DISCOVERING LAW
Hayekian Competition in Medieval Iceland

Carrie B Kerekes and Claudia R Williamson[*]

The general consensus is that some minimal government is needed to provide law and enforce rules. However, between 930 and 1262, the Icelandic Commonwealth functioned without a central government, relying instead on market mechanisms and private institutions. An elaborate legal system developed that guided social interaction and coordinated conflict resolution. This article utilises Hayek's theory of competition as a discovery process to examine the emergence of law in medieval Iceland. Founded on private property and competition, the legal structure in medieval Iceland promoted discovery of law and resulted in the relative impartiality of judgments.

> From the start, Icelandic society operated with well-developed concepts of private property and law, but, in an unusual combination, it lacked most of the formal institutions of government which normally protect ownership and enforce judicial decisions.[1]

It is commonplace to assume that government must establish and enforce property rights and political institutions that provide law, contract enforcement and adjudication of disputes. The general consensus, even among defenders of free markets, is that some minimal government needs to exist to protect individuals' rights and supply particular goods and services that otherwise would be under-provided by the market. However, the fundamental problem we confront when discussing institutional design is knowledge: how does one know how to define and enforce property rights efficiently? Economist FA Hayek derives a theory of competition that describes the market as a knowledge discovery process. Hayek argues that knowledge is dispersed among many individuals and this information is not available to any one person or group of persons. Hayek applies this logic to legal institutions and rules where law emerges from a competitive discovery process. Historical examples support Hayek's theory of law as a discovery process.

This article illustrates the Hayekian institutional competition theory by analysing the legal institutions in medieval Iceland. For more than 300 years (930–1262), the Icelandic Commonwealth (or Free State) functioned without a central government, relying instead on market mechanisms and private institutions. An elaborate legal system developed that guided social interaction and coordinated conflict resolution.

---

[*] Carrie B Kerekes is Assistant Professor of Economics, Florida Gulf Coast University. Claudia R Williamson is Assistant Professor of Economics, Mississippi State University.

[1] Byock (2001), p 28.

David Friedman's seminal article illustrates that medieval Iceland's legal institutions developed without any central authority, hence providing an example of private creation of law and its enforcement. In addition, Friedman argues, 'the society in which they survived appears to have been in many ways an attractive one. Its citizens were, by medieval standards, free; differences in status based on rank or sex were relatively small; and its literary output in relation to its size has been compared, with some justice, to that of Athens'.[2] This private legal system also minimised violence, rape, torture and murder. Friedman estimates that the average number of killings during Iceland's most violent period is similar to murder rates in the modern United States.[3] Jesse Byock echoes this description:

> The sagas, with their many descriptions of resolutions, are literary evidence of a national process of limiting violence. The first 300 years of Iceland's medieval independence, beginning in the early ninth century, were characterized by the almost total absence of the murderous pitched battles that routinely took place in Scandinavia and elsewhere in the medieval world. Only in the mid-thirteenth century, in the very last decades of the Free State, is there evidence of the incidence of casualties that might be expected when two groups of committed men battled.[4]

Friedman states that 'medieval Icelandic institutions have several peculiar and interesting characteristics; they might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions'.[5] That 'mad economist' could easily have been FA Hayek. Hayek viewed institutions and rules as evolving from human action, not human design. Law is not from a legislator but stems from the individuals that comprise society. As he explains, 'The basic source of social order, however, is not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and wrong …'[6] These opinions of right and wrong – that is, law – are revealed through a similar discovery process to the one that reveals market prices to economic actors.

Several scholars have studied medieval Iceland and examined its history, system of dispute resolution and mechanisms of private law enforcement.[7] Birgir Solvason explains how reciprocity led to cooperation that was the foundation of Iceland's legal structure.[8] Icelanders found it in their self-interest to cooperate, as repeated interactions were enough to

---

2 Friedman (1979), p 400.

3 Friedman (1979), p 410.

4 Byock (1982), p 101.

5 Friedman (1979), p 400.

6 Hayek (1979), p 33.

7 Byock (1982, 1988, 2001); Solvason (1992, 1993); Miller (1990).

8 Solvason (1992, 1993).

discourage defection. In addition, institutional mechanisms evolved to solve information-sharing problems. This article applies Hayek's theory of competition as a discovery process to examine the general social structure and private legal institutions within medieval Iceland. The novel contribution is to discuss the private rules and law that emerged and evolved spontaneously to promote peaceful cooperation and exchange. Specifically, we apply Hayek's theory to examine rules that emerged in medieval Iceland through a competitive process to meet the needs of medieval Icelandic society. Our purpose is not to detail how particular legal institutions came to exist in medieval Iceland, but rather to examine how these institutions facilitated the discovery of law. An examination of the particular rules and laws that existed or provision of a framework to analyse the efficiency of these laws, while important, is beyond the scope of this article.

