nation state is the primary, if not only, source of social order, and diminish other (e.g., indigenous) sources (e.g., Griffiths, 1986). These scholars suggest that non-state modes of social order are often omitted from contemporary social sciences, despite the fact that they have historically played and still continue to play an important role in human societies. Still others study normative regimes of the international scene, where spontaneous institutions play the primary role. Some of them believe that spontaneous institutions can safeguard international peace and stability (e.g., Keohane, 1984); others challenge this view (e.g., Grieco, 1988).

In any case, before any of such claims can be assessed, it is necessary to answer a prerequisite question: how to systematically distinguish spontaneous institutions within the wider class of institutions as such? In other words: which institutions count as spontaneous and why? Because the scholarship on spontaneous institutions has become immense, this question has lived to see many answers. As a result, leading terms and concepts started to overlap. Scholars have begun to notice that the concept of spontaneous institutions and related concepts are used to characterize such supposedly diverse phenomena as “rancher/farmer relations, (...) extralegal contractual relations among wholesale diamond traders, (...) aboriginal customs in Papua New Guinea, (...) [and] the rulemaking procedures of the American Law Institute” (Katz, 1995:1745). It is far from self-evident, then, what the proper topic of such research is, or even whether it is just one of many topics.

Attempts to pinpoint spontaneous institutions touch upon some fundamental philosophical problems, such as the nature of law and its relation to other methods of social control and social organization. For this reason, they depend on the choice of legal philosophy and involve, at least implicitly, a philosophical discussion. Aware of this, this paper takes a step back to make a more moderate claim. It suggests that various established criteria for determining what counts as a spontaneous institution can be combined into a compelling typology. This typology can serve as a useful analytical tool for navigating the broadly conceived field of institutions that possess a spontaneous element. An additional advantage of this typology is its “structural”

nature. It classifies institutions based on their underlying incentive structures. For this reason, our approach aligns with all, or at least most, legal philosophies. In fact, it aligns even with those – or especially those – that reject the notion of law altogether (so-called eliminativist approaches) in favor of focusing on the incentives and strategic constraints that agents face (Nye, 2022). This structural nature of the typology also allows for mapping the ideal types of spontaneous institutions to classes of game-theoretical models that can represent their key qualities.

Specifically, the subsequent subsections focus on three structural criteria for delineating spontaneous institutions: (i) custom as a source of rules; (ii) decentralized enforcement or sanctioning; (iii) private interpretation of compliance, or the absence of third-party coordination in interpreting and validating rules.

The first criterion emphasizes the rule creation function of governance structures, or institutions. It considers the customary character of rules as the distinguishing feature of spontaneous institutions. In these institutions, normative standards of behavior are derived from the actual behavior of community members. The second criterion emphasizes the sanctioning function. According to this criterion, spontaneous institutions should be identified with those characterized by a decentralized enforcement structure (e.g., those that rely on reputational sanctions or ostracism as an enforcement mechanism). Finally, the third criterion emphasizes the conduct assessment function. According to this criterion, we should speak of spontaneous institutions when normative standards of behavior are validated and interpreted privately. In other words, there is no public agent that provides a single interpretation of rules, or classifies behavior into compliant and non-compliant with rules. All in all, the three criteria emphasize three layers of decentralization in institutions: decentralized rule creation, decentralized enforcement, and decentralized validation and interpretation.

## 2.1 Implicit rulemaking: custom as a source of rules

The first approach to delineating spontaneous institutions emphasizes the customary character of rules as its distinctive feature. Custom is depicted as an organic and spontaneous method through which rules emerge rather than being deliberately constructed (e.g., Parisi, 2001; Hayek, 2013 [1973]). This is why scholars skeptical of the “state-centric” view of social order, which gives primacy to command-and-control legislation as a source of rules, often look to bottom-up rulemaking mechanisms as possible alternatives (e.g., Cooter, 1994; Griffiths, 1986).

The commonplace meaning of custom comprises long-standing and well-established practices that withstood the test of time – 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”. With time, such established ways of behaving may become normatively expected. They are not only behavioral regularities within the group (“People drive on the right-hand side of the road”; “Men let women go first through doors”) but also rules (“People should drive on the right-hand side of the road”; “Men should let women go first through doors”). This basic concept of custom as a source of rules is well known to legal scholarship (e.g., Bederman, 2010; Parisi, 2001).

In legal theory, the distinction between custom and other forms of rulemaking (like legislation and precedent) receives special attention. It emphasizes the difference in the method by which rules are formed. Unlike legislation made at a particular moment through an explicit and deliberate act, customs develop 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:1163). Thus, the conventional legal theory states that custom as a source of law requires two constituents: the existence of practice in a community and the accompanying belief that this practice is obligatory – i.e., *opinio juris* (Bederman, 2010).

Given the significant presence of custom in general legal scholarship, it comes as no surprise that the juxtaposition of custom and legislation is also popular among law and economics scholars. Because the law and economics paradigm combines legal background with economic analysis, it often considers rules as “prices” that agents pay for various behaviors (Cooter & Ulen, 2016). Rule design by a legislator is thus likened to fixing prices in a planned economy; analogously, customary mechanisms for rule-making are pictured as a flexible discovery procedure in which interested actors reveal their preferences for or against a specific rule, thus collectively shaping rules-prices (Cooter, 1994). Although most scholars are aware that the details of the custom formation process are more nuanced and claims about its efficiency in setting right “prices” need to be qualified (see, e.g., Bertolini, 2016), custom as a mechanism for devising rules remains widely used as one of the primary indicators of spontaneity in institutions.

The contrast between custom and the explicit provision of rules may also be understood through the lens of game theory. Social interactions are often envisioned as games, with institutions functioning as equilibria of these games (Hindriks & Guala, 2015). Like all equilibria, institutions require that agents have shared expectations, which helps them to predict the actions of others and accordingly adjust their own. The key question is how such expectations are formed.

Custom is often understood as an equilibrium that emerges naturally in a game without external intervention. Participants in a social interaction may develop self-fulfilling expectations about how the interaction will unfold in the future by committing precedential acts. Given these expectations, repetitions of the original actions solidify as the equilibrium outcome. This process allows parties to reach a solution to a given social problem by themselves (Sugden, 1986). For example, ranchers may, over time, compensate farmers for crop damage caused by their cattle. This initial practice can establish an expectation that ranchers will continue providing compensation in the future.

Alternatively, a solution may be devised by an external agent before the game begins. A legislator, for instance, may deliberately use the “expressive power” of the law to designate one of the possible solutions as binding. Through such interventions, lawmakers, instead of the parties themselves, create focal points that shape shared expectations (McAdams, 2000, 2009; Schelling, 1980 [1960]).

## 2.2 Lack of third-party enforcement

A different approach to delineating spontaneous institutions associates them with institutions functioning under a dissipated distribution of power, i.e., in social settings where sanctions and rewards for various behaviors are administered in a decentralized manner. Under decentralized enforcement, each agent has limited capability to incentivize others and may separately decide on the application of punishment. In other words, the problem of spontaneous institutions is “posed as a pre-state process: How does social cooperation emerge without external enforcement?” (Knight, 1992:173) Institutions whose implementation relies on decentralized enforcement are contrasted with those enforced by a specialized agent who enjoys a superior power position within the group.

Philosophically, the juxtaposition of decentralized and centralized enforcement is founded on the Austinian positivist notion of law. This notion envisions law as a set of coercive orders. It boils down to a command of a sovereign backed by a threat of punishment or other adverse consequences. What differentiates law from non-legal forms of governance, such as morality or social mores, is its enforcement by a distinct agent (the “sovereign”) who applies force in a consistent manner (Austin, 1832; Schauer, 2015). In contrast, non-legal institutions are not backed by centralized sanctions but are sustained through different incentive structures, such as moral conviction, peer pressures, or group mobilization. Echoes of this view can also be noticed in predominant law and economics contributions. In the previously mentioned rules-as-prices approach, legal rules are frequently seen as prices that are *exogenously* imposed on economic agents for taking specific actions (Cooter & Ulen, 2016). The usual problem is to assist the planner in designing such prices to achieve predefined policy objectives.

