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The Authoritative Text as Imperative to Comprehensibility of Legislation

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ABSTRACT ENGLISCH

The most understandable of texts is of little use as law if it is not clear that it is **authoritative**. This is the comparative lesson of this essay. American law is—Americans say—**indeterminate**. American law is indeterminate because American texts, clear as they may be in wording, often are not authoritative; other texts apply too and may be inconsistent. German law is rarely indeterminate in this sense.

This essay identifies in bullet-points some comparative aspects of clarity of American and German law. Why is American law indeterminate? Why is German law not? What, if anything, do these differences counsel for future European Union law? I identify five areas of differences. 1. Legal System and Statutes, 2. Lawmaking. 3. Federalism. 4. Constitutional Review and 5. Law Application.

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1 An authoritative text as imperative to understandability

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This is the *Fünftes Europäisches Symposium zur Verständlichkeit von Rechtsvorschriften.* Helen Xanthaki in her opening address "On the Comprehensibility of EU Legislation" emphasized the importance of understandability-oriented reform for a sustainable European Union. Through legislation the EU can "tell its story to its citizens, thus regaining their trust, their support, and their active participation in EU integration." Major benefits include:

(1) Subjects can follow, appreciate, and apply to themselves understandable texts without outside intervention.

(2) If intervention is needed, understandable texts are more easily applied by government authorities and members of the regulating professions.

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Understandability and comprehensibility are aspects of legal methods, i.e., how laws are made and applied. They contribute to legal certainty, i.e., *Rechtssicherheit*; they are essential to an effective rule-of-law state, i.e., *Rechtsstaat*.

The clearest, most understandable of texts is of little use as law if it is not clear that it is **authoritative**. This is the comparative lesson of this essay. American law is—Americans say—**indeterminate** (MAXEINER 2006: 517, 518-519). American law is indeterminate because American texts, clear as they may be in wording, often are not authoritative; other texts apply too and may be inconsistent. German law is rarely indeterminate in this sense. According to European courts, **legally certainty** is fundamental value of European law (MAXEINER 2007: 541, 547-551, 2008: 27, 31-32).

Legal certainty does not mean that how law applies to a particular case is certain. What it does mean is that which law applies, what are the criteria for applying the law, who shall apply the law, and what the possible consequences of that application are, are determinate (MAXEINER 1986: 26-46, 2006: 517, 521-527, 2007: 541, 553-556, 601; ZIPPELIUS 2008: 6-7).

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This essay is an encapsulation of what was to have been a poster-presentation. The space allotted is small (a few thousand words): here I identify in bullet-points some comparative aspects of American and German law. Why is American law indeterminate? Why is German law not? What, if anything, do these differences counsel for future EU law? I identify five areas of differences. 1. Legal System and Statutes, 2. Lawmaking. 3. Federalism. 4. Constitutional Review and 5. Law Application.

2 Laws' Authority in the U.S., Germany, and in the EU

2.1 Legal System of Statutes

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The United States does not have a legal system in the dictionary sense of "a regularly inter-

acting or interdependent group of items forming a unified whole". It has piles of norms; it has legal institutions. There are few systematic laws, i.e., codes and other fundamental laws.

The United States pays a heavy price for lack of systematic laws. Without authoritative codes, there is no foundation on which to build special laws. There are no gap fillers and no tiebreakers. Without codes and other systematic laws, there are no guides to coordinating laws. Priority among laws degenerates into a choice among hierarchies rather than a choice among solutions that work better for the system. Which law governs: the federal constitution, federal statutes, federal regulations, state constitutions, state statutes, state regulations, state common law, municipal charters, municipal ordinances, or municipal regulations?

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Even without considering state and local laws (addressed in 2.3), contemporary American statutes are a collection of individual laws poorly systematized internally and externally. Often, they are affected or overridden by regulations and presidential executive orders. Finding one written law, statute, regulation, or executive order, that might govern your case is no assurance that there is not another one somewhere else that will apply too and possibly with a different result. In planning and in litigation, one must guess which of these laws applies and how they may be related together!

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Historically, Americans did not want indeterminate laws. They sought legal certainty. They were among the first to base their governments on written constitutions. Less well known, they were among the first to seek to systematize statutes. Thomas Jefferson's 1784 Revisal of Virginia's laws predated the Prussian codes of the 1790s and the French Codes of the first decade of the nineteenth century. For U.S. laws, see MAXEINER (2018: 180-193).

