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From Custom to Law – Hayek revisited

Guido Rossi* and Salvatore Spagano**

The present paper combines legal history with economic theory so to explain the passage from custom to law. Economists have usually explained the shift from customary to statutory law (that is, from spontaneous to formal rules) either in terms of contractualism or evolutionism. In the first case, law is the only efficient solution for a Hobbesian-like immanent social conflict. In the second case, customs do create an efficient enough equilibrium. Law comes on a later stage just to formalise an already accepted rule, vesting the custom with a formal status. Neither theory, however, is fully able to explain the transition from custom to law. One struggles with the very acceptance of customs in the first place. The other fails to provide a satisfactory explanation of the passage from custom to law. The present work seeks to reconcile the two theories by looking at the economic advantages of statutory law over custom. Unlike the first theory, it does not deny that customs may produce a relatively efficient status, but it seeks to explain why, at a certain point, customs were considered as inadequate and statutory law became more desirable. Our answer lies in the publication of written rules, for the presumption of knowledge it entails. Presumption of knowledge of the applicable rules is one of the elements that (oral) customs could not provide to contracts. Although somewhat neglected in many studies on customs and legislation, publication is a crucial element for our understanding of the passage from spontaneous custom to positive law.

The work shall first introduce the passage from customary to statutory law in both legal and economic theories. Then, it will analyse the deep symmetry between the number of agents involved and the number of transactions on the one hand and the progressive replacement of customs with statutes on the other. The conclusions of such an analysis will be used to prove the crucial role played by the presumption of knowledge, which is perhaps the missing link between different economic theories on customs and law.

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1. Introduction

Widespread knowledge of ‘due behaviour’ allows to cope with future events with sufficient foreseeability. Some behaviour patterns emerge spontaneously, others are legally imposed. Whatever their origin, be it spontaneous or prescribed, rules improve exchange efficiency and so the welfare of the agents involved therein. These two kinds of rules derive from two cultural approaches, and ultimately from two different legal policy options. The scholars who investigate such rules may be grouped (oversimplifying a good deal) in categories ranging from contractualists to evolutionists. Contractualists see rules as means to an end.¹ Evolutionists consider

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¹ McCormick – Tollison (1981); Voigt (1997); Buchanan (1990; 2006); Buchanan – Tullock (1965); Voigt (2011).

rules as spontaneous phenomena, whose success and diffusion depends on their prevailing over others.² As no-one planned a spontaneous rule, so nobody can amend it: arbitrary changes would entail unforeseeable consequences. Spontaneous rules therefore result, so to say, in an equilibrium lacking of any sense of direction. They do not aim to achieve a certain result, to fulfil a particular task. Much to the contrary, legally imposed rules envisage a certain balance between the parties in order to achieve a given purpose.

The present work shows how both kinds of rules share the common element of efficiency (the former as their cause, the latter as their purpose), and it envisages their possible integration by looking at the diffusion of behaviour mechanisms. Firstly, this work introduces briefly the two extremes of the economic literature on the subject of collective behaviour regulation. Secondly, it looks at Hayek's problem on the conditions requiring the shift from spontaneous to imposed rule, and it argues that the main variable depends on the number of people involved. Thirdly, and lastly, it provides some legal examples in support of such an argument.

2. Efficient rules: short overview of evolutionism and contractualism

2.1 Spontaneous rules

Frederick von Hayek paved the way for a theory of law understood as the unintentional result of the pursuing of individual aims. Hayek's analysis of the law moves from the problem of the nature of the *order* which regulates human institutions:³

Classical Greek was more fortunate in possessing distinct single words for the two kinds of order, namely *taxis* for a made order, such as, for example, an order of battle, and *kosmos* for a grown order, meaning originally 'a right order in a state or a community'

Hayek's critique of the legitimacy of 'made orders' moves from the rejection of the tendency to interpret regular behaviours as the product of a mind at work. Instead of considering regular conducts as the result of '*taxis*', he argues, it is necessary to look at them in the same way as Darwinian scientists re-interpreted natural sciences:⁴

The theory of evolution proper provides no more than an account of a process the outcome of which will depend on a very large number of particular facts, far too numerous for us to know in their entirety, and therefore does not lead to predictions about the future

Just as in nature, so in law evolutionism may only help understanding the process that has taken place, but not to amend it.⁵

² Axelrod (1986); Sugden (1989); Binmore (1998); Gintis (2000); Ostrom (2000); Hodgson (2003); Richerson – Boyd (2005); Aoki (2007).