This work most closely connects with the literature that examines and explains self-enforcing exchange relationships.[9] In the absence of government, private solutions emerge to encourage cooperation in a variety of settings; ranging from medieval international trade, to New York diamond traders, to modern international trade. Such arrangements operate mainly through reputation and usually involve multilateral punishment (through ostracism or boycott), reliance on cooperative social norms, and the use of arbitration organisations. Each of these factors was present in medieval Iceland.

The next section describes the Hayekian theoretical framework. The third section provides a history of Iceland's settlement and legal institutions. The fourth section illustrates how private property and competition led to private law and governance in Iceland. Section five generalises the theory to other applications and section six concludes the article.

Theoretical Framework

The Hayekian theory of competition describes a process whereby information available to no single person or groups of persons is essentially 'discovered'.[10] In decentralised markets, this discovery process is guided by market prices. The price system transmits important information throughout the economy. Prices continuously provide updated information that communicates relative scarcities. In addition, prices also provide incentives that guide entrepreneurs. Profits and losses signal whether consumers value the end product of a good more than they value the inputs used to produce that good. This coordinating discovery process determines which goods and services should be produced among countless possible alternatives. The price system aggregates dispersed knowledge possessed by myriad individuals and communicates it to everyone. Economic order emerges spontaneously without central design or planning.

---

9 Leeson (2006, 2007a, 2007b, 2007c, 2008a, 2008b, 2009); Anderson and Hill (1979, 2004); Greif (1989, 1993, 2002); Clay (1997); Landa (1994); Greif et al (1994); Ellickson (1991); Milgrom et al (1990); Benson (1989a, 1989b).

10 Hayek (1945, 1960, 1967, 1968).

The foundation of this discovery process hinges on a system of private property. The only way market competition takes place and leads to a price system is if private property rights are secure. Ludwig von Mises illustrates this idea in 'Economic Calculation in the Socialist Commonwealth'.[11] In this work, he addresses the concept that private property leads to a price mechanism that makes possible a system of profits and losses – in essence, economic calculation. Lacking property rights, individuals do not have an incentive to engage in economic exchange. Without widespread exchange, markets do not emerge to generate a price system. Without prices, a profit and loss system does not exist, thus eliminating the possibility of rational economic calculation. The ability of markets to coordinate and discover knowledge is based on the institution of private property.

This naturally leads one to ask 'Where do institutions, such as property rights, come from?' Hayek applied his thinking about spontaneous orders to institutions. Harold Demsetz supported a Hayekian notion of the emergence of property rights institutions when he argued that property rights arise when the gains of privatisation outweigh the costs of defining and enforcing those rights.[12] Other scholars support this view with research that documents numerous historical and contemporary examples of spontaneously emergent systems of private property rights.[13]

In addition to property rights institutions, Hayek maintains that legal institutions can also arise spontaneously through a competitive market process. In *Law, Legislation, and Liberty*, he argues that the bottom-up law-making process of common law (versus civil law) utilises dispersed knowledge to coordinate individual expectations.[14] His explanation of the efficiency of common law is analogous to a market process. To Hayek, judges utilise tacit and local knowledge to reach a decision, whereas legislators are forced to try to predict future events in order to construct detailed rules. Thus the role of the judge is not to make law but to discover it, based on communal norms and expectations.[15] To Hayek, this judge-made law is part of the spontaneous order. He states:

> The difference between the rules of just conduct which emerge from the judicial process, the nomos or law of liberty – and the rules laid down by authority … lies in the fact that the former are derived from the conditions of a spontaneous order which man has not made, while

---

11 Mises (1920).

12 Demsetz (1967).

13 Adolphson and Ramseyer (2009); Leeson (2007b); Anderson and Hill (2004); Dixit (2004); Morriss (1998); Benson (1990); de Soto (1989).

14 Hayek (1973, 1976, 1979).

15 Zywicki and Sanders (2008). Rubin (1977) describes one aspect of this discovery process. When a similar type of case is continually brought before a judge, this signals some sort of inefficiency in the law. Thus judges become aware of the need to discover and articulate the underlying norms and expectations of justice through repeated interactions.

> the latter serve the deliberate building of an organization serving specific purposes.[16]

This process of common law produced a body of abstract principles that emerged from many decentralised decisions. Common law was capable of adapting to changes in society and evolved to meet the needs of individuals living in that society. Extending this logic, it is natural to see how a completely private order of law can function.[17] Just as competition in markets leads to the discovery of how best to satisfy competing ends, competition in law leads to legal discovery and innovations that best satisfy the wants and desires of individuals living in that society. A centralised body of law produces a one-size fits all approach to legal enforcement with rules that possibly no one wanted. However, with pluralistic competitive provision of law, the rules and enforcement procedures that emerge are more reflective of what individuals actually value. Legal knowledge can only be discovered through a competitive institutional structure.

