The limits of legislation as a product

By Professor Helen Xanthaki[1]

A. Introduction

Legislative studies acquire an ever increasing focus in the limelight of better regulation and good governance. There is now an understanding that legislation is a means of communication from the government to the citizen. It is used as a tool of communicating what changes in behaviour, what new obligations, or what new rights are demanded or offered to citizens. In the pursuit for better legislative communication Parliaments and governments have applied plain language. The words used, the structure employed, and the placement of the new legislative text within the statute book have all been discussed to a degree. The question remains whether legislation, albeit good, can really achieve its legislative communication scope fully.

This paper supports the view that legislation as a product has inherent limits. The paper identifies the main limits of legislation as a product to be its limited control over regulatory success, the limited scope of the means by which this success is achieved, the nature of legislation as a written text, and the instinctive aversion of citizens to legislative texts. The paper then proceeds to assess whether current legislative trends respond to these inherent limits and how. The paper concludes that the limits of legislation are unsurpassable but that current legislative responses to these limitations exacerbate the problem further. Alternatives are suggested, under the disclaimer that they may well be perceived as blue sky research rather than practically feasible options. At least for now.

B. The limits of Legislation

a. Legislation as a tool for regulation

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Legislation is simply a tool for regulation, namely a tool in the process of putting government policies into effect to the degree and extent intended by government.[2] In other words, legislation is one of the many weapons[3] in the arsenal of governments for the achievement of their desired regulatory results, which in turn is the prevalent measure of policy success.[4] The regulatory tools available to government vary[5] from flexible forms of traditional regulation (such as performance-based and incentive approaches), to co-regulation and self-regulation schemes[6], incentive and market based instruments (such as tax breaks and tradable permits) and information approaches.[7] But legislation remains one of the most popular regulatory tools.

So what is legislation attempting to achieve and by what means? The diagram[8] below visualises these goals and their hierarchy.[9]

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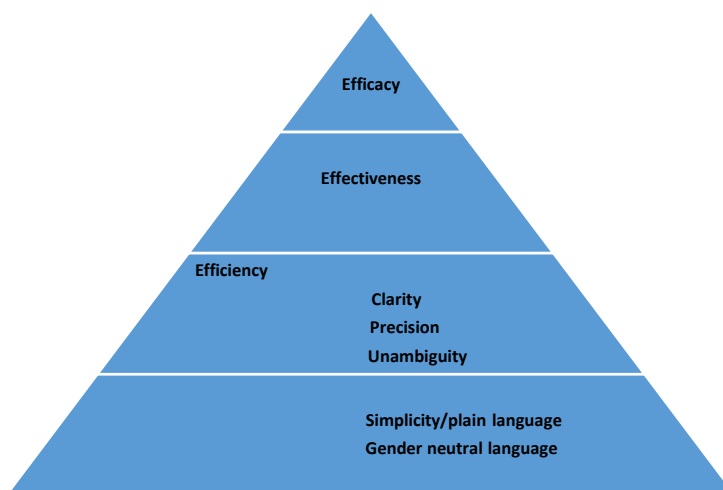
[2] See National Audit Office, Department for Business, Innovations and Skills, 'Delivering regulatory reform', 10 February 2011, para 1.

[3] See A. Flueckiger, 'Régulation, dérégulation, autorégulation : lémergence des actes étatiques non obligatoires' (2004) 123 *Revue de droit suisse* 159.

[4] See N. Staem, 'Governance, Democracy and Evaluation' (2006) 12(7) *Evaluation* 7, 7.

[5] See Better Regulation Task Force (BRTF), 'Routes to Better Regulation: A Guide to Alternatives to Classic Regulation', December 2005.

[6] See J. Miller, James, 'The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation' (1985) 4 *Cato Journal* 897.

[7] See OECD Report, 'Alternatives to traditional regulation', para 0.3; and also OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (Paris, OECD, 2002).

[8] See H. Xanthaki,'On transferability of legislative solutions: the functionality test' in C. Stefanou and H. Xanthaki (eds), Drafting *Legislation: A Modern Approach – in Memoriam of Sir William Dale*, above, n.19, 1.

[9] For a thorough analysis of the goals for drafters and the theoretical basis for their universality, see H. Xanthaki, *ibid*.

