

Courts and legislation: Do legislators and judges speak the same language?

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Introduction²

Although each legislative act is a unique product, its life is fragmented: the policy process belongs to policy officers, the legislative process belongs to legislators, the drafting process to drafters, its implementation to citizens, its enforcement to enforcers, and its interpretation to judges.³ This fragmentation invites the contribution of all actors in the policy process, thus leading to the production of a legislative text that, hopefully, encompasses the agreement of all. However, it also invites frictions and diversities that may endanger the efficacy and effectiveness of the whole regulatory package.

In the field of legislation, much praise is placed on modern drafters whose accessibility techniques seem to have borne fruit in bringing legislation to the people. Radical innovations in legislative techniques have been introduced mainly in Europe but also in Australia, New Zealand, South Africa, and elsewhere. The question is, whether these innovations, so firmly rooted within legislative cycles, have left the other actors of the policy process isolated.

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² This chapter is based on the following works: Helen Xanthaki, “Judges v drafters: the saga continues” in Jeffrey Barnes, *Statutory Interpretation*, forthcoming; and Helen Xanthaki, “An ‘Ordinary meaning of words’: is there such a thing?” in Ik-Hyeon Rhee and Wim Voermans, *Innovation of Legislative Process* (2018, KLRI/IAL, Seoul), pp.123-136.

³ Constantin Stefanou, ‘Legislative Drafting as a form of Communication’ in Luzius Mader and Marta Tavares de Almeida (eds), *Quality of Legislation Principles and Instruments* (Nomos 2011) 308; and also see C. Stefanou, ‘Drafters, Drafting and the Policy Process’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 321.

The hypothesis of this chapter is that recent innovations in drafting techniques have disturbed the continuity of language used by those who produce and those who interpret legislation. Which, in turn, confirms that, currently, legislators and judges speak a different language.

Legislation as a fluid collective task: from policy concept to application/interpretation

The UK's Good Law initiative has proven empirically that legislation is read mainly by lay users. If one sees legislation as a mere tool for regulation, then the drafters of legislation must use the language of lay users as a means of explaining clearly how their behaviour is expected to change and law reform is to come about. Communicating these messages clearly is the only way in which the legislation can, with the synergy of the other actors of the policy process⁴, achieve the regulatory results required by policy makers.⁵ A good law is one that is capable of leading to efficacy of regulation. A good law is an effective law. In addition, ultimately, quality in legislation is effectiveness. Effectiveness is the criterion that drafters use when selecting the most appropriate drafting rule for the problem before them. This qualitative definition of quality in legislation respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting.⁶

The drafter of legislation cannot be isolated from the many other actors of the process to which the drafter belongs. Leaving aside the necessity for multiplicity of disciplines to be represented in the drafting process in its narrow sense, one must view the drafter as one of the actors of the drafting process, which is a mere stage of the legislative process, which in turn

⁴ J. P. Chamberlain, 'Legislative drafting and law enforcement' 21 (1931) *Am.Lab.Leg.Rev.* 235-243 at 243.

⁵ L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' 22 (2001) *Statute Law Review* 119131 at 126.

⁶ H. Xanthaki, "Drafting manuals and quality in legislation: positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?" [2010] 4 *Legisprudence*, pp.111-128.

constitutes a stage of the policy process.⁷ If one takes this holistic picture of legislation as a tool for regulation into account, and in application of Stefanou's scheme on the three processes, drafters can only perform a small, albeit crucial, part in the application of governmental policy better expressed as regulation. Legislation becomes a collective task that can only be achieved with the synergy of all actors, including judges.

The collectiveness of the task requires fluid and uninhibited homogeneity in the drafting of legislation. This touches upon the conceptualisation of legislation, the logic of its structure, and, of course, the linguistic choices involved in legislative expression. The main argument of this chapter is that this fluidity lacks, at least at the moment. This endangers the quality of the legislation and, ultimately, the success of the regulation that the legislation serves.

Let us explore this argument further by discussing the theory of phronetic drafting that underpins choices related to legislative expression.

The values of regulation and legislation present as follows:⁸

⁷ C. Stefanou, "Drafters, drafting, and the policy process" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (Ashgate 2008), pp.321-332, at 323.