This Hayekian framework illustrates how private mechanisms can emerge to provide law and its enforcement. In the following sections, we apply Hayek's theories to examine institutions in medieval Iceland. During the Free State, private property rights and competition underpinned the market discovery of law and the creation of complex legal and social institutions. Property rights and competition also enabled the enforcement and sustainability of private law.

Medieval Iceland

In the Icelandic Commonwealth, institutions emerged that reflected the local conditions of medieval Icelandic society. Two of the most important institutions to emerge were the *hreppar* (local administrative units) and local assemblies.

Early Settlement

> Iceland's medieval social order reflected the conditions of its settlement. As a culture group, the immigrants came from societies with mixed maritime and agricultural economies and brought with them the knowledge and expectations of European Iron Age economics. The absence of an indigenous population on so large an island was an unusual feature that permitted colonists the luxury of settling in any location of their choosing. As there were no hostile native inhabitants, the settlers enjoyed extraordinary freedom to adapt selectively to their new surroundings. In this frontier setting they

---

16 Hayek (1973), p 123.

17 Friedman (1979); Stringham and Zwyicki (2011). Stringham and Zwyicki (2011) analyse Hayek's evolution of legal thought and compare it with his market-based discovery process. The authors argue that Hayek's own logic leads to theoretical support for a purely private competitive legal system. This leads the authors to conclude that Hayek 'should have been an anarchist': p 1.

> established scattered settlements in accordance with the availability of resources. The settlers and the immediate tenth-century descendants adapted quickly to life in the sometimes hostile environment. Called *landnámsmenn* (land-takers) by later generations, these early Icelanders had an extremely large 'founders' effect' on subsequent social, economic and political systems.[18]

Between c 870 and 930, Norwegians began to settle in Iceland during the Age of Settlements. Sources attribute their settlement in Iceland as a reaction against King Harald Finehair in Norway and a response to threats to the rights of freemen by Scandinavian kings. According to *Íslendingabók* (*The Book of Icelanders*, written in approximately 1120), Iceland was fully settled by 930.[19] The first settlers (*landnámsmenn*) claimed large tracts of land, and many initially attempted to assert control over entire regions. When settlers were unable to maintain control over such large tracts of land, disputes emerged between these settlers and later immigrants to Iceland. Land claims eventually were broken up into relatively equal farmsteads.[20] The economy centred primarily on animal husbandry and coastal hunter-gathering.[21] Therefore, landownership was of central importance in medieval Iceland, as agriculture and livestock ownership depended on the accessibility of productive land. Disputes regarding land claims and private property were a common source of conflict during the Free State. However, private mechanisms arose to settle disagreements and provide incentives for dispute-resolution versus violence.

The institutions that evolved in Iceland were especially concerned with political and legal rights pertaining to free farmers. Immigrants to Iceland brought with them their cultural norms and mores. Influenced by their beliefs and in response to the new environment and the constraints imposed by its physical characteristics, institutions emerged that were particular to the Free State. Icelanders incorporated brokerage into the ancient Norse concept of local freemen's assemblies to create a complex judicial system. Byock argues that one factor underlying the development of Iceland's institutions was its geographical location.[22] Far removed and difficult to access, Iceland was not significantly threatened by foreign attack or invasion. The Free State did not have to confront issues of military defence and was able to develop institutions unique to its local conditions and cultural attitudes. This article argues that the more important factors underlying the development of Iceland's institutions were private property rights and competition in law.

---

18 Byock (2001), pp 8–9.

19 Thorgilsson (1930).

20 Byock (1982).

21 Byock (2001); Miller (1990).

22 Byock (1982, 1988).

Social Structure and the Hreppar

Farmers (*bændr*, sing *bóndi*) and chieftains (*goðar*, sing *goði*) were the primary actors within Icelandic society. The most important farmers were the thing-tax-paying-farmers (*thingfararkaupsbændr*). Each farmer was required to establish a contractual relationship with a chieftain. By approximately 965, Iceland was divided into four quarters (Northern, Southern, Eastern and Western). Farmers could establish a relationship with any chieftain in their quarter, and had to renew the bond each year. Upon the establishment of a bond, farmers were said to be 'in-thing' with their chieftain. A farmer was then known as a thingman (*thingmaðr*, pl *thingmenn*), or legally recognised follower, of the chieftain.[23] Farmers were free to change their allegiance between chieftains, and chieftains had the right to refuse to accept a particular farmer as a thingman. Each member of a household followed the thing attachment of their *bóndi*; therefore, each individual was tied to a chieftain.