Starting with efficacy, this is the extent to which regulators achieve their goal.[10] The term is often used interchangeably with effectiveness, especially by experts outside the field of legislative studies.[11] But the concept of the main regulatory goal remains the achievement of the desired regulatory results. However, achieving the desired regulatory results is not a goal that can be achieved by the drafter alone[12]: 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.[13]

The drafter's limited possible contribution to efficacy is effectiveness[14], defined as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator[15]; or "the fact that law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine"[16]; or a term encompassing implementation, enforcement, impact, and compliance[17]; or the degree to which the legislative measure has achieved a concrete goal without suffering from side effects[18]; or the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address[19]; or a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and

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[10] See *ibid*, 126; also see M. Mousmouti, 'Operationalising quality of legislation through the effectiveness test' (2012) 6 *Legisprudence* 191.

[11] Also see A. Flückiger, 'L' évaluation législative ou comment mesurer lefficacité des lois' (2007) *Revue européenne des sciences sociales* 83.

[12] See J. P. Chamberlain, 'Legislative drafting and law enforcement' (1931) 21 *Am.LabLegRev* 235, 243.

[13] 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.

[14] 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.

[15] See L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' (2001) 22 *Statute Law Review* 119, 126.

[16] 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.

[17] See G. Teubner, 'Regulatory law: Chronicle of a Death Foretold' in Lenoble (ed), *Einfuhrung in der Rectssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

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

[19] 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.

enforcement of legislation to be enacted[20]; 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.[21] 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 legislation[22], which reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.[23] 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 necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.[24]

And so this is the first and main inherent limit of legislation. 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. 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. But 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.[25]

b. Legislation as written communication

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[20] 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.

[21] See M. Mousmouti, above, 200.

[22] See H. Xanthaki, 'On Transferability of Legal Solutions' in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.

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

[24] This is Mousmouti's effectiveness test: M. Mousmouti, above, 202.

[25] 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.

Added to the lack of its ultimate control over efficacy, legislation is further limited by the means by which it can pursue efficacy. The diagram above expresses that effectiveness can be achieved by means of clarity, precision, and unambiguity. And that these can be enhanced by the use of plain language and gender neutral language. Legislation aims to communicate[26] 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 receipt of the legislative message in the way that it was sent by the legislative text is crucial for its effectiveness and, ultimately, for the efficacy of the regulation that the text expresses.

Plain language aims to introduce principles that convey the legislative/regulatory message in a manner that it clear and effective for its audience. Plain language encompasses all aspects of written communication: words, syntax, punctuation, the structure of the legislative text, its layout on paper and screen, and the architecture of the whole statute book as a means of facilitating awareness of the interconnections between texts. And so plain language begins to kick in during the analysis of the policy and the initial translation into legislation, with the selection and prioritization of the information that readers need to receive. It continues with choices related to structure during the selection and design of the legislative solution, with simplification of the policy, simplification of the legal concepts involved in putting the policy to effect, and initial plain language choices of legislative expression (for example, a decision for direct textual amendments combined by a Keeling schedule, or a repeal and re-enactment when possible). Plain language enters very much into the agenda during the composition of the legislative text. And remains in the cards during the text verification, where additional confirmation of appropriate layout and visually appeal come into play. And so plain language extends from policy to law to drafting. The existing concept of plain language relates to a holistic approach to legislation as a text, as a printed or electronic image, and as part of the statute book.

But the blessing of this ambitious mandate constitutes the weakness (or is it limit?) of plain language as a main contributor to clarity, precision, unambiguity, effectiveness, and ultimately efficacy. Plain language cannot be distilled to the set of rules that must always be followed: the rules are relative and directly affected by the precise audience of the specific legislative communication: mens rea is easily understood by a legal audience but of course it

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[26] Legislation is communication: see ibid.

is an unfamiliar term to audiences without legal sophistication. The relativity of plain language is expressed by the recent replacement of objective simplification as its goal with the more subjective easification.[27] 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.

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.

It is this inherent limit of legislation that has led to the supplementing of the legislative text by policy guidance, explanatory materials, and annotations. What these fail to take into account though is the change in user attitudes: at a time where users are used to using the internet to receive direct answers from the original sources of communication instead of relying on intermediary professionals, legislation is used as a direct source of answers to questions related to the text. This is proven by the 2,000,000 users per month of the UK government's free electronic legal database. But more about this a bit later. For now, it suffices to identify the second limit of legislation, its presentation in the form of written communication.

   c.   *The intrinsic aversion of users to legislative texts*[28]

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[27] See Helen Xanthaki, '*Legislative Drafting* e lingua: ipotesi di semplificazione del testo normativo' in *Studi parlamentari e di politica costituzionale*, forthcoming (together with Giulia Adriana Pennisi).