Against this approach, decentralized enforcement attracted the attention of rational choice scholars who attempted to explain compliance with rules of cooperation in the absence of a central political authority, e.g., in preliterate societies (Benson, 1989; Rasmusen & Hirshleifer, 1989) or under the regime of self-help characteristic of the international scene (Norman & Trachtman, 2005). This interest resulted in the development of models that attempt to specify the conditions under which decentralized sanctioning structures may sustain rules-based social order (Powell & Stringham, 2009 for a survey). It also produced many case studies of rules-based cooperation achieved under conditions of low or no state capacity (e.g. Friedman et al., 2019; Stringham, 2015). Among scholars of international relations and international law, decentralized enforcement is considered the cornerstone of rational-choice theories on rules, norms, and cooperation among sovereign states (e.g., Abbott, 2008; Guzman, 2008).

The emphasis on the structure of enforcement as a factor differentiating various forms of social control can also be found in sociology (e.g., Durkheim, 1984 [1893]) and political sciences (e.g., Axelrod, 1986; Taylor, 1982). 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; the latter are administered by designated persons or corporate entities and are seen as a characteristic feature of legal orders. Taylor (1982:7) studies



social order under anarchy by contrasting a situation of “a limited concentration of force but no means of enforcing collective decisions” with one resembling a 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, 1987:23)

Similarly, Axelrod (1986) models social norms, understood as spontaneously emergent and decentralized means of social control, by introducing an option to voluntarily sanction defectors as the only available means of enforcement.

The precise nature of decentralized enforcement is contextual: it depends on the actions that agents can perform within their technological constraints. Depending on who the agents are and what kind of interaction with others they are involved in, such actions may include, e.g., gossip (Ellickson, 1991), shunning (Gruter, 1986), refusal to share or reciprocate benefits (Malinowski, 2017 [1926]), cessation of cooperation (Bernstein, 1992, 2001; Guzman, 2008), symmetric reciprocation of the offensive act (Barsalou, 2010), or feud (Friedman, 1979; Leeson, 2009). All in all, regardless of the precise nature of decentralized sanctioning, its usage as the sole (or at least primary) means of enforcement is often treated as a criterion that delineates the meaning of spontaneous institutions.

### 2.3 Lack of ex post third-party coordination (private interpretation and validation)

Finally, a factor differentiating spontaneous institutions may be sought in the absence of a third-party assessment of compliance and third-party validation of rules. This criterion is inspired by the coordination account of law (Basu, 2018; Postema, 1982), and, more fundamentally, by Hartian legal positivism (Hart, 1994 [1961]).

According to the coordination account of law, the defining feature of legal orders, as opposed to non-legal institutions, is third-party coordination. The role of a third-party coordinator is to provide social actors with clear statements about the validity of legal rules (i.e., whether a rule belongs to the legal system or not) and about compliance (i.e., whether a rule has been violated or not). For instance, a coordinator might declare: “Ranchers have a duty to compensate for crops destroyed by their cattle if there is no fence around the rancher’s land, and do not have this duty otherwise” or, “Rancher X has built an enclosure that does not qualify as a fence and must therefore compensate for the damage caused by his cattle.”

The statements of a designated third party are conventionally recognized as having special status, which differentiates them from mere opinions of private parties. Individuals may differ in their views about what the rules are and whether rules have been breached in particular cases. For example, witnesses of a traffic accident may voice various opinions about who is responsible, and support these opinions with various interpretations of traffic rules that the individuals involved should have obeyed and

various recollections of events. However, statements supplied by a special authority (e.g., a relevant court) override those of private parties. They are conventionally treated as definitive. In other words, this authority has “the capacity to articulate, clarify, and adapt the [...] system” of rules in the form of public knowledge (Hadfield & Weingast, 2012:491), and to decide how it should be applied in specific circumstances. This role is typically played by legislators, courts, tribunals, councils, and other functionaries of the legal bureaucracy.

The idea of third-party coordination is closely related to the focal point theory of law mentioned earlier. However, the coordination account of law and the focal point theory differ in how they conceptualize coordination. The coordination account of law specifically emphasizes the importance of ongoing (as opposed to pre-established) coordination. It argues that a third party plays a proactive role by resolving disputes or disagreements as they arise. Such disagreements may occur when parties have already failed to coordinate, for example, by interpreting rules or facts differently. All parties may know that ranchers are freed from liability if they build fences, but what qualifies as a fence? When such doubts arise, the third party restores coordination by providing definitive judgments about who is “right” and “wrong.” If there are subsequent disagreements, it continues to do so until a final conclusion is reached. For this reason, and unlike the initial coordination provided by focal points, *ex post* coordination requires agency: the coordinator must actively respond to emerging controversies.

In contrast, the same criterion of *ex post* third-party coordination suggests that non-legal institutions rest upon the private assessment. The interpretation of rules and facts is supplied independently by agents based on their private judgment. To frame the issue in Hartian terms, there are no “secondary rules,” i.e., rules stipulating who has the mandate to recognize and change other rules, and how this can be done (Hart, 1994 [1960]). For example, although there are multiple elaborate rules of courtesy functioning in contemporary societies (often written down in *savoir-vivre* manuals), no specialized tribunal exists to validate the behavior of individuals against those rules, or to decide that some rules are outdated and no longer binding. Such validation is performed privately and independently by each agent.

In other words, the lack of third-party assessment of compliance does not preclude the emergence of common normative concepts and shared expectations. Rather, such expectations are developed differently. Instead of being externally supplied, they are established through the “confluence of individual decision-making exercised in the absence of external coordination” (Hadfield & Weingast, 2012:491). According to the private interpretation criterion, institutions whose normative components emanate from such decentralized confluence are classified as spontaneous institutions.

### 3 Typology

So far, the discussion has revolved around the three criteria for delineating spontaneous institutions within the general category of institutions. In the next step, these criteria will be combined into a systematic classification of Weberian ideal types: abstract, idealized, and simplified notions constructed to represent crucial features

of real-world phenomena (Weber, 1949). Because ideal types are characterized by reduced complexity and model-like simplifications, they may be useful tools for navigating infinitely complex realities.

Since the three classification criteria are binary (custom or explicit source of rules; decentralized or centralized enforcement; *ex post* third-party coordination or private assessment), there are eight possible combinations. However, if logical dependencies exist between two or more classification criteria, the actual number of ideal types can be further limited. Indeed, it can be claimed that one such dependency exists between the enforcement method and the presence of *ex post* third-party coordination: the existence of a specialized enforcement agency entails such coordination. It is safe to assume that the actions of the enforcement agency are salient for other agents, because the agency occupies a special position of power in society. Thus, it publicly communicates what should be considered “right,” “wrong,” or “neutral,” and therefore can coordinate agents’ expectations.

With this exception, other possible combinations of the three criteria seem logically plausible, resulting in a total of six ideal types of institutions summarized in Fig. 1. The residual type aside, they will now be concisely discussed.

### 3.1 Ambient rules, pure customary law, and centrally enforced customary law

The upper panel of Fig. 1 includes ideal types of institutions that correspond with the dictionary definition of custom – i.e., institutions in which the rule creation role is played by community practice. Within this broader category, the panel contains

| Custom as a source of rules |  |   |
|-----------------------------|--|---|
|                             | No <i>ex post</i> third-party coordination | <i>Ex post</i> third-party coordination |
| No third-party enforcement  | Ambient rules (Generalized social norms)   | Pure customary law                      |
| Third-party enforcement     |  | Centrally enforced customary law        |

  

| Explicit formation of rules |  |   |
|-----------------------------|--|---|
|                             | No <i>ex post</i> third-party coordination | <i>Ex post</i> third-party coordination |
| No third-party enforcement  | Relational agreements                      | Private orderings                       |
| Third-party enforcement     |  | (residual type)                         |

**Fig. 1** Typology of spontaneous institutions

three ideal types, called ambient rules, pure customary law, and centrally enforced customary law.

Ambient rules refer to institutions that exhibit all three features associated with spontaneous institutions; they would qualify as spontaneous according to any of the three criteria. The normative component of ambient rules is derived from the usual pattern of action in the wider social environment. They are enforced through decentralized sanctioning (or rewarding) in a situation of dispersed agents' power. Finally, ambient rules are interpreted and articulated privately. These three properties jointly make ambient rules fully "emergent," in the sense that deliberate rulemaking, centralized enforcement, or third-party assessment of compliance are absent. Their structural resemblance to social norms (discussed in Sect. 4) justifies understanding them as "generalized social norms."

