

RESEARCH ARTICLE

Economists or lawyers? Who is better at designing institutions?

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Abstract

What can economists and lawyers contribute to the stock of useful knowledge for designing institutions? How do their contributions differ? I argue that law and economics generate two complementary but distinct types of knowledge. At its core, legal knowledge is participatory and internal to law's practice, while economic knowledge is observational and external. Drawing on Michael Polanyi's concept of 'intellectual orders', I propose that economics as a social science and law as a primarily practical profession each rely on complex institutions to generate their respective types of knowledge. The comparative analysis clarifies the potential and limits of using economics for institutional design, the role of law as a knowledge-generating profession, and principles for intellectual collaboration.

Keywords: dispersed knowledge; institutional design; law; Michael Polanyi

Introduction

Both economists and lawyers can contribute to the stock of useful knowledge for designing institutions. How do their contributions differ? What is the difference between the types of knowledge they produce? And what explains the difference? Answering these questions can help economists better understand the potential and limits of their institutional knowledge. Some 60 years ago, Hayek wrote that the design of institutional details 'presupposes concern with concrete cases, which is more the province of the lawyer than of the economist', and 'it is to be regretted that economists have on the whole contributed little to the solution of these problems [of institutional details]' (1960: 229–230). Economists have since become much more concerned with the nuts and bolts of institutions. At the same time, many of them have become more aware of the limits of their expertise in 'getting institutions right'. However, self-reflection has not taken a comparative form. It is time to revisit the question of the comparative advantages of economists and lawyers in this respect. This is not to suggest that other professionals or laypeople cannot make important contributions. However, a systematic comparison can help both professions understand their respective capacity to produce institutional knowledge and the terms of effective collaboration.

One reason for the absence of comparative analysis has been a missing theoretical framework in institutional economics that covers the knowledge-producing processes of both a social science and a practical profession. While economics fits the first category, law is a more complicated case. Although it has its (quite ancient) academic discipline, most of its institutional knowledge emerges from legal practice. As I shall argue, *doctrinal* legal science differs from economics as social science precisely by its

being derivative of and symbiotic with legal *practice*. Academic jurisprudence can therefore be viewed as part of the profession of law.

I build on Michael Polanyi's concept of 'intellectual orders' to propose a theoretical framework. I define an intellectual order as a complex and consistent set of institutions dedicated to generating a specific type of knowledge. It supports processes of consultation, persuasion, and competition. Such a theory of 'intellectual orders' is a comparative *institutional* theory of knowledge production. I interpret law and economics as two distinct intellectual orders and explain how their own institutionalised processes influence their ability to generate different types of knowledge for designing institutions.¹

My main comparative thesis is that (i) in law, as a primarily practical profession, the main processes of knowledge generation are centred on actual cases of institutional problem solving, the paradigmatic case being a legal dispute. The cumulative result is systematic, practical knowledge about and for institutions that are *participative and internal to their practice*. By comparison, (ii) economics as social science is centred on publications as forms of analytical reflection. It is geared primarily to producing scientific knowledge that is *observational and external to the practice* of the institutions studied. These ideal types of knowledge define the comparative advantages of law and economics for designing institutions. The gap between law and economics can be narrowed if one moves towards the core knowledge type of the other.

I proceed in three steps. As a starting point for my analysis (*The knowledge problem of designing institutions* section), I review the debate on 'institutional calculation' (Boettke and Candela, 2015): What types of knowledge are needed for designing institutions and what economists can contribute to them? By institutions, I mean 'the rules of the game in society or, more formally, the humanly devised constraints that shape human interaction' (North, 1990: 3). I focus on how four prominent scholars have reflected on their own involvement in institutional design: Dani Rodrik, Alvin Roth, Esther Duflo, and Elinor Ostrom. I identify a common thread in their thinking: *scientific* knowledge needs to be combined with *dispersed* social knowledge for the successful designing of any institution. I argue that this approach neglects a third category of knowledge for institutional design: *systematic practical* knowledge that is often generated, in its most developed form, by practical professionals, such as lawyers, accountants, or managers.

As a second step (*The legal profession and institutional design* section), I show the importance of this type of lawyer-generated knowledge for designing legal institutions. In the standard view of economics, law is a set of rules and enforcement mechanisms. However, law is also a complex process of rule articulation. A small strand in economic thought understands this aspect of law but stresses its spontaneous, non-deliberate nature and downplays the conscious efforts of lawyers in designing legal rules. Drawing on theories of jurisprudence, I argue that much of law is best understood as a continuous process of marginal rule-designing. This is why lawyers continuously use and generate knowledge for institutional design.

Third, I turn to the question of comparing the nature of institutional knowledge produced by economists and lawyers (*A comparative institutional theory of knowledge generation: intellectual orders* section). My underlying assumption is that the type of knowledge and the institutional context of its production are linked intimately. I introduce the concept of 'intellectual order' to grasp this linkage. Taking it from Michael Polanyi, who briefly sketched it, I develop the concept into a comparative institutional theory of knowledge production that covers practical professions, social sciences, and other intellectual communities. I then apply the theory to compare law and economics as two intellectual orders. I show in detail how the distinctiveness of the knowledge they produce for institutional design is closely tied to the different processes of its generation. The analysis highlights the limits of the two fields, but also the possibilities for their convergence and collaboration.

