

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 4**

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**2021**

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# Response paper to “The Law is a Fractal: The Attempt to Anticipate Everything” - Andrew Morrison Stumpff

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## ABSTRACT

*Andrew Morrison Stumpff's paper, "The Law is a Fractal: The Attempt to Anticipate Everything" is very intelligible and seemingly rather simple, which he manages to achieve with excellent analogies and examples. The author has managed to evoke some relevant and important questions which are worth pondering. He argues that the act of anticipating every single outcome, by the rule writes, creates complexity in law. This argument provokes the question of whether simplicity in law is what the rule writers should aim for? This response paper will attempt to reflect on his article by elaborating on the points that the author has put forth, points which we are in agreement with, points of disagreement, and our critique.*

**Keywords:** *Law is a Fractal, Andrew Stumpff, Response Paper.*

Therefore, Andrew Morrison Stumpff's paper, “The Law is a Fractal: The Attempt to Anticipate Everything” is very intelligible and seemingly rather simple, which he manages to achieve with excellent analogies and examples. The author has managed to evoke some relevant and important questions which are worth pondering. In this response paper, we will attempt to reflect on his article by elaborating on the points that the author has put forth, points which we are in agreement with, points of disagreements and our critique of his article. We have also attempted to elaborate and analyse the author's point of view with some practical examples from the Indian context.

The thesis of Stumpff's paper is rather straightforward, he states that it is impossible for a rule writer to write an appropriate and objective rule to cover every eventuality in advance. Further he states that this attempt to anticipate every situation and make laws for the same cannot and should not be endeavoured as the persistent effort to achieve it imposes under-recognised costs on the regulated population.<sup>3</sup> The process of anticipating, contemplating and drafting rules for

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<sup>3</sup> Andrew Morrison Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, 44 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 649, 661 (2013).

every possible scenario is an extremely complex and sometimes futile exercise. We agree with Stumpff's point that it is most certainly impossible to anticipate and draft appropriate, specific rules for an infinite number of scenarios. However, despite its pitfalls and complexities, we believe that the endeavour to at least try anticipating and covering as many scenarios as possible while law makers draft laws seems a worthy enterprise to undertake. 'The forms, costs, structural causes, limits, and possible reform of these legal complexities raise important social issues that need to be explored in greater depth and breadth'<sup>4</sup>. 'Our present socio-political complexities have been the result of seeking answers to questions that did arise under our approach, the seemingly simpler past was simpler largely because the generalities had not yet been exposed as inadequate. Our present laws are more complex than in 1939 and of course the 1913, because these laws answers questions which the earlier laws could not. So what may look simpler now may only be a reflection of the innocence of 1939, if not 1913.'<sup>5</sup>

The author puts forth an excellent analogy by saying that law is a fractal. He elaborates that "no precise, definite border can exist between all the possible specific actions microscopically on this side of that which is appropriately legal and all the possible specific actions microscopically on the other side. One can always find, by adding new facts and circumstances, some new unresolved "grey area" that exists between the regions of fact-space previously resolved by rules."<sup>6</sup> The law being a fractal is an impeccable and close to perfect way of describing the intricacies and the complexities of the legal system. While we do agree with the fact that law is a fractal, we find that the author has failed to take into account the multi-dimensional aspects of law. We propose that a better way of describing law would be to compare it to a moving Mandelblub, a 4 dimensional fractal, that is constantly growing and changing with the added complexities of a fractal. Unlike a stagnant 2 dimensional fractal, law is constantly changing due to the interplay of different facets of society, we cannot expect certainty from the law and the law makers. The legal system in itself is a kinetic being. Legal complexity "arises in a multitude of different contexts that may have little in common, contexts in which its meanings are likely to be different and it's consequences not readily traceable. The task of distinguishing when it is a cause of some other cause from when it is an effect of some other cause, always difficult, especially so because of complexity frequent association with cognate concepts such as uncertainty."<sup>7</sup> The purpose of mathematical certainty is different from

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<sup>4</sup> Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE LAW JOURNAL 1, 6 (1992).

<sup>5</sup> Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & CONTEMP. PROBS. 673, 682 (1969).