Goðorð (pl. *goðorð*), the office of chieftaincy, was a private possession – a marketable commodity; it could be bought, inherited, traded, given as a gift or shared. The initial role of the *goðar* was as temple chieftains; they performed religious functions as well as the legal functions they would later come to provide.[24] Successful farmers often obtained chieftaincies, as could ambitious individuals. Chieftains acted as advocates, legislators, arbitrators and enforcers of Icelandic law.[25] They held assemblies, appointed judges to courts and presided over courts of confiscation.[26] In approximately 965, the number of chieftaincies was limited to 39. However, the number of chieftains could be higher than the number of chieftaincies, as it was possible for individuals to share a particular chieftaincy.

Prior to the end of the eighteenth century, no villages or towns existed in Iceland. Free farmers controlled the majority of productive land, and the farmstead was the basic unit of production and residence. Household and kin relationships, in addition to the chieftain-thing bonds, were very important for the private enforcement of Icelandic law. One important institution that developed early in Icelandic society was the *hreppr* (pl *hreppar*). *Hreppar* were local administration units. These communal units were organised geographically, and each unit consisted of a minimum of 20 households, or farmsteads. A farm could not change its affiliation after joining a *hreppr*, and no one could move into a *hreppr* without recommendation from another such organisation. Each *hreppr* met regularly three times a year, with additional meetings organised as needed.[27]

---

23 Byock (2001).

24 This mix of religious and legal functions is similar to a situation in medieval Japan, where individuals turned to temples and monasteries to secure property rights (Adolphson and Ramseyer 2009).

25 Byock (1982, 1988).

26 Miller (1990).

27 Byock (1988); Miller (1990).

Hreppar operated independently of chieftain–thing relationships and served two primary functions: to care for orphans and the poor who had no household or kin support; and to act as a sort of insurance system. To provide poor relief, a *hreppr* collected mandatory contributions from each household. The poor were placed with different households for varying lengths of time, depending on the wealth of each household. The insurance system was 'funded by a maximum assessment of one six-ell ounce per 120 ounces of a member's total wealth (ie 0.83 percent)'.[28] Any member of a *hreppr* suffering a loss of more than a quarter of his herds to disease was able to recover half of his loss. *Hreppar* also provided fire insurance. Members could obtain insurance for three rooms of the farmhouse (the living room, kitchen and pantry), and could collect half the value of the loss. Households could draw on insurance funds a maximum of three times. Recoveries were reduced accordingly if these funds were to fall below the level sufficient to cover losses. In addition to its two primary functions, the *hreppar* also oversaw and controlled summer grazing lands.[29] Interestingly, the *hreppar* continued to operate following the end of the Free State. According to Byock, 'In 1703, there were 162 of these units.'[30]

Legal Institutions and Assemblies

Whereas *hreppar* operated as local administrative units, early Icelanders also organised local assemblies, called things, to settle disputes. Local things formed the basis of the extensive legal system and provided a forum to resolve conflicts. Chieftains were responsible for conducting the local things. Solvason conjectures that the earliest assemblies were likely overseen by a single chieftain and were relatively informal.[31] These local things evolved into more formal assemblies, meeting at specific locations at legally determined regular intervals.[32]

There were four critical events in the evolution of the Icelandic court system: the creation of the Althing; the division of Iceland into quarters and the establishment of the Quarter Courts; and the introduction of the Fifth Court.[33] The Althing was established c 930, and at that time there were 36 chieftaincies. The Althing was the most important assembly and met each year in June for two weeks at Thingvöllr (the Thing Plain). All chieftains attended this meeting, with each chieftain accompanied by some of his thingmen.

The most important local thing was the springtime thing, *várthing*, which assembled each May and acted as a court that tried local cases. This district assembly was composed of three local chieftains and their thingmen. The thingmen of all three local chieftains were required to attend this

---

28 Miller (1990), p 20.

29 Jóhannesson (1974); Miller (1990).

30 Byock (2001), p138.

31 Solvasson (1993), p 104.

32 Byock (1988).

33 Miller (1990).

assembly. The *várthing* was divided into two parts: the courts of prosecution (*sóknarthing)* and the courts of payment (skuldathing), which handled debts.[34] The value of the standardised ounce (*thinglagseyrir*) was set at the *várthing*. Also at this assembly, each chieftain could require each ninth thing-tax-paying farmer of his followers to go with him to the Althing. The chieftain then collected the thing tax (*thingfararkaup*) from the thingmen who were not traveling to the Althing to compensate those who did travel.[35]

The fall thing, *leið*, met each August, and could be held by chieftains individually. The purpose of this assembly was to announce the happenings at the summer Althing and to relay any new laws. The *leið* did not serve a judicial function. According to Byock:

> The *leið* had an additional function within the context of the political economy. It publicly defined who a chieftain's thingmen were at the conclusion of that summer's dispute season. The group noted thingmen who had defected during the season when push had come to shove, and counted the current membership.[36]

Thus these assemblies can also be viewed as institutional devices that arose to minimise information-sharing costs.[37]

Initially, there were likely twelve *várthings* spread relatively evenly throughout medieval Iceland. In approximately 965, the country was divided into quarters and an additional *várthing* and three chieftaincies were added in the Northern Quarter. Thus each quarter had three local things, with the exception of the Northern Quarter, which had four local things. This made a total of thirteen thing districts and 39 chieftaincies.[38] The three new chieftaincies created in the Northern Quarter did not have the power to appoint judges to the Quarter Courts. Three new chieftaincies were created in each of the other three quarters to preserve a balance of power among the quarters at the Althing. These nine new *goðar* sat in the *lögrétta*, but were not able to act as chieftains in the local things or to nominate judges to the Quarter Courts.[39] This brought the total number of *goðar* to 48 (36 ancient and twelve new).