The article contributes to several strands of literature. First, it tries to move forward the debate on 'institutional calculation' (Boettke and Candela, 2015) by introducing systematic practical knowledge

¹In sociology, a broadly related line of inquiry considers how expert knowledge emerges in various social domains of expertise (Collins & Evans 2007). My analysis is more explicitly comparative and institutional.

as a third category besides dispersed and scientific knowledge (Hayek, 1945). This also allows for a more nuanced view of what economists can contribute to designing institutions. Second, it builds on the institutional economics of science (Stephan, 1996; McQuade and Butos, 2003; Tarko, 2015) but expands it with a comparative theory that covers both scientific fields and practical professions. The latter are usually considered in economic theory as organisations that provide collective goods and lower transactions costs (Shaked and Sutton, 1981; Ogun, 2000). However, professional communities also support intellectual debates about goods, markets, and institutions (Mike, 2017). In this vein, I explicate their role in generating institutional knowledge. Third, as concerns the case of the legal profession, a strand in economics views lawyers as being engaged in an ongoing process of rule articulation (Hayek, 1982; Hadfield and Weingast, 2012). My analysis offers a richer picture of how lawyers generate knowledge for rules. Last, I contribute to the literature that applies Polanyi's insights on spontaneous, polycentric orders and institutions. While most studies focus on the exegesis of his thought (Bíró, 2025; Butos and McQuade, 2017; Festré, 2021; Jacobs, 1999; 2015; Jacobs and Mullins, 2008; Mullins 2013;), I build on Polanyi's ideas to develop a comparative institutional theory of intellectual orders. In doing so, I take up the challenge of operationalising his approach for institutional analysis (Aligica és Tarko 2012).

The knowledge problem of designing institutions

The challenge of 'institutional calculation'

In the debate on socialist calculation, Mises, Hayek, and M. Polanyi showed that the idea that scientific calculation could direct myriads of individual decisions about production, trade, and consumption was wrong. The main reason is that economic activities rely mostly on dispersed local knowledge that is time- and space-specific, subjective, and often tacit. This realisation was one of the impetuses that led many economists to focus on the institutions or 'rules of the game' of economic life rather than allocative decisions within existing rules (Brennan and Buchanan, 1985; North, 1990). Thus, the analytical focus on institutions implicitly acknowledges the limits of what an academic economist or a policymaker can possibly know.

As both theories and empirical methods developed, economists became increasingly involved in designing or improving institutions themselves – from auctions and regulated markets in developed countries to fine-tuning policies in Africa. The results were predictably mixed. The knowledge problem has resurfaced on the institutional level and necessitates an 'institutional calculation debate' (Boettke and Candela, 2015). Its central question is 'How do individuals rationally calculate the institutional context for rational economic calculation itself?' (ibid: 6) At its heart, this continues an old debate since the Scottish Enlightenment about the possibility of designing an institution by any one mind, in contrast with the spontaneous evolution of traditions.² What is new is the massive development of the scientific tools of institutional economic analysis in recent decades. Economists who specialise in the institutional analysis may now be better equipped to design or improve institutions. But to what extent? What can they accomplish? And what are lawyers still better at? To answer these questions, we need to clarify (i) what types of knowledge are needed for designing institutions, and (ii) to what extent economists and lawyers can produce them. I review the state of debate among economists on these issues and then offer a critique of the emerging consensus.

How some prominent economists see the challenges of institutional design

I provide a brief overview of how four prominent economists, each with a distinct background, see the knowledge needs of institutional design and the potential of their work to contribute to it. While I acknowledge differences, I look for common elements in their reflections.

²For example, see the views of Hobbes and Bacon vs Coke and Hale as contrasted by Hayek (1982, Chapter 4).

Dani Rodrik, (2007) is interested in institutions that national governments can influence to support economic growth. He argues that economic science can identify the general institutional prerequisites of prosperous economies, but the actual institutions always need to be ‘context-specific’. Finding them must utilise ‘local knowledge’ and experimentation rather than abstract blueprints (Rodrik, 2007). Accordingly, an economic scholar has two roles, as suggested by the title of his book, *One Economics, Many Recipes*, and explained more fully in Rodrik, (2015). First, he engages in the ‘science’ of explaining general economic phenomena that include abstract institutions, such as property rights or contract enforcement. Second, he pursues the ‘craft’ of building models that are suitable for specific contexts.

Alvin Roth’s interests are very different, but his views on institutional design are surprisingly similar. As one of the pioneers who applied game theory to the design of regulated markets, he found that, compared to the rules assumed by game-theoretic models, actual market institutions involve much more context-specific detail. Their improvement often relies on historical knowledge of the specific market and ‘tinkering with new designs, based on early experience’ (2002: 1345). This experience led him to make a distinction that is similar to Rodrik’s. Roth distinguishes economic theory from what he calls design economics. While the former seeks to understand the general principles of economic interactions, the latter seeks ‘to further the design and maintenance of markets and other social institutions (2002: 1341). While an economic theorist is likened to a physicist, a designer is more like an engineer, who has ‘a responsibility for detail’ and ‘to deal with complications’ (ibid.) To succeed, he must also listen to people who will actually use the institution, such as physicians or public officials.

Esther Duflo accepts Roth’s distinction between the economist as a theoretical scientist and as an engineer but moves even further by suggesting a third role as a ‘plumber’ (2017). Institutional details and complications are so numerous and idiosyncratic that even careful, context-specific design is insufficient to get them right. Success requires continuous, hands-on involvement. Like Rodrik and Roth, she emphasises that ‘every INSTITUTION . . . is realized on the ground, through many specific local *institutions*’, whose numerous details and marginal changes matter (Banerjee and Duflo, 2011: 243, emphases in original).