[28] See https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex.

The last limit of legislation relates to a phenomenon observed and recorded by the Office of Parliamentary Counsel: users' aversion to legislation. This takes the form of perceptions of over-complexity or negative perceptions. The OPC is not unique in identifying this as an issue: the basis of the plain language movement lies with legislative complexity with reference to words, structure, and placement within the architecture of the statute book.

In other words, users of diverse legal sophistication are overwhelmed by the volume and complexity of legislation. They find it difficult to understand the terminology used with the text, the structure of the Act itself, and the interconnection of the Act with other primary and secondary legislative texts and the statute book as a whole. What users find intimidating is not just the words themselves (one could argue that the simplification of words has come a very long way) but the context of the legislative message within the many provisions of the same Act, and within the labyrinth of relevant primary and secondary sources of law.

Negative perception of legislation describes the phenomenon of citizens' attribution of more complexity to legislation than it actually is. Navigation between pieces of legislation is often the problem. Users also appear to find it difficult to find reliable explanatory information and relevant guidance.

This is the third limit of legislation: it is an inherent living and ever evolving organism of complexity whose understanding requires context, both conceptual and historical. In other words, legislation needs to be accessible in a manner that allows the user to understand what the law (rather than the specific legislative text) is, at any given moment in time.

C. Current legislative trends and the limits of legislation

One could argue, rather persuasively, that these are unsurpassable limits of legislative texts. They form part of the characteristics of legislation as a product. And one could resign to their prevalence. But that would means resigning to the ineffectiveness of legislation, or its inappropriateness as a regulatory tool. This could not be further from the truth. Having identified its measure of excellent, and the means by which legislation can achieve it, the study of legislation must now turn to its weakness and an assessment of a method that can reduce the effect of these inherent limits. Until very recently, this was impossible. What can facilitate

communication is the identification of the possible precise users of the specific legislative text: identifying who the users of the text will be allows the text to 'speak' to them in a language that tends to be understood by them. Until now identifying the users was a hypothetical and rather academic exercise. Recent empirical data offered by a revolutionary survey of The National Archives in cooperation with the Office of Parliamentary Counsel have provided much needed answers. The survey of 2,000,000 samples of users of www.legislation.gov.uk has identified at least three categories of users of legislation: lay persons reading the legislation to make it work for them , sophisticated non -lawyers using the law in the process of their professional activities, and lawyers and judges. In more detail in the UK there are three categories of users of legislation:

a.   Non-lawyers who needs 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 seeks answers to questions related to their personal or familial situation; 'Heather Cole' represents about 20% of users of legislation; and

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

The significance of the survey cannot be understated. 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 legislation speaks to three distinct groups of users, whose legal awareness varies from none, to some, to expert. 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 the

drafter are probably judges and lawyers. So the language and terminology used can be sophisticated: paraphrasing the term 'intent' with a plain language equivalent such as 'meaning to' would lead the primarily legal audience to the legitimate assumption that the legislation means something other than 'intent' and would not easily carry the interpretative case-law of 'intent' on to 'meaning to'. And so 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. Moreover, since accessibility of legislation is directly linked to Bingham's rule of law, passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. And so 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.

But how 'plain' must legislation be? 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? It certainly is not the commonly described as 'the 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? Since effectiveness is the goal of legislative texts, should legislation not speak 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.

This is a rather revolutionary innovation. Identifying the users of legislation has led to not one but two earthquakes in legislative studies: yes, the law does not speak to lawyers alone; but the law does not speak to the traditional plain language 'average man'. If applied in practice, this new knowledge will change the way in which legislation is drafted. First, legislative language can no longer be gauged at legal and regulatory professionals. Although great advances have already taken place, legislation now tends to be pitched to 'Mark Green': further simplification to the benefit of 'Heather Cole' needs to take place with immediate effect. The Office of Parliamentary Counsel are working on this: for example, the term 'long title' referring

to the provision starting with 'An Act to…' is now replaced by the term 'introductory text' as standard in the tables of arrangement found on all Acts in www.legislation.gov.uk. Similarly, there is talk of switching from 'commencement' to 'start date', as user testing has shown that commencement is puzzling to non-lawyers. The Guidance to drafting legislation reflects the UK government's commitment to legislating in a user friendly manner.

