

## Chapter 6

# Judges v Drafters: The Saga Continues

*Helen Xanthaki*

### I Introduction

Although statutory law features prominently as a common factor in the duties of drafters and judges, the two professions traditionally find themselves opposite each other. Instead of sharing legislation, drafters and judges are divided by the eternal conflict between drafting ('construction') and interpretation. So much so, that Sir George Engle divides even the timing over which the two professions comes into play: construction, he says, comes into play during application of the text to the facts, whereas statutory interpretation comes into play during dispute and litigation.

The recent trend in legislative studies is to soften the divides of the past, and accentuate the cohesions of legislation. Legislation, as a tool for regulation, is now viewed as a team effort of policy-makers, lawyers and drafters. Efficacy of regulation requires effectiveness of legislation. This demands a prominent link between policy, law reform and legislative drafting. But statutory interpretation is outside this cycle of cohesion.

The hypothesis of this chapter is that the exclusion of statutory interpretation from the recent trend of accentuation of cohesions in the conceptualisation of regulation and legislative expression has detached legislative drafting from statutory interpretation even more. Judges are neither part of nor privy to the debate on modern legislative expression, to the point that they often fail to recognise a standard drafting technique.<sup>1</sup> Whilst purposive interpretation increases the necessity of unity in expression and interpretation, drafters and lawyers have never been further apart in what is described as 'the great divide';<sup>2</sup> and, in addition to their traditional ignorance of parliamentary practices,<sup>3</sup> judges are increasingly deprived of the tools to understand the effect of drafting expression. As a result, certainty in the law becomes uncertain, and the application of the rule of law suffers fluidity.

---

1 See The Honourable Hilary Penfold, 'Legislation in the Courts' (2019) *The Loophole*, 2, 6.

2 Ibid 12.

3 See Daniel Greenberg, 'Judicial Ignorance of the Parliamentary Process: Implications for Statutory Interpretation', *Policy Exchange: Judicial Power Project: Posts, Publications, Publications: Critiquing Judicial Power*, 27 March 2017 <<https://judicialpowerproject.org.uk>>.

## II The Core of Alienation

Professor Slocum makes an eloquent and rather persuasive argument for the increased use of the ordinary meaning of words in statutory interpretation.<sup>4</sup> Professor Slocum argues that the quality of statutory interpretation, and judicial assertions about language, would improve, if judges considered the ordinary meaning of words. Professor Slocum expresses the prevalent doctrine of modern statutory interpretation, namely departure from archaic esoteric notions of learned interpretation and prominence of ‘ordinary’ words as used by the ‘average man’.

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. If judges were to read the legislative text as its user, they would be able to establish what their understanding was and what awareness of the law they had when they read the legislation and when they made the decision to proceed with action in the manner that they did.

This may sound plausible, or perhaps even progressive, in the field of statutory interpretation. But it is objectionable on a multitude of levels in the field of legislative drafting. First, the notion of an ‘average man’ is obsolete: there are other users, equally worthy of inclusion, who happen to self-determine as other than man. Second, the notion of an ‘average man’ is obsolete as there is no average user: users below or above whatever is considered ‘average’ are also to be included in the legislative audience. And so, progression and inclusivity in the field of legislative drafting is rather more individualistic than in statutory interpretation. Here, interpretation is audience-centred rather than text-centred.

## III The Context: Legislation as a Tool for Regulation

The membership and characteristics of the legislative audience have been elusive to drafters for years. The term ‘legislative audience’ has been 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 do they possess?

The membership and characteristics of the legislative audience are very relevant to the drafting and interpretation of legislation. I view legislation as one of the many<sup>5</sup> tools available to governments for the achievement of their desired regulatory results.<sup>6</sup> The achievement of the desired regulatory results is the prevalent measure of policy success.<sup>7</sup> 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

4 See Brian Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (Chicago University Press, 2015); also see Brian Slocum, ‘Linguistics and “Ordinary Meaning” Determinations’ (2012) 33 *Statute Law Review* 39.

5 See Alexandre Flueckiger, ‘Régulation, Dérégulation, Autorégulation: L’émergence des Actes Étatiques Non Obligatoires’ (2004) 123 *Revue de Droit Suisse* 159.

6 See Better Regulation Task Force, *Routes to Better Regulation: A Guide to Alternatives to Classic Regulation* (UK Government, 2005) <[https://www.eesc.europa.eu/resources/docs/routes\\_to\\_better\\_regulation.pdf](https://www.eesc.europa.eu/resources/docs/routes_to_better_regulation.pdf)>.

7 See Nicoletta Stame, ‘Governance, Democracy and Evaluation’ (2006) 12(7) *Evaluation* 7, 7.



approaches), co-regulation and self-regulation schemes,<sup>8</sup> incentive and market based instruments (such as tax breaks and tradable permits) and information approaches,<sup>9</sup> and of course legislation. Legislation is used frequently to get government to their desired regulatory destination.