The *lögrétta* was the central legislative unit of medieval Iceland, and it convened during the Althing. The purpose of the *lögrétta*, or law council, was to amend previous laws and make new ones. Chieftains were the only individuals able to vote in the *lögrétta*, but each chieftain could bring two advisers with him. When a chieftaincy was shared, only one chieftain at a time could attend the *lögrétta* and perform the other chieftain responsibilities at the Althing. All 48 (ancient and new) chieftaincies participated in the *lögrétta*.

---

34 Byock (2001).

35 Byock (1988).

36 Byock (2001), p 174.

37 Solvasson (1993).

38 Byock (1982, 1988).

39 Byock (1988).

In addition to the *lögrétta*, the four Quarter Courts (*fjórðungsdómar*) convened at the Althing, as did the Fifth Court (*fimtardómr*) after its establishment in approximately 1005. The Quarter Courts met to hear cases that could not be decided at the *várthing*. These courts also heard cases of first instance for litigants who belonged to different local things. Thirty-six judges were selected to hear cases at both the local things and the Quarter Courts. At the local things, each of the three local chieftains appointed twelve *bændr* to act as judges. At the Althing, each of the 36 chieftains holding an original (ancient) *goðorð* nominated judges to the Quarter Courts. To do so, each chieftain selected four *bændr* at the *lögrétta*. These individuals then drew lots to determine their assignment to the Quarter Courts.[40]

Cases that ended in divided judgments in the Quarter Courts were heard at the Fifth Court, which acted as a court of appeal. Whereas cases in the Quarter Courts required the agreement of 31 judges, the Fifth Court required a simple majority for judgment. Forty-eight judges presided over this court, one chosen by each of the 48 (ancient and new) chieftaincies. Litigants to this court were able to dismiss twelve judges so that 36 individuals, as in the other courts, ultimately determined judgment.[41]

During the Icelandic Free State, there was only one significant national figure. The Lawspeaker (*lögsögumaðr*) was the elected official of the *lögrétta*. This individual served a three-year term and recited one-third of the laws each year at the Law Rock (*lögberg*). Each *goði* was required to attend the recitation of the laws. In addition, the Lawspeaker announced any new laws passed by the *lögrétta*.[42]

Legal 'Discovery': Private Property and Competition in Medieval Icelandic Law

Private property and competition underlie medieval Icelandic law. Private law emerged in medieval Iceland through voluntary choices and knowledgeable individuals, and resulted in relative impartiality. The chieftaincies themselves were private property: marketable commodities that could be bought, sold, gifted or shared. Chieftaincies, analogous to any private commodity, were likely to be owned by those individuals who valued them most. Recall that successful farmers or other ambitious individuals could acquire chieftaincies. Just as resources flow to their highest valued use via exchange in markets for goods and services, individuals with local knowledge and incentives for efficient decision-making obtained chieftaincies. Through the competitive allocation of chieftaincies there was a tendency for rule articulation that reflected 'on-the-ground' values versus a top-down process of rule-making. Although farmers were required to establish contractual relationships with chieftains, they voluntarily chose a chieftain from their Quarter. Likewise, chieftains could voluntarily refuse a

40 Byock (1982, 1988); Miller (1990).

41 Miller (1990).

42 Byock (1982, 1988, 2001).

particular farmer. Geography did not determine the chieftain–thing relationship. Byock states:

> the chieftains lived interspersed among farmers who might be thingmen of other, sometimes rival, *goðar*. Thingmen of competing *goðar* might also be advocacy clients of chieftains other than their own, as well as clients of prominent *bændr* who themselves might be thingmen of still other *goðar*. In order to understand Iceland we must remember that farmers and chieftains had many choices.[43]

As such, competition existed between chieftaincies. This competition served as a disciplinary force and constraint on the abuse of power by chieftains. Possession of a chieftaincy was worthless without followers. In order to secure and maintain followers, *goðar* were accountable for the quality and price of the services they provided to farmers. These services included advocacy, arbitration and enforcement of law, each of which required knowledge of what the law was. Successful chieftains utilised tacit and local knowledge to reach decisions and were adept at making necessary adjustments when faced with changing surroundings.