But more can be done. It is time to look at legislation with an innovative lens in order to identify initiatives that can address its inherent limits.

D. Alternatives: delimit the limits

Having established the concept of effectiveness as synonymous to good legislation, and the new holistic mandate of plain language in legislation, and armed with the new empirical data offered by TNA and OPC, let us discuss further possibilities. I have identified three blue sky mechanisms for better law. They respond to the limits of legislation: the layered structure promotes a three tier structure for legislative texts each addressed to each of the three user groups; the typography inspired presentation and layout responds to the need to bring to light the main regulatory messages in legislation; and the interactive electronic statute book highlights the interconnectivity between legislative texts within the statute book as a whole.

a. The layered approach to structure

Currently legislative texts are structured in application to Lord Thring's Five Rules of Drafting[29] that offers precedence to provisions declaring the law versus provisions relating to the administration of the law; to simpler versus the more complex proposition; and to principal versus subordinate provisions. Exceptional, temporary, and provisions relating to the repeal of Acts, and procedure and matters of detail should be set apart. But there is much scope for blue

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29 See Lord Thring, *Practical Legislation, The Composition and Language of Acts of Parliament and Business Documents* (London, 1902), 38; also see V.C.R.A.C. Crabbe, *Legislative Drafting* (Oxford, Cavendish Publishing, 1998), 148-150.

sky innovation by use of the layered approach[30]. The rationale behind the modern approach lies with the logical sequence of provisions within the text, which reflects logic, and philosophical and linguistic approaches to language and thought. This basis has now been overcome by the crucial evidence on the three user groups for legislation. Heather Cole, Mark Greene, and Jane Booker are diverse users that require diverse pitches of the legislative text. Speaking to all three of them at the same time is a rather complex, for some impossible, task. Introducing three versions of the same legislative text is a possibility but it is a recipe for disaster on such a diverse range of grounds, moral, ethical, constitutional, practical: rule of law, issues of interpretation between versions, identifying which version corresponds to each user, using that version as opposed to the one selected by the user, who subjects each user to their corresponding persona, ethical and moral consequences of the application of a diverse version for each user. And the parallel existence of three different texts could be counter-productive: users currently choose to use the complex but official legislative text over any of the many interpretation aids offered by government. If the plethora of attractive user friendly manuals and policy documents are shunned in favour of legislative texts, what makes it probable that users will go to the simple Heather Cole text as opposed to the legal Jane Booker one that reflects users' perception of legislation? And so remaining with a single text is really the only option. But this is exactly what has imprisoned legislative drafters in the struggle for simplicity within legislative texts.

It is now possible to see that each user group has its individual requirements for legislative information that are distinct from those of the other user groups. Identifying the needs for legislative information for each user group at a provision, rather than text, level would allow drafters to imitate oral communication, and pitch the legislative text to specific abilities and requirements. Drafters of legislative texts can now begin to think what regulatory or legal message is relevant to each group, and structure the text accordingly.

The layered approach promotes the division of legislation into three parts, corresponding to each of the three profiles of legislative users. Part 1 can speak to lay persons: the content is limited to the main regulatory messages, thus conveying the essence of law reform attempted by the legislation, focusing gravely on the information that lay persons need

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30 The term, and to a certain extent, the concept is attributed to John Witing, Tax Director at the Tax Simplification Office. I am very grateful to John for his inspiration and the generosity with which he has shared it with me.

in order to become aware of a new regulation, to comply with new obligations, or to enjoy new rights. Part 2 can speak to non-legally trained professionals who use the legislation in the course of their employment. Here one can see scope for further detail in the regulatory messages introduced, and for language that is balanced [technical, yet approachable to the professionals in question]. Part 3 of the legislation can then deal with issues of legislative interpretation, issues of procedure, and issues of application, in a language that is complex but not quite legalese, as there is nothing to prevent all groups from reading all parts.