Further, the ideal types of pure customary law and centrally enforced customary law encompass institutions that can be aligned with the legalistic notion of customary law. In building definitions of customary law, legal scholars routinely stress the conjunction of the sociological fact of custom-driven behavior and the corresponding elevation of this fact to the status of binding law by legal authorities. Conformity with customary rules is assessed by a specialized official (e.g., a court, tribunal, council of elders, etc.), and thus customary rules are given a single public interpretation.

For example, Parisi describes customary law as "a spontaneous norm which is recognized by the legal system (...) as a proper legal rule" (Parisi, 1998:672).<sup>2</sup> Likewise, Kadens (2013) systematically distinguishes social rules that emerge from spontaneous activity and legally binding customary rules proclaimed by an authorized official. According to this approach, customary law consists of two counterparts: factual behavior-custom and legalistic rule-custom. Behavior-custom is a recurrent behavior in the community. Rule-custom is the variant of said behavior endorsed and authoritatively communicated as a normative standard. Historical and empirical research on the strategies employed by courts to identify customary rules suggests a significant role played by courts and tribunals in shaping the binding variants of customary law (Kadens, 2013; Petersen, 2017).

The difference between the ideal types of pure customary law and centrally enforced customary law can be specified in terms of Hohfeldian analysis (Hohfeld, 1917). In a social environment lacking a monopoly of coercion, a breach of a rule typically gives a subgroup of agents (e.g., the offended party, the cognatic group, the clan, or all interested agents) the freedom to undertake steps toward redress. The role of legal officials comes down to authorizing and legitimizing the subsequent use of decentralized means of enforcement. For example, a court may authorize the kin group of the injured party to enter the injurer's estate and recover damage payments; the rest of the enforcement process is left to the kin group itself. Such enforcement would be characteristic of the ideal type of pure customary law. In contrast, in the case of centrally enforced customary law, a breach confirmed by an authorized third party gives the offended party a claim right to the actions of the enforcement agency.

<sup>2</sup> Kim (2009, 2007) argues that this concept of customary law is specific to the broadly understood Western legal tradition and thus absent from other legal cultures, such as Far Eastern ones, that have developed well-organized legal systems with strong top-down enforcement.

The enforcer, such as the police or specialized agents of the court, becomes burdened with a duty to act on the offended party's behalf (Hoebel, 1967).

### 3.2 Relational agreements and private orderings

The bottom panel of Fig. 1 includes ideal types of institutions that do not fit the commonplace definition of custom. Nonetheless, two of them exhibit at least one trait associated with spontaneous institutions. These traits are decentralized enforcement and the absence of *ex post* third-party coordination. Institutions with at least one of these qualities are often discussed, among others institutions, in the literature on private and non-legal ordering (e.g., Dixit, 2004; McAdams & Rasmusen, 2007). We refer to the ideal type of an institution where rules are formed explicitly but lack external enforcement and ex-post third-party coordination as a “relational agreement.” The second type, characterized by the presence of ex-post coordination, will be referred to as a “private ordering.”

The ideal type of a relational agreement corresponds to a situation where explicitly adopted rules (e.g., through pacts, exchanged promises, or authoritative religious texts) are sustained entirely via in-group enforcement mechanisms. Consequently, adherence to the rules depends on the value each group member attaches to the future relationship between the member and the other group members. For this reason, relational agreements structurally resemble relational contracts studied by legal scholars and institutional economists. Relational contracts are contracts in which ongoing contractual performance depends on a mutual belief that the beneficial relationship between the parties will continue (e.g., Dixit, 2004; Macneil, 1980; Tesler, 1980). However, relational contracts typically involve relatively few (typically two) parties. In contrast, relational agreements generate a broader expectation of compliance within wider society. Agents who are expected to abide by the rules are not necessarily the same agents who established them.

Finally, when explicitly adopted rules are adjudicated or interpreted by an authorized social agent, the institution will be labeled as a private ordering. In general, private ordering refers to a concept in which a group of actors decides how to govern and police dealings and interactions among themselves. This involves both establishing rules and in-group regulations as well as resolving potential conflicts between members. In a theoretical paper, Sagy (2011:923) defines private ordering as “a development of extralegal forums and forms of dispute processing by nonhierarchical groups,” but suggests that the capacity to deliberately make rules also belongs to this notion.

An important feature of private orderings is the absence of legal sanctions for non-compliance. Decisions of dispute-resolution bodies lack the backing of the state, and therefore, the only sanctions for non-compliance may be administered by group members. The purest form of private ordering is represented by those forms of self-organization where no state authority is present, even as a fallback option (Renner, 2021). This form, in which agents cannot have recourse to a higher-order authority, will be understood as the ideal type within the context of the typology.

## 4 Filling the matrix: real-world examples

The previous section developed a typology of spontaneous institutions, using existing legal and economic scholarship to distill abstract types of spontaneous institutions that can be formally represented and analyzed. The ideal types summarized in Fig. 1 are designed as conceptual shells, ignoring contingencies but capturing key structural features of real-world phenomena. In turn, this section of the paper aims to make the typology practical by assigning real-world examples to the ideal types. While the correspondence between ideal types and actual institutions can never be perfect, the purpose of providing illustrations is to demonstrate that the typology can be a useful classification tool. Equally important, this mapping reveals structural similarities between various (*prima facie* dissimilar) institutions (Fig. 2).

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

It is worthy of reminding that ambient rules represent customary rules that are both enforced and interpreted privately between agents. Such institutions are best exemplified in social norms. The rationale for conforming to social norms stems from their historical establishment and sufficiently widespread acceptance in society. Moreover, their continued existence depends on decentralized incentivization by group members. They are transmitted and interpreted privately by individuals, families, or other organic social units. Researchers have acknowledged similar characteristics of social norms when modeling them as emergent and evolutionary phenomena in evolutionary game theory (e.g., Young, 2001, 2015 [1998]; Sugden, 1986).

Social norms have been extensively studied from the rational choice perspective in various contexts. Such studies often consider social norms as substitutes for legal rules when the latter are too costly or infeasible to establish or enforce. Examples include norms of liability for animal-caused property damage among cattlemen and ranchers in Shasta County, California (Ellickson, 1991); norms of property rights in hunted animals among whale fishers in the North Atlantic Ocean (Ellickson, 1989); norms regulating inheritance of real property in rural Catalonia (Assier-Andrieu, 1983); and footbinding norms in Imperial China (Mackie, 1996). In all these cases, the relevant rules are unwritten, derived from practice, privately interpreted, and enforced through decentralized social sanctions by the community.

Beyond contemporary domestic social norms, other examples of ambient rules can be sought in legal anthropology – more precisely, in primitive law. While the term “primitive law” can be interpreted in various ways, we follow the convention established by Diamond in the seminal work *Primitive Law, Past and Present* (1971). According to Diamond, the term refers to social rules that predate the development of formalized state structures and, especially, codified laws. In other words, the history of primitive law begins with the advent of humanity and concludes around the time when the first legal codes are established.

Legal historians and anthropologists often observe that a common trait of primitive law is the prevalence of rules embedded in flexible oral traditions or commonly followed practices – in other words, “whatever is regularly or generally done is con-

| Custom as a source of rules |   |   |
|-----------------------------|---|---|
|                             | No <i>ex post</i> third-party coordination  | <i>Ex post</i> third-party coordination   |
| No third-party enforcement  | Social norms; Primitive law without public adjudication; Customs of waging war; Customary international law in the pre-international dispute resolution era | Primitive law with public adjudication; Customary international law in the (post-1945) international dispute resolution era, to the extent that compulsory adjudication is recognized |
| Third-party enforcement     |   | Diligence standards based on custom in tort law; Commercial custom, when incorporated into the law; Colonial “customary law”  |

  

| Explicit formation of rules |  |   |
|-----------------------------|--|---|
|                             | No <i>ex post</i> third-party coordination   | <i>Ex post</i> third-party coordination   |
| No third-party enforcement  | International agreements in the pre-international dispute resolution era, or without external dispute resolution | Some international agreements in the international dispute resolution era; Religious laws in diasporas (e.g., among Mennonites); social order of medieval Iceland; private commercial law, e.g., in the diamond and cotton industries |
| Third-party enforcement     |  | (residual type)   |

**Fig. 2** Examples corresponding to the ideal types from Fig. 1

sidered rightly done” (Diamond, 1971:164). In the absence of written codes, legislation and precedent are unlikely to emerge as socially approved sources of rules, and thus “the remaining source of law, and the one that dominates primitive law, is custom” (Posner, 1980:31). Additionally, the egalitarian social structure prevents any individual or small group from amassing enough power or wealth to dominate the community (see, e.g., Taylor, 1982; Hoebel, 1967). Under such conditions, the provision of incentives to comply with social rules requires collective participation

(e.g., through ostracism or ex-communication) or at least widespread acceptance of the legitimate use of force by others.

