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## Fragmented Political Structures and Fragmented Law<sup>1</sup>

In a 1963 lecture, the American legal philosopher Lon Fuller<sup>2</sup> presented the parable of King Rex, who was determined to create an entirely new and improved legal system for his people. But King Rex was a naïve, artless legislator. Every form of law he promulgated evoked intense public opposition. His first new legal system, the people complained, was impossibly vague. Then he issued a legal code that was specific but plagued by confusing contradictions. King Rex's next code was logical, but so complex and technical that it was incomprehensible. The king's next legal code had to be changed almost daily to deal with unanticipated issues, so that confusion of another kind reigned.

Citizens and business firms in modern democratic states may feel a certain kinship with King Rex's subjects. We now live amidst constantly growing bodies of laws that are so dense, complex, and technically-worded that we need expensive legal experts to advise us about our legal risks, rights and duties. Often even the lawyers can provide us little certainty. This growing legal complexity, according to legal scholar Peter Schuck<sup>3</sup>, makes *the administration of law* more cumbersome, more costly, less predictable. That discourages the assertion of legitimate legal claims and defenses, especially for those who cannot afford complexity's higher lawyering costs. "Intelligible only to experts", Schuck warned, "the law is likely to mystify and alienate lay citizens", diminishing their belief in the inherent justice or necessity of the law and perhaps their commitment to compliance as well<sup>4</sup>.

But there is no easy escape from legal complexity. It reflects the ever-increasing complexity of modern life and of democratic politics. Hence one cannot sensibly prescribe the optimal level of legal simplicity or complexity as a matter of principle, without regard to the particular policy and social context. But as I will demonstrate today, some legal systems do enact laws that are somewhat less complex than others. Then

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<sup>2</sup> Fuller, Lon L., *The Morality of Law*, Yale University Press, 1964, p. 33-40.

<sup>3</sup> Schuck, Peter, *The Limits of the Law*, Boulder Co., Westview Press, 2000, p. 4.

<sup>4</sup> *Ibid.*, p. 14-15.

I will explore *why* legal complexity differs across nations. In doing so, I will focus on one simple but *measurable* aspect of legal complexity – the relative density or specificity of legislation.

## I. The Dilemma of Specific Rules vs. Broader Standards

Legislators all confront the issue of how detailed and specific to make the laws they enact. Some statutes include *specific legal rules*, such as those which prohibit driving over 60 miles per hour on roads of one kind, and limits of 30 miles per hour on others. Other statutes, however, articulate much more general *standards*, such as those that impose liability for accidents caused by driving “unreasonably dangerously”, or declare that family court judge’s decisions in child custody cases shall be guided by “the best interests of the child”<sup>5</sup>.

The search for optimal legislative specificity is complicated, of course, by the enormous variety of human activity in populous, fast-changing societies. Even hard-working legislators, wrote H.L.A. Hart<sup>6</sup>, suffer from relative ignorance of fact and indeterminacy of aim. Hence, to quote Isaac Ehrlich and Richard Posner, “the reduction of a *standard* to a set of [specific] rules must in practice create both overinclusion and overinclusion”<sup>7</sup>.

*Underinclusion* creates loopholes through which clever subjects of the law can pass, subverting the legislator’s policy goals. Conversely, to be subjected to *overinclusive* rules is experienced as maddening and unreasonable *legalism*, which can prompt resistance and noncompliance<sup>8</sup>. While the legislator can seek to avoid legalism by giving administrative officials, prosecutors and judges authority to make exceptions to the statutory rule when it appears unjust or unproductive to apply it literally, there is a substantial risk that different legal officials will interpret those criteria (which are general standards) inconsistently and stimulate public criticism for governmental legal inconsistency and bias. Yet steering away from the Scylla of too much legal specificity by legislating a few broad legal standards pushes the legislator toward the Charybdis of legal indeterminacy. In modern, politically-pluralistic

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<sup>5</sup> Isaac Ehrlich and Richard Posner (“An Economic Analysis of Legal Rulemaking”, *Journal of Legal Studies*, 3 (1974), p. 257-286, p. 258) point out that more precise rules limit the number and simplicity of facts to which legal consequences attached (e.g. posted speed limit), whereas “standards” (“unreasonably dangerously”) require the consideration of numerous facts, determined and weighted according to the circumstances of the particular case.

<sup>6</sup> Hart, H.L.A., *The Concept of Law*, Clarendon Press, 1961, p. 125.

<sup>7</sup> Ehrlich, Isaac, Posner, Richard, “An Economic Analysis of Legal Rulemaking”, *Journal of Legal Studies*, 3 (1974), p. 257-286, p. 268.

<sup>8</sup> Bardach, Eugene, Kagan, Robert A., *Going by the Book: The Problem of Regulatory Unreasonableness* [1982], New Brunswick, NJ, Transaction Books, 2002, ch. 4.

democracies, most important pieces of legislation entail compromises among conflicting values. In practice, therefore, different implementing officials and judges may assign different weights to the blend of values in the statute, undermining legislative purpose and producing unjust decisions.<sup>9</sup>

Given these conflicting considerations, we can ask how different national legislatures vary in terms of how much implementing discretion they choose to delegate to administrative agencies and judges, that is, how much specificity to build into their statutes.