In this example, the chieftain and farmers (in their role as nominated judges) in private law were analogous to judges under common law. The law was not something given to each chieftain; instead, it had to be discovered and had to reflect the local values, norms and conditions specific to time and place. Chieftains did not create law, but instead discovered law that expressed communal norms and expectations. Because of the competitive elements within this legal apparatus, it was possible to reveal and articulate law in a manner that created a working body of law. For instance, if a similar type of case would continually be brought before a chieftain, this signalled the need for further clarification. Through repeated interactions, chieftains became aware of the need to discover and articulate the underlying norms and expectations of justice. This process of discovery and articulation created focal points that were self-reinforcing. However, if a chieftain made a ruling that did not align with notions of what was right, individuals could express disatisfaction by 'exiting with their feet'. Individuals could change alliances but without the requirement and additional costs of actually relocating.

The particular arrangements of the courts and legal system in medieval Iceland also resulted in relative impartiality of court judgments. As discussed above, the local things served to try local cases, relay laws and information from the Althing, and share information regarding chieftain–thing relationships. The Quarter Courts had two primary functions. First, they served as a court of appeals when there was a divided judgment at a local thing (*várthing*). Second, they served as a court of first instance when the litigants were from different quarters or if impartiality was in question. In addition, the Fifth Court served as a final court of appeal when facing a divided judgment at a Quarter Court. Also, as discussed above, chieftains

---

[43] Byock (1988), p 113.

nominated farmers as judges to the Quarter Courts. These individuals then drew lots to determine the court over which they would preside. The result was that individuals from different regions served on court juries. The multi-tiered structure of the court system, as well as the selection process of judges and juries, incentivised impartial rulings. This multi-tiered structure also clarified law, as cases that could not be decided at local things moved to the Quarter Courts and ultimately to the Fifth Court if necessary. These mechanisms served to provide continuity and standardisation of law across quarters.

Equally important to the discovery of law is the enforcement of that law. Just as no central figure or body designed the law, no central authority existed in medieval Iceland to enforce law. Enforcement rested with the individual, who could enlist the aid of family, friends or chieftains. Dispute resolution occurred via private arbitration or through the court system. Violators of the law owed financial restitution to their victims. Any individual not in a position to enforce their claim to compensation could sell this claim to a stronger party. In this manner, claims to compensation were tradable commodities and acted as another institutional constraint. The ability to sell the right to prosecute a case discouraged more powerful individuals from abusing the relatively poor and weak.[44]

Individuals who did not adhere to the rules of medieval Iceland faced outlawry. There were two types of outlawry: lesser outlawry (*fjörbaugsgarðr*) and full outlawry (*skóggangr*). Lesser outlaws were banished from the island for three years; failure to do so resulted in full outlawry. Full outlaws could be killed with impunity and were not to be assisted, harboured or helped to leave the country. Both types of outlawry required confiscation of the individuals' property.[45] This method of dealing with criminals was efficient in the sense that it did not require a state apparatus or a police force to execute punishments.

General Applications of Hayek's Theory

The Hayekian institutional competition theory can be applied to other cases throughout history where creation of law and property rights emerged without government. We relate the experience in medieval Iceland to three specific historical examples: Lex Mercatoria, *Leges Marchiarum* and medieval Japan. It should be noted that Iceland's case is distinct in that it involved broad institutional emergence where many other examples are of a more narrow focus. Also, depending on the context, the appropriate unit of analysis may not be the nation-state. Although the modern world is carved into countries with clear boundaries, in much of the world and throughout history, the units of social order are not at a national but at a much lower level. Each case summarised below provides us with some evidence of the

44 Byock (2001); Long (1994); Friedman (1979).

45 Byock (1988, 2001).

market's ability to provide 'meta' institutions that enable widespread cooperation without government.

For example, one of the most documented cases is the Lex Mercatoria, the Law Merchant: 'the early development of commercial law prior to the rise of large-scale third-party enforcement of legal codes by the nation-state'.[46] The Law Merchant is a complex polycentric system of customary law that arose from the desire of traders in the late eleventh century to engage in cross-cultural exchange. In the absence of state enforcement, this custom-based system relied on private arbitration for resolving disputes. By the end of the eleventh century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations.[47]

Since this set of code developed before the rise of the nation-state, a key issue was the problem of enforcement. Due to merchant travel, differing local laws and fear of partiality against foreign merchants, traders did not view government courts as fair and efficient. Merchants needed ways to resolve disputes; therefore, they created what became known as 'pie powder' or 'dusty feet' courts. These private courts adjudicated disputes based on customary business practices. Adjudicators were selected based on knowledge of a particular area of commerce. One key difference was that these private courts were much faster than government courts, since merchants did not have time to wait for resolution. Merchants would bring a dispute before a court and if a merchant refused to abide by a ruling, he was blacklisted. The courts were voluntarily chosen, which led to knowledgeable judges and impartial rulings. The result was a system of private judges that enforced practices and overcame incentives to cheat.[48] As certain mechanisms emerged as being better than others, the Law Merchant in essence created commercial codes. As these codes evolved, the most effective rules spread throughout Europe and provided a uniform set of rules.