The existence or non-existence of public adjudication is a well-known source of variety in primitive law. Organized and ritualized dispute resolution is observed in some non-literate societies, typically those that are more economically advanced, while being absent in others (Diamond, 1971; MacCormack, 1973).<sup>3</sup> It is precisely those regimes of primitive law lacking public adjudication – systems of sophisticated social norms in non-literate communities – that can be considered real-world exemplifications of the ideal type of ambient rules.

Anthropologists have long studied regimes of primitive law without public dispute resolution mechanisms. For example, in his pioneering work on the “savage society” of the Melanesian people in the Trobriand Archipelago, Malinowski (2017 [1926]) denies the existence of anything resembling a tribal court for settling disputes:

“The rare quarrels which occur at times take the form of an exchange of public expostulation (*yakala*) in which the two parties assisted by friends and relatives meet, harangue one another, hurl and hurl back recriminations. Such litigation (...) may be of assistance in settling disputes. Sometimes it seems, however, only to harden the litigants. In no case is there any definite sentence pronounced by a third party, and agreement is but seldom reached then and there.” (Malinowski, 2017 [1926]:85)

In the absence of mandatory litigation, tribe members would willingly resort to reciprocal sanctioning to punish perceived transgressions of community norms. They would refuse to share means of subsistence, cooperate, or associate with someone they considered a wrongdoer. Similarly, MacCormack (1973:77) 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. He reports on complex systems of unwritten rules regulating behavior within a single tribe and 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, 1971:238).<sup>4</sup> All in all, it can be asserted that institutions of many societies governed by primitive law represent the ideal type of ambient rules: they lack implicit rule formation, third-party enforcement, and commonly recognized legal officials.

<sup>3</sup> 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.

<sup>4</sup> 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. Greuel (1971) argues that the authority of leopard-skin chiefs is founded on the ability to build large coalitions on a case-by-case basis and thus channel the threats of social sanctions against those refusing to make peace with other tribe members.



Another locus of ambient rules may be found in the international realm. Scholars of international law noticed that customary norms governing international relations structurally resemble social norms in the domestic context (e.g., Norman & Trachtman, 2005) or primitive law (e.g., Barkun, 1968; Dinstein, 1986). Therefore, norms of customary international law can be considered ambient rules. Indeed, the fundamental features of customary international law, as recognized in the literature, include the derivation of norms from the observed regularities in the behavior of states and decentralized enforcement, i.e., enforcement through actions taken by individual states in response to perceived infringements (Shaw, 2017). According to Guzman (2008), in the absence of a hierarchy in the international system, the enforcement mechanism crucial for the operation of international law consists of “the three Rs of compliance”: reputation, reciprocity, and retaliation.

Like in the case of primitive law, the derivation of normative standards from the past behavior of states and the decentralized method of sanctioning suffice to classify customary international law in two out of the three identified dimensions. The presence or absence of third-party interpretation and validation of rules poses a more complicated challenge. Contemporary it may seem that customary international law is supported by a set of broadly recognized dispute resolution authorities (e.g., the International Court of Justice) that play the role of a public third-party interpreter of compliance. Nevertheless, two caveats need to be made.

First, permanent international dispute resolution authorities are a historically novel phenomenon. For instance, the International Court of Justice (ICJ) was established in 1945, and its predecessor, the Permanent Court of International Justice, was established in 1920. Before their creation, no bureaucratic body could reasonably claim to have the authority to interpret rules of customary international law or adjudicate disputes between states.

Secondly, even after the establishment of the ICJ, there is no mandatory jurisdiction in international law that is independent of states’ will. This means that states must consent to the ICJ’s jurisdiction, either by recognizing it in advance or agreeing to it in specific disputes. By default, states are free to deny jurisdiction. Only when all parties to a dispute have explicitly recognized the authority of the ICJ can it rule on a contentious issue (see, e.g., Alexandrov, 2006). Nevertheless, many states choose to bind their hands by willingly subordinating themselves to the ICJ’s jurisdiction. As of late 2024, 74 states have declared, typically with various reservations, that they accept the “compulsory jurisdiction” of the ICJ in prospective, hypothetical disputes involving other states that have made similar declarations (International Court of Justice, 2024). In effect, these states recognize, among other competences, the power of the ICJ to clarify and interpret customary international law, and to adjudicate disputes between them based on customary international law. Thus, they participate in a system with *ex post* third-party coordination.

However, the participation is far from universal. Currently, there are around 200 states in the world, including 193 members of the United Nations. Both figures are much greater than the number of states that have declared their recognition of the ICJ’s compulsory jurisdiction. Thus, fewer than 40% of states globally make such declarations. This figure decreases further when weighted with state power. Only one permanent member of the United Nations Security Council, i.e., the United King-

dom, is among the declaring states. Neither the United States, China, Russia, nor France – of which the first three have nuclear triad capabilities<sup>5</sup> and are universally regarded as the most powerful actors in the international system – recognizes compulsory jurisdiction by the ICJ.

For these reasons, it should be concluded that historically, i.e., before the advent of the ICJ and the “international dispute resolution era,” customary international law represents the ideal type of ambient rules: spontaneous institutions with custom as the primary source of rules, decentralized enforcement, and no third-party coordination (see, e.g., Bederman, 2001). Even today, to the extent to which states hesitate to recognize the authority of international dispute resolution bodies, customary international law retains this historical nature as a collection of ambient rules governing the interactions between international actors.<sup>6</sup>

## 4.2 Pure customary law: primitive law with adjudicative mechanisms, present-day customary international law, to the extent that compulsory adjudication is recognized

As suggested in the previous section, the ideal type of pure customary law represents an ambient rule that is articulated and interpreted through a public process conducted by a specialized social agent. Consequently, it is reasonable to expect that many real-world institutions exemplifying the ambient rules type may also have a corresponding variant falling under the ideal type of pure customary law. Indeed, it has been noted that primitive legal systems differ in whether they have public dispute resolution mechanisms. Therefore, those with public adjudication can be seen as instances of the ideal type of pure customary law.

The legal organization of the Indian Yurok tribe may serve as an example. Their social system combined traditionalist rules with self-help as the primary enforcement method. This was supported by well-established public adjudication procedures, which legitimized acts of self-help within the community (Benson, 1989; Hoebel, 1967). According to Hoebel (1967:52–53), 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 “crossers” who were chosen from among nonrelatives living in different communities than those occupied by parties to the litigation.” The Yurok procedure was structured and evidence-based. Importantly, the procedure culminated in a definitive verdict that was binding on the parties. If the crossers “found the defendant guilty, [they] declared an explicit judgment against him. (...) [T]he

<sup>5</sup> I.e., the capability to launch nuclear strikes from land, air, and sea.

<sup>6</sup> This claim is particularly applicable to the customs regulating warfare. By definition, belligerents normally reject any possibility of external coordination of actions and are not subject to a single superior force capable of resolving the conflict. However, even ongoing hostilities do not preclude the spontaneous development of rules in war. For example, customs that specified the acceptable ways of conducting siege in the early modern era (i.e., in the 16th – seventeenth 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 (tit-for-tat strategies), and required individual interpretative abilities of the field commanders to be applied consistently and understandably to others (Lesaffer, 2007).

judgment assessed the customary damages against him, which he had to pay over to the plaintiff.”