## II. Comparing Statutory Complexity Across Countries

In a 1981 article, William Dale, a British lawyer, compared the United Kingdom's Copyright Act of 1956 with comparable statutes enacted in France, Sweden, and Germany<sup>10</sup>. The substantive legal provisions of the four laws, he noted, were rather similar. On the other hand, Dale wrote:

The Continental Acts strike one as concise, straightforward and readable. Our Act is long-winded, complex, indirect in approach and unreadable. The leading characteristics of our statutes ... are prolixity, complexity, poor arrangement and excessive particularity<sup>11</sup>.

The United Kingdom's statute, Dale added, "is twice as long as the German, more than three times as long as the French, and five times as long as the Swedish"<sup>12</sup>. Dale also tells us that the U.K.'s Companies Act of 1980 added 150 pages to the already existing 460 pages of earlier, still valid, earlier companies acts, for a total of 610 pages. On the other hand, Dale writes, the French law on the subject, including the decree

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<sup>9</sup> For example, a 1974 U.S. Congressional Act guaranteeing public education for handicapped children said that each such child should be given "a free and appropriate education". This general standard effectively left it to school administrators and ultimately to the courts to determine whether "appropriate" meant "adequate" or "optimum", and whether the cost of the assistance needed should be taken into account. And since administrators, parents, and judges frequently have different views on those questions, and different willingness to do battle on the issue, it gradually became clear that outcomes varied from school to school, from judge to judge, and from family to family, depending, among other things, on the education level and persistence of the child's parents.

<sup>10</sup> Dale, William, "Statutory Reform : The Draftsman and the Judge", *International & Comparative Law Quarterly*, 30 (1981), p. 141-164.

<sup>11</sup> *Ibid.*, p. 145.

<sup>12</sup> *Ibidem.*

containing the “regulations”, is “contained in 176 pages of the *Petit Codes Dalloz*”<sup>13</sup>.

A similar pattern was found by American political scientists John Huber and Charles Shipan<sup>14</sup>. After examining 4100 labor laws passed by 19 parliamentary governments between 1986 and 1998, they observed that “longer statutes on the same topic typically have *more detailed policy language* that places greater constraints on the individuals who implement laws”<sup>15</sup>. For example, in European national statutes forbidding gender discrimination in employment, Huber and Shipan compared how the legislators dealt with situations in which gender is a legitimate job criterion - as in the case of clothing models. In France, Article 1 of Law 83-635 (1983) simply says the anti-discrimination prohibition does not apply to positions in which one’s sex is the “*condition determinante*” for performing the job. It then adds a single sentence stating that the *Conseil d’État*, in consultation with representatives of employers and workers, will determine by decree those specific jobs for which sex is the “*condition determinante*”<sup>16</sup>. The same issue in the *Irish* legislation consumes two pages, which state in detail the reasons and circumstances under which sex can lawfully be considered an occupational qualification. And unlike the French law, the Irish statute does *not* explicitly delegate to civil servants any further discretion to further specify those criteria<sup>17</sup>.

Next, correcting for differences in languages and printing style, Huber and Shipan<sup>18</sup> found that among 14 European countries, the labor laws enacted by Norway, Sweden and Finland were exceptionally short, averaging 5 or 6 pages. France’s statutes averaged 21 pages, a bit shorter than the 14-country median, which was 25 pages. Germany, Italy and Spain were well above the median, averaging 38-42 pages. Longer still were Ireland’s statutes, averaging 54 pages, and at the top of the scale, the United Kingdom - a vastly longer 121 pages, which is 5 times longer than the median country, 6 times longer than France<sup>19</sup>.

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<sup>13</sup> *Ibid.*, p. 147.

<sup>14</sup> Huber, John D., Shipan, Charles R., *Deliberate Discretion ? The Institutional Foundations of Bureaucratic Autonomy*, Cambridge University Press, 2002.

<sup>15</sup> *Ibid.*, p. 176.

<sup>16</sup> *Ibid.*, p. 173.

<sup>17</sup> *Ibid.* p. 174-176.

<sup>18</sup> Huber and Shipan (*Deliberate Discretion ?*, *op. cit.*) downloaded four different pieces of E.U. legislation in each of the E.U.’s official languages, and used Microsoft Word to count the number of characters in each translation. English was the most efficient, which they used to state the baseline 1.0. German was least efficient, taking 1.22 pages to say what is said in one page in English. (It would take 1.13 pages in French, they found).