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Germany does have a system of statutes. The most elementary of German lawbooks for laymen, *Juristische Methoden für Dummies*, explains in everyday terms why:

> If you want to find your coffee spoon, you need to have order in your kitchen. If you want to find the legal rule that solves your case, you need to have order in your legal rules. This order is called *the legal system* (*Rechtsordnung*).
> (KÖNIG 2016: 29)

German statutes are systematized. Norms are brought together in codes or in key statutes. The lawmaking process (discussed in the next section) takes pains to keep statutes consistent and not duplicative one with another. For German laws see MAXEINER (2018:193-205).

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There is no secret to making laws authoritative. Here are some basic considerations that have long been followed in lawmaking in Germany but less so in the United States:

(1) Omit needless laws. Fewer rules makes for fewer contradictions among rules.
(2) Craft laws that are internally consistent.
(3) Craft laws that are consistent with other laws.

(4) Review laws for continued relevancy; repeal those no longer relevant.
(5) When adopting news, amend existing laws explicitly.
(6) Limit authority to adopt laws; more lawmakers make more contradiction.

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Where will the European Union go? The draft Constitution failed. An EU Civil Code remains a dream. Challenges seem enormous. How are EU Regulations and Directives to be coordinated among each other and with Member States' legal systems? With as many people involved in making and applying laws at multiple levels, the opportunity for losing certainty which law applies, is present. For European Union laws see KARPEN/XANTHAKI (2017); for laws in Member States see KARPEN/XANTHAKI (2020).

2.2 Lawmaking

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The United States is alone among major modern democracies in retaining law crafting within the legislature. In other countries legislatures do not do the drafting. The results of legislative drafting in the U.S. are dismal. In recent years, dysfunctions in the lawmaking process in Congress, particularly in the United States Senate, have led to few laws being made at all. What was once the usual order of legislation, i.e., Congressmen proposing laws and committees reviewing them, has declined. Most bills serve no purpose other than to call attention to a particular Congressman's interests. Typically, Congress adopts fewer than 3% of the thousands of bills introduced. Such laws as come into being, are last minute deals among a few leaders. Drafts are not circulated: they are presented for passage at the last moment, unread, on a take-it-or-leave-it basis. Lately, they are not hundreds of pages long, but thousands. The opportunities for introducing provisions that serve special interests and not the common good are rife. The Better Regulation programs of the Organisation for Economic Cooperation and Development (OECD) have little impact in the U.S. For U.S. lawmaking, MAXEINER (2018: 206-215).

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Lawmaking in Germany is different. As in most modern countries, most bills are prepared by the Government. The Common Rules of Procedure of the Federal Ministries (GGO: *Gemeinsame Geschäftsordnung der Bundesministerien*) sets out a system for consideration that is followed. Most government bills introduced are adopted. They number in the hundreds, not in the tens of thousands. Bills are drafted within the Ministries, circulated among government and private stakeholders, and vetted by three reviewing ministries (justice, interior, and finance) and the Regulatory Control Council (*Normenkontrollrat*). Only then are they considered by the Council of State (*Bundesrat*) and by the Legislature (*Bundestag*). They are accompanied through these legislative bodies by their government authors. If changes are desired, it is usual for the government authors to be instructed to make them. For lawmaking in Germany see MAXEINER (2018: 216-229); KLUTH/KRINGS (2014).

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European Union procedures for lawmaking do not share the long history of either the American conference system or the German GGO procedures. The future will tell if they are able to meet or exceed the quality control standards of German and other EU Member States. For lawmaking in the European Union see KARPEN/XANTHAKI (2017).

2.3 Federalism

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Federalism is about power sharing among different governmental entities. It is about keeping one larger unit of government on the same path while permitting subunits to make local corrections and variations. There is no one way to federalism. It is inherently political.

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Federalism in the United States presents harmony of legal system without, however, unity of laws. Harmony is limited to broad chords. The reality of everyday life is a cacophony of confusing and conflicting federal, state, and local laws, often competing for application.

Most laws in the United States are state or local laws. While largely similar, rarely are they identical. Each state has its own legal system with its own laws, courts, and other institutions. That each has its own, distinct system, is thought an essence of federalism. Each state makes its own laws and institutions cognizant of federal and state counterparts but without adherence to them. There is no government mechanism for coordinating states as states one with another. The United States Senate, since 1913, does not represent states but citizens of states.

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Most areas of law are subject to concurrent legislative authority of both federal and state governments; authority is exclusive in only a few areas. The Supreme Court, with little success, has sought to create rules setting limits on that authority. Many disputed issues can be litigated in federal or in one or more state courts. There is no general federal law that directs matters to one state or another. Each state has its own—different—choice of law rules. Each state has its own—different—jurisdiction rules. At the most basic of levels, a person subject to law, before considering what the text means, must consider which text applies. Even something as seemingly simple as knowing what the statute of limitations is, cannot be conclusively determined.