<sup>6</sup> *supra* note 2, at 656.

<sup>7</sup> *supra* note 3, at 2.

the purpose of a rule. Law is a dynamic field and it seldom remains static. Law strives to be flexible and evolve with mankind's inventions and developments. Therefore, there will inevitably, always be consequences but attempting to make specific, appropriate and objective rules is the most favorable way to go about the law-making. "Legal complexity is a subject that has continued to obsess lawyers, policymakers, social critics, editorial writers, and who almost invariably condemn legal complexity in the most caustic terms."<sup>8</sup>

The important question at this point is, whether it is more prudent to draft laws keeping in mind the infinite number of scenarios the human mind can anticipate and let the consequences of the complexity of the said law and the problems that arise with it be dealt with by the executive and the judiciary, whose function is to navigate through and interpret the laws laid down and execute it in an efficient way.

Simplicity of law, although a compelling virtue comes with its own costs. While the author puts forth a compelling argument against attempting to make specific, appropriate and objective realizable rules, he does not delve into the consequences of the other available solution – which is to make subjective, simple rules and leave it open for interpretation by the judges – “a solution identified by Plato of entrusting all power to a perfectly enlightened despot to decide each case as it arises.”<sup>9</sup> Even a judge cannot be expected to get it right at all times and such perfection is hardly achievable. Further, a judge's decision, although constrained by the law will certainly be affected by a number of factors such as history, institution, politics, personal biases etc. Even when there is no clear, specific and objective rule established, the judges are still trying to find a law or a standard to justify their discretion within the bounds of the legal system – ultimately looking for guidance from the legislation – therefore, why not put in the effort to reasonably anticipate as much as we can and deal with the complexities that arise from it with the help of effective management, rather than further add to the burden of the judiciary, which is already overwhelmed with the number of cases even with the existence of extensive, specific laws. Stumpff argues that legal complexity is increasing judicial burden, but moving back or making simpler legislations will only lead to further increase in the number of cases that end up in the judicial system due to lack of clarity.

Additionally, law makers tend to anticipate the various scenarios that might arise while drafting laws, but we don't legislate exclusively for the exceptions, we legislate for the other 90-95% of the cases which are covered under the law which helps provide stability to the general public and leave some exceptional cases up for interpretation by the judiciary. Certainly this method

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<sup>8</sup> *Id* at 3.

<sup>9</sup> *supra* note 2, at 661.

is better than just drafting subjective, unrealizable laws leaving all of the regulated population confused. It is pointed out in the article that complex law making is futile and the intended consequences are sometimes not achieved or that the consequences achieved are not what was originally intended. Therefore, in a scenario where even the intended consequences aren't entirely controllable even with the painstaking effort of attempting to anticipate possible consequences and eventualities, one can only imagine the devastating consequences of having subjective, simple laws and rules which leaves interpretation open and paves way for innumerable unintended consequences as no prior thought went into making them. Although it is agreed that even with complex, specific legislations there are many unintended consequences of the law which aren't favourable, there has at least been an effort to curtail and make provisions for the few that could be anticipated for the greater good of the regulated population.

While discussing the drawbacks of legal complexity, Stumpff also points towards its costs. He presents the example of the American tax compliance, that "the annual economic cost of "tax compliance" in the U.S. is \$431 billion, and that "the tax compliance industry" employs more people than Wal-Mart, UPS, McDonald's, IBM, and Citigroup combined."<sup>10</sup> According to him the cost of compliance for complex rules outweighs the benefits of precision. A contrary view was given by Louis Kaplow, an American economist, in his paper *A Model of the Optimal Complexity of Legal Rules*. Kaplow argues, and we agree, "that private compliance costs are incurred only by actors who find it in their interest to do so, and the benefits of improved behaviours are realized only to the extent that actors become informed about the distinctions made by more complex rules. As a result, higher aggregate compliance costs hardly indicate the undesirability of more complicated rules: low compliance costs may reflect little attempt to comply, in which case the added administrative costs of applying differentiated sanctions would be wasted."<sup>11</sup> The mere action of inducing that compliance cost shows the individual's interest in complying with the complex rules. An "individuals becomes informed if and only if they believe that the expected benefit of improving their behaviour will exceeded the cost of information."<sup>12</sup>