Elinor Ostrom did not subscribe to the metaphors of society as machinery and of economists as mechanistic fixers of its problems.³ Nonetheless, her views on institutions share some important features with those of the preceding scholars. Extensive work on the governance of common-pool resources led her to distinguish between underlying design principles that characterise robust common-property institutions and their manifestations in hugely diverse, specific rules (2005: 255–288). She argued that design principles, distilled by theorists, ‘can be used as a practical guide for increasing the efficacy of groups, although local tailoring is usually required for their implementation’ (Wilson et al., 2013: 22). They are ‘not blueprints’ (Ostrom, 2005: 257); the appropriate goal is ‘a more effective blend of scientific information with local knowledge’ (Ostrom, 2005: 283).

Ostrom was more reticent about academic economists acting as practical institution builders (McGinnis, 2019). Instead, she forcefully argued that theory should explicitly account for the diversity and context-specific nature of institutions. Theory must acknowledge that (i) affected actors are capable of designing their own institutions, (ii) designing rules is rarely a simple analytical task, and (iii) organisation is often polycentric rather than centrally directed (2005: 237–240). A scientist ought to become a ‘tinkering craftsman patiently learning from trial and error and extracting knowledge from local uses’ (Labrousse, 2016: 298). As such, he will be able to give advice to local actors about how things may be done better through institutional change (Ostrom, 2005: 30–31; see also Ostrom, 2013).

Despite significant differences in these authors’ approaches, some common points emerge. All share the view that *institutions are best designed by combining scientific and dispersed, context-specific knowledge*. Institutions that govern similar social phenomena are comprised of some common general elements or design principles as well as context-specific manifest forms and details. Scientific knowledge relates primarily to the first component, while dispersed, local knowledge relates to the

³Labrousse (2016) provides an insightful comparison of Duflo’s and Ostrom’s epistemic views and methodologies.

second. For economists who engage in institutional design, a crucial question is how they deal with dispersed, institutionally relevant knowledge among social actors. On the one hand, it is a significant constraint on what economic analysis can achieve. On the other hand, *economists can and must find ways to combine scientific and dispersed knowledge.*

The missing element between scientific and dispersed knowledge

The prevailing view in economics about the knowledge requirements of institutional design retains the distinction between scientific and dispersed knowledge that Hayek initially developed for allocative decisions and applies it to institutional choices (Boettke and Candela, 2015). How can we define the characteristics of legal knowledge in this conceptual framework? While economists often emphasise the need to collaborate with other professionals, the nature of their institutional knowledge is rarely explored. Legal knowledge is not dispersed since it is largely systematised and formalised. It is primarily not scientific, either, as it is produced mostly in legal practice. The binary categories of dispersed/scientific seem inadequate. I propose to add a third category to grasp the special character of law: systematic practical knowledge.

It is worth returning to Hayek's original discussion. He defined 'scientific' knowledge broadly as 'knowledge of general rules' wielded by experts (Hayek, 1945: 521). Such a concept of 'science' extends well beyond academic scholarship. To contrast it with dispersed knowledge, he provides the following illustration: 'We need only to remember only how much we have to learn in any occupation after we have completed our theoretical training, how big part of our working life we spend learning particular jobs, and how valuable an asset in all walks of life is knowledge of people, of local conditions, and special circumstances' (522). While the knowledge imparted in vocational training concerns general rules and is organised and best wielded by experts, it is not necessarily scientific in a narrow sense. It is often systematic practical knowledge accumulated and transmitted by members of a practical trade or profession. The term 'practical' does not mean 'useful' here since scientific knowledge can be useful for institution building in many ways, as the cited economists attest. It is a descriptive term that refers to knowledge emerging from and tied directly to the practice of working with social rules.

Practical professions, such as lawyers, accountants, managers, engineers, and so on generate a large amount of systematic knowledge about and for designing institutions with which they are concerned. To appreciate their role, we need to take seriously the notion that real-life institutions are 'crafted' (Ostrom, 2005, 133). Craftsmen in the traditional sense of the word, such as jewellers, mechanics, or even plumbers, are not lone combinatorers of dispersed knowledge but belong to crafts, guilds, and trades. They partake in systematic, articulated bodies of knowledge. Similarly, there exist 'intellectual crafts' dedicated, mainly or partly, to designing and running institutions. The most ancient and probably most developed such craft is the legal profession. To some extent, all developed trades and professions generate systematic knowledge that pertains to the design of the institutions used by their members. They remain firmly rooted in practice even as they develop their own academic disciplines in aid of practice.⁴

Therefore, it seems helpful to distinguish three types of knowledge relevant to institutional design: dispersed, systematic practical, and scientific knowledge. While all three appear in both law and economics, I propose that the core type of institutional knowledge produced in economics is scientific, while in law, it is systematic practical knowledge. The epistemic cores of these two professions limit their potential contributions to institutional design and define their comparative advantages.⁵ I first

⁴Dekker and Kuchař (2024) apply the concept of 'knowledge commons' to the formation and interpretation of market rules by communities of market actors. However, they focus on the formation of knowledge as a by-product of market exchange. Professions could be thought of as highly advanced forms of community governance.

⁵Professional and scientific types of knowledge have their own tacit and dispersed components (see Section 4.1). Nonetheless, they are distinguishable from general, non-specialist dispersed knowledge in the Hayekian sense.

show the importance of systematic practical knowledge generated by lawyers. I then take up the main task of comparing this with the social scientific knowledge produced by economists.