The layered approach is revolutionary, as it shifts the criterion for legislative structure from the content and nature of provisions to the profile of the users. It switches on a user-centred structure, thus promoting both a link between policy and its effecting legislative text but also enhancing and personalising the channel of communication between drafters and users. And it applies and reflects the modern doctrine of contextualism in language and philosophy. But it cannot be viewed as a complete departure from tradition, as it continues to apply Lord Thring's five rules. By requiring that Part 1 includes the primary regulatory message, it promotes Lord Thring's rules that give precedence to the simpler proposition. And by structuring legislation into three parts, the layered approach complies with the other Thing rules that require division of provisions declaring the law [in Part 1 or 2] with provisions administrating the law [in Part 2 or 3 accordingly]; that principal provisions should be separated from subordinate [in Parts 1 and 2]; that exceptional, temporary, and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings [in Part 3]; and that procedure and matters of detail should be set apart by themselves [either in Part 3 of the layered approach, or in a Schedule].

The layered approach seems to be one of the promising initiatives in the field of legislation. But there are three points that need to be clarified. First, the layered approach may, but will not necessarily, lead to a partial, fragmented, or incomplete legislative communication to Heather Cole. There is no doubt that an erroneous application of the approach could result to that. But the placement of the main messages in Part 1 per se must be seen as an added bonus to lay users compared with the current state of affairs: in the layered approach the now frequently elusive main regulatory message will be easily identified, will be brought forward in a pronounced place at the beginning of the legislative text, and will be expressed in a language that is accessible to lay users. Compared to the current state of affairs, where the main message is communicated somewhere within the legislative text and is expressed in the layered

approach's Part 2 or 3 language, this is certainly an improvement. And of course, there is nothing preventing Heather Cole from reading the rest of the text: in fact, an inviting Part 1 can only encourage Heather Cole to keep reading, whilst offering her a clear context within which her understanding of complex and detailed messages can only be enhanced.

Second, although Part 1 carrying the main regulatory message is distinctly different from Parts 2 and 3, it may be unclear what really distinguishes between Part 2 data and Part 3 data: both Mark Green and Jane Booker are able to handle complexity and technicality of legislative data. However, they do not both require the same data, as demonstrated by their motives when using www.legislation.gov.uk: Mark Green is interested in answers that allow him to perform his professional but non-legal duties, whereas Jane Booker seeks legal information. As a result, what Mark Green needs is a clear understanding of substantive and procedural requirements imposed by the legislation, whereas Jane Booker seeks deeper statutory interpretation often coupled with a holistic view of the statute book. As a result, Part 2 of the layered approach involves answers to questions such as who must do what by when, and what happens if they don't. Part 3 will delve deeper into intricate distinctions and possible exceptions that relate to statutory interpretation and interconnections between legislative texts within the statute book. There are two caveats here. One, Mark Green must still read the text as a whole. And Part 3 cannot be viewed as a mere shell of definitions, repeals, and consequential amendments: this would deprive the readers from at least part of the benefits of the layered approach.

Third, it would be inappropriate to consider that the simplification serviced by the layered approach would result to an abolition of the need for explanatory materials for legislation. In fact, as the layered approach results in an inherent fragmentation of data, it renders the use of explanatory materials and notes reinstating the fluidity of information and the cross-fertilisation between parts an ever so crucial requirement. The new style of explanatory notes[31] introduced by Good Law and showcased in the Armed Forces (Service

31 See Office of Parliamentary Counsel, 'Explanatory Notes Pilot: Response to Consultation', April 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427779/explan atory_notes_respo nse_to_consultation_on_pilot.pdf.

Complaints and Financial Assistance) Bill [HL] Explanatory Notes[32] enhance the layered approach by introducing a clear table of contents that is thematic rather than provision based, with information on the policy and legal context of the Act, and with simple narratives on the main regulatory messages for all three user groups.[33]

Ultimately, the proof of the layered approach is in its application. User testing can prove whether it works, which user group for, and how it can be amended or fine-tuned to serve users better.

b. Legislative image: presentation, layout, pictures

Looking now in the image of the legislative text, namely at the picture that the user receives when looking at the text, it is necessary to distinguish between paper and electronic. It is noteworthy that in New Zealand legislation is only published electronically: paper publication ceased last year. In the UK I am not aware of government intent to abolish paper publication or even the tradition of vellum.

Plain language has always advocated the need to rethink the layout of legislative texts.[34] The single font, the lack of adequate contrast between paper and text, the unique format are elements of the current legislative image that prevent the user from identifying the important aspects of the regulatory message thus reducing readability of legislative texts. Legislative texts attempt to convey a 'legislative story' to the user, thus allowing them to identify and then understand the underlying policy, the legislative choices made, and the rationale behind the text. This offers them the ability to read and interpret the text in context, thus making accessibility easier and more secure.