³ Hayek (1983, p. 37), emphasis in original.

⁴ Hayek (1983, pp. 23-24).

⁵ Hayek (1983, p. 164), emphasis in original. Some hints in the same directions are already to be found in Adam Smith. When commenting Hume's division of labour, Smith argued that 'This division of labour, from which so many advantages are derived, is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion' Smith (2006, p. 12).

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

Evolutionary process is blind. Chance and need alone move it. While it ensures the survival of the more apt rule, evolutionism does not necessarily lead to the best one. Provided such best rule existed, it is well possible that it never materialised. It might just never had the *chance* to appear. Behaviour patterns appear spontaneously and spread themselves. It is possible to track their origin and their cause, but not their end, for they structurally lack of any aim. Rules aim at something only when devised by some authority. Rules assert themselves: free interaction of individual behaviours, each looking after its own benefit, results in a spontaneous order. Only then the authority bestows its approval to that order, sanctioning it as lawful.⁶

Factual observance of some rules no doubt preceded any deliberate enforcement

2.2. Imposed rules

Imposed rules lie at the other extreme of the economic literature on collective behaviour regulation. Although contractual law-making (which results in imposed rules) stands in clear opposition to spontaneous legal evolution, they both share the same methodological individualism. The different approach depends on the possibility of *choosing* a law. Such a choice presupposes the full understanding of a legal system. For Hayek (and, with him, evolutionary scholars) this is not possible. For Buchanan and the contractualists it is both possible and necessary.

Buchanan moves from the same starting point as Hobbes – mistrust leading to social unrest.⁷

a natural distribution will emerge from actual or potential conflict. [...] In attaining his share in this natural distribution, each person finds it necessary to invest effort (time and energy) in predatory and/or defence activity

For Buchanan complete lack of social unrest is unattainable. Paucity of resources and absence of laws (or of enforceable laws) would necessarily lead to conflict. The only possible solution is the forcible imposition of rules, so to correct and amend spontaneous behaviours.⁸ Constitutional Economics is ultimately the research of the most efficient rule to order social behaviours. Contractualism and evolutionary theory both ultimately stem from the same individualistic methodology, and yet they reach entirely opposite results. While contractualism seeks to improve the original (and, in its view, highly inefficient) spontaneous order, evolutionism denies the very possibility to amend it. At first sight the two theories appear one the nemesis of the other. They both move from extremely aprioristic positions, irreconcilably distant from each other. The present work would suggest the contrary – contractualism may be considered as complementary to spontaneous law-making.

⁶ Hayek (1983, p. 96).

⁷ Buchanan (2006, p. 28).

⁸ Cf. Buchanan (1990).

3. A third way

Surprisingly enough, Hayek did appreciate the merits of intentionally amending spontaneous rules. He allowed such a possibility, but markedly narrowed its scope:⁹

The fact that all law arising out of the endeavour to articulate rules of conduct will of necessity possess some desirable properties not necessarily possessed by the commands of a legislator does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an *impasse* from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. [...] The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation

The above passage might look somewhat perfunctory. In a few lines Hayek allowed what he had strongly denied throughout his entire legal theory – the legitimacy and the merits of imposed rules. Moreover, Hayek does not explain what such an ‘impasse from which [spontaneous law-making] cannot extricate itself’ may be, nor even the desirable speed at which the system should overcome it. Furthermore, Hayek does not say what kind of authoritative remedy should be applied, and what conditions should accompany the remedy itself. All such questions find a clear answer in the contractualist theory. And yet Hayek is silent on each and every of them. His silence depends on his reluctance to acknowledge expressly the need to support spontaneous rules with imposed ones. Reluctant as he is, Hayek confines the possibility of deadlocks in the development of spontaneous legal order to a few lines in which he considers them as possible but highly improbable. And yet, the possibility of such deadlocks betrays the limits of Hayek’s own theory, or at least disproves its self-sufficiency.