The legal profession and institutional design

How important is the systematic practical knowledge produced by lawyers when it comes to designing legal institutions? In most theoretical economic approaches to law, there is little or no room for lawyers as designers of legal rules. I confront these theories and argue that the deliberate and conscious designing of rules is a fundamental and irreducible aspect of the complex phenomenon of law. I then address in more detail the many ways in which lawyers engage in designing rules. This requires a closer look at the nature of social rules, made possible by incorporating ideas from legal scholarship.

Three concepts of law in economics: rules, enforcement, and rule articulation

Much of economic analysis identifies law as a body of rules (Shavell, 2005: 397) and asks how certain given rules influence the behaviour of people who are subjected to them. The interest is in the *end result* of the legal process: what social rules are applied by courts or public authorities, and how people respond to these rules as they predict them. The process that leads to predictable legal rules remains a black box.

The box is opened when questions of enforcement are raised. Many take for granted that legal rules are determined and enforced by the state (Shavell, 2005) but realise that courts, administrative agencies, organisations of prosecution and policing can play diverse roles more or less efficiently ‘within the state’ in the enforcement of legal rules (Polinsky and Shavell, 2000; Pistor and Xu, 2002). Still, others point to the role of non-state actors in enforcing the law, such as market actors, communities, and formal private associations (Brousseau, 2006). In this perspective, the law is not seen simply as a body of enforced rules but as a special type of enforcement mechanism for social rules. For the ‘law as rules’ approach, the main question is: What are the rules, and what should they be? By contrast, the ‘law as enforcement’ approach asks: How are rules enforced, and how should they be?

Viewing law as a mechanism of enforcement hardly grasps the whole or perhaps even the greater part of its social reality. It is based on the implicit assumption that *finding and articulating* the appropriate rules for governing people’s behaviour is relatively easy, and the real difficulty lies in their enforcement. In fact, the application of a sanction may be easier than figuring out what the sanction ought to be. The articulation of rules is in itself a fundamental social function of law. Juridical decisions would play a role in clarifying social rules even if they were unenforced by a public apparatus. They provide disputing parties with common knowledge about clear classifications of right and wrong conduct (Hadfield and Weingast, 2012). At least since the *iurisperiti* and *praetors* of Roman law, a great deal of social effort has been put into the improvement of legal rules (Brundage, 2008). The development of a legal system is as much or perhaps even more about an improved articulation of a system of social rules as it is about the improved enforcement of that system.

Even if one takes the view of ‘law as an articulation of rules’ (Hayek, 1982; Hadfield and Weingast, 2012), as I do here, one need not accept that it involves – or should involve – the deliberate designing of rules. A strong current in economics argues that efficient law arises from spontaneous evolution rather than conscious design. The knowledge problem in law is usually discussed in terms of the relative ability of common law versus civil law or that of judge-made law versus codification to produce more efficient legal rules (e.g. Rubin, 1977; Hayek, 1982; Posner, 1986; Friedman, 2001). An extreme form of the argument in favour of judge-made law assumes that judges simply respond to incentives of the legal process without making any conscious effort to improve their decisions. Litigants’ differential efforts push courts to change precedents marginally in efficient directions, as if by an invisible hand (Friedman, 2001). In a somewhat more realistic version, judges are assumed to labour on establishing or improving rules but accomplish little with deliberate efforts.

Although unplanned evolution is certainly a key feature of law, it does not imply that conscious design is unimportant. As Hayek, (1982) acknowledged, the ‘gradual perfection [of rules of just conduct] will require the deliberate efforts of judges (or others learned in the law) who will improve the existing system by laying down new rules’ (96). Although a complex system of rules cannot be designed from scratch, *conscious* marginal contributions to the design process still matter. A closer reading of jurisprudential literature reveals a very broad range of lawyers’ actions that pertain to the designing of legal rules.

The nature of rules and the ubiquity of rule-designing in law

The main classical roles of lawyers are judge, advocate, and counsellor (Llewelyn, 1940). Consider adjudication first. Do judges design legal rules? It seems useful to examine judges where they have the least opportunity to design rules, for example, in civil law jurisdictions that restrict their function to ‘interpreting’ and ‘applying’ rather than ‘making’ law. To comprehend what judges do, we must have a clear understanding of the nature of social rules.

Social rules in the broadest sense can be thought of as ‘instructions’ or ‘prescriptions’ for human behaviour that structure interactions (Ostrom, 2005: 3–19). Using a rule, an actor must be able to reason with some confidence that ‘if I do X, Y will happen’. However, rules rarely prescribe actions and their consequences unambiguously. In fact, the very idea of a rule is that actors replace case-by-case decisions that define precisely what to do in a situation by appealing to more general principles to which behaviour must conform. This is true not only of norms that do not specify sanctions (e.g. ‘Do not walk on the lawn!’) but also of seemingly quite specific regulative rules (e.g. ‘You must pay 10 dollars if you walk on the lawn’). (Consider the following ambiguities: What counts as ‘the lawn’: can one trample on the flower beds? Who is ‘you’: are children included? What if someone is running to save a life? and so on) Unless a rule applies to very few nearly identical situations (or perhaps even then), it remains ‘indeterminate’ (Hart, 2012) or ‘incomplete’ (Pistor and Xu, 2002) in the sense that it will not unambiguously predict the outcomes of actions in a particular case. We may not know which rules are relevant to it or how (Cardozo, 1928; Wilburg, 1950). Hence, a rule needs to be ‘completed’ by interpreting it for the specific situation.

