05.

An “ordinary meaning” for words: is there such a thing? Innovations in drafting

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*Professor Helen Xanthaki**

I Introduction

There is no doubt that taking into account the semantic field of words as determined and used by the users of legislation could go a long way in assessing disputes on the basis of the users' understanding of words and text.

What one wonders, however, is whether there is indeed a single, an "ordinary" meaning of words and texts. Latest developments in legislative studies suggest that the pursuit of one "ordinary" meaning of words, sentences, and text is futile. Instead of conducting a text-focused interpretation, one could conduct an audience-centred interpretation that brings to light meaning as perceived by the user. But as there is no ordinary or average user, there is no average or ordinary meaning. My response aims to prove this hypothesis, namely that the diversity of legislative users suggests diversity in the interpretation of legislative meaning.

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Ⅱ The diversity of legislative audience

The membership and characteristics of the legislative audience have been elusive to drafters for years. The term is used generically to convey the concept of those to whom legislation is addressed. But, who constitute the legislative audience, and what levels of common and legal knowledge to they possess? Perhaps, even before one deals with the membership of the legislative audience, the preliminary question "why bother find out?" needs to be addressd.

Let me start with the latter question: why is the legislative audience relevant in the drafting and interpretation of legislation. I view legislation as one of the many[1] tools available to governments for the achievement of their desired regulatory results[2]. The achievement of the desired regulatory results is the prevalent measure of policy success.[3] And so, to achieve success in regulation, policy makers can use a range of tools: flexible forms of traditional regulation (such as performance-based and incentive approaches), co-regulation and self-regulation schemes[4], incentive and market based instruments (such as tax breaks and tradable permits) and information approaches[5], and of course legislation. Legislation is used frequently to get government to their desired regulatory destination.

The diagram[6] below visualises the journey from legislation to successful regulation[7] and, in reverse, the journey from successful regulation to legislation.

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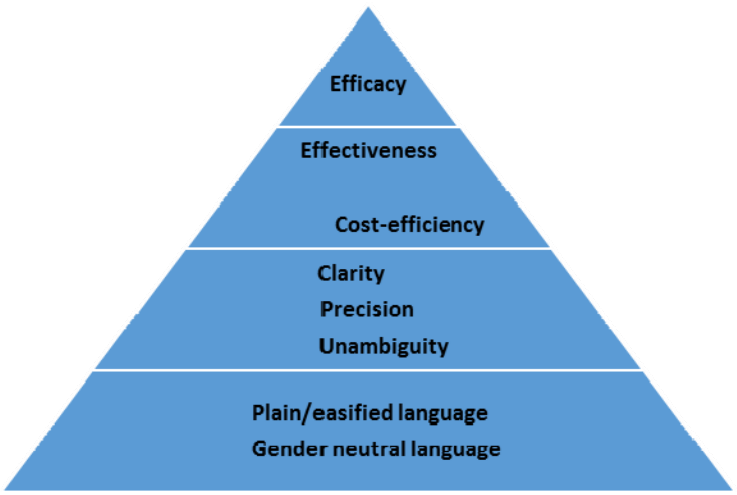
1) See A. Flueckiger, 'Régulation, dérégulation, autorégulation : lémergence des actes étatiques non obligatoires' (2004) 123 *Revue de droit suisse* 159.
2) See Better Regulation Task Force (BRTF), 'Routes to Better Regulation: A Guide to Alternatives to Classic Regulation', December 2005.
3) See N. Staem, 'Governance, Democracy and Evaluation' (2006) 12(7) *Evaluation* 7, 7.
4) See J. Miller, James, 'The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation' (1985) 4 *Cato Journal* 897.
5) 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).
6) 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.
7) For a thorough analysis of the goals for drafters and the theoretical basis for their universality, see H. Xanthaki, *ibid*.



Successful regulation, defined as the production of the desired regulatory results, is the goal of regulators and is expressed as "efficacy".[8)]

The term efficacy has in the past been used interchangeably with effectiveness, especially by experts outside the field of legislative studies.[9)] But efficacy and effectiveness are far from synonymous. Efficacy is factual and answers the question whether the regulatory efforts have actually achieved the set regulatory goals. Effectiveness is a qualitative concept and answers the question whether the legislative is capable of producing the desired regulatory results, i.e. whether the text is capable of achieving efficacy. In this sense, effectiveness is just one elemen t[10)] of efficacy[11)]: efficacy requires a solid policy, appropriate and realistic policy measures for its achievement, cost efficient mechanisms of implementation, effectiveness of the legislative text,[12)] the users' willingness to implement, and judicial inclination to interpret according to

8) See M. Mousmouti, 'Operationalising quality of legislation through the effectiveness test' (2012) 6 *Legisprudence* 191.