⁸ For a first draft of the pyramid, see H. Xanthaki, "On transferability of legislative solutions: the functionality test" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale* (Ashgate 2008), pp.1-18.

Starting with regulatory efficacy, this is the extent to which regulators achieve their goal.⁹ However, achieving the desired regulatory results is not a goal that can be achieved by the drafter alone¹⁰: legislation requires a solid policy, appropriate and realistic policy measures for its achievement, cost efficient mechanisms of implementation, and ultimately user willingness to implement and judicial inclination to interpret according to legislative intent.¹¹

The drafter's limited possible contribution to efficacy is effectiveness¹², defined as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator¹³; or “the fact that law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the

⁹ See *ibid.*, 126; also see M. Mousmouti, ‘Operationalising quality of legislation through the effectiveness test’ (2012) 6 *Legisprudence* 191.

¹⁰ See J. P. Chamberlain, ‘Legislative drafting and law enforcement’ (1931) 21 *Am.LabLegRev* 235, 243.

¹¹ See D. Hull, ‘Drafters Devils’ (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm; also see U. Karpen, ‘The norm enforcement process’ in U. Karpen and P. Delnoy, (eds.), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden, Nomos, 1996), 51, 51; also L. Mader, ‘Legislative procedure and the quality of legislation’ in U. Karpen and P. Delnoy (eds.), *Contributions to the Methodology of the Creation of Written Law*, above, n 35, 62, 68.

¹² See C. Timmermans, ‘How Can One Improve the Quality of Community Legislation?’ (1997) 34

Common Market Law Review 1229, 1236–7; ‘European Governance: Better lawmaking’, Communication from the Commission, COM(2002) 275 final, Brussels, 5.6.2002; also see High Level Group on the Operation of Internal Market, ‘The Internal Market After 1992: Meeting the Challenge – Report to the EEC Commission by the High Level Group on the Operation of Internal Market’, SEC (92) 2044; also Office of Parliamentary Counsel, ‘Working with OPC’, 6 December 2011; and OPC, ‘Drafting Guidance’, 16 December 2011.

¹³ See L. Mader, ‘Evaluating the effect: a contribution to the quality of legislation’ (2001) 22 *Statute Law Review* 119, 126.

elaboration of legal doctrine”¹⁴; or a term encompassing implementation, enforcement, impact, and compliance¹⁵; or the degree to which the legislative measure has achieved a concrete goal without suffering from side effects¹⁶; or the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address¹⁷; or a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted¹⁸; or a measure of the causal relations between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.¹⁹ If one attempts to use all of the elements of these enlightened definitions of effectiveness, one could suggest that effectiveness of legislation is the ultimate measure of quality in legislation²⁰, which reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.²¹ In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for

¹⁴ See F. Snyder, ‘The effectiveness of European Community Law: institutions, processes, tools and techniques’ (1993) 56 *Mod L Rev* 19, 19; also F. Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) 3.

¹⁵ See G. Teubner, ‘Regulatory law: Chronicle of a Death Foretold’ in Lenoble (ed), *Einführung in der Rechtssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

¹⁶ See G Muller and F Uhlmann *Elemente einer Rechtssetzungslehre* Zurich, Asculthess, 2013) 51-52.

¹⁷ See I. Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981) 180; also see R. Cranston, ‘Reform through legislation: the dimension of legislative technique’ (1978-1979) 73 *NwULRev* 873, 875.

¹⁸ See W. Voermans, ‘Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?’ (2009) 2 *Erasmus Law Review* 59, 230.

¹⁹ See M. Mousmouti, above, 200.

²⁰ See H. Xanthaki, ‘On Transferability of Legal Solutions’ in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.