For any type of rule, its completion is a process during which a rule takes shape up to the point when it can be applied meaningfully to a given situation. The difference is in the way the tasks of completion are allocated.⁶ The formal process may begin with legislative codification, administrative decreeing, or judicial judgements serving as precedents. However, these are never really the first steps of articulation because they inevitably rely on a broad range of existing rules as articulated more or less clearly before. The usual endpoint is a judicial or an administrative decision. As Pistor and Xu put it, judicial or regulatory ‘interpretation, even if narrowly construed, involves an element of law-making’ (2002: 947). It always involves deciding if a rule applies to a given situation, which clarifies (or sometimes obscures) the content of a rule. It often involves making a general rule more concrete or detailed, too. Trials are often needed not (only) to discover facts but also to clarify which rules apply to a given case and how (Cardozo, 1928). The experience of civil law jurisdictions proves that even if judicial decisions are not accepted as sources of law, judicial interpretations can transform a legal system of legislated codes (Gény, 1915; Wilburg, 1950). The actions of legislators, courts, and regulators can all be (possibly marginal but still real) instances of designing in a long and never-ending process of rule-articulation.

The advocate’s role is to try to influence the decision of the judge. Hence, he directly contributes to the rule-designing that is involved. A good advocate will place himself imaginatively in the place of the judge and think with his head, as it were (Kronman, 1987: 870). Indirectly, a legal counsellor may do the same when advising their client about a contract or some other affair. He will need to consider how a judge would decide the rules applicable to the given case. A counsellor’s role often involves designing

⁶Pistor and Xu (2002) discuss how the inherent incompleteness of law leads to varying allocations of law-making and law-enforcement powers. I generalise their argument to all kinds of social rules and actors.

working rules for various cooperative efforts, such as contracts, partnerships, or corporations. While this may be a purely technical administrative exercise, it is often an imaginative invention of a set of rules that accommodate diverse interests and support common endeavours (Kronman, 1987).

Other social roles that lawyers fulfil involve rule design, too. They act as codifiers in all fields of legislation.⁷ Throughout history, they have been involved as public officials in designing and handling rules for public organisations and policies (Brundage, 2008). It seems that wherever there is a need for general knowledge and skills in designing rules, the demand for professional lawyers emerges. This is unsurprising once we accept that legislation, interpretation, and application are closely connected steps in the articulation process of rules that involve instances of design all along.

What kind of knowledge do lawyers use when they engage in rule crafting? Judges, advocates, and counsellors must become knowledgeable of the specific circumstances of the conflictual or cooperative situations with which they deal. Codifiers must also obtain knowledge of many aspects of the practical situation in which legislation takes place. The same holds for administrative officials in the implementation phase. That is, lawyers rely on the dispersed, time-and-place knowledge of social actors. Indeed, a crucial professional skill expected of lawyers is the ability to deal with facts and evidence and quickly grasp the full context of an event or a dispute (Schauer, 2009). In addition, they rely on systematic practical knowledge that abstracts from any given case. They need to know how to interpret, apply, and design rules in diverse situations. This requires much more than factual knowledge of a set of legal principles and rules: the know-how of *legal reasoning* (Schauer, 2009). A lawyer must be able to formulate and put forward arguments about rules and be able to defend them against (potential) objections. A lawyer does not simply use an existing body of systematic knowledge but, by formulating his own arguments in concrete situations, he also contributes (if only marginally) to it. In effect, he participates in an ongoing intellectual debate that links past, present, and future cases. By doing so, he moves within and makes advances to an existing system of thought (cf. Hayek, 1982: 112–3).

A comparative institutional theory of knowledge generation: intellectual orders

The concept of ‘intellectual order’

How does the systematic practical knowledge of lawyers differ from the social scientific knowledge of economists? I take an institutional approach to this question. I compare the institutionalised processes of knowledge generation in law and economics and ask what kind of knowledge their respective processes can generate. This requires a general institutional theory that covers both the processes of a social science (economics) and a practical profession that has its own academic discipline (law). To provide such a theory, I draw on Michael Polanyi’s concept of ‘intellectual orders’ (1998 [1951]).

Like Hayek, Polanyi was a theorist of spontaneous social order, but, unlike Hayek, he was especially interested in *differences between types of spontaneous orders* within society (Jacobs, 1999; 2015; Jacobs and Mullins, 2008; Mullins, 2013). He distinguished the spontaneous orders of an exchange-based economy from spontaneous ‘intellectual orders’, science being his primary example. Building on his work, differences between markets and science have been explored by economists of science in the Austrian tradition (McQuade and Butos, 2003), but comparisons between different intellectual orders have not. One reason is that, besides science, Polanyi only sketched applications of his theory to other kinds of organised intellectual life, first in *The Growth of Thought in Society* (1941), then in *The Logic of Liberty* (1998 [1951]) and finally in his lesser known, posthumous *Meaning*, co-authored with Prosch, (1976).⁸ Building on his concept, I propose a *comparative institutional theory* of knowledge generation.

According to Polanyi, (1998 [1951]), science, law, literature, the various arts and professions and ‘many other branches of human culture’ are organised as spontaneous orders in a similar sense as a

⁷Although legislation can also happen without lawyers.