<sup>19</sup> In a similar analysis, Robert D. Cooter and Tom Ginsburg (“Comparative Judicial Discretion : An Empirical Test of Economic Models”, *International Review of Law &*

Then there is the case of the United States. Robert Cooter and Tom Ginsburg compared pollution control statutes in the United States, the United Kingdom, and Japan<sup>20</sup>. The U.K.'s air pollution statute is 5 times as long as Japan's. But the U.S. Clean Air Act is in a mega-statutory league of its own, almost 9 times as long as that of the United Kingdom, and 43 times as long as Japan's<sup>21</sup>! Surprisingly, Japan's water pollution statute is 40 percent longer than the British counterpart. But the U.S. Clean Water Act is more than 5 times as long as Japan's and more than 8 times as long as the U.K.'s.

This meager quantitative evidence supports *numerous* qualitative comparative case studies that say that American statutes are much longer, more detailed, more complex than similar-subject statutes in other countries<sup>22</sup>. For example, comparing American, British, and Swedish taxation systems, political scientist Sven Steinmo observed: "No other tax system in the industrialized world comes anywhere close to the degree of specificity found in the U.S. Federal Revenue Code, which includes myriad special exemptions, deductions, credits, adjustments, allowances, rate schedules, special tariffs, minimum and maximum taxes designed to affect certain classes, groups, regions, industries, professions, states, cities, companies, families, and individuals"<sup>23</sup>. Similarly, Congressional appropriations bills go on for hundreds of pages, incorporating detailed provisions requiring expenditures on individual projects in legislators' home states or districts and even detailed substantive policy changes.

### III. A Note on Administrative Regulations

From the standpoint of citizens or business firms, "the law" they must attend to, and whose complexity they must cope with, is not merely statutory law. What matters is the entire web of statutes, administrative

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*Economics*, 16 (1996), p. 295-313), focusing on European national statutes on product liability law, works-councils, and immigration -- all areas in which the E.U. mandated or strongly pushed for policy convergence -- obtained roughly the same results. In Cooter & Ginsburg's study, Belgium and Netherlands above the median, rather than at the median length. The difference perhaps is explained by the difference in legal subject matter (Huber and Shipan looked at labor law alone), or perhaps it is due to Huber and Shipan's much larger sample of statutes, or perhaps both reasons apply. Also, Germany's laws, just below the median length in Cooter and Ginsburg's study, were above the median in Huber and Shipan's.

<sup>20</sup> Cooter, Robert D., Ginsburg, Tom, "Comparative Judicial Discretion", *op. cit.*

<sup>21</sup> *Ibid.*, p. 306.

<sup>22</sup> Kagan, Robert A., *Adversarial Legalism and American Government: The American Way of Law*, Harvard University Press, 2001, p. 8.

<sup>23</sup> Steinmo, Sven, *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State*, New Haven, Yale University Press, 1993, p. 38.

regulations, and judicial precedents. One might imagine that in countries that have shorter statutes, lengthy administrative regulations fill in the specific details, so that the *net density of law* in any field is as great in short-statute countries, such as France or Sweden, as in longer-statute countries like the U.K. or even in the U.S. But the Cooter and Ginsburg study does not support this “net density” thesis. For example, Japan’s *water pollution* statute is 40 percent *longer* than the U.K.’s, but Japan’s administrative regulations in that field *also* are longer than their British counterparts – 6.6 times longer. And for both air and water pollution, Cooter and Ginsburg note, administrative regulations in the U.S. are much longer and more detailed than the already immense federal statutes<sup>24</sup>. In addition, there is extensive comparative case study evidence that American administrative regulations on many subjects are much more detailed and prescriptive than their counterparts in the U.K., continental European countries, and Japan<sup>25</sup>.

#### IV. Explanations

Why do some legislatures enact much more specific, detailed, complex statutes than others? The scholars whose data I have cited - Huber and Shipan, Cooter and Ginsburg – frame the search for an explanation in terms of *principal-agent theory*. The legislator, as principal, needs to be assured that the “agents” who interpret, enforce, and apply the law – judges, administrative officials, regulatory inspectors, immigration officers, and so on – will implement the principal’s statutory standards faithfully, intelligently, and consistently<sup>26</sup>. The greater the risk of divergent decisions by the agents, the greater the legislator’s incentives to write detailed, discretion-constraining statutory rules.

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<sup>24</sup> The U.S. water pollution regulations, for example, are 3.6 times as long as the U.S. Clean Water Act (and 4.5 times the length of Japan’s water regulations). The total combined length of U.S. air and water pollution statutes and implementing regulations, according to Cooter and Ginsburg, (“Comparative Judicial Discretion”, *op. cit.*, p. 306) are 6.6 times as long as the Japanese statutes and regulations, and 14 times as long as the U.K.’s.

<sup>25</sup> Kagan, Robert A., *Adversarial Legalism and American Government: The American Way of Law*, Harvard University Press, 2001, p. 8, 187-188. Jewell, Christopher, *Agents of the Welfare State: How Caseworkers Respond to Need in the United States, Germany and Sweden*, Basingstoke, Macmillan, 2007.