Our question is when exactly the State ought to intervene in a spontaneous order, when it should change its attitude – from a negative duty (duty not to interfere) to a positive one (duty to intervene). Hayek leaves the question unanswered, ducking entirely the problem. He merely acknowledges the possibility that spontaneous development might lead to undesirable results. If this happens, it is desirable that the authority create laws. But when does it occur, and why? And what should the features of such a legislative intervention be?

The present work argues that efficiency valuation between spontaneous and imposed rules should also take into account the relationship between number of people and the speed at which a rule spreads. It is submitted that there is at least a quantitative variable of spontaneous development which might require authoritative intervention for the sake of efficiency: the number of individuals affected by the rule. With the increase of agents, spontaneous order tends to become inefficient. The probability that this might happen increases with the rise in number of the agents operating within that order. When this occurs, imposed rules become desirable. There are two reasons for this. Firstly, the increase of the recipients of a rule entails a similar increase in the time needed for the last of such recipients to become aware of the rule. This may result in long delays for the rule to be operative and to regulate exchanges. The

⁹ Hayek (1983, p. 96), emphasis added.

outcome is a significant loss of wealth. Secondly, it is well possible that the spontaneous order would produce several rules for the same situation, and not just one. And yet a single rule for each kind of transaction is more efficient than a plurality. The more people in a group, the more the chances of a plurality of rules for the same situation. Obviously enough, this plurality of different rules would significantly decrease the total welfare. Those individuals who follow a same rule extract the maximum benefit from exchanges among themselves. Those who follow different rules, on the contrary, will have to suffer additional costs to coordinate themselves in order to be able to exchange.

Length of time for a rule to become known to all the members of a group and potential conflict among several rules are probably the reasons for Hayek's 'impasse'. When considerable time is needed for a rule to be known within a group, and more rules 'emerge' to regulate the same case, then an intervention of the authority is needed to impose the same rule to all the members of the group. It is therefore reasonable to envisage some threshold in the number of individuals within the group. When their number reaches the threshold, the costs of the 'impasse' might exceed the advantages of spontaneous development of rules. It is then that imposed rules would become efficient, for a simple cost/benefit valuation.

Law lies in between evolution and authority. Law reacts to Hayek's *impasse* with the publication of a rule. Publication is often neglected in orthodox legal theory, but it is crucial to understand the passage from spontaneous to imposed rules in the development of a legal system. Publicising due behaviour renders it *public* – that is, presumptively known to all recipients in the moment of its publication. Obviously, a similar presumption could not arise within spontaneous legal evolution, for it is plainly false. Imposed law presumes knowledge of its rules in that it does not excuse their ignorance. But this is precisely the advantage of publication: to impose knowledge of due behaviour to all agents within a system instantaneously. This way imposed law overcomes the *impasse* described (in a rather obscure way) in Hayek. The advantage of publication does not mean that imposed law is always preferable to spontaneous law. Rather, imposed law is more efficient than spontaneous law when a cost-benefit valuation would yield a Paretian improvement for the commonwealth.¹⁰

4. Custom as a (spontaneous) source of law

In legal terms, Hayekian spontaneous order is nothing but customary law.¹¹ The following pages provide some empirical confirmations of the primacy (in time) of spontaneous custom over positive law, and most of all of the reason for their combination. When and why did spontaneous behaviour patterns (i.e. custom) give way to imposed rules (i.e. positive law)?