⁸While Prosch had a significant and controversial impact on the posthumous book (Mullins and Moleski 2005), its discussion of intellectual orders is consistent with Polanyi’s earlier work.

catalactic (i.e. exchange-based) economy consists of such orders: ‘order is achieved among human beings by allowing them to interact with each other on their initiative – subject only to laws which uniformly apply to all of them’ (195). His main explanation is epistemological. All human knowledge is personal and at least partly tacit, that is, unspoken, intuitive, and non-codified. This is because in the act of knowing, a person always integrates many unspoken subsidiary details to support the focal point of his attention (Malik, 2023; Bíró, 2025). Even the production of highly formalised knowledge, such as science, law, and literature, involves tacit and dispersed elements that are learnt and transmitted in networks and communities of practice. The sharing and use of tacit knowledge is necessarily decentralised or ‘polycentric’ as it relies on personal involvement. An orderly accumulation of knowledge is supported by norms and rules that coordinate these personal acts of knowledge use and generation (Aligica and Tarko, 2012; Festré, 2021; Hess and Ostrom, 2007).

While the coordinating process of an exchange-based order is competition, an intellectual order is supported by three processes: *consultation, competition, and persuasion* (Polanyi, 1998 [1951]; Mike, 2017). First, actors must be able to consult an intellectual heritage, which provides them with a means of mutual understanding, an already existing body of knowledge as well as methods for moving beyond it. For example, ‘a scientist, wrestling with a problem, accepts as his premise a great mass of previously established knowledge and submits to the guidance of scientific standards’; or a judge refers ‘to precedent and statute and interpret[s] them in the light of contemporary thought’, while he sticks to standards of legal reasoning (1998 [1951]: 201). Second, actors must be able to compete in the sense that they must be free to pursue their conjectures and lines of reasoning and should be rewarded for their contributions. Third, those who advance competing arguments must persuade the participants of a debate. Their lines of reasoning must be pitted against one another in a sincere and fair controversy, which compels participants to adjust their ‘arguments to what has been said before and thus all divergent and mutually exclusive aspects of a case are in turn revealed’ (1998 [1951]: 202).

The processes of consultation, competition, and persuasion are institutionalised in ‘associations of free, self-governing persons’ committed to the pursuit of certain intellectual ends (Polanyi and Prosch, 1976: 211). These associations build up ‘disciplining traditions’ that provide standards for acceptable arguments. They may develop formal collective bodies, such as in modern science, jurisprudence, and some professions, or remain informal communities as we often see in the arts and among public intellectuals. The rules of an association must support all three processes of the intellectual order. The three sets of rules are interrelated and must be consistent. They reflect *shared intellectual convictions* about the subject matter and nature of knowledge to be discovered. The institutional differences between intellectual orders reflect differences in these underlying convictions. To understand how the intellectual order of law differs from the order of economics as social science, we need to identify their respective convictions and how they manifest themselves in their rules. Polanyi (1941; 1998 [1951]) made forays into the analysis of common law but more as an illustration of his general concept than an exhaustive examination. I depart from Polanyi’s narrow focus on evolutionary judge-made law. As I discussed in Section 3, the legal profession in any developed legal system is a system of continuous and decentralised knowledge generation. Thus, it can be interpreted as a spontaneous intellectual order.

Differences between the intellectual orders of law and economics

A useful starting point for comparing the intellectual orders of law and economics is examining how their basic intellectual convictions differ. In other words, how does the *kind* of knowledge sought by law differ from that sought by economics? An important theme of legal philosophy is how specifically legal knowledge differs from other potential ideas about law. H.L.A. Hart introduced the distinction between an ‘internal view’ of the law and ‘external views’. An internal view of law is adopted by members of a social ‘group that accepts and uses them as guides to conduct’ (Hart, 2012, 89). This is the view of legal practice, followed by lawyers as they carry out their tasks. It is also the fundamental view of doctrinal jurisprudence taught in professional schools, which grew out of and directly serves legal practice (Schwartz, 1992, Cserne, 2019). Tellingly, jurisprudence means both ‘skill in law’ and ‘the science of

law'. Thus, the academic discipline of law forms an integral part of the systematic practical knowledge of the legal profession.

Law's truth-statements are *participative* in the sense that they are made from the position of one of the actors involved in working with legal rules (e.g. legislator, judge, or advocate). This is reflected in the view that it is a basic error of legal reasoning to confuse from which position an argument is made (Twining and Miers, 2010). Legal knowledge is *internal to practice*: it emerges from the institutional practice of law, is a constituent part of it, views it from within, and is to be used directly by it. As the legal realist Karl Llewellyn put it, formal law and legal knowledge only make sense as far as they enable and support 'law jobs' (1940).

An 'external view' of law is characteristic of an 'observer who does not himself accept them' (Hart, 2012, 89). The philosophy, sociology, history, and economics of law all take such a view and formulate truth-statements about law from the *observational* position of an outside spectator. While doctrinal jurisprudence makes propositions *of* law, social sciences make propositions *about* law (Patterson, 1993). While social science, such as economics, can have great practical relevance, it is not directly (or at all) tied to legal practice. In its core, such a body of knowledge about law is *external to* the institutional *practice* of law in the sense that, typically, it does not emerge from it, is not constitutive of it, views it from without, and is not directly used in it. This corresponds to the fact that an economist remains an 'outsider' to the intellectual order of law, while he generates knowledge within the order of economics as a social science.