The importance of layout has been the main motivation behind the change of legislative layout in the UK in 2001. The current layout shows more white space and a slight change of

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32 See
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377467/new-formatexplanatory-notes.pdf.
33 See http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0003/en/15003en.htm.
[34] See Office of Scottish Parliamentary Counsel, 'Plain language and legislation', February 2006, http://www.gov.scot/resource/doc/93488/0022476.pdf.

font coupled with shorter sections and sentences; structure in parts and sections, headings, and the new table of contents [previously known as the table of arrangements] are all tools that promote clearer layout for the purposes of enhancing readability. Specific demonstrations of the modern layout are observed in a number of Acts: the 'step by step' approach to setting out a series of complex rules in section 91 of the Income Tax Act 2007; the tables in section 181 of the Finance Act 2013; the headings for subsections in section 2 of the National Insurance Contributions Act 2014.[35]

However, there is plenty of scope for further progress. Within the remit of Good Law, the use of typography tools has been discussed and tested amongst experts. Rob Waller of the Simplification Centre presented before and after images of legislative text with text presented in different fonts, in frames, in colour. The Waller layout involves reduced punctuation and simplified numbering; bold terms and horizontal rules to show the structure; a solution to the problem of 'and' and 'or' relationships; and framed text showing amendments to other Acts.[36]

Layout is now at the forefront of practitioners' agenda. And quite rightly so. It has been overlooked and there is great scope for change. However, layout alone cannot respond to a complex text, to a complex regulatory message, or indeed to a complex policy. It will contribute to simplification but with the aid of additional visual tools.

One of those tools that have been ignored by even the most visionary of legislative academics and practitioners is the use of image in legislation. Images have been used in legislation that introduces national flags, traffic signs, or planning regulations. But the relationship between picture and legislation has not been explored fully. The visual arts could play a significant role here: there is nothing more direct, relevant to a wide range of users, and time resistant than Cain swinging his club above the prostrate Abel in Titian's painting in Santa Maria della Salute in Venice. The visual representations of themes relating to wrongdoing are so emotionally charged and the characters shown in such magnification that, combined with beauty and other aesthetic values, picture has had tremendous impact on the viewer.

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[35] See H. Rogers 'Good Law: how can the design of Bills and Acts help?' in Design Commission, *Designing Democracy: how designers are changing democracy – spaces and processes*, An Inquiry of the Design Commission, March 2015, http://www.policyconnect.org.uk/apdig/sites/site_apdig/files/report/497/fieldreportdownload/designingdemocracyinquiry.pdf, 56.

[36] See R. Waller, 'Layout for Legislation', Technical Paper 15, www.simplificationcentre.org.uk/resources/technical-papers/.

Perhaps the inclusion of images in legislation can enhance the quality of communication. An example could be drawn from criminal provisions. The picture accompanying the legislation in the form of a Schedule may show:

- what behaviour is to be condemned (show the action; and specify if the person knows that this is bad, suspects that this is bad, or is ignorant of the badness of the behaviour); and
- that this is an offence (for example show a stop sign or show societal disapproval); and
- that it carries a sanction (for example show the penalty and its adverse effect).

The use of typographical and visual aids in legislation can enhance readability[37] immensely. They can address textual limitations and can take the user further by banishing the barriers or written textual communication. User testing is the only way to assess if and how useful they are. But academic research, indeed inter-disciplinary academic research, is the only forum for analysis at a theoretical level first, and then in application to actual legislation.

c. The statute book as a whole

Reforming the structure and layout of individual legislative texts may bear little fruit without changes in the statute book as a whole. Addressing the issue of legislative volume that enhances complexity[38] has been at the forefront of the agendas of the last two governments as the epicentre of regulatory quality. The volume of legislation came under review in 2003. The Better Regulation Task Force's 'Principles of Good Regulation'[77] linked better regulation with less legislation, and offered a number of regulatory alternatives: do nothing; advertising campaigns and education; using the market; financial incentives; self-regulation and voluntary codes of practice; and prescriptive regulation. In 'The Coalition: our programme for