¹⁰ Obviously enough, no such valuation would be needed in case of conflicting spontaneous rules and infinite temporal horizon. In that case, imposed law would yield a Paretian improvement whatever the cost to adopt it. This cost would be compensated by the permanent gain of advantages which would never be achieved otherwise.

¹¹ We are referring to customs regulating cases not regulated by the law (*consuetudo praeter legem*). Other kinds of customs may regulate situations already provided for by the law, hereby clashing with it (*consuetudo contra legem*) or endorsing it (*consuetudo secundum legem*). Such other kinds of custom however presuppose the existence of positive law, and so do not represent Hayek's idea of spontaneous order which develops in its absence.

4.1. Custom in State law

Custom is the only source of law not produced by the lawmaker which is acknowledged by the legal system. National law allows custom but places it into a residual category, the lowest grade within the legal hierarchy.¹² Customs grow up spontaneously – that is, without the control of the authority. As such, modern legal systems, based as they are on positive commands, seek to limit the scope of custom. In modern law, custom applies only to situations in which no legal command (either of statutory or jurisprudential nature) can be found.¹³ What is important to our purposes is that such customs, narrow in scope as they may be, are acknowledged by the legal system *after* their making. A legal system may acknowledge some usages and lend them some (limited) authority – just enough to compensate for the absence of a formal rule, so to ‘fill the gap’ in the system. But the usage pre-exists to the legal system which acknowledges and accepts it. Some customs have been in existence for a very long time, going through different historical periods and so different legal systems. In such cases, the longevity of the custom probably depended on its acknowledgement (and so enforcement) by the different legal systems: enforcing the custom meant also sanctioning its violation.¹⁴ Even within purely ‘contractual’ systems such as the modern legal systems, therefore, some room is left to spontaneous regulation of collective behaviours. Within such systems, customary law is the link connecting spontaneous and imposed rules.

4.2 Custom in Public International law

Marginalised as it is by State law, customary law enjoys a pre-eminent rank when it comes to regulate the interaction between different States – that is, in Public International law.¹⁵ International custom, as unwritten law, is often opposed to the ‘law of the treaties’, the ‘contractual’ side of International law. Whenever a State has not underwritten a specific international treaty, or not treaty regulates a specific issue, international custom fills the gap in International law. At the same time, the exponential growth of the number of international treaties and international institutions over the last century, coupled with the unprecedented increase in the number of active international players, has progressively reduced the scope for international custom. The growth of international relations and the increase in scope and aims of supranational organisations both entail a higher need to plan and foresee

¹² Apparently, such a statement begs the question about the customary nature of common law. The issue is too complex to be dealt with in the present essay. Suffices to say, to our purposes, that the association common law – customary law is ambiguous at best, if not just wrong. For a first introduction on this centuries-old ambiguity see Cromartie (2007), Ibbetson (2007) and moreover Baker (2001, pp. 59-90).

¹³ For the role of custom in primitive legal systems see (Elias, 1956; Hoebel, 2006). Obviously enough, these studies apply the term ‘custom’ in a very different context. And yet, they seem to strengthen the impression that the scope of custom is inversely proportional to the advancement of a legal system. The less sophisticated the legal system, in other words, the more the room for custom, and vice-versa.

¹⁴ On the necessity of sanctioning the violation of a spontaneous custom see the debate between Robert Sugden and Ken Binmore (Binmore, 1998; Sugden 2001; Binmore 2001).

¹⁵ For instance, Article 38(1) of the Statute of the International Court of Justice states that ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom, as evidence of a general practice accepted as law’. See further Bederman (2010, pp.135-167).

behaviours. In such circumstances it is but reasonable for a non-written law to progressively withdraw in favour of a written legal system.

All this makes International law a good example of what argued in this paper. Because of the limited number of agents, the initial relations between States develop spontaneously and tend to crystallise into customary rules. Later on, the increase in the number of participants and the consequent risk of developing conflicting customs require some degree of coordination among spontaneous rules. This can only be achieved by agreement and so contractually.