<sup>26</sup> Huber and Shipan (*Deliberate Discretion?*, *op. cit.*, p. 2): “Politicians can benefit from using statutes to delegate policymaking authority to bureaucrats and other actors who have knowledge and expertise that politicians lack, and who have the ability to address problems that politicians, all else equal, may prefer not to delve into. On the other hand, the very expertise that bureaucrats and other actors enjoy, along with their structural role in the in policy processes, provides them with opportunities to work against the interests of politicians and their supporters”.

The *risk* of such divergent decisions, I have argued<sup>27</sup>, varies with the extent to which law-making and law-implementing authority is *fragmented* - rather than consolidated and hierarchically controlled. Similarly, Cooter and Ginsburg<sup>28</sup> hypothesized that legislative confidence in the reliability of law-implementing agents is likely to be weaker and legislation should be more detailed and complex - in governments with the following features :

1. The constitutionally-prescribed law-making process entails multiple veto points, for example, a bicameral rather than unicameral legislature, and/or a president with veto powers ;
2. Constitution formally separates executive and legislative powers, with separate elections for each branch of government ;
3. Constitutionally entrenched federalism, in which authority is divided between the central and separately elected subnational governments ;
4. Less stable, less cohesive majority political parties or party coalitions.
5. I would add a fifth feature; systems in which partisan politics, rather than hierarchically- administered bureaucratic systems, play a large role in the selection and promotion of judges, top administrative officials, and bureaucrats.

## V. Fragmented Authority and American Legislative Exceptionalism

This principal-agent theory does seem to explain the hyper-complexity of Congressional statutes in the United States. American government approximates a “perfect storm” of all the constitutional and political factors that fragment law-making and law-implementing authority - which enhances the “agency problem” for Congressional lawmakers, and therefore encourages them to build as much specificity as possible into the statutes they enact. Let me illustrate the impact of each structural factor :

**1. *Separation of powers.*** The U.S. Constitution makes the president and Congress co-equal branches of government. The American

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<sup>27</sup> Kagan, Robert A., *Adversarial Legalism and American Government*, *op. cit.*

<sup>28</sup> Cooter, Robert D., Ginsburg, Tom, “Comparative Judicial Discretion”, *op. cit.*

Congress, in consequence, is what political scientist Nelson Polsby<sup>29</sup> labeled a “transformational” legislature - well-staffed, accustomed to substantially reworking and changing proposed legislation submitted by the President and executive branch bureaucracies. Congress often passes laws that the president disagrees with, at least in part.

In addition, separate electoral contests for Congress and the President often result in politically divided government. The immensely detailed major air and water pollution control statutes, mentioned above, were first enacted in 1970 and 1972 by a Democratic Party majority in Congress. The laws were to be implemented, however, by a Republican president - Richard M. Nixon - and by the Environmental Protection Agency (EPA), whose current heads were Republican political appointees. Congressional lawmakers, therefore, feared that the agency would bend to industry’s wishes in making and enforcing regulations. So Congress wrote into the statutes many specific, judicially-enforceable provisions, both substantive and procedural. Moreover, for the Congressional Democrats, more specific statutory rules would provide some assurance that the federal *judiciary*, staffed partly with Republican judges appointed by Republican presidents (as well as with Democratic judges appointed by Democratic presidents), would reliably police an environmental agency that might be inclined to subvert the Congressional Democrats’ statutory purposes.

**2. *Federalism*** also fragments power and intensifies Congress’s agency problem. In formulating the Clean Air and Clean Water Acts, for example, traditions of federalism induced Congress to delegate a great deal of anti-pollution law implementation and enforcement authority to state and local environmental agencies. These agencies are structurally and politically independent of the federal government. Environmental advocates in Congress worried that many local agencies would be understaffed or pressured by local industries and labor unions to moderate the laws’ demands. So here too, Congress dealt with the “agency problem” by legislating many judicially-enforceable, prescriptive rules, deadlines and reporting procedures.

**3. *Politicized Agencies and Courts.*** American legislatures’ agency problem is further exacerbated by the fact American judiciaries and governmental agency heads are selected for partisan political reasons. This has long been the case. In 19<sup>th</sup> Century United States, decentralized, fragmented government encouraged the development of political parties held together by the dispensation of patronage to partisan supporters rather than by cohesive ideology. Hence professional

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<sup>29</sup> Polsby, Nelson W., “Legislatures”, in Greenstein, Fred, Polsby, Nelson (eds.), *Governmental Institutions and Processes. Vol. 5, Handbook of Political Science*, Addison Wesley Publishing Co., 1975.

national governmental bureaucracies were slower to develop in the United States than in Europe<sup>30</sup>. Even today, in U.S. federal executive branch departments, not only the cabinet secretary but two or three bureaucratic layers of under-secretaries, assistant secretaries, and deputy assistant secretaries are replaced, by and large, each time a president from a different political party is elected. The same is true for the numerous federal regulatory agencies. This increases the legislative majority's incentives to "lock in" its policy preferences with detailed statutory provisions designed to constrain and check administrative discretion.