²¹ See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Governments Approach*, March 2008, para 2.4.

necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.²²

As a mere expression of the regulatory agenda, legislation inevitably relies on the soundness of the policy goals and regulatory aims set by regulators. Legislation requires a constitutionally, legally, ethically, and democratic (in the sense of acceptable by the majority) policy aim pursued by equally constitutional, legal, ethical, democratic, and cost efficient means to achieve it. Moreover, it relies on the intent of users and interpreters to comply with it.²³ Of course, this interdependence of policy, regulation, legislation, and implementation works both ways: good legislative expression can accentuate the logic of the policy, can clarify the choice of regulatory tools, and can ultimately incite implementation. However, in the same way that efficacy requires legislative facilitation of regulatory success, it also requires the synergistic contribution of all parts and actors of the drafting process as part of the legislative process, which in turn is part of the policy process.²⁴

The new language of legislation

Legislation aims to communicate the regulatory message to its users as a means of imposing and inciting implementation. It attempts to detail clearly, precisely, and unambiguously what the new obligations or the new rights can be, in order to inform citizens with an inclination to comply how their behaviour or actions must change from the legislation's entry into force. The

²² This is Mousmouti's effectiveness test.

²³ Helen Xanthaki, "The limits of legislation as a product" *Hukim – The Israeli Journal on Legislation* 11 [2018] 153-172

²⁴ See C. Stefanou, 'Legislative Drafting as a form of Communication' in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; and also see C. Stefanou, 'Drafters, Drafting and the Policy Process' in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

receipt of the legislative message in the way that it was sent by the legislative text is crucial for legislative effectiveness and, ultimately, for regulatory efficacy.

Easified language, as a development of plain language, aims to introduce principles that convey the legislative/regulatory message in a manner that is clear and effective for its audience. Easified language encompasses the analysis of the policy and the initial translation into legislation, the selection and prioritization of the information that readers need to receive, the selection and design of the legislative solution, and choices of legislative expression. Easified language extends from policy to law to drafting.

The blessing of this ambitious mandate comes with a curse of relativity. Easification requires simplification of the text for its specific audience, and thus requires an awareness of who the users of the texts will be, and what kind of sophistication they possess. And it must do so in a single document: possible clashes between various instruments at various levels would incite uncertainty in the law, thus making it ineffective anyway.

Answers to these questions were simply not present for legislation until very recently. It was widely accepted that legislative communication involved the drafter (who, at least in the UK, is a trained lawyer with drafting training and experience) and the generic user (who can be anything from a senior judge to an illiterate citizen of below average capacity). The inequality in the understanding of both common terms (whichever they may be) and legal terms renders communication via a single text a hopeless task. And this is precisely the second limit of legislation: communication from a trained and highly experienced lawyer to a wide circle of possible audiences with vast diversion of general and legal sophistication is simply an impossible task. Much more so if this is attempted by means of a single written text. This deprives the communication sender from the opportunity to gauge reception and make amends by means of further clarification where needed, or by means of intonation or even gestures that are simply not available in written communication.

Until now, identifying the users was a hypothetical and rather academic exercise. Recent empirical data offered by a revolutionary survey of UK's The National Archives in cooperation with the OPC have provided much needed answers.²⁵ Speaking to the users is a noble pursuit but presupposes an understanding of who uses legislation and what level of legal awareness these users have. At the end of the day identifying the people whose choice to act or not makes government policy a success or a failure²⁶ is crucial in establishing effective communication with them. But is there one audience of legislation? Can a drafter rely on the common notion of the 'lay person', the 'average man on the street'²⁷, the 'user'? The theoretical debate over this point has now been answered by the Good Law Initiative survey: at least three categories of people constitute the audience of legislation, and these are lay persons reading the legislation to make it work for them²⁸, sophisticated non-lawyers using the law in the process of their professional activities, and lawyers and judges. In more detail, there are three categories of users of legislation:

- a. Non-lawyers who need to use legislation for work, such as law enforcers, human resources professionals, or local council officials; the 'Mark Green' of the survey represents about 60% of users of legislation;
- b. Lay persons who seek answers to questions related to their personal or familial situation; 'Heather Cole' represents about 20% of users of legislation; and

²⁵ See <https://www.gov.uk/good-law>.

²⁶ See D. Berry, 'Audience Analysis in the Legislative Drafting Process' (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm.

²⁷ See D. Murphy, 'Plain English-Principles and Practice', Conference on Legislative Drafting, Canberra, Australia, 15 July 1992.