Other similar examples have been extensively reported in legal anthropology. 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, 1971:239). 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, 1971:241). The research on “legal pluralism” in developing countries suggests that community-involving adjudication based on customary law continues in the developing world (e.g., Worby, 1997).

Importantly, in all the mentioned cases, adjudication procedures typically do not involve action by organized enforcement authorities, as they are either absent or weak. Instead, verdicts grant the offended party and their allies the privilege to seek redress on their own. For example, among the Yuroks,

“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.” (Hoebel, 1967:52-53)

In other words, although imperfect, the procedure serves as a coordination mechanism that grants widespread social legitimacy to private sanctioning efforts. Yurok courts of crossers distinguish illegitimate, wrongful acts of violence from legitimate, rightful ones in the eyes of the wider public.

Another example can be cited by continuing the discussion about customary international law from the previous subsection. Indeed, present-day customary international law adjudicated in international tribunals may represent another example of pure customary law as characterized in Fig. 1. The derivation of rules from the regular behavior of states and reliance on decentralized sanctions as the primary enforcement tool remain constant features of the international legal order. However, a 20th-century novelty lies in the prominence of permanent international dispute resolution bodies such as the ICJ or the International Tribunal for the Law of the Sea.

The functions of international dispute resolution organizations, emphasized in the law and economics literature, overlap with the characteristics of a third-party assessor of compliance outlined in the preceding section. International courts interpret, clarify, and articulate norms of customary international law, and thereby “assist states to come to a common understanding regarding relevant (...) law” (Guzman, 2008:51–52). They provide focal points within the spectrum of possible interpretations of rules, potentially reducing the effects of states’ private, idiosyncratic understandings of rules of international law (Ginsburg & McAdams, 2004). Specifically concerning custom as a source of international law, courts play a role in identifying relevant customs, assessing their binding nature, and delivering clear rulings on their legal implications.

Moreover, by publicly announcing outcomes, international dispute resolution bodies disseminate information about states' behavior to interested parties. Scholars of international law, such as Guzman (2008) and Norman and Trachtman (2005), highlight the crucial role of courts in spreading information, which enhances the effective administration of responses by individual states within the international system. This dissemination facilitates the coordination of sanctions and reduces the costs associated with developing a state's track record, thereby contributing to more accurate reputation-building. However, it must be stressed once again that the classification of present-day customary international law as a system of pure customary law, as understood in Fig. 1, is limited by the extent to which states accept the compulsory jurisdiction of courts like the ICJ and the International Tribunal for the Law of the Sea. At present, this acceptance is far from universal.

Nevertheless, history provides further examples of customary international law that differ from how it operates in the contemporary international system, which are marked by the broader acceptance of third-party interpreters and adjudicators. An early case can be observed in the system of rules known as *Leges Marchiarum*. *Leges Marchiarum* was a set of rules which regulated cross-border interactions during the prolonged borderland conflict between England and Scotland in the sixteenth century. Despite the warlike conditions, unwritten rules of cooperation emerged organically from these interactions (Leeson, 2009). They constrained violence and unprovoked everyday hostilities. Enforcement of these customary rules relied on private violence, including raiding and hostage-taking.

Significantly, despite the ongoing low-intensity conflict between England and Scotland, *Leges Marchiarum* saw the development of an organized public adjudication forum. This forum aimed to prevent arbitrary acts of vengeance that could escalate into a full-scale war. The dispute resolution body supervised compliance with meta-rules governing raiding and revenge. It ensured that borderland customs, as brutal and tough as they were, did not descend into a cycle of ever-accelerating, alternate violence. The case of *Leges Marchiarum* suggests that third-party coordination extends beyond providing focal points in simple games that approximate pure coordination problems. It can also support equilibria in games where conflicting motives prevail, yet opportunities to avoid unnecessary waste and destruction through cooperation remain present.

### **4.3 Centrally enforced customary law: customary standards of diligence, enforceable commercial custom, colonial and post-colonial “customary law”**

Centrally enforced customary law refers to customs that are authoritatively recognized as legally binding and enforced by a specialized enforcement agency. As such, it can be represented by rules within contemporary domestic law whose content originates from community practices.

An illustration can be found in the adjudicative philosophy underlying the American Uniform Commercial Code (UCC). The UCC, a document that has served as a blueprint for commercial codes in most American state jurisdictions since the 1950s, enshrines the idea of commercial customary law. It directs that courts should look into “immanent business norms,” or trade usages practiced among merchants. In

litigation, these usages should be interpreted as state-of-the-art conduct expected from the litigating parties. They “vary or qualify the meaning of either trade rules or explicit contractual provisions” (Bernstein, 1996:1777). Court rulings based on this principle are then granted enforcement.

Further examples of centrally enforced customary law may include customary standards of care in American tort law, e.g., in boating accidents or medical malpractice. The standards of care expected in both cases are often determined by courts based on the typical practices within the relevant group of professionals (Epstein, 1992; Peters, 2000).

Beyond the context of contemporary legal systems, the ideal type of centrally enforced customary law aligns conceptually with the construct of “customary law” developed during the colonial era. Colonial customary law encompassed the practices of indigenous peoples recognized by colonial authorities as substantive legal rules applicable within their respective communities and enforceable in courts (Hooker, 1975). Admission of these customary rules typically depended on their compliance with the colonizer’s standards of decent morals (they were subject to “repugnancy clauses”) and broader political order. Today, similar approaches to customary law persist in many post-colonial countries, particularly in Sub-Saharan Africa (Zenker & Hoene, 2018).

However, the translation of indigenous practices into legal frameworks foreign to their originators created incentives to modify, reinvent, or abandon old customs and usages. This often resulted in a significant transformation of their original meanings and functions. Therefore, researchers studying colonial and post-colonial legal systems have frequently observed a notable gap between pre-colonial social arrangements and the technocratic customary law created through colonization (Kim, 2009; Moore, 1986; Snyder, 1981). This finding led them to distinguish between 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, 2017:143).

Critics of incorporating trade usages into commercial law make a similar argument: the involvement of third-party interpreters and enforcers creates a new set of incentives. It inadvertently changes the motivation to develop and sustain customary practices. Most importantly, it transforms customary practices meant to sustain ongoing relationships into endgame rules enforced by a third party – i.e., rules applicable to situations in which the relationship irrevocably deteriorates. The argument runs as follows: agents often engage in informal, customary business practices, such as providing extracontractual services or routinely disregarding contractual deadlines. They do so precisely because these practices are informal and customary – meaning they are not enforceable by a third party. If the relationship between agents deteriorates or if a member of an informal business community no longer finds participation in the community advantageous, withdrawing from these practices becomes a desirable option. For example, extracontractual services may not be offered any longer, or strict adherence to deadlines may become expected in all circumstances. However, when these informal practices are subjected to third-party enforcement, their role in sustaining relationships loses its meaning, and the incentive to engage in them diminishes (Ben-Shahar, 1999; Bernstein, 1996).

On the other hand, Kostritsky (2006) suggests that at least some trade usages and business norms should be recognized by courts as valid legal rules and enforced by a third party. She argues that courts should evaluate the purpose of each business practice and, based on the purpose assessment, decide whether to incorporate it. However, this criticism seems to abandon the fundamental premise of the “incorporation strategy.” According to this premise, insiders, such as merchants and other members of the business community, have superior knowledge and situational awareness compared to courts. For this reason, they are better suited to judge the purposes and functions of trade usages.

In any case, the fact remains that the possibility of some trade usages being granted third-party enforcement changes the underlying incentives to create and sustain such usages. In general, this criticism aligns with the idea that centrally enforced customary law and other ideal types of spontaneous institutions, such as ambient rules and pure customary law, are structurally different, and institutional transitions of one into another are therefore consequential.

#### **4.4 Relational agreements and private orderings: international agreements and other agreements under anarchy, self-governance of religious diasporas**

In the previous section, we defined relational agreements and private orderings as spontaneous institutions in which rules are not customary in origin but are adopted explicitly. Nevertheless, relational agreements still retain two other features often associated with spontaneous institutions: decentralized sanctioning and the absence of *ex post* third-party coordination.