The American method of selecting and promoting judges also emphasizes political responsiveness more than legal reliability. In most European countries, judges are selected and promoted, by and large, in a non-partisan manner, on the basis of their adherence to norms of legal craftsmanship. Most American judges, in contrast, are appointed or nominated for election on the basis of the political commitments they have demonstrated in their prior careers as lawyers. In many American states, both lower court and high court judges are selected in popular elections. In other states and in the federal system, judges are appointed, but partisan politics plays a very prominent role in selection. Comparing American judges to British judges, Atiyah and Summers note that the American judge is more likely to rely on her own judgment to reach a result that she thinks is legally just and proper<sup>31</sup>. And what the judge thinks is legally just and proper will often be influenced by her political party background. Thus in controversial statutory-interpretation cases in U.S. Courts of Appeal, decisions by Democratic judges very often differ from those of Republican judges<sup>32</sup>. For the American legislator, therefore, the judiciary is a somewhat unreliable agent for implementing generally-worded statutory provisions. More specific statutory language has a better chance of ensuring judges will follow the legislator's intent.

**4. Weak Political Party Discipline.** Fragmentation of power in political parties also helps explain statutory complexity. In late 2008, American voters elected the Democratic Party's candidate, Barack Obama, as

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<sup>30</sup> Skowronek, Stephen, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, Cambridge University Press, 1982 and Shefter, Martin, *Political Parties and the State: The American Historical Experience*, Princeton University Press, 1994.

<sup>31</sup> Atiyah, P. S., Summers, Robert S., *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford: Clarendon Press, 1987.

<sup>32</sup> Haire, Susan, Lindquist, Stefanie, "Social Security Disability Cases in the U.S. Courts of Appeals", *Judicature*, 80 (1997), p. 230. Cross, Frank, Tiller, Emerson, "Judicial Partisanship and Obedience to Legal Doctrine", Whistleblowing on the Federal Courts of Appeals, *Yale L.J.*, 107 (1998), p. 2155. Gotschall, John, "Reagan's Appointments to the U.S. Courts of Appeals", *Judicature* June/July 1986, p. 49-54.

President, and gave the Democratic Party a strong majority in both houses of Congress. During the campaign, Obama repeatedly promised legislation that would guarantee the health care insurance for all Americans. But despite his position as leader of the Democratic Party, President Obama and his cabinet did not draft the proposed legislation. Nine months after taking office, as this conference is taking place, five different proposed laws, each about 1000 pages long, are emerging from five different House and Senate committees, each dominated by Democrats. Some of the bills, although drafted by Democratic legislators, explicitly exclude certain provisions that President Obama has asserted are essential. Other bills contain provisions that some Democratic congressmen and senators have said they will not vote for. At the time of this conference, it is still not clear what will happen.

The health care legislation saga illustrates how difficult it is for American political party leaders to mobilize legislators *in their own party* to enact the party's legislative program. Over the last two decades, political party control over "back benchers" has actually increased<sup>33</sup>, but party discipline remains weak in the U.S. compared to most parliamentary systems. Most significant Congressional statutes must be painfully stitched together by assembling issue-specific coalitions of legislators. As Atiyah and Summers<sup>34</sup> put it, due to the absence of powerful party leaders who command party loyalty on all legislative issues, "in place of identifiable consistent voting blocks, there is a multitude of floating, ever-changing coalitions around specific issues". Party leaders often can gather majority votes for their bills only by adding to the law a number of precisely-worded amendments, exceptions, special benefits, and procedural provisions that have been demanded by various interest groups and members of Congress. Legislation, in consequence, expands in length and complexity, while simultaneously including purposely ambiguous standards that paper-over political disagreements<sup>35</sup>.

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<sup>33</sup> One commonly-used measure of party unity in Congress is the percentage of votes in which a majority of one party votes against a majority of the other party. (Note that it is not a very strict standard for "party unity," since it would count as "unified" votes in which, for example, one third of Democrats "disloyally" voted with three-fourths of Republicans, one fourth of whose members were also "disloyal.") In the 1970-80, somewhat less than 40% of votes in the House of Representatives met that "majority of party votes" standard of unity. In the 1990-2005 period, the percentage increased to over 50%, and exceeded 60% in a few years (Lowi, Theodore, Ginsberg Benjamin, Shepsle, Kenneth, *American Government: Power and Purpose*, 10<sup>th</sup> Core Edition, W.W. Norton & Company, 2008, p. 220).

<sup>34</sup> Atiyah, P. S., Summers, Robert S., *Form and Substance in Anglo-American Law*, *op. cit.*, p. 310.

<sup>35</sup> Atiyah, P. S., Summers, Robert S., *Form and Substance in Anglo-American Law*, *op. cit.* Schuck, Peter, *The Limits of the Law*, *op. cit.*, p. 27-30.