²⁸ See J. J. E. Gracia, *A Theory of Textuality: The Logic and Epistemology* (Albany, State University of New York Press, 1995), 159-163, and 164-165; also see G.L. Pi and V. Schmolka, 'A Report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada' (unpublished, August 2000); and V. Schmolka, 'Consumer Fireworks Regulations: Usability Testing, TR1995-2e (Department of Justice Canada, unpublished, 1995).

- c. Lawyers, judges, and senior law librarians; the ‘Jane Booker’ persona represents about 20% of users of legislation.²⁹

The significance of the survey for plain language and good legislation cannot be understated. The survey provides, for the first time in UK legislative practice, empirical evidence from a huge sample of the 2,000,000 visitors of www.legislation.gov.uk per month. The survey, whose data relate to users of electronic versions of the free government database of legislation only, destroys the myth that legislation is for legal professionals alone. In fact, legal professionals are very much in the minority of users, although their precise percentage may well be affected by their tendency to use subscription databases rather than the government database, which is not annotated and often not updated. Whatever the exact percentages of each category are, there is significant empirical evidence that in the UK, and most probably in the rest of Europe of which the UK is a representative case study, legislation speaks to three distinct groups of users, whose legal awareness varies from none, to some, too much. But is the legal awareness of the users the only parameter for plain language as a means of effective legislative communication?

Pitching the legislative text to the ‘right’ level requires an additional consideration. Having realised which are the rough profiles of the audience, the next parameter for plain communication is the topic of the legislative text. Legislative texts are not all aimed at the same readers. Their primary audience varies. For example, the main users of rules of evidence are probably judges and lawyers.³⁰ The language and terminology used can be sophisticated: paraphrasing the terms ‘intent’ or ‘mens rea’ with a plain language equivalent such as ‘meaning to’ would lead the primarily legal audience to the legitimate assumption that the legislation means

²⁹ See A. Bertlin, ‘What works best for the reader? A study on drafting and presenting legislation’ [2014] *The Loophole*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326937/Loophole_-_2014-2_2014-05-09_-_What_works_best_for_the_reader.pdf, pp.27-28.

³⁰ See B. A. Garner ‘Guidelines for drafting and editing court rules’ [1997] *Federal Rules Decisions* 169, 187.

something other than ‘intent’ and would not easily carry the interpretative case-law of ‘intent’ on to ‘meaning to’. Rules of evidence can be drafted in specialist language, albeit with a caveat: a primarily legally sophisticated audience cannot serve as a ‘carte blanche’ for legalese, since non-lawyers may need to, and in any case must, have access to the legislation too. As audiences become more specialized and more educated in technical areas, they expect texts that are targeted to their particular needs.³¹ Moreover, since accessibility of legislation is directly linked to Bingham’s rule of law³², passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. There is an argument for either the continued use of legal terminology or for the provision of a definition of the new plain language equivalent referring to the legal term used until now.

How easified is legislation currently? Even within the ‘Heather Cole’ persona, there is plenty of diversity. There is a given commonality in the lack of legal training, but the sophistication, general and legal, of Heather Coles can range from a fiercely intelligent and generally sophisticated user to a rather naïve, perhaps illiterate, and even intellectually challenged individual. Which of those Heather Coles is the legislation speaking to? Certainly not the commonly described ‘average man on the street’. To start with, there are also women on our streets, and they are users of legislation too. And then, why are the above or below averages amongst us excluded from legislative communication?³³ Since effectiveness is the goal of legislative texts, legislation speaks to each and every user who falls within the subjects of the policy solution expressed by this specific legislative text. This includes the above average, the average, and the below average people.

³¹ See K. A. Schriver, ‘Plain Language through Protocol-Aided Revision’ in E. R. Steinberg (ed.), *Plain Language: Principles and Practice* (Detroit, Wayne State University Press, 1991), 148, 152.

³² See Lord Simon of Glaisdale, ‘The Renton Report-Ten Years On’ (1985) *Statute Law Review* 133.

³³ J. Kimble, ‘Answering the Critics of Plain Language’ (1994-1995) 5 *The Scribes Journal of Legal Writing* 51, 59.