As such, the ideal type of relational agreements can be represented by international agreements. Agreements between international actors, such as conventions and multilateral treaties, are explicitly formulated and typically put down in writing. However, the underlying feature of the contemporary international order is structural anarchy, and the resulting security competition between states naturally counter-weighs the possibility that a distinct enforcement agent emerges in the system (Waltz, 1979). Therefore, they lack third-party enforcement. 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, 2008:50). Thus, the performance of such agreements lacks external coordination: the parties do not recognize any third party with the authority to interpret or decide questions of compliance.

Of course, in present-day realities of the international realm, the possibility of using an external dispute resolution mechanism is open to willing states, even if not generally used. The Statute of the ICJ in article 36 stipulates that “[t]he 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.” Moreover, some important contemporary international conventions, such as the Law of the Sea Convention, explicitly establish mandatory third-party dispute resolution mechanisms for their signatories (Noyes, 1988).

According to our typology, international agreements that use such mechanisms represent the final category in the classification of spontaneous institutions – private orderings.

Naturally, examples of private orderings extend way beyond contemporary international law. An interesting historical case of a society-wide private ordering can be found in the social system of early medieval Iceland, a historical case study often cited by enthusiasts of spontaneous institutions. The period between the ninth century, when the Vikings arrived on the island, and 1262, when they pledged loyalty to Norwegian King Hakon, is often considered a successful example of a “stateless society” (e.g., Geloso & Leeson, 2020; Miller, 1996). During this period, the country functioned as a loose confederation of small chieftaincies that were themselves internally divided. Even by the standards of medieval Europe, Icelanders lacked political authority and organized force, having neither dukes nor any equivalent figure of similar power. Therefore, the legal system of medieval Iceland can be considered international law in microcosm.

Within this system, the laws of Iceland were shaped and proclaimed during annual assemblies of freemen (*Althing*) held at a designated place, the Law Rock. A special public officer called a lawspeaker memorized the laws and recited them upon request, particularly during each Law Rock assembly. The lawspeaker’s sole role was to accumulate knowledge of Iceland’s laws and ensure they were accurately communicated. Beyond their legislative function, the Law Rock meetings heard disputes between individual Vikings or families, effectively imposing obligations on the parties involved. The outcomes of disputes settled during the Law Rock meetings were enforced through a sophisticated system of private vigilantism authorized and regulated by the *Althing*. The Icelandic system attempted “to limit the permissible range of self-help, but it did not try to prohibit it altogether. It sought to limit the class of expiators and the time and place where self-help could be legitimately taken.” (Miller, 1996:232) Compliance with a decision made during the *Althing* in one year was verified during the following assembly. Persistent refusals to comply would result in declaring the transgressor an outlaw, to whom no one was allowed to offer help or shelter (Stein-Wilkeshuis, 1986).

In sum, the political system of medieval Iceland combined the three characteristics of the ideal type of private orderings: explicit rulemaking through the *Althing*, with a repository of legal knowledge embodied in the lawspeaker; *ex post* third-party coordination provided by dispute resolution meetings during the *Althing*; the absence of a third-party enforcer and thus the resulting exclusive reliance on decentralized sanctions for enforcement.

Outside the realm of broadly conceived international law, other real-world examples of private orderings can be sought within religious diasporas subject to secular laws of modern nation-states that do not recognize their religious rights and duties. For instance, Mennonites, a branch of Protestants, are obligated by their faith to live in strict accordance with the Dordrecht Confession – a foundational document specifying their religiously permissible lifestyle. The Dordrecht Confession grants Mennonite religious leaders supreme authority in interpreting the document and identifying infringements. Although these leaders lack the power to forcibly subordinate fellow believers, their elevated position within Mennonite communities allows



them to effectively coordinate social sanctions against transgressors (Gruter, 1986). A similar phenomenon has been observed within contemporary Muslim diasporas in England (The British Home Office, 2018) and Germany (Jaraba, 2020).

Finally, well-known case studies of private orderings can be found in the self-organization of various industries, such as New York diamond retailers (Bernstein, 1992) or the American and international cotton trade (Bernstein, 2001). The latter reportedly functions so effectively that it has earned the name “private commercial law.” Its distinctive feature is the complete absence of centralized (state-backed) sanctions. Noncompliance with cotton trade rules simply results in expulsion from trader organizations, which usually carries heavy reputational consequences. Aside from this, the system exhibits centralization in rule-making and *ex post* coordination through arbitration tribunals. Rules for the American cotton trade are shaped and proclaimed by several national and regional business associations. Importantly, these rules are not based on commercial customs; in fact, cotton trade rules explicitly prohibit custom from trumping or varying trade rules or explicit contractual provisions. Disputes between traders are resolved by a panel of arbitrators. According to Bernstein (2001:1725).

“The trade rules are periodically revised to respond to technological advancements, market changes, and ambiguities revealed during disputes. Their content is known and understood by most market participants. The arbitration tribunals that resolve disputes do so expeditiously and inexpensively.”

## 5 Game-theoretical interpretation of the typology

Game theory has long been established as an elementary tool of theoretical institutional analysis. In particular, scholars studying economic institutions have developed multiple game-theoretical models of social norms, customary law, relation-based governance, and other phenomena relevant to this paper. With some exceptions (notably Dixit, 2004), the modeling techniques typically involve the use of repeated games to represent various spontaneous institutions.<sup>7</sup> The repeated game design reflects the

<sup>7</sup>The precise techniques of representing various types of spontaneous institutions differ from subject to subject. Within this variety, two aspects stand out as the key model design features: (i) informational assumptions and (ii) solution concepts.

Depending on the subject and context, researchers of spontaneous institutions use games with complete information (in which players know the full structure of the game) or with incomplete information (in which players lack some knowledge about the game’s structure). The assumption of incomplete information corresponds to the observation that the preferences or characteristics of interaction partners in most social settings are not explicitly given to others but need to be discovered in the interaction itself. Likewise, researchers use games with perfect information (in which players have full knowledge of the past events in the game) or imperfect information (in which the knowledge of the past events is limited). The assumption of imperfect information may reflect the idea that episodes from the distant past are unknown or doubtful and only recent events can be recalled with certainty.

Repeated games with perfect and complete information have been used to study customary international law (e.g., Norman and Trachtman, 2005); with imperfect but complete information have been used to study the rules of medieval trade backed by reputational sanctions (Milgrom et al., 1990); with perfect but



recurring nature of a social interaction, e.g., a commercial transaction, accidentally caused damage, or a conflict over the ownership of a resource. The equilibrium of the game represents how agents manage this recurring problem.

This section offers a game-theoretic interpretation of the typology developed in Sect. 3. Its objectives are limited. It does not attempt to construct an all-encompassing model. Instead, this section suggests several design principles that can be useful in modeling various types of spontaneous institutions. The discussion proceeds as follows. First, we outline how the customary formation of rules, decentralized enforcement, and the absence of *ex post* third-party coordination can be (and typically are) represented in game theory models. Second, building on these considerations, we propose principles for designing models that represent the ideal types of spontaneous institutions identified in Sect. 3.

### 5.1 Representing implicit rule formation, decentralized sanctions, and *ex post* third-party coordination

In game-theoretical terms, explicit rule formation can be interpreted as a provision of focal points by a third party before the game unfolds. Such focal points are common knowledge<sup>8</sup> and outline the “plan for the game” for all players, specifying how the game should be played.

Focal points play two roles. For one, they provide agents with guidance about how they should behave when making decisions within the game. For example, in a repeated prisoner’s dilemma, preannounced focal points may specify the rules of playing the game by indicating when an agent should cooperate and when to defect. In this way, focal points inform agents’ actions. Second, and equally important, focal points shape agents’ expectations about how others will behave – i.e., they set expectations for when others will cooperate or defect. However, even if actions and expectations can be preconfigured in this way, it does not guarantee that the plan for the game will be carried out; it can be carried out only if it aligns with the incentives of all agents, meaning it constitutes an equilibrium of the game. Agents must not only know what to do and correctly anticipate others’ actions but also need to have the incentives to act accordingly.

Designing focal points may involve adding a pre-game “constitutional” stage (Buchanan & Tullock, 1962) at which agents determine the rules of the subsequent repeated game with a predefined selection method. Conversely, the absence of the

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incomplete information, to study the possibility of a legal order without centralized enforcement (Hadfield and Weingast, 2012).