In the opinion of Stanley Surrey, an American Tax law scholar and a reliable source used by Stumpff, "our present tax complexity is that a very large amount of complexity is inevitable, and that the degree of the complexity will probably increase rather than decrease. The solution

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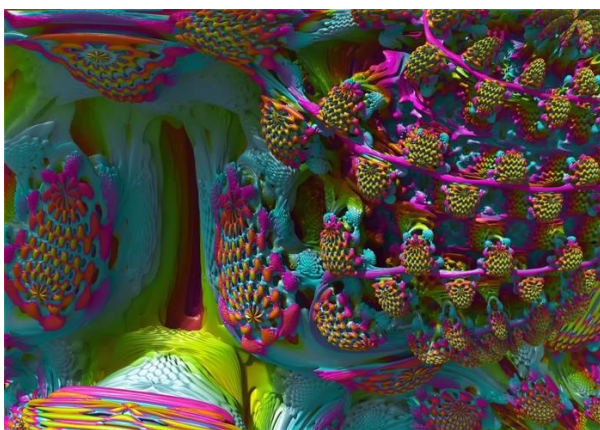
<sup>10</sup> *supra* note 2, at 676.

<sup>11</sup> Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, OXFORD JOURNALS, 150, 161 (1995).

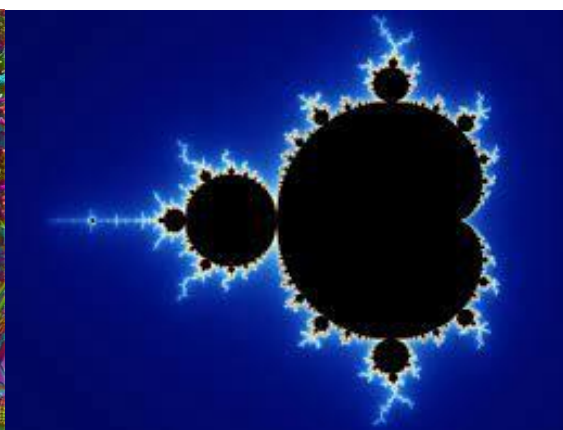
<sup>12</sup> *Id.*

thus does not lie in any “simplification” of the tax law. Nor does it lie in a nostalgic search for the “simpler” Internal Revenue Code that is simpler solely because it avoids many of the structural problems that require an answer. The challenge of the future in the tax field is not the attainment of such simplification. Rather, the challenge lies in finding the most efficient way for the management of tax complexity.”<sup>13</sup> We concur with the idea that there is no going back to simpler time and rules but to find a way to manage the inevitable complexity of law.

To understand all this from an India prospective we can take the example of the Good and Services Tax laws introduced in 2017. GST was introduced as one nation one tax to reduce the complexity from the interplay of many State and Central level indirect taxes and to bring efficiency in the tax structure. After 4 years GST has helped in eliminating the cascading effect of multiple indirect taxes, but due to its own complexities it has also managed to launch a new set of complex structure. The compliance cost under the GST reign has increased, indicating more and more people are ready to comply with it to avoid violations of the rules, as maintained by Kaplow. GST is a perfect example that even if we take reformist steps to curtail legal complexities, those steps will only pose new sets of challenges and thus Stanley’s argument stands true i.e.. complexity is inevitable and a solution is to invest in management of legal complexity. The question that should now be pondered upon is what will that management structure look like and who will be the new players of this new structure. Tribunals have been set up for specialised area of law. A tribunal for GST matters, GSTAT, is purposed by many courts and still under discussion. So are Tribunals the solution for interpretation of complex rules?



(Figure 1: A Mandelblub)



(Figure 2: A Fractal)

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<sup>13</sup> *supra* note 4, at 709.

## Reference:

1. Andrew Morrison Stumpff , *The Law is a Fractal: The Attempt to Anticipate Everything*, 44 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 649, 661 (2013).
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