A more general example illustrates the creation of law between warring societies in the sixteenth-century Anglo-Scottish borderlands.[49] Border people belonged to two different social groups and considered each other hated enemies. As such, the societies had frequent conflict. To regulate this violence, a self-enforcing private system of cross-border law emerged called the *Leges Marchiarum*. These 'laws of lawlessness' managed all aspects of cross-border interaction, including murder, theft, arson and harbouring outlaws.

To enforce these rules, trials occurred during 'days of truce', where community members would file a complaint regarding a cross-border grievance. Members from both communities would meet to decide cases. An English warden selected Scottish jurors and a Scottish warden selected English jurors. The Scottish jurors judged English grievances and vice versa. This system incentivised both groups to be impartial, and led to common rules regarding

46 Milgrom et al (1990), p 4.

47 Benson (1989b).

48 Benson (1989b).

49 Leeson (2009)

social cooperation and interactions. The *Leges Marchiarum* and its enforcement created a decentralised legal order that led to private governance regarding cross-border relations between otherwise hostile groups.

Lastly, medieval Japan provides an example of the establishment of property rights outside of government by relying on temples and monasteries. During the period 1100–1600, Japan's government did not provide stability or incentives for citizens to invest or engage in cross-cultural exchange; therefore, many individuals commended their rights of land to temples and monasteries. The temple was granted an equity interest equal to a share of the harvest, and the landholder received a tax exemption from the government and could rely on the temple to protect property from invasion. The temples adjudicated disputes within their own jurisdictions as well as providing protection from outside invaders. In addition, merchants and traders acquired contract enforcement by paying temple dues and joining their guilds. Since the temples competed with one another for guild members and commended land rights, these religious institutions created effective market-based solutions to substitute for weak government institutions.[50]

These examples all rely on some form of reputation and multilateral punishment, cooperative social norms and the use of arbitration. As articulated in Hayek's theory of markets as a discovery process, market-based emergence of law and institutions stems from private property and competition.

Conclusion

This article derived a Hayekian theoretical framework based on competition as a discovery process not only for market prices, but also for law. Medieval Iceland provides a historical example of how private legal institutions can evolve spontaneously and function successfully. During the Free State, private property rights and competition underpinned the market discovery of law and the creation of complex legal and social institutions. Property rights and competition also enabled the enforcement and sustainability of private law. The institutions that emerged reflected the needs and values of Iceland's population.

Medieval Iceland illustrates that, contrary to popular belief, private institutions can emerge that are sufficient to promote cooperation, exchange and conflict resolution without a centralised state. Through systems of reciprocity, repeat interactions, ostracism and information-sharing, these private institutions were self-enforcing. In addition to reflecting the cultural norms of medieval Icelanders as law was 'discovered', the legal system also resulted in the relative impartiality of judgments. Private property rights and competition were at the root of both of these positive outcomes.

The application of Hayek's insights to law creation as a discovery process has important implications for modern legal systems. Law is likely to be more efficient, and will more closely reflect the values of a society, when legal systems enable law to emerge spontaneously versus being centrally planned. This supports the argument for competitive legal systems versus government control of law.

---

[50] Adolphson and Ramseyer (2009).

References

Mikael Adolphson and John Ramseyer (2009) 'The Competitive Enforcement of Property Rights in Medieval Japan: The Role of Temples and Monasteries' 71 *Journal of Economic Behavior and Organization* 660.

Terry Anderson and Peter Hill (1979) 'An American Experiment in Anarcho-Capitalism: The Not so Wild, Wild, West' 3 *Journal of Libertarian Studies* 9.

Terry Anderson and Peter Hill (2004) *The Not So Wild, Wild West: Property Rights on the Frontier*, Stanford University Press.

Bruce Benson (1989a) 'Enforcement of Private Property Rights in Primitive Societies: Law Without Government' *Journal of Libertarian Studies* 1.

Bruce Benson (1989b) 'The Spontaneous Evolution of Commercial Law' 55 *Southern Economic Journal* 644.

Bruce Benson (1990) *The Enterprise of Law: Justice without the State*, Pacific Research Institute for Public Policy.

Jesse Byock (1982) *Feud in the Icelandic Saga*, University of California Press.

Jesse Byock (1988) *Medieval Iceland: Society, Sagas, and Power*, University of California Press.

Jesse Byock (2001) *Viking Age Iceland*, Penguin Putnam Inc.

Karen Clay (1997) 'Trade without Law: Private-Order Institutions in Mexican California' 13 *Journal of Law, Economics, and Organization* 202.