The diagram<sup>10</sup> above, starting from the base and working upwards, visualises the journey from legislation to successful regulation<sup>11</sup> and, in reverse, the journey from successful regulation to legislation.

Successful regulation, defined as the production of the desired regulatory results, is the goal of regulators and is expressed as 'efficacy'.<sup>12</sup>

The term 'efficacy' has in the past been used interchangeably with 'effectiveness', especially by experts outside the field of legislative studies.<sup>13</sup> But efficacy and

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

9 See OECD, *Alternatives to Traditional Regulation* (OECD) 4 [0.3] <<https://www.oecd.org/gov/regulatory-policy/42245468.pdf>>; and also OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD, 2002) <<http://regulatoryreform.com/wp-content/uploads/2015/02/OECD-Regulatory-Policies-in-OECD-Countries-2002.pdf>>.

10 See Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 1.

11 For a thorough analysis of the goals for drafters and the theoretical basis for their universality, see *ibid* 1.

12 See Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test' (2012) 6 *Legisprudence* 191.

13 Also see Alexandre Flückiger, 'L'évaluation Législative ou Comment Mesurer l'Efficacité des Lois' (2007) *Revue Européenne des Sciences Sociales* 83.

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 legislation is capable of producing the desired regulatory results, that is, whether the text is capable of achieving efficacy. In this sense, effectiveness is just one element<sup>14</sup> of efficacy:<sup>15</sup> efficacy requires a solid policy, appropriate and realistic policy measures for its achievement, cost-efficient mechanisms of implementation, effectiveness of the legislative text,<sup>16</sup> the users' willingness to implement, and judicial inclination to interpret according to legislative intent.<sup>17</sup>

In an effective legislative text the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.<sup>18</sup> The 'law matters: it has effects on political, economic and social life outside the law – that is, apart from simply the elaboration of legal doctrine'.<sup>19</sup> Effectiveness encompasses several things: implementation, enforcement, impact and compliance.<sup>20</sup> With it, a legislative measure achieves a concrete goal without suffering from side effects.<sup>21</sup> And

14 See Constantin Stefanou, 'Legislative Drafting as a Form of Communication' in Luzius Mader and Marta Travares-Almeida (eds), *Quality of Legislation: Principles and Instruments* (Nomos, 2011) 308; and also see Constantin Stefanou, 'Drafters, Drafting and the Policy Process' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 321.

15 See Joseph P Chamberlain, 'Legislative Drafting and Law Enforcement' (1931) 21 *American Labor Legislation Review* 235, 243.

16 See Christiaan Timmermans, 'How Can One Improve the Quality of Community Legislation?' (1997) 34 *Common Market Law Review* 1229, 1236-7; Commission of the European Communities, *European Governance: Better Lawmaking*, Communication from the Commission, COM(2002) 275 final, Brussels, 5.6.2002 <[www.osservatorioair.it/documenti/e\\_ue/documenti%20commissione/better\\_lawmaking\\_giu\\_02.pdf](http://www.osservatorioair.it/documenti/e_ue/documenti%20commissione/better_lawmaking_giu_02.pdf)>; also see High Level Group on the Operation of Internal Market, *The Internal Market After 1992: Meeting the Challenge*, Report to the EEC Commission, SEC (92) 2044; also Office of Parliamentary Counsel (UK), *Working with Parliamentary Counsel*, 6 December 2011 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62668/WWPC\\_6\\_Dec\\_2011.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62668/WWPC_6_Dec_2011.pdf)>; and Office of the Parliamentary Counsel, *Drafting Guidance*, 16 December 2011 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61010/Office\\_of\\_the\\_Parliamentary\\_Counsel\\_revised\\_guidance\\_16\\_12\\_11.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61010/Office_of_the_Parliamentary_Counsel_revised_guidance_16_12_11.pdf)>.

17 See Daniel Greenberg, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 *Statute Law Review* 15; also see David Hull, 'Drafters' Devils' [2000] *Loophole* 15 <[www.calc.ngo/publications/loopholes#loophole-table-2000](http://www.calc.ngo/publications/loopholes#loophole-table-2000)>; Ulrich Karpen, 'The Norm Enforcement Process' in Ulrich Karpen and Paul Delnoy (eds), *Contributions to the Methodology of the Creation of Written Law* (Nomos, 1996) 51, 51; also Luzius Mader, 'Legislative Procedure and the Quality of Legislation' in Ulrich Karpen and Paul Delnoy (eds), *Contributions to the Methodology of the Creation of Written Law* (Nomos, 1996) 62, 68; Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012).

18 See Luzius Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22 *Statute Law Review* 119, 126.

19 See Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19, 19; also Francis Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, 1990) 3.