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[37] See G. Jones, P. Rice, J. Sherwood, J. Whiting 'Developing a Tax Complexity Index for the UK', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285944/OTS_Developing_a_Tax_Complexity_Index_for_the_UK.pdf.
[38] See Office of Parliamentary Counsel 'When Laws Become Too Complex: A review into the causes of complex legislation, March 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf, 6-7. [77] See http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets /www.brc.gov.uk/principlesleaflet.pdf.

government'[39] the previous government undertook to cut red tape[40] by introducing a 'one-in, one-out' rule whereby no new regulation is brought in without other regulation being cut by a greater amount;[41] and to impose sunset clauses on regulations; and to give the public the opportunity to challenge the worst regulations. Such was the importance attributed to legislative volume that the Prime Minister in his letter of 6 April 2011 to all Cabinet Ministers declared:

> 'I want us to be the first Government in modern history to leave office having reduced the overall burden of regulation, rather than increasing it.'

In order to achieve this aim, the UK government went one step further and introduced a one-in two-out approach. It undertook to use regulation for the achievement of its policy objectives only where non-regulatory approaches cannot lead to satisfactory outcomes; cost benefits analysis demonstrates a clear margin of superiority of regulation to alternative, self-regulatory, or non-regulatory approaches; or the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.[42] The number of Acts passed in 2012 was only 20 with a total number of pages of 1,886[43]: this was a new low after the peak of the late 1990s and early 2000s. But, whilst the number of Acts has decreased since the 1980s, the mean average number of pages per Act has increased significantly, from 37 and 47 pages during the 1980s and 1990s respectively, to 85 in the past decade; if one compares these numbers with the 1950s when the average was 16, a trend of fewer but longer Acts becomes evident.[44] One could contribute this increase to plain language drafting and to the increasing amounts of white space and bigger margins leading to 20% fewer words on a page.[45] However, there is a crucial contributing

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[39] See 'The Coalition: our programme for government', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

[40] For further information on the Red Tape Challenge, see http://www.redtapechallenge.cabinetoffice.gov.uk/home/index.

[41] http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.

[42] See Department for Business, Innovation and Skills, 'Better Regulation Framework Manual', July 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-betterregulation-framework-manual-guidance-for-officials.pdf, 4.

[43] See HoL Library Note 2013/008, Volume of Legislation, 4.

[44] See HoL Library Note, Volume of Legislation, LLN 2011/028, September 2011.

[45] See R. Heaton, House of Commons Political and Constitutional Reform Committee 'Ensuring standards in the quality of legislation' First Report of Session 2013–14, HC 85 Incorporating HC 74-i to vii, Session 2012-13, 20 May 2013, Question 64.

factor: over the last 30-40 years the number of Statutory Instruments has steadily increased.[46] And so the volume of legislation, including primary and delegated, seems to be fighting its ground in practice.[47]

Nonetheless, the UK has been very active in the field of regulatory reform. This is evidenced by a recent OECD Review, which pronounces the regulatory reforms in the UK as impressive.[48] Points of excellence include the effective balance between policy breadth and the stock and the flow of regulation; and the extensive application of EU's Better Regulation initiatives in the UK[49].

But of course innovations to the statute book do not end with legislative volume. Blue sky proposals, which in this case may be put to effect much quicker than one might expect, include the current work of The National Archives. John Sheridan leads current thinking both at the theoretical level of viewing the statute book as a collection of big data, and at the application level of presenting a prototype of a radically reformed screen presenting legislation at www.legislation.gov.uk. Our Big Data in Law project[50] revolutionized the way in which the statute book is viewed and led to big data applications and capabilities to UK legislation as a coherent, interrelated, and up to date whole. The project created a search mechanism for researchers allowing them to instigate research on legislation as a body: from the census that allows counting for example the number of 'shall' in UK legislation throughout the years to the introduction of methodology tools that provide empirical data on aspects of the statute book or the whole of the statute book.[51] This entirely new and free resource for the research community offers pre-packaged analyses of the data, new open data from closed data, and creates the capability of identifying pattern language for legislation, which would encapsulate commonly occurring legislative solutions to commonly occurring problems thus facilitating legislative communication. The project, which has just concluded, enhances user [in this case

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[46] See R. Cracknell and R. Clements 'Acts and Statutory Instruments: the volume of UK legislation 1950 to 2012' HoC Standard Note SN/SG/2911, 15 November 2012, 2.