4.3 Mercantile custom: London and Antwerp in the sixteenth century

Contemporary examples of customary law used by large groups are relatively few. There are too many agents, and exchanges are easy, immediate and virtually without borders. Going back in time, however, it is easier to find examples in support of the primacy (in time) of spontaneous legislative process. In such examples authoritative interventions occurred only because of external circumstances, which made economically convenient to move from custom to law.

Our example is about insurance customs. Accurate enough data are available only from the late fifteenth century, which signalled also the beginning of the great codification of customary law.¹⁶ During the late Middle Ages customs were progressively written down. Writing down customs meant crystallising a rule so far held as compulsory but never properly formalised. It fulfilled the very same function as the one we are arguing: entailing the presumption of knowledge. ‘Publication’ originally meant exactly what the word suggests: making something public. As such, it required just printing out and spreading a document, reading aloud its content in a crowded square, or posting it up in busy venues.¹⁷ A particularly interesting example is the insurance code of the Spanish Consulate in Bruges. The Code was published (that is, printed *and* circulated) in 1569, and it was written both in Spanish and in French so to ensure a wider audience. At the end of its 147 articles, the Code read:¹⁸

in order that our subjects and any other who want to know the content of such ordinances may know, read and understand them, it is ordered that the above ordinances be printed in our Spanish language and be translated and published in the French language at the same time. Upon printing the ordinances, they shall be at disposal of this nation [i.e. the Spanish merchants within the Consulate], so

¹⁶ The most famous case is that of northern France, which started with the *Ordonnance of Montil-lez-tours* of 1454 (although it was completed only in 1583).

¹⁷ ‘Laws and edicts must be promulgated and published in a public venue, through the crier’s voice [...] Sometimes with a horn, as in Naples and in the District of Paris [...] At the sound of the horn the people gather together, and then the law is published, so that in the city of Naples laws and pragmatics are published in a large square and before the nobles, where a large concourse of citizen and people gather together. Hence, ecclesiastical constitutions and the like are often published in solemn Masses, during the preaching, and on market-days [...] the text of the law is posted up in crossroads and in the main places of the city [...] before everybody’s eyes, so to be read out. Borrello (1621, pp. 413-414, nn. 3-4, 6-7), our translation.

¹⁸ Verlinden (1950, p. 126), our translation, emphasis added. The Spanish text, identic to the French, is published by the same Verlinden (1947*b*, pp. 179-180). See also the Preamble to the Ordinances: ‘We, the Consuls, desiring that our subjects suffer no more frauds or abuses for lack of understanding of those usages and customs, have deemed good [...] to establish and write down the above ordinances and institutes, so that from now on our subjects may know and understand how insurances work, both when they underwrite and when they take out a policy in this city of Bruges’, transcription in Verlinden (1950, p. 60), our translation; Spanish text in Verlinden (1947*a*, p. 162).

that anyone may ask me, the Secretary, or my successor, for a copy thereof [...] To make sure that our subjects have time enough to be aware and duly informed, it is ordered that these ordinances will be in force on the first day of January of the year of our Lord Jesus Christ's Nativity 1569 [1 January 1570]

Commercial customs were usually written down by mercantile corporations, the *universitates mercatorum*. Public authority often ratified such transcriptions.¹⁹ Insurance customs, however, had been used for some centuries. Why transcribing so many of them right in that period? While we cannot put forward strictly causal relations, we might offer a conjecture. The rapid increase in publication of mercantile customs starts with the intensifying of mercantile (particularly maritime) exchanges and the increase in the routes' length.²⁰

From the late fifteenth century Antwerp grew exponentially, to the point of becoming the main commercial gateway of northern Europe during the sixteenth century. Antwerp's growth attracted an increasing number of merchants from many different areas – and so applying different customary rules. In a short while, the presence of several customs incompatible with each other became less and less sustainable (that is, too expensive in terms of transaction costs) for the mercantile community at large.²¹ The above-mentioned insurance code of the Spanish Consulate of Bruges (whose members were mostly resident in Antwerp) explains that:²²