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

10) 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.

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

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

legislative intent.[13]

In an effective legislative text the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator[14]. The "law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine".[15] Effectiveness encompasses implementation, enforcement, impact, and compliance[16]. The legislative measure achieves a concrete goal without suffering from side effects[17]. And the legislation influences in the desired manner the social phenomenon that it aims to address.[18] An effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.[19] Effectiveness is the ultimate measure of quality in legislation[20], 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

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

15) 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.

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

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

18) 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.

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.

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.[22)]

Leaving cost efficiency out of the equation, since it is an economic-political rather than purely legal choice, effectiveness is promoted by clarity, precision, and unambiguity.

Effectiveness is achieved by means of clear, precise, and unambiguous communication with the legislative audience. Legislation aims to communicate[23)] 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.

Clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambiguity is certain or exact meaning: semantic unambiguity requires a single meaning for each word used, whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses. Clarity, precision, and unambiguity offer predictability to the law. Predictability allows the users of the legislation, including enforcers, to comprehend the required content of the regulation. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law. Thus, compliance becomes a matter of conscious choice for the user, rather than a matter of the users' subjective interpretation of the exact content of the legislation and, ultimately, the regulation expressed by the text.

In turn, clarity, precision, and unambiguity are promoted by plain language and gender neutral language. Gender-neutral language is a tool for accuracy: whilst calling for gender neutrality as a rule, it allows for gender specificity in drafting and before the courts where

22) This is Mousmouti's effectiveness test: M. Mousmouti, above, 202.
23) Legislation is communication: see ibid.

needed. Gender-specific language serves in parallel with plain language as an additional tool for the promotion of precision, clarity, and unambiguity. The UK has introduced gender neutral language in its legislation for the last decade. Plain language as a concept encapsulates a qualifier of language that is subjective to each reader or user. Eagleson defines plain language as clear, straightforward expression, using only as many words as are necessary.

Plain language has been promoted both in the UK and internationally as the main tool for achieving clarity and in turn effectiveness of legislation. As a result, its contribution to good legislation is crucial, and merits further exploration. 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 e, 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 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 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 easificatio n.[24] 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 seemingly hopeless task.

Ⅲ The diversity of the legislative audience in its true extent: empirical data

One could argue, rather persuasively, that this is an unsurpassable weakness of legislative texts. As audience diversity is inherent in legislation, this unsurmountable gap of legal awareness and linguistic experiences can lead to the pursuit of "ordinary meaning" in words. But, ordinary for whom? Who are the real users of legislation in the UK today?

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:

24) 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).

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 admittedly 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?

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 are normally 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' can 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 and "ordinary words": 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 changes the way in which legislation is drafted and interpreted. First, legislative language is no longer 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.

Ⅳ What then for "ordinary words"?

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 "ordinary words" further.

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. And, 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, seem to be 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. But it cannot forgive a mismatch in the meaning of "ordinary words". Because drafters choose to use words based on the linguistic and legislative characteristics of the user groups of legislation.

"Ordinary" is not unique. "Ordinary" must be sought within the linguistic eccentricities of the specific user groups of the provision at hand within the legislative text at hand. What is "ordinary" for mortgage lenders is not necessarily ordinary for mortgage recipients. And what is "ordinary" in criminal evidence is not "ordinary" in benefits and pensions provisions.

V Conclusions

This is by no means the end to the pursuit of "ordinary meaning" in words. Far from it. 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.

But, 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 equally well as a guidance there.

One wonders where the interpreter could trace these elements of the drafting choices. I would suggest that explanatory notes 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.

I am tempted to say that my layered approach to legislation (where the legislative text is divided into three parts addressing each of the three legislative audiences and answering their specific questions in an easified manner) could be of great assistance for an accurate interpretation of "ordinary words".

Whatever form guidance takes, wherever it is placed, it must respond to the interpreter's needs. Which makes a further dialogue on "ordinary" words all the more relevant.