[47] And not just in the UK: see R. Pagano *Introduzione alla legistica – L'arte di preparare le leggi* (Milano, Giuffre, 1999) 6.

[48] See http://www.oecd.org/dataoecd/61/60/44912018.pdf.

[49] For a listing of such policies and their implementation in the UK, see http://www.bis.gov.uk/policies/bre/improving-eu-regulation/guiding-principles-eu-legislation.

[50] The project team was led by John Sheridan, TNA, as Principal Investigator; D. Howarth, University of Cambridge, and Prof. Helen Xanthaki, Sir William Dale Centre, were Co-Investigators; the Advisory Board was chaired by Sir Stephen Laws, KCB, QC, LLD former First Parliamentary Counsel.

[51] http://tna.bunnyfoot.com/LDRI/#p=home.

researchers'] understanding of the interrelations and interconnections between legislative texts, within fields of law, and across fields of law.

The project feeds into the great efforts led by The National Archives to review the way in which legislation is 'served' to users by offering unprecedented capabilities of identifying relevant legislative texts, such as delegated legislation, cross referenced texts, definitions of terms used in a legislative text, and, in the long term, even case-law clarifying or applying the text to cases. There are already two prototypes of the new screen for legislation. Both have been tested in user testing undertaken by BunnyFoot and including iris trackers as a means of assessing how long a user's eye spends in each part of the text, where the eye is searching for further information and where on the screen, and where the user fails to understand the text or the cross reference completely. This work is of profound importance. What is missing for the purposes of legislative readability is context, and this is what the new screen can provide. This, along with the new format of explanatory notes, can finally offer the user an accurate picture of the labyrinth of legislative data in all their complexity and cross-wiring. Would this facilitate the user? Of course it will: it will depict an accurate image of legislative regulation on the topic searched, thus demonstrating if clear answers can be found or if it is time for the user to accept that statutory interpretation by a trained legal professional is what is really needed in that case.

D. Conclusions

This paper set out to prove that legislation as a product suffers from inherent limits. First, even effective legislation can only contribute, rather than lead, to regulatory success: as a result, legislation's success is not in its own hands, at least not fully. Second, the means by which this limited contribution to its own success can be achieved suffer from their own inherent limitations: communicating the regulatory message effectively is almost impossible due to the great gap between the legal sophistication of drafter and user, but mainly due to the great unknown that is the concrete membership of the legislative audience and its multiple levels of legal sophistication; and this great difficulty is only accentuated by the nature of legislation as a mere written text. Third, legislation has a reputation: negative perceptions and perceptions of over-complexity lead to the users' aversion to legislation.

These limits are inherent and seem unsurpassable. Does this signify an end to the use of legislation as a successful regulatory tool? Far from it. A breakthrough in the identification of the membership of legislative audiences in the UK has unlocked the key to unknown

parameters that create legislation's limits. A recent study of legislative users in the UK has shown that there are mainly three type of users with varied common and legal sophistication that seek answers to diverse questions from the legislative text. Lay users seek to understand the main regulatory message and apply it to the particular circumstances of themselves or their family. Non-legal professionals seek to understand how the regulatory reform affects the performance of their professional duties and how to administer the regulatory reform. And legal professionals seek to understand the intricate messages that respond to queries of statutory interpretation and to place the specific piece of legislation within the architecture of the statute book. This is the key to legislative limits.

First, the structure of the legislative text can be liberated from the restraints of a text-centred prioritisation of regulatory messages: a user centred layered approach can lead the drafter to address the main regulatory issues that are relevant to lay users in Part 1 placing the text in context and using a totally unsophisticated objectively plain language; specific regulatory messages and administrative issues can be placed in Part 2 that speaks to non-legal professionals in an easified language; and issues of statutory interpretation and text contextualisation can be addressed in Part 3 in a language as legally sophisticated as required. Second, the layout of legislation can focus the user's mind to the main messages, can refer the user to relevant context within the text and even outside it. Visualisation of messages can surpass the limit of legislation as a form of written communication. And third, the concept of legislation as data can lead to the provision of information from outside the text and within the statute book as a means of offering the user a global understanding of what the law, rather than the legislative text, is at their relevant moment in time.

These innovative tools, all stemming from the newly acquired revelation of who reads legislation and why, can strengthen plain language as a tool for achieving legislation that is viewed within the context of regulatory efficacy. Will this make legislation limitless? Of course not. But it certainly is worth a try!