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

It might be interesting to note how the intensification of mercantile exchanges and the increase in the routes' length both grew with a similar, and extremely rapid, trend right during the time in which oral customs gave way to written ones. In writing down their customs, merchants had the chance to select them, so to decide which one to abide. Among merchants, abiding by the rules was strictly observed because of the importance of good faith in transactions. Invoking personal ignorance of a document printed, distributed and most of all posted up in venues institutionally used for exchanges (which were already called 'bourses') was universally held as contrary to good faith. Such documents, therefore, fulfilled a three-fold task: coordinating, spreading and legitimising the expected behaviour.

It is not only the increase of agents and the consequent growth of exchanges that strain a custom. As mentioned above, spontaneous order may not be able to solve conflicting rules. This deadlock is more frequent when different and already

¹⁹ See for instance the Ordinances of the Consulate of Burgos (1538, 1546 and 1582), of Seville (1556), and of Bilbao (1520, 1531 and 1560).

²⁰ Cf. first of all Braudel (1966, vol. I).

²¹ Goris (1925, pp. 59-67, 178-184); Genard (1882, pp. 195-196); Guiard (1972, vol. I, pp. 121-127). Already in 1550-51 the Spanish merchants residing in Antwerp sought to separate themselves from the general Consulate of Bruges in order to publish their own customs and solve (by contractual means) the growing *impasse*. Archivo General de Simancas, Estado, leg. 536, transcription in Coronas Gonzales (1984, p. 388).

²² Prologue to the Ordinances of the Spanish Consulate in Bruges of 1570, transcription in Verlinden (1950, p. 60), our translation. Spanish text transcribed in Verlinden (1947a, p. 162).

developed customs meet. The answer to such a Hayekian *impasse* has often been contractual, and it is frequently attested in legal proceedings.

A typical case was the *enquête par turbe*.²³ The *turbe* was a gathering of the most representative members of a community (originally, the elders), summoned to ascertain some particular facts so as to solve a legal dispute. The *turbe* is a very ancient practice,²⁴ and its link with the modern jury is quite probable. Among merchants, the importance of the *turbe* grew proportionally to the demand for clarity. Whenever it was not clear which rule to apply to a particular transaction, a group of merchants (usually the most experienced and trustworthy) gathered together so to find out the customary rule applicable to the case. Finding out the custom often meant in fact choosing in between the customs invoked by the parties. Thus, often the merchants gathered in the *turbe* ended up deciding whether, according to their own experience, the applicable rule was the one invoked by the plaintiff or that supported by the defendant. This way the conflict among customs was solved in favour of the customary rule used by the majority among the community.²⁵ In Antwerp, the first evidence of mercantile *turben* dates back to the late fifteenth century,²⁶ and so right at the beginning of the great expansion of the city. This seems hardly fortuitous: attracting merchants of different regions and nationalities meant also attracting different and often opposite customs. Hence the need to clarify the applicable custom – that is, deciding which rule to apply for a certain kind of exchange within a given community.

Turben were expensive, first of all because of the organisational costs they entailed. It was not always possible to gather a *turbe* for each single dispute. Another means to achieve the same result was to rely on the interest of the parties to a dispute to prove their case. In this case it was up to the parties to gather evidence about the applicability of a custom within the community, not to the community itself. In the 1570s London, such a means was called (in a somewhat derogatory way) *perrera*. *Perrera* was a different procedure to reach the same end as the *turbe*: contractual coordination of conflicting usages. In case of dispute on the (customary) applicability of a certain clause in a mercantile contract, each party sought to obtain the highest possible number of underwritings from fellow merchants declaring that they knew of the clause and used it routinely (that is, customarily), or that they never heard of it.²⁷ Obviously enough, the *perrera* shows the most common downside of any contractual approach: self-interest. Sometimes, a merchant underwrote a *perrera* not because he was truly familiar with the clause and used it himself, but just to help out a colleague who would then owe him a favour. It was well possible that the underwriter would have needed some signatures in support of his own contract later on. Signing a false *perrera* was therefore a good way to ensure support for one's own future disputes.²⁸ This 'exchange of favours' verged into the absurd when a same merchant underwrote

²³ Waelkens (1985, pp. 337-346).

