

Discretion is Fractal

Dimiter Toshkov, Leiden University

25 January 2013

What is discretion?

- Discretion is a central concept in the study of politics, law, public policy and administration
 - the power to decide or act according to one's judgment rather than formalized rules
- Administrative discretion:
 - the amount of leeway bureaucrats have in interpreting and applying formal rules

Discretion and Red Tape

- Discretion is the inverse of red tape
- Red tape & discretion - two conceptual levels:
 - administrative (legislatures > administration)
 - societal (governments > citizens and companies)

Studying discretion

- Legislative decision making and delegation (why and under what conditions is discretion likely) e.g. Epstein and O'Halloran 1999, Calvert et al. 1989, Huber and Shipan 2002, Oosterwaal et al. 2012
- Policy implementation (what is the impact of discretion on the timing and success of implementation) e.g. Steunenberg and Toshkov 2009, Zhelyazkova and Torenvlied 2009, Thomson et al. 2007
- Normative political theory (what are the implications of discretion for democracy and good governance) Stephanou 2002
- Institutional design (what is the optimal level of discretion in political systems)

Necessity to measure

- Hence, a measure of discretion is needed:
 - Compare different pieces of legislation in one jurisdiction
 - Compare the codification of the same issue across jurisdictions
 - Etc.

Existing approaches

- Currently, discretion is operationalized and measured as the share of norms which provide for some leeway, exceptions, derogations or significant interpretation from all norms (possibly filtered for relevant norms only)

Epstein and O'Halloran 1999, Franchino 2007, Steunenberg and Toshkov 2009, Zhelyazkova and Torenvlied 2009, Thomson et al. 2007

My argument

This measurement strategy is flawed, because norms are nested and form a complex structure.

Discretion can be found at any level of the structure

which makes direct comparisons of the discretion ratio problematic.

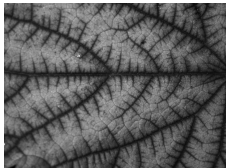
Instead, reconstruct the normative structure and compare discretion at the same level

An example

- Case 1 (discretion ratio 0 [low]):
 - Art.1 The agency should take requests seriously.
- Case 2 (discretion ratio 0.5[high]):
 - Art.1 The agency should report to the supervisory authority with a written report which contains an impact assessment and results from a consultation of the interested parties within two weeks of receipt of the request, or else face administrative sanctions.
 - Art. 2 The report can be printed in blue or black ink

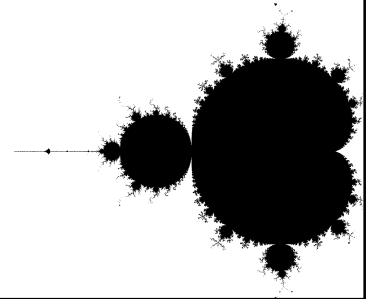
Why fractal?

- A fractal object is self-similar at various levels of observation

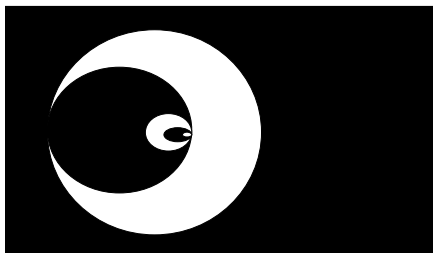


More fractals

- Mandelbrot set

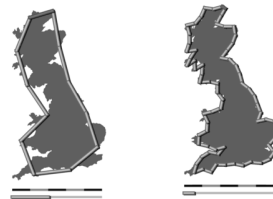


Representing discretion



Trouble with fractals

- Measurement
- How long is the coast of Britain?



As with discretion

- If rules/legal systems systematically differ in the level of detail at which they operate, measuring discretion in the usual way is a problem

A way out?

- Crawford and Ostrom's institutional grammar and syntax (1995). A rule has:
 - Attribute (A) /addressee/
 - Deontic (D) /shall, may, must/
 - aIm (I) /action/
 - Condition (C) /when and where, if and else/
 - Or else (O) /sanction/
- *Students should wear uniforms at all times or else be expelled.*

Grammar of rules and discretion

- Discretion can be contained in each formal element of the rule,
- Each instance of discretion, in turn, can be subjected to restrictions and rules,
- Ad infinitum (in principle)

A tentative procedure

- Reconstruct the structure of the rules
- Select the level of analysis/comparison
- Assess, compare and measure discretion

An alternative route

- ~Hausdorff dimension

Conclusion

- Studying empirically discretion (and its inverse, red tape) is important
- But measuring and even comparing discretion is tricky
- Reconstructing the rules with the help of the 'grammar of institutions' as a pre-processing step might be helpful
- The proof of pudding is in the eating, and this pudding hasn't been baked yet.
- But I offered a recipe!