The comparatively weak discipline of American parties has numerous causes. First, legislators are elected not via proportional representation, but via **winner-take-all voting in local electoral districts**; this tends to tie individual legislators to the preferences of their local constituencies, which may conflict with national party platforms. Second, candidate-selection often occurs through intra-party *primary elections* in which voter turnout often is low; this further increases the possibility that the candidates chosen will differ from the national party leadership on many issues. Third, the **campaign finance system** for Congressional races emphasizes private fund-raising by individual candidates to a far greater extent than financial support from the national party; individual candidates, consequently, face strong pressures to give priority to the concerns of their donors rather than to the policy preferences of national party leaders. Fourth, the **committee-structure** in both houses of the legislature delegates substantial influence to a multitude of committee and subcommittee chairs; this multiplies the points of access and influence by lobbyists representing particular localities, industries, and ideological groups, each arguing for specific statutory benefits or protections. Fifth, the American **two-party system** leads political parties to devise appeals to an ever-wider range of social groups who may have divergent interests on many issues<sup>36</sup>.

## VI. Statutory Complexity in Parliamentary Systems

Compared to American legislatures, most parliamentary governments in economically advanced democracies face a much less severe agency problem<sup>37</sup>. Their national bureaucracies and judiciaries, generally speaking, are not politically selected and, compared to the U.S., are more closely controlled by national ministerial and judicial hierarchical structures. Political party discipline tends to be tighter than in the U.S. Not surprisingly, therefore, when Huber and Shipan<sup>38</sup> compared laws enacted by parliamentary governments with laws passed by U.S. state legislatures, they found the parliamentary statutes contained far less specifically-worded *procedural language* designed to check administrative discretion. For example, in the 1990s, many American states, prodded by the federal government, enacted laws which encouraged provision of health insurance for very low income families through group health maintenance organizations. Analyzing these statutes, Huber and

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<sup>36</sup> Lowi, Theodore, Ginsberg Benjamin, Shepsle, Kenneth, *American Government, op. cit.*

<sup>37</sup> Moreover, with fewer veto points than the American legislative process, and tighter party discipline, it is probably somewhat easier for parliamentary legislators to enact more coherent statutes and to enact corrective legislation if administrative officials or courts make policy decisions that the current parliamentary majority strongly disapproves of.

<sup>38</sup> Huber, John D., Shipan, Charles R., *Deliberate Discretion ?, op. cit.*, p. 68.

Shipan<sup>39</sup> found that 33% of the statutory language dealt with *procedural instructions* such as deadlines for implementation; reporting requirements for implementing agencies; and provisions facilitating participation in agency decisionmaking process by advocacy groups, business interests, and other governmental bodies<sup>40</sup>. In contrast, when Huber and Shipan analyzed 30 employment-related statutes in 12 *parliamentary* systems, mostly in Western Europe, they found that merely 2.3% of the language involved such procedural instructions<sup>41</sup>. That doesn't mean the parliamentary statutes were substantively vague. They included many relatively specific legal standards and rules. It is the absence of the detailed *procedural language* that helps explain why European statutes are much shorter and much less complex than the conflict-ridden products of the U.S. Congress.

Yet parliamentary governments have differing legislative styles. In the Huber and Shipan study, the labor laws enacted by Scandinavian countries, on average, were only one-fifth as long as the French statutes on the same subjects. Conversely, the British labor laws were three times as long as Germany's and six times as long as France's. To explain that variation, Huber and Shipan again turned to principal-agent theory. They hypothesized that "Incentives to micromanage the policymaking process through policy details in the statutes will be greatest when members of the governmental majority do not trust each other to implement desired policies", for example, when there is conflict between the cabinet majority and individual cabinet ministers<sup>42</sup>. Conversely, they predicted shorter statutes "when the governing party is reasonably homogeneous and disciplined"<sup>43</sup>.

That in fact is what their multiple-variable regression analysis found. Other things being equal, parliamentary governments in which the governing majority was a coalition of different parties, rather than a single majority party, generally wrote longer, more detailed statutes. Coalitions formed by a minority party tended to enact still longer ones<sup>44</sup>. Similarly, where there is a federal constitution, as in Germany, it was associated with longer-than-average statutes<sup>45</sup> presumably because law-

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<sup>39</sup> *Ibid.*, p. 62.

<sup>40</sup> *Ibid.*, p. 56.

<sup>41</sup> *Ibid.*, p. 68-71.

<sup>42</sup> *Ibid.*, p. 185.

<sup>43</sup> *Ibidem.*

<sup>44</sup> *Ibid.*, p. 201-202.

<sup>45</sup> *Ibid.*, p. 202.

making and law-implementation through federal structures intensifies the legislator's agency problem<sup>46</sup>.

Why, then, are United Kingdom's statutes are so much longer than comparable laws in other European democracies? The U.K. has had stable, disciplined, majority parties who rule for substantial periods of time. There are relatively few veto points in the British Parliament's legislative process. The U.K. has a highly professional, reliable civil service and judiciary. All these factors, in theory, should produce short statutes. Huber and Shipan think that the explanation stems from the U.K.'s common law heritage. In the U.K., according to a British legal scholar, the "judicial tendency to regard statutes as exceptions to the common law, and as such to interpret them restrictively, has also influenced their drafting. Highly detailed and specific language is employed in an attempt to ensure the courts apply statutes in the way intended by Parliament"<sup>47</sup>. Cooter and Ginsburg make a similar argument<sup>48</sup>.