The internal/external distinction is an ideal-typical comparison, which abstracts from many nuances. In jurisprudence, an exclusively internal view of law would result in excessive formalism (Schwartz, 1992, Cserne, 2019). Legal theory often subjects doctrines to critical examination according to philosophical, comparative legal, policy, or social scientific criteria that are external to the given legal system. Practicing lawyers must also regularly consider the non-legal – practical and moral – consequences of their decisions and how non-lawyers view them. Nonetheless, external insights serve to improve but never replace the internal view of the legal system. For economics as social science, the external viewpoint can arguably never be absolute because human behaviour, which it seeks to understand, is, at least partly, intentional and meaningful action, understandable for the actors themselves (Weber, 1947; Hayek, 1943). Economists also create knowledge that becomes internal to law. Antitrust and European common market law are obvious examples. Still, even in such areas, economics only influences (perhaps heavily) rather than constitutes the internal institutional knowledge of legal practice. Hence, ideal types highlight the key differences and comparative advantages of each profession. They are also useful starting points for exploring their possible convergence.

The rules of consultation, competition, and persuasion reflect the epistemic differences of the two intellectual orders. In law, the central forum of persuasion is a legal dispute in a broad sense. It is an instance of practical decision-making where the goal is to arrive at a decisive judgement about rules and their applications. A court trial is the classical form of dispute that brought the legal profession into existence (Brundage, 2008). However, disputes take many forms that include legislative and regulatory debates, arbitration, mediation, settlements, bargains, and decisions about administrative commands.

In economics as social science, the central forum takes the form of publications in which analytical reflection aims to provide interim judgements subject to corrections about what is true as a general pattern. In law, social actors affected by rule design are involved in the debate and provide feedback about arguments. In contrast, social scientists use affected actors as sources of information, at most. A third difference is in the focus of inquiry. While lawyers typically strive to consider the full context and all details of a concrete situation and weigh them according to salience for affected parties, social scientists usually select just one or a few aspects of similar situations and weigh them according to the salience of theoretical interest rather than significance for actors.

The primary process of consultation bridges sequences of disputes in law and sequences of publications in social science, respectively. In the first case, consultation communicates knowledge about prudential judgements guiding action and fits new pieces of knowledge into an internal view of a

system of rules. The outcome is one (largely) consistent set of sophisticated concepts and doctrines that express practical wisdom. In social science, the communicated *explicit* knowledge takes the form of hypotheses and proofs. It must be fitted into external views about systems of rules or developed into such new perspectives. The outcome is an articulation of theories and methods that aim at 'objective truth' in the sense of apprehending rationality in our world in ever more accurate and profound ways, following (dynamic) standards of validity set by the scientific community (Polanyi, 1962, 2–17, 142–50).⁹

Competition is supported by professional autonomy in both orders. However, lawyers must deal with problems as they come by and have relatively little freedom in selecting which to pursue. In social science, the basic rule is that of freedom of inquiry, that is, problems can be selected according to their capacity to contribute to advancing theoretical knowledge as the scientist sees fit. What drives competition? In science, the dominant mechanism is reputation among peers (McQuade and Butos, 2003). This appears in law, too – especially among jurisprudential scholars. However, the more direct mechanism is market reputation among social actors whose problems they ought to solve, as with advocates and counsellors, and careers related to success in solving such problems, such as with judges and attorneys.

Table 1 summarises the ideal-typical differences between the two intellectual orders, both in terms of the nature of knowledge sought and the institutional details. As we see, these differences are manifold and significant. Both orders are institutionalised in highly sophisticated ways that reflect the primary type of knowledge sought: participative and internal to legal practice versus observational and external to that practice.

Narrowing the gap between law and economics

How can the gap between the ideal types of legal and economic knowledge be narrowed? The analysis suggests a general answer: by moving the knowledge produced in one profession closer to the ideal type of the other.

For economists, one way is to engage in applied or field research and become 'engineers', 'plumbers', or 'craftsmen' of an institution, as suggested by the economists discussed above. What the analysis here clarifies is that they must *combine general scientific knowledge, not just with dispersed social knowledge, but also the systematic practical knowledge accumulated by lawyers and other professionals*. It also reinforces the view that a continuous and deep engagement with solving concrete institutional problems is a precondition for useful advice. Moreover, it highlights that the challenge is to produce knowledge that is comprehensible and useful for actors who have their own internal view of the institutional practice in which they participate.¹⁰

Another, complementary, way for economists to narrow the gap on law is to *turn to jurisprudence for institutional ideas that can enrich economic theory*. In fact, economics has borrowed freely key concepts from various practical professions, such as contract or property from law, interest or capital from accounting, and infrastructure from engineering. To give two concrete legal examples, Ronald Coase studied nuisance cases in the common law to clarify the problem of social cost and externalities. In his analysis of governance structures, Oliver Williamson (1979, 1996) relied on the legal realist jurisprudence of Karl Llewellyn for the idea of contracts as frameworks as well as the relational contract theory of Ian Macneil.

Searching for general patterns, economists often make borrowed concepts even more abstract, shedding a large part of their meaning in their original institutional context (Hodgson, 2015). This is

⁹For Polanyi, objectivity in science is a feature of the *personal* – and always partly tacit – knowledge of scientists. '[T]he discovery of objective truth in science consists in the apprehension of a rationality which commands our respect and arouses our contemplative admiration' (1962, 4).

¹⁰In addition to the authors discussed in Section 2.2, Dobbie and Fryer (2013) is a good example of such applied research in a specific institutional field (education).