This is a rather revolutionary innovation. Identifying the users of legislation has led to not one but two earthquakes. First, the law does not speak to lawyers alone. Second, the law does not speak to the ‘average man’.

The gap between drafters and judges³⁴

All through this drafting revolution, judges and courts have remained excluded. There seems to be a rather gaping schism between the linguistic perceptions of drafters and interpreters of legislation in the UK today. Drafters seem to be much more aware of the specific parameters of legislative diversity. And drafting has moved a long way to achieve real easification.

Awareness of diversity of the legislative users has prompted drafters to start their task by identifying the profile of the main users of the specific legislative text before them. Aware of the analytics of legislative users in abstract, they can achieve a better understanding of whom the text is addressed to, and, perhaps more importantly, which parts of the legislative story is relevant to each user group. They can therefore pitch the text and its provisions to the right level. In fact, they could (and should) test the provision by means of representative user groups to verify the level of easification achieved by their draft.

Judges, as interpreters of legislation, are excluded from the debate on easification, legislative diversity, and effectiveness. Discussions on methods of statutory interpretation and the “ordinary meaning” of words remain outside the scope of audience analytics and user diversity. In view of the novelty of the legislative debate, perhaps this mismatch is explained. However, it cannot remain as is. Drafters choose to use words based on the linguistic and legislative characteristics of the user groups of legislation, whilst judges continue to be guided by usage of what is still perceived as the “average man” and the “ordinary meaning” of words.

³⁴ Helen Xanthaki, “An ‘Ordinary meaning of words’: is there such a thing?” in Ik-Hyeon Rhee and Wim Voermans, *Innovation of Legislative Process* (2018, KLRI/IAL, Seoul), pp.123-136

The new empirical data on the analytics of legislative diversity in the UK feeds further breath to what one could view as an archaic debate. The parameters of “ordinary” can now be identified with some accuracy, thus allowing the judge or statutory interpreter to guess what the meaning of the word could be to a legislative user. However, in order to achieve this enlightened understanding of the true meaning of words, the statutory interpreter must become aware of the debate on legislative diversity, must be privy to the factors of choice used by the drafter and to any user testing results. Purposive interpretation, which puts context to the language of the text, serves well as a guide here.

One wonders where the interpreter could trace these elements of drafting choices. I would suggest that explanatory notes (what civil lawyers would recognise as *travaux préparatoires*) could be a handy place. Despite erroneous perceptions of the past, explanatory notes are used exclusively by lawyers and judges. They can therefore serve as a source of sophisticated guidance on which user groups were identified, what linguistic and legislative awareness they have, and how this is reflected in the provisions of the text.

Conclusions

This chapter aimed to prove that recent innovations in drafting techniques have disturbed the continuity of language used by those who produce and those who interpret legislation.

Legislative drafting, and legislative studies, have been radically revolutionised by the recent empirical data on legislative usage. There is now compelling empirical evidence that legislation, at least in the UK, is mainly read by lay users, namely users without legal sophistication who read legislation in order to acquire answers to problems related to their everyday life or to the exercise of their professional duties.

To ensure legislative effectiveness as a tool for regulatory efficacy, drafters draft legislation in an easified language. This is language that is understood by the specific users of the particular legislative text.

The language choices of drafters seem to clash with the expectation of judges, who continue to interpret legislation by use of the “ordinary meaning of words” as used by “the average man”.

This division in the perceived usage of language by legislative users creates a schism between the linguistic choices of drafters and their interpretation by the courts. In turn, this creates a considerable hurdle in the normally fluid seamless passage from conceptualisation to drafting to application and interpretation of legislation. To put it simply, at the moment, users are more likely to understand the intended meaning of legislation than the courts.

Aligning language expectations, usage, and interpretation between drafters and judges is not necessarily a hefty task. Purposive interpretation (what civil lawyers recognise as teleological interpretation) has given rise to guidance tools, such as explanatory notes. Although these used to be addressed to lay users, they can serve as a valuable channel of communication with learned users such as judges. They can identify the main legislative audiences and can provide context to judges for the purposes of delimiting and specifying the “ordinary meaning” of words.

For now, one can simply confirm that, currently, legislators and judges speak a different language.