Consistent with the "common law heritage" theory, Huber and Shipan found that labor law statutes in Canada, Australia and Ireland also were substantially longer than the continental European average. On the other hand, the labor statutes in all these former common law countries were not nearly as long as the comparable British statutes. So the British puzzle is not quite solved. William Dale, whom I mentioned earlier, complained about the stylistic conventions employed by parliamentary draftsmen in the U.K., such as placing lengthy definitions of numerous terms at the beginning of statutes, and using highly legalistic and

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<sup>46</sup> In addition, Huber and Shipan (*ibidem*) hypothesized it that would be more difficult for the cabinet to reach agreement on detailed statutory language in countries in which governmental cabinets were less stable over time and the ministers in charge of writing the statutes on particular subjects had shorter tenures. That helped explain why France, which had a relatively high level of turnover in individual cabinet ministries during the period studied (1986-1998), wrote substantially shorter labor statutes than Germany, which enjoyed relatively high continuity in office for individual cabinet members.

<sup>47</sup> *Ibid.*, p. 193.

<sup>48</sup> Cooter, Robert D., Ginsburg, Tom, "Comparative Judicial Discretion", *op. cit.*, p. 18-19. Huber & Shipan's speculation that a common law tradition drives legislatures toward greater specificity is based on the notion that the legislature in those countries, in contrast to civil law legal cultures, must be quite clear how each statute relates to the underlying body of existing judge-made law. Building on that idea, perhaps one additional reason Congressional statutes in the U.S. are so much longer than the comparatively lengthy British statutes is that Congressional lawmakers must make clear how each law they enact relates to an underlying body of state government law, both common law and statutory. The basic legal doctrine is that state law is not preempted by federal statutes unless the federal statutes clearly are intended to do so. Congress's resulting incentives to be legally precise is probably intensified, moreover, by the higher frequency with which regulatory and social benefit law results in litigation in U.S. courts (Kagan, Robert A., *Adversarial Legalism and American Government*, *op. cit.*, ch. 8-9).

redundant methods of expression. Similarly, P.S. Atiyah and Robert Summers<sup>49</sup>, in their superb comparison of law, legislation, and adjudication in the U.S. and the U.K., acknowledge that “Many lawyers today find the style of parliamentary drafting obscure and tortuous ; it is often quite impossible to get a general idea of the intent of a statute from a casual reading...” But they argue convincingly that British statutes are far more legally coherent and precise than the far more voluminous U.S. statutes. Strong internal discipline within the single Parliamentary ruling party, they say, is one reason. But another is that

English Parliamentary Counsel ... know and understand the way in which English judges interpret statutes, and they draft bills in the knowledge that they will be interpreted in the traditional literal manner.... Interpretation [by judges] and drafting [by the office of legislative counsel] are thus reciprocal and complementary functions, each of which is affected by the uniformity of technique of the other<sup>50</sup>.

Those observations suggest that in addition to the structural factors I have been discussing, particular professional traditions among statutory draftsmen play a meaningful role in shaping statutory style and language<sup>51</sup>. Professional tradition may also help explain why Scandinavian countries’ statutes are so very short, and why French statutes tend to be a bit shorter than the European average, even though some prominent structural features of the French government - separately elected presidents, abstract constitutional review by the Constitutional Council - in theory would produce *longer* statutes.

## VII. Concluding Thoughts

What have we learned from this kind of analysis of statutory form? Putting aside particular stylistic traditions in legislative drafting offices, three structural factors tend to diminish the level of statutory detail and complexity. First, a national constitution that consolidates rather than fragments political law-making and policy-implementing authority. Second, more stable and ideologically cohesive majority political parties or party coalitions. Third, legislative faith in the professionalism and

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<sup>49</sup> Atiyah, P. S., Summers, Robert S., *Form and Substance in Anglo-American Law*, *op. cit.*, p. 317.

<sup>50</sup> *Ibid.*, p. 314.

<sup>51</sup> In addition to professional legislative drafting conventions, the extraordinary short statutes of Sweden, Norway and Sweden may reflect structural factors like the Scandinavian countries’ strongly corporatist systems of governance and policy-implementation, which probably reduce perceived agency problems (Huber, John D., Shipan, Charles R., *Deliberate Discretion ?*, *op. cit.*, p. 206).

neutrality of the administrative bureaucracies and the judiciary that interpret and implement the laws.

It is more difficult to detect the *normative* lessons of this analysis. Is more statutory complexity good or bad, more simplicity good or bad? The British case suggests that greater statutory complexity does not necessarily breed confusion if that is the legal language which judges, administrators and practicing lawyers are comfortable with. One cannot know, *a priori*, whether the relatively less-specific statutes of Norway and France generate more consistent and coherent judicial and administrative decisions than the more detailed British statutes or the vastly more detailed American statutes.