Hernando De Soto (1989) *The Other Path: The Invisible Revolution in the Third World*, IB Tauris.

Harold Demsetz (1967) 'Toward a Theory of Property Rights' 57 *The American Economic Review* 347.

Avinash Dixit (2004) *Lawlessness and Economics: Alternative Modes of Governance*, Princeton University Press.

Robert Ellickson (1991) *Order Without Law: How Neighbors Settle Disputes*, Harvard University Press.

David Friedman (1979) 'Private Creation and Enforcement of Law: A Historical Case' 8 *Journal of Legal Studies* 399.

Avner Greif (1989) 'Reputation and Coalitions in Medieval Trade: Evidence on the Mahgribi Traders' 49 *Journal of Economic History* 857.

Avner Greif (1993) 'Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition' 83 *American Economic Review* 525.

Avner Greif (2002) 'Institutions and Impersonal Exchange: From Communal to Individual Responsibility' *Journal of Institutional and Theoretical Economics* 168.

Avner Greif et al (1994) 'Coordination, Commitment and Enforcement: The Case of the Merchant Guild' 102 *Journal of Political Economy* 745.

Friedrich Hayek (1945) 'The Use of Knowledge in Society' 35 *American Economic Review* 519.

Friedrich Hayek (1960) *The Constitution of Liberty*, University of Chicago Press.

Friedrich Hayek (1967) 'The Results of Human Action but Not of Human Design', in Hayek, *Studies in Philosophy, Politics, and Economics*, University of Chicago Press.

Friedrich Hayek (1968 [2002]) 'Competition as a Discovery Procedure' Marcellus Snow trans, 5 *Quarterly Journal of Austrian Economics* 9.

Friedrich Hayek (1973) *Law, Legislation and Liberty, Volume 1: Rules and Order*, University of Chicago Press.

Friedrich Hayek (1976) *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice*, University of Chicago Press.

Friedrich Hayek (1979) *Law, Legislation and Liberty, Volume 3: The Political Order of a Free People*, University of Chicago Press.

Jon Jóhannesson (1974) *A History of the Old Icelandic Commonwealth: Íslendinga Saga*, Haraldur Bessason trans, University of Manitoba Press.

Janet Landa (1994) *Trust, Ethnicity, and Identity*, University of Michigan Press.

Peter Leeson (2006) 'Cooperation and Conflict: Evidence on Self-Enforcing Arrangements and Heterogeneous Groups' 65 *American Journal of Economics and Sociology* 891.

Peter Leeson (2007a) 'An-arrgh-chy: The Law and Economics of Pirate Organization' 115 *Journal of Political Economy* 1049.

Peter Leeson (2007b) 'Efficient Anarchy' 130 *Public Choice* 41.

Peter Leeson (2007c) 'Trading with Bandits' 50 *Journal of Law and Economics* 303.

Peter Leeson (2008a) 'How Important is State Enforcement for Trade?' 10 *American Law and Economics Review* 61.

Peter Leeson (2008b) 'Social Distance and Self-Enforcing Exchange' 37 *Journal of Legal Studies* 161.

Peter Leeson (2009) 'The Laws of Lawlessness' 38 *Journal of Legal Studies* 471.

Roderick Long (1994) 'The Decline and Fall of Private Law in Iceland' 1 *Formulations*, http://www.freenation.org/a/f13l1.html

Paul Milgrom et al (1990) 'The Role of Institution sin the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs' 2 *Economics and Politics* 1.

William Miller (1990) *Bloodtaking and Peacemaking: Feud, Law, and Society in Sage Iceland*, University of Chicago Press.

Ludwig von Mises (1920 [1935]) 'Economic Calculation in the Socialist Commonwealth', in Friedrich Hayek (ed), *Collectivist Economic Planning*, Routledge & Kegan Paul.

Andrew Morriss (1998) 'Miners, Vigilantes and Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law' 33 *Land and Water Law Review* 581.

Paul Rubin (1977) 'Why is the Common Law Efficient?' 6 *Journal of Legal Studies* 51.

Birgir Solvason (1992) 'Ordered Anarchy: Evolution of the Decentralized Legal Order in the Icelandic Commonwealth' 17 *Icelandic Economic Papers*.

Birgir Solvason (1993) 'Institutional Evolution in the Icelandic Commonwealth' 4 *Constitutional Political Economy* 97.

Edward Stringham and Todd Zywicki (2011) 'Hayekian Anarchism', George Mason University Law and Economics Research Paper No 11-06.

Ari Thorgilsson (1930) *(Íslendingabók) The Book of Icelanders*, Halldór Hermannsoon ed and trans, Islandica 20, Cornell University Library.

Todd Zywicki and Anthony Sanders (2008) 'Posner, Hayek, and the Economic Analysis of Law' 93 *Iowa Law Review* 559.