²⁴ Howard Bloch (1977, pp. 121-122).

²⁵ Such a majority could be a simple majority, a qualified majority or even unanimity according to time and place. Although *prima facie* not strictly necessary, it would seem that the *turbe* procedure could be invoked by the party even in case of notorious custom. Poudret (1987, p. 71).

²⁶ de Ruyscher (2012, pp. 7, 12-13).

²⁷ The procedure of *perrera* is minutely described by an anonymous London merchant: British Library, MS Additional 48020, fol. 348r-348v (very probably written in January-February 1577).

²⁸ 'These days men are ever assured who use always do for me and I will do for thee', *ibid.*, fol. 348v. The same problem is attested in the insurance Ordinances of the Consulate of Bilbao of 1560, ord. 56, text in Guiard y Larrauri (1972, p. 615).

in favour of both parties' *perreras*, this way stating something and its opposite at the same time.²⁹

5. Conclusions

The present paper suggested two possible reasons for the inefficiencies of normative autopoiesis for which Hayek argued in favour of a legislative solution: the elevated number of agents and the resulting potential conflict between spontaneous rules. The speed at which a rule spreads among the involved agents is a crucial factor to assess whether an imposed rule (law) is more efficient than a spontaneous one (custom). Imposed rules can rely on publication and the ensuing presumption of knowledge. Customary rules cannot. It is therefore possible to suggest a different approach to customary law. While contractualists consider State law as the crystallisation of collective will, the most radical evolutionaries regard it as an undue constraint on the liberty of pursuing individual aims. Between these two extremes there is however room for a third way, seeking to reconcile them. Hayek's position is the actual starting point of collective rules, stemming from spontaneous interaction of free agents: customary law. If an objection has to be raised to Hayek's theory, it lies in his extremely narrow views about the later stage, that of legislation. Hayek does not leave enough room to law, for he considers it as a prevarication against the free will of individuals, their freedom to *individual* self-determination. The opposite is true: legislation can well increase the efficiency of individuals' self-determination, regardless of any redistributive issue. It is therefore possible to slightly revise his theory on the spontaneous formation of rules. The reason for the possible *impasse* of customary law lies in the excessive length for the rule to reach the last individual within the community, and in the potential conflict among uncoordinated usages. To be more efficient than imposed rules, spontaneous rules must spread rapidly enough so that the loss of potential welfare does not exceed the cost resulting from introducing, publishing and enforcing the imposed rule.

Some empirical evidence seemingly in favour of our thesis was found in both contemporary and historical legal systems. As contemporary examples, we looked at the (residual) role of custom in State law, and most of all at Public International law. There (much to the contrary of State law) custom comes before law. As an historical example, we hinted at the passage from oral to written customary law. Such a passage is of particular importance, for it attests a *spontaneous* effort to improve the efficiency of a custom. The authority's intervention was sporadic but already present. It consisted in the approval of the redaction of the custom. Such approval may well be considered as a forerunner of modern authoritative law-making, held by contractualists as necessary and irreplaceable.

The pitfalls in the evolution of spontaneous behaviours require the intervention of imposed law for efficiency's sake. Imposed law solves such pitfalls through an instrument too often given for granted and so neglected: the publication of due behaviour. From the town crier of old to the modern Official Journals passing through the news-sheets, publication renders due behaviour both intelligible and uniform. When the number of agents increases too much, or their interactions become too fast and frequent, spontaneous coordination is too expensive and so inefficient. This is when imposed law takes over.

²⁹ British Library, MS Additional 48020, fol. 348v.

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