In my view, the social and normative costs and benefits of legal complexity can reliably be assessed and compared across national legislative styles only if we adopt the perspective of King Rex's subjects. We need to know how practicing lawyers, litigants, business firms, taxpayers, and applicants for governmental benefits in different countries perceive the law and the way it is administered. This is not as impossible a task as one might fear.

Ten years ago, for example, I conducted 10 case studies of multinational corporations that conducted parallel business operations in the United States and at least one other economically advanced democracy<sup>52</sup>. Invariably, corporate managers said the American laws and regulations, compared to substantively similar laws and regulations they encountered elsewhere, were vastly more voluminous, complex and confusing<sup>53</sup>.

In 2001, Christopher Jewell studied welfare administration in Los Angeles (California), Bremen (Germany) and Malmo (Sweden). The American administrators, he found, were overwhelmed by detailed regulatory requirements and checklists, reflecting both federal and California law. Legalistic decisionmaking abounded; decisionmakers went by the book and failed to meet the real needs of many impoverished applicants. The German administrators also had to cope with very complex laws and regulations. But they had received much more regulatory training than their American counterparts. They were

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<sup>52</sup> In each case study, the corporation's branches dealt with substantively similar kinds of laws and regulations — such as water pollution rules for silicon chip manufacture in the U.S. and Japan; the construction of municipal waste disposal facilities in the U.S., the U.K., and the Netherlands; collection of delinquent credit card debt by a multinational bank with operations in the U.S. and Germany. My colleagues and I asked corporate officials to describe in detail and compare their experiences with the law in the different legal systems.

<sup>53</sup> Kagan, Robert A., Axelrad Lee (eds.), *Regulatory Encounters : Multinational Corporations and American Adversarial Legalism*, Berkeley, University of California Press, 2001.

trusted to make decisions that adjusted legal rules to specific cases. Legal complexity less often resulted in unresponsive legalistic decisions. In Sweden, the law was astonishingly simple - a two page statement of social assistance goals in national “framework law”, as elaborated by 15 pages of local government regulations. Consistency and responsiveness in administering these more general standards, Jewell found, was achieved through three mechanisms: extensive education of front-line administrators in social work; frequent intra-office consultation among case workers; and detailed advisory guidance documents issued by the National Health and Welfare Board<sup>54</sup>.

The lesson is that there are many ways for national legal systems to deal with the tension and tradeoffs between specific rules and broader standards. Much depends on precisely how the laws are administered and how administrators and judges are trained and resourced. Sometimes legal complexity, as in the United States, is indeed frustrating and justice-defeating. For British litigants and German welfare applicants, legal complexity may work reasonably well. In cohesive Sweden, which invests in extensive professional education for caseworkers, very *general* legislative standards may yield legal decisions in welfare cases that are both consistent and responsive. In other administrative systems, such simple laws might be disastrous. Therefore, to understand which legislative styles produce legal predictability and justice, which do not, and why, we need many more close-to-the-ground sociolegal studies of the type that Christopher Jewell conducted.

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**Résumé :** La complexification des lois est une conséquence de la vie démocratique moderne qui ne cesse elle-même de devenir de plus en plus complexe. Il n'est pas possible de s'en tenir à un principe démocratique qui énoncerait la nécessité d'établir des lois simples sans prendre en compte à la fois le contexte social et la spécificité de certaines politiques. Ainsi, l'auteur expose les raisons pour lesquelles certaines législations nationales sont parfois moins complexes que d'autres en étudiant l'un des critères de la complexité législative : la densité et le degré de précision de la législation. Des institutions fragmentées par la séparation des pouvoirs ou le fédéralisme, un système politique caractérisé par des coalitions instables, un défaut de confiance du législateur envers les organes d'application, administratifs ou judiciaires, sont autant de facteurs qui favorisent des législations complexes.

**Summary :** *It is impossible to prescribe the optimal level of legal simplicity or complexity as a matter of principle, without regard to the particular policy and social*

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<sup>54</sup> Jewell, Christopher, *Agents of the Welfare State: How Caseworkers Respond to Need in the United States, Germany and Sweden*, Basingstoke, Macmillan, 2007.

*context. The article demonstrates that some legal systems do enact laws that are somewhat less complex than others, and goes on to enquire why the legal complexity differs across nations, focusing on one simple but measurable aspect of legal complexity : the relative density or specificity of legislation. An institutional framework based on a strict separation of powers principle, or on federalism, weak governmental coalitions, legislative distrust towards administrative or judicial institutions, often produce legal complexity.*

**Zusammenfassung** : Die wachsende Komplexität der Gesetzgebung ist eine Folge des demokratischen Lebens, das selbst zunehmend komplexer wird. Es ist nicht möglich, sich auf ein demokratisches Prinzip zu beschränken, das das Gebot der Einfachheit der Gesetze postuliert. Die Gründe der Komplexität der Gesetzgebung können je nach dem landesspezifischen Kontext unterschiedlich sein. Der Autor analysiert sie mittels eines der möglichen Kriterien : die Dichte und der Grad der Bestimmtheit der Gesetze.