In turn, the solution concepts employed in the research of spontaneous institutions can be grouped into two categories: perfectly rational and boundedly rational. Under perfect rationality, players make optimal choices given the available information. In the most consistent variant of perfect rationality, players’ ability to carry out a strategy is constrained by the requirement of subgame perfection: at every node of the game, a player chooses a locally optimal action. In contrast, such stringent requirements do not apply under bounded rationality. Players do not adapt their choices to information and beliefs but instead use simple decision rules. For instance, they may imitate strategies that have proven successful in preceding periods (e.g., Axelrod, 1986; Skyrms, 1996; Mahoney and Sanchirico, 2001; Young, 2001 [1998], 2015).

<sup>8</sup> 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.

constitutional stage corresponds to the formation of customary rules. Customary rules are not designed within any structured procedure but are fully emergent from the players' actions in the game. Expectations are set throughout the game by observing how players act and hypothesizing what they are likely to do in the future.

The easiest way to represent the absence of third-party enforcement is to equip all agents with the same range of possible strategies. This ensures that (many) agents have equal opportunities to punish or reward behaviors they deem undesirable or desirable.

As in most game-theoretic models of decentralized enforcement, punishment should have two key characteristics. First, it must be costly not only for the punished party but also for the punishing party. The disutility experienced by one side of the punishment interaction must be coupled with a disutility experienced by the other side as well. For example, in the case of ostracism, both the ostracizing and the ostracized parties suffer from the termination of their relationship (see, e.g., Rasmusen & Hirshleifer, 1989). Similarly, in a commercial boycott, both the boycotting and boycotted parties lose a trading opportunity (see, e.g., Hadfield & Weingast, 2012). Second, punishment can only influence behavior if it is collective, meaning that a critical mass of punishers is reached.<sup>9</sup> In other words, decentralized sanctions face a collective action problem.

In contrast, third-party enforcement requires the introduction of an additional player, i.e., the enforcer, who alters agents' payoffs in ways others cannot. When legal rules are modeled as being enforced by a third party, this player is often considered non-strategic, meaning that they lack a utility function of their own and follow a pre-programmed strategy of rewarding or punishing other players' actions. Such a non-strategic player can be omitted from the game entirely, and their actions can be incorporated directly into other players' payoffs. For example, the enforcer may punish defectors in a prisoner's dilemma, which increases the cost of defection regardless of the actions taken by other players. If the enforcer is non-strategic, their activity can be represented simply as lower payoffs earned by defectors. Because third-party enforcement is salient, changes to payoffs made by the enforcer are common knowledge, even if other payoff components may be private information.

Finally, we turn to the absence of *ex post* third-party coordination. As suggested in Sect. 2, third-party coordination refers to the provision of coordination in real time. Even if rules have been firmly established either at a "constitutional stage" or via custom, playing the game may lead to various conflicts. One possible conflict is a dispute over facts. Players may have imperfect knowledge of past events in the game or may be unwilling to share their information with others. For instance, in a prisoner's dilemma, players may not know whether others fully cooperated in the past, and those who failed to cooperate may choose to conceal this fact. Another possible conflict is a conflict over the rules themselves. Even if all parties observed past events, they might interpret them differently. Does my performance count as cooperation or not? What exactly does the rule require in a given situation? This issue becomes especially important when circumstances change. If new situations arise that were

<sup>9</sup>This critical mass may involve only one agent in special cases (e.g., in the case of rivalry among major geopolitical powers, where one power has sufficient capabilities to punish another).

not anticipated, which rule should apply? Or how should an existing rule be adapted? (see, McAdams, 2009).

Solving such conflicts as they arise during the game requires an additional player. Unlike the enforcer, this player's actions are payoff-irrelevant. Their role is limited to making announcements that are common knowledge. These announcements can influence the equilibrium of the game solely because they are information-relevant, i.e., players know them and know that others know them as well. Conversely, in the absence of third-party coordination, conflicts over facts and rules cannot be resolved by appealing to such announcements. Whatever institutions emerge must form an equilibrium in a game without *ex post* third-party coordination.

## 5.2 The structure of spontaneous institutions as the design of stage games

We can now illustrate the structural differences between the ideal types of spontaneous institutions with a simple structure - of a repeated game. Imagine a one off game where:

- (i)  $N = (1, \dots, n)$  is a set of players,
- (ii)  $A_i$  (where  $i \in N$ ) is a set of all technologically feasible actions  $a_i$  of player  $i$ ,
- (iii)  $A = A_1 \times \dots \times A_n$  is a set of all technologically feasible action profiles,
- (iv)  $U = (u_1, \dots, u_n)$  is a vector of utility functions  $u_i : A \rightarrow \mathbb{R}$  attributing player's  $i$  utility value to a given action profile.

Points (i) to (iii) describe the objective structure of a one-off social interaction. They specify the participants of the interaction (e.g., traders, firms, states, etc.) and the combinations of actions that can be taken by the participants.<sup>10</sup> The interaction can be anything that involves a group (or a randomly selected subset) of agents making interdependent choices. For example, a simple two-person game of chicken is often used to represent a conflict between two actors over an ownerless resource (e.g., Ginsburg & McAdams, 2004; Sugden, 1986); two-person stag hunt games are used to illustrate the dilemma between cooperation and security faced by international actors (e.g., Weiss & Agassi, 2020).

Point (iv) characterizes the relationship between players' choices and the utility enjoyed by players. It describes how players value various outcomes: e.g., being a "chicken" while others are also "chickens" or hunting stag while others hunt hare. Many game theory models assume that all utility functions in the vector  $U$  are known to all players. In general, this may not be the case. The real shape of  $u_i$  may depend

<sup>10</sup>This description can be further complicated to account for a broader range of possible scenarios. First, this can be achieved by introducing a temporal dimension to the one-off game, which transforms it into a sequential (but still finite) game. In this setup, agents move in sequence: for example, sellers may act first by making an offer, followed by buyers, who can either accept or reject the deal. Second, some outcomes may be unobservable. Players may observe the outcomes without knowing how other players contributed to them; in other words, actions selected by players can remain private information. In our description, we focus on the simplest case: a simultaneous game (i.e., a game without a temporal structure) where action profiles are observable.

|   | Players         | Pre-game focal points | Stage game sequence   |
|---|-----------------|-----------------------|---|
| <b>Ambient rules</b>                    | $N$             | No                    | (1) Basic stage game  |
| <b>Pure customary law</b>               | $N$ Coordinator | No                    | (1) Basic stage game<br>(2) Coordinator makes payoff-irrelevant announcements |
| <b>Centrally enforced customary law</b> | $N$ Enforcer    | No                    | (1) Basic stage game<br>(2) Enforcer affects payoffs                          |
| <b>Relational agreements</b>            | $N$             | Yes                   | (1) Basic stage game  |
| <b>Private orderings</b>                | $N$ Coordinator | Yes                   | (1) Basic stage game<br>(2) Coordinator makes payoff-irrelevant announcements |

**Fig. 3** Game designs corresponding to the items in the typology of spontaneous institutions

on player's  $i$  private type. In this case, other players hold beliefs about others' types without knowing them with certainty.

The game outlined in points (i) to (iv) will be treated as a basic stage game. Together with the initial beliefs about players' private types (if applicable), this basic stage game can be used to build repeated games corresponding to the ideal types of spontaneous institutions identified in Sect. 3. Beside the basic stage game, there are three optional building blocks of the repeated games. First, there are focal points that can be provided before the repeated game starts. Second, there is Enforcer who can affect the payoffs of other players. Third, there is Coordinator who voices payoff-irrelevant announcements that are public knowledge. The repeated games are depicted in Fig. 3.

Ambient rules are the easiest type to represent in the game-theoretical framework. They can be envisioned as an infinite string of basic stage games. The absence of the "constitutional" stage accentuates their unplanned emergence.

Formal analyses of spontaneous institutions that utilize model designs similar to the model suggested for ambient rules are plenty (e.g., Axelrod, 1986; Sugden, 1986; Young, 2001 [1998]; 2015). The relative simplicity of such models can be counterbalanced by realistic assumptions about the process through which players select their actions or, especially, information available to players. For example, players' discount factors may be treated as 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. In this setup, adhering to spontaneously emergent rules that we classify as ambient rules can be an indication of a player's future orientation (Posner, 1998).