Table 1. An ideal-typical comparison of the intellectual orders of law and economics

	Law as a practical profession	Economics as a social science
Primary nature of knowledge	- systematic practical knowledge: internal to practice and participative (perspective of decision-maker)	- social scientific knowledge: external to practice and observational (perspective of spectator)
Rules of persuasion	- central forum: dispute (practical decision-making about rules) - goal: arrive at a final judgement about what to do - involvement of affected social actors: yes, often actively involved in debate and feedback - focus of inquiry: full context, all details of situation, weighing what is important for actors	- central forum: publications (analytical reflection on rules) - goal: arrive at an interim judgement about what is true as a general pattern - involvement of affected social actors: no, as a source of information at most - focus of inquiry: one aspect singled out in similar situations, weighing not necessarily related to salience for actors
Rules of consultation	- sequence of disputes: judgements guiding action (what to do?) - fitting new knowledge into a consistent internal view of a system of rules - leading to the articulation of sophisticated concepts and doctrines as expressions of practical wisdom	- sequence of publications: hypotheses and proofs (what is?) - fitting new knowledge into external views or creating new views about systems of rules - leading to the articulation of theories and methods as truth-statements according to standards of validity
Rules of competition	- restricted freedom in selecting problems (cases assigned or paid by parties) - feedback through references to precedents, arguments, concepts - reward according to reputation among social actors (or, for scholars, indirectly: according to ability to help them)	- freedom of inquiry - feedback through citations - reward according to reputation among peer scientists

perhaps inevitable to some extent, but can also impoverish theory and detach it from differentiations that have great practical significance. Revisiting the systematic practical knowledge of lawyers may often be an important corrective to this tendency. A recent example may be the reconsideration of the meaning of ‘property rights’ in economic analysis initiated by Merrill and Smith (2001). Attempts to identify the general institutional framework of a market economy by a closer reliance on specific legal institutions also fall into this category (Acemoglu et al., 2005; Adelstein, 2017; Cooter and Schäfer, 2011; Eucken, 1950; Hodgson, 2015; Ostrom, 2005; Williamson, 1985).

In a related effort, *economic analysis can be extended to explore how lawyers and other professionals generate systematic practical knowledge* for institutional design. What kind of practical intellectual order exists in a social situation? Does it generate relevant and effective knowledge? How does it influence institutional design? The institutionalised processes of consultation, persuasion, and competition can be explored.

For lawyers, a move towards the economic type of knowledge means a move towards an external viewpoint of law. The challenge is to incorporate external economic knowledge into their internal perspective. This largely explains the struggles of law and economics scholars to influence actual law. A general implication is that they must *take seriously the question how extra-legal arguments can fit into legal reasoning* (Cserne, 2019; Patterson, 1993; Schwartz, 1992). Perhaps, the deepest challenge, at least to the core areas of law, is conceptual. Legal rules define duties and obligations, and legal reasoning focuses on corrective justice in individual cases of rule-breaking. By contrast,

economics treats rules from the perspective of allocative efficiency or social welfare. Thus, for economic arguments to be relevant, the criteria of corrective justice and efficiency must be reconciled at least to some extent.¹¹ One possible response is to restrict the application of economic arguments to legal questions for which *prudential* arguments are relevant (Craswell, 1993; Cserne, 2011). Examples include defining the level of due care in tort law, allocating risks in contracts, or considering the social effects of leniency in criminal law.

However, the economic analysis of law tends to have a much broader ambition: even those aspects of law that strictly follow the logic of justice have efficiency or welfare effects and are considered valid subjects of economic analysis and recommendations. To have influence on legal reasoning, *economic arguments must be 'translated' into the language of corrective justice*. Some economic theories seem better suited to this than others. In *The Morality of Law*, Fuller (1964) argued that within economics, the catallactic approach (Buchanan, 1964) has an especially close affinity with law. While an unrestrained efficiency calculus admits no limits of justice, exchange shares with law an implicit adherence to the 'morality of duty'. Voluntary exchange is a procedural guarantee of efficiency. Voluntary consent is also the basic criterion of interpersonal justice. Much of the law, including contracts, property, torts, and crimes, aims at punishing and rectifying infractions or lack of consent. While this allows for a broad reconciliation of efficiency and corrective justice, tensions remain. For example, efficient deterrence from causing involuntary harm would often require a sanction that (far) exceeds the harm caused, due to latency. However, legal justice often insists on a sanction proportionate to harm or the severity of individual action (Adelstein, 2017; Miceli, 2023). An economist must respect this internal limitation of legal reasoning if he wants to be heard. On a more general note, a careful inclusion of interpersonal justice into institutional economics may make it more compatible with legal reasoning (and may even improve it on its own terms).

Conclusions

The difference between an economist's and a lawyer's approach today is not so much between addressing general or more concrete institutional problems, as Hayek once noted (1960: 229–230). Rather, it consists in the distinct *types* of useful knowledge they produce for designing institutions. The difference arises because they operate in different 'intellectual orders' formed by institutions dedicated to generating a distinct type of knowledge. The intellectual order of law is focused on systematic practical knowledge. Its processes of consultation, persuasion, and competition generate knowledge with an internal and participative view of legal rules. By contrast, the intellectual order of economics is dedicated to scientific knowledge that is, at its core, external to and observational of the practice of law. While they can converge, these cores define their comparative advantages. A more general conclusion is that institutional knowledge can be of three types: beyond the Hayekian dichotomy of dispersed and scientific knowledge, a third type is systematic practical knowledge. It is generated not only by law but also by other practical crafts, trades, and professions. The comparative theory of intellectual orders developed in this article could also be applied to them.

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