No one can know beforehand what the law will be. With fifty states and one federal government, it is a huge task just to set out what the laws in any one area in all 51 jurisdictions are. Rarely today does anyone try. Instead, law teachers typically teach one "national" law, which is an amalgam of all state laws coupled with a reminder that the person subject to law must check the local jurisdictions.

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The problem of disparate laws has been recognized since the first days of the United States. In the first years of the country there was a hope that naturally, by states facing similar problems independently they would reach similar solutions by copying the work of other states. In commercial law, there was the idea of a federal judge-made common law. The failures of these methods to meet the need for one national law for one national society and market were apparent toward the end of the nineteenth century. Since then, there have been three principal approaches to creating national law: (1) federal law, as exclusive as politically possible; (2) uniform state laws adopted by each state independently; and (3) restatements and other precatory rules of state law (e.g., model codes).

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Of the three, only exclusive federal law has had substantial success. The principal barriers to its invocation are constitutional limits on federal authority and insufficient political will. The United States Constitution cannot practically and politically be amended for any reason, including to readjust federal and state competencies. There has not been one meaningful amendment in the last fifty years.

Uniform laws, first proposed in the 1890s, while providing uniform rules, have had only a few adoptions by many states, let alone by all states. The single most important one is the Uniform Commercial Code which is a contract law limited to transactions in goods (similar to the UN Convention on Contracts in the International Sale of Goods). It has proven difficult to amend.

Restatements and similar proposals are not intended to be binding statutory law, but only aids to judges in deciding cases subject, generally, to judge-made law.

For federal lawmaking in the United States see MAXEINER (2013 and 2018: 230-241).

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German federalism is another matter. Most German laws, especially the most important ones, are federal. The idea of sharing authority is less insistent on independent lawmaking authority, "sovereignty," as it is on independent authority to act. States carry out federal laws. Federal institutions largely exist to lead and coordinate independent state executive authorities.

The Council of State (*Bundesrat*) acting in cooperation with the legislature (*Bundestag*) can adjust the relationship of states and their laws with federal laws. They together can amend the German Constitution. The most important of amendments was the "Federalism Reform" of 2006 and not the reincorporation of the former East Germany in 1990.

German localism also puts tight limits on what municipalities can legislate. In short, German methods work to limit the number of lawmakers who have competence to legislate and to coordinate legislation they do adopt. The German Constitution's supremacy clause has found little use because the laws themselves are in order. People know which law is authoritative. For federal lawmaking in Germany see MAXEINER (2018: 242-248).

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European Union. EU lawyers assert the EU is *sui generis* and neither federal nor confederal. No matter how the EU is characterized, as it becomes ever closer, problems of coordinated laws and administration are omnipresent. The failure of the proposed Constitution was surely one warning. Preferring "**Regulations**" before "Directives" is one way to avert disparate laws. American experiences suggest advantages to Regulations.

Directives, unlike American uniform laws, are compulsory: Member States must adopt them. That adoption, however, has proven less than easy. It does not require, as American uniform laws do, uniform provisions. Moreover, sometimes they are applied by courts even before they are adopted by legislatures.

Restatements and similar precatory instruments have received some attention in the EU lately. As in the United States, while not without benefits, they are unlikely to produce uniform law that lay people can consult. For lawmaking in the EU, see KARPEN/XANTHAKI (2017).

2.4 Constitutional Review

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Constitutional review should serve to clarify law and to determine which laws are authoritative. Constitutional review originated in the United States as judge-made law. In the United States, no statute systematically governs constitutional review. Like judge-made law generally, determining the applicable rules alone—distinguishing between holding and *dicta*—can be difficult or impossible. Supreme Court decisions are infrequently unanimous; commonly, even for the most important of cases, there are separate opinions giving competing rationales instead of clarification. Decisions may create rather than reduce indeterminacy.

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Even before cases reach the Supreme Court for constitutional review, the process of review produces indeterminacy. Constitutional review is through the ordinary system of courts: there are no separate constitutional courts. Issues of constitutional review can be raised and decided at every court level. It may be years, if ever, before a question is decided by the Supreme Court. In the meantime, different courts in different jurisdictions may decide the issue differently. Lately, the state legislature of Texas has written an abortion law that deliberately made constitutional review difficult. It worked. The Supreme Court allowed the law to go into force not withstanding widespread belief that it is unconstitutional.