Moreover, several models of ambient rules assume imperfect information by limiting players' awareness of the past events in the game (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 in shaping social norms by assuming that, unlike ordinary events, their actions are visible forever. In their overlapping generations model, such figures can divert the pattern of development of social norms driven by the recent past.

In turn, pure customary law by definition embodies a spontaneous rule (i.e., a rule that emerges without a “constitutional” stage) which is explicitly recognized as a legal rule by an authorized agent but enforced in a decentralized manner. In a game-theoretical setting, the event of recognition can be represented through the introduction of an additional player – i.e., Coordinator – that moves alternately with all other players.

The actions available to Coordinator are limited to (payoff-irrelevant) opinionating on the compliance of agents in the preceding iterations of the repeated game. The decision rule used to formulate opinions corresponds to a method of “finding” customary norms among the previous iterations. While the decision rule itself may remain private information, the public character of the assessment might enable a rational reconstruction, making future decisions, at least to a certain extent, predictable in the eyes of other players (see, Hadfield & Weingast, 2012, 2013).

The public assessment by Coordinator plays two important roles: interpretative and informative. Its common knowledge characteristic allows for the coordination of responses to other players’ actions and, if future announcements are predicted with certain accuracy, coordination of expectations. Especially in cases when preferences are private, the announcements can support a coordinated, single view of what the rules are and who has breached them.

Game-theoretical models that emphasize the interpretative role and resemble the design proposed in this subsection can be found, e.g., in papers by Aldashev et al. (2012), and Hadfield and Weingast (2012). The argument in the second paper is that, if payoff-irrelevant announcements by Coordinator possess certain desirable characteristics (i.e., universality, generality, stability, prospectivity, congruence, and uniqueness) and do not diverge significantly from the private preferences of regular players, they can support a perfect Bayesian equilibrium in which players obey the rules because violation would be followed by coordinated social sanctions.

In turn, the informative role is key for the operation of reputation-based enforcement mechanisms. The informative role is theorized in a model by Milgrom et al. (1990), in which the only function of Coordinator lies in informing players about others’ past behavior. According to this approach, the dissemination of information about the past performance of players is a substitute for long-term bonds between parties. The awareness of the track record allows for the formation of correct beliefs about the intended behavior of trading partners. In consequence, it allows for cooperating only with those who are likely to refrain from cheating. Although careful historical examination suggests that the assumptions of the model do not correspond with the historical realities of medieval trade (e.g., Kadens, 2012b; Volckart & Mangels, 1999), it still can be treated as a generic formal representation of a system of

rules characterized by decentralized enforcement supported by a centralized dissemination of information.

We now turn to the ideal type of centrally enforced customary law. In the setting of game theory, centrally enforced customary law can be treated as a version of the previous model of pure customary law. However, there is one important difference: the additional player not only assesses compliance but also affects payoffs accordingly. Such a design reflects the idea that compliance is periodically assessed in courts whose decisions are, in consequence, enforced by third-party agencies or some other specialized entity. Of course, the presence of Enforcer may affect the possible equilibria in the repeated game.

Although not based on formal models, the arguments against the enforcement of business norms developed by Bernstein (1996), Ben-Shahar (1999), and Kostritsky (2006) go along the same lines. Enforcement by a third party strategically influences the rule-creation process, which makes the ambition to enforce such norms without affecting their substantive content implausible. For example, imagine a contract that specifies a certain price. Further, assume that the payer customarily pays less than this price, and the other party regularly accepts such payments. If payments below the contractual price could become enforceable as a new contractual price, the receiving party would have no incentive to accept them. The receiving party would fear that by consistently accepting lower payments, it would lose the option to demand the full contractual price in the future. Rather, it would risk being penalized by Enforcer for refusing to accept the lower amount. However, if lower payments do not alter the enforceable terms of the written contract, contractual performance would remain more flexible (Ben-Shahar, 1999).

Finally, relational agreements and private orderings can be represented in the same way as ambient rules and pure customary law, respectively. The only difference is an addition of a “constitutional” stage at the start of the game. The constitutional stage corresponds to the time in which the rules are established or otherwise presented to the players. Since neither of the two institutional types does not entail centralized enforcement, the further course of the game does not differ from the ambient rules or pure customary law types.

## 6 Closing remarks

This closing section suggests two important research avenues 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 institutions in legal history and their superseding with more “rigid” or “formal” modes of social organization. Second, we suggest that the framework can be used to address the problem of the viability of governance by spontaneous institutions, as opposed to state-made and state-administered social order.

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 customs available in documents

like the Bible (e.g., Parisi et al. 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 custom declined over time, giving way to other sources of rules and social order (Van Caenegem, 1988). This general tendency has been documented in many case studies (e.g., Kadens, 2019; Masferrer, 2019; Thompson, 2015 [1992]; Assier-Andrieu, 1983), and the process seems to continue today. As Epstein (1998:579) 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.” In the European context, the gradual displacement of spontaneous institutions was a multi-step process. Its steps include, but are 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 powers (see, e.g., Glenn, 1997; Dalhuisen, 2008).

The gradual qualitative transformation of law has not been limited to sources of rules (custom *versus* explicit provision of rules). More broadly, the process comprises the departure from “spontaneous” institutions in all three dimensions identified in the preceding sections. For example, Schauer notices that the past two centuries have been marked by a conspicuous centralization of law enforcement capabilities:

“[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.” (Schauer, 2015:44-45)

Likewise, Hadfield and Weingast (2013), Carugati et al. (2015), and, in the international context, Ginsburg and McAdams (2004) describe historical case studies of the emergence of centralized rule-interpreting bodies in environments of loose and ambiguous *de facto* rules. Josselin and Marciano (2002, 2005), as well as Rossi and Spagano (2018), offer several economic rationales that explain this institutional transformation in Western Europe.

The suggested law and economics interpretation of this problem suggested in this paper is relatively simple. The journey from spontaneous institutions to the relative centralization of social control can be separated into three parts: (i) the decline of “implicit” rules, (ii) the centralization of enforcement, and (iii) the solidification of third-party coordination. Any explanation for the qualitative changes in dominant forms of social control should seek to elucidate these three distinct phenomena.

The second topic concerns the viability of governance by spontaneous institutions. Many classically liberal or libertarian political philosophers consider such governance 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 the law is viable and desirable. The fascination with “stateless” law is often visible already in the titles of books, papers, or chapters, such as “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” (Hadfield & Weingast, 2013), or “The Laws of Lawlessness.” (Leeson, 2009).

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 human interactions (e.g., Friedman, 1989 [1973]; Benson, 1990; Kinsella, 1995). When justifying this position from the law and economics perspective, researchers rely on theoretical models and invoke numerous case studies, both historical and contemporary (see, Powell & 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 umbrella terms used to denote such alternatives, such as “private ordering” or “private legal orders,” cover, in fact, a broad array of various institutions (Katz, 1995). It is far from obvious how they are related to each other and why they should be considered elements of a single category. Yet they all used by the critics of state-centric legal systems to illustrate their argument.

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 rules-based governance can gain the clarity that it is currently missing. In other words, the typology developed in the paper can be a useful tool for future normative debates about the law from the classical liberal or libertarian standpoint.

All in all, the primary ambition of this paper was to conceptually organize the mosaic of law and economics research on spontaneous institutions. It is difficult to deny that notions like “spontaneous ordering,” “private ordering,” “non-legal institutions,” “informal institutions,” “customary rules,” “laws of lawlessness,” and many similar ones have spread throughout the academic literature. While they tend to be properly defined in every piece of research where they happen to appear, the sheer amount of accumulated scholarship makes the connections between them unclear. Do they constitute a single body of research? To what extent are they related, and how?

The typology developed in the paper sketches an answer to these questions. Given the vast volume of existing literature, delivering an all-encompassing picture of the field is implausible. However, the classifications outlined in this paper may hopefully improve its understanding from the law and economics perspective. It transforms the variety of approaches and perspectives – the very source of internal fuzziness and opaqueness within the field of spontaneous institutions taken as a whole – into a classification tool. This tool is shown to be helpful in seeking structural similarities and differences between various institutions considered, for one reason or another, to be spontaneous.



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