The pressure on the Supreme Court is increased by the demise of constitutional amendment. The Supreme Court is pressured to do by interpretation ("living constitutionalism") what the legislature cannot do. Against that is "originalism", i.e., the Constitution today means what it did in 1787 when drafted. For constitutional review in the U.S., see MAXEINER (2018: 249-259).

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German constitutional review had the benefit of more than a century of U.S. experiences. It uses a special constitutional court. Unlike other German court decisions, the Constitutional Court's decisions have general legal force. But formal legal force is restricted to the official headnotes. Although dissenting opinions are allowed, they are not as common as in the U.S. Separate opinions are not normal.

The procedures for bringing cases for constitutional review are set out in the Constitution and in law. Review is **concentrated**, that is, lower courts cannot put a law out of force due to constitutional defects. They must refer the case to the Constitutional Court. So-called **abstract** review permits review even before a law goes into force. In the United States there must be a case or controversy. The Constitution can be and is amended. Both before and after litigation amendment may relieve pressure on the Constitutional Court. For constitutional review in Germany, see MAXEINER (2018: 260-266).

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European Union. The Court of Justice of the European Union in the last fifty years has gone from having little to do, to having much. Although it not created as an exclusive constitutional court, much of its non-constitutional business has been shifted to other courts. Review is **concentrated**: to put an EU law out of force requires referral to the Court of Justice. As this has become a more frequent course, it has led to difficulties. These include the level of the Member State court system at which review has to be taken, other criteria for review, and the relationship of the Court of Justice to the Constitutional Courts of Member States. Moreover, the separate Council of Europe has its own constitutional court, the European Court of Human Rights. There is no guarantee Europeans will avoid American type problems of authority.

2.5 Law Applying

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When the institutions charged with applying law, either because of defects in the laws themselves or in the people or procedures they use, cannot be counted on to find and apply authoritative law, clear texts are undermined. American methods of law applying charge the parties' lawyers with choosing the law to be applied and look to lay jurors to carry through the application. This is done without justified, i.e., explained opinions. This amateur application permits turning laws upside down. To make matters worse, the unjustified opinion of a jury cannot be easily revised or corrected on appeal.

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The American system of statutory interpretation also undermines well written statutes. American judges are passive both in finding facts and applying law; their role is to decide questions of law. American infatuation with judge-made law is well known. Through the doctrine of *stare decisis* lower courts are bound to follow decisions of courts superior to them. The courts' interpretations of statutes are more authoritative than the statutes themselves. In

the federal system 94 lower federal courts are subject to thirteen federal appellate courts. Decisions of the latter are rarely reviewed by the Supreme Court of the United States. This means, under what is called the doctrine of statutory *stare decisis* or statutory precedent, out of one federal statute can come thirteen (or more!) different rules. Lawyers and lower courts, even when applying statutes, commonly read judicial precedents first. Out of one federal statute come many binding interpretations. It produces the opposite of the nation's motto, *e pluribus unum*. For law applying in the U.S., see MAXEINER (2011, 2018: 267-289).

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German fact finding, law finding, and application to facts are all tasks of professionally trained judges. In the internship period after law school all aspiring German lawyers learn this "relationship" technique (*Relationstechnik*). They learn to write judgments. These judgments are subject to appeal on facts and law.

Although lower German courts in deciding cases are informed by precedents of superior courts, with one small exception for the headnotes of the Federal Constitutional Court, they are not required to do so. Germans, lawyers, and laymen alike, read statutes first and turn to case decisions, not for binding interpretations, but to understand statutes. For law applying in Germany see MAXEINER (2011, 2018: 290-299).

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Insofar as EU laws are left to Member State application, and local decisions are given binding effect, the chance exists that the same EU law means different things in different Member States. When Directives apply before Member States have turned them into positive law, on what shall people rely? When those affected begin reading decisions of prior cases before statutes, writing better statutes won't matter much.

3 Conclusions

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The legal system of the United States risks dysfunctionality because it pays too little attention to the organization of legal decision making, i.e., legal methods, and setting out the authoritative law for individual cases.

The legal system of Germany works better because it pays close attention to the organization of legal decision making; it identifies the authoritative law.

The EU legal system is a work in progress. The closer attention it pays to functional legal methods, including to the understandability of legal provisions, the better it should work.

Legal provisions form (or should form) a legal system. How well they fit into a discernable system is critical for comprehensibility. Which provisions are authoritative in my case? Are they consistent with other provisions I am subject to, or do they depart from them? What methods of lawmaking can best promote that comprehensibility? Can I apply the provisions to myself? If my choice is questioned, who is to determine which apply to my case?

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