20 See Gunther Teubner, 'Regulatory Law: Chronicle of a Death Foretold' in Jacques Lenoble (ed), *Einführung in der Rechtssoziologie* (Wissenschaftliche Buchgesellschaft, 1987) 54.

21 See Georg Muller and Felix Uhlmann, *Elemente einer Rechtssetzungslehre* (Asculthess, 2013) 51-2.

the legislation influences in the desired manner the social phenomenon that it aims to address.<sup>22</sup> An effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.<sup>23</sup> Effectiveness is the ultimate measure of quality in legislation,<sup>24</sup> which reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.<sup>25</sup> 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.<sup>26</sup>

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<sup>27</sup> 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 user's 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 general rule, it allows for gender specificity in drafting where

22 See Iredell Jenkins, *Social Order and the Limits of the Law: A Theoretical Essay* (Princeton University Press, 1981) 180; also see Ross Cranston, 'Reform Through Legislation: The Dimension of Legislative Technique' (1978-1979) 73 *Northwestern University Law Review* 873, 875.

23 See Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test' (2012) 6 *Legisprudence* 191, 200.

24 See Helen Xanthaki, 'On Transferability of Legal Solutions' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 6.

25 See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Government's Approach* (House of Commons, UK, 2008) 18 [24] <<https://assets.publishing.service.gov.uk/>>.

26 This is Mousmouti's effectiveness test: see Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test' (2012) 6 *Legisprudence* 191, 202.

27 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 United Kingdom has used 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’.<sup>28</sup>

Plain language has been promoted 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 or regulatory message in a manner that is 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 prioritisation 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 it remains on the cards during the text verification, where additional confirmation of appropriate layout and visual appeal come into play. And so plain language extends from policy making to drafting, inclusive. 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*, for instance, 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 easification.<sup>29</sup> 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 common law world, 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

28 Quoted on plain language website of the United States Government: <<https://www.plainlanguage.gov/about/definitions/short-definition/>>.

29 See Helen Xanthaki, ‘Legislative Drafting e Lingua: Ipotesi di Semplificazione del Testo Normativo’ in *Studi Parlamentari e di Politica Costituzionale* [2016], 41.

of both common terms (whatever ‘common terms’ may be) and legal terms renders communication via a single text a seemingly hopeless task.

#### IV The Diversity of the Legislative Audience

As audience diversity is inherent with legislation, this insurmountable 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?

Recent empirical data offered by a ground-breaking survey of the National Archives in cooperation with the UK 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 United Kingdom, 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 per cent of users of legislation;
- (b) lay persons who seeks answers to questions related to their personal or familial situation; ‘Heather Cole’ represents about 20 per cent of users of legislation; and
- (c) lawyers, judges and senior law librarians; the ‘Jane Booker’ persona represents about 20 per cent of users of legislation.<sup>30</sup>

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, confirms the diversity of the legislative audience. Legal professionals, a category that includes judges, 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 official, not annotated and often not updated. Whatever the exact percentages of each category are, there is significant empirical evidence that, at least in the United Kingdom, legislation speaks to three distinct groups of users, whose legal awareness varies from none, to some, to expert.

Of course, not all legislative texts are aimed at the same readers. Their primary audience varies. For example, the main users of rules of evidence 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 criminal 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 specialised and

30 See Alison Bertlin, ‘What Works Best for the Reader? A Study on Drafting and Presenting Legislation’ [2014] 2 *The Loophole* 25.

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, what is 'ordinary'? 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? 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 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 'average man'. When 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. Legislation now tends to be pitched to 'Mark Green' and increasingly to 'Heather Cole'. 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](http://www.legislation.gov.uk)>. Similarly, legislation is increasingly 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 United Kingdom government's commitment to legislating in a user-friendly manner.

## V 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 the National Archives and the Office of Parliamentary Counsel, let us discuss 'ordinary words' further.

There seems to be a rather gaping schism between the linguistic perceptions of drafters and interpreters of legislation 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 the diversity of 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 to whom the text is addressed, 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. Judges are still locked in the dual-dimensional friction between learned and ordinary meaning, whereas drafters have moved to a multi-dimensional concept of meaning.

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'. Drafters choose to use words based on the linguistic and legislative characteristics of the particular user groups of the legislative text. For them 'ordinary' is not single-dimensional. 'Ordinary' is 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.

Legislative drafting is moving forward; it is moving quickly, but unfortunately is not taking judges and statutory interpretation with it.

## VI Conclusions

Legislative drafting is undergoing a period of innovation. The United Kingdom, Europe and the Commonwealth are looking at legislation as a tool for regulation. Through its nature as a method of communication with its users, legislation has become the focal point as a carrier of regulatory messages. Stefanou and Greenberg have explored legislation as a means of communication. For me, legislation is a means of regulatory communication able to achieve two purposes: on a micro-level, legislation can convey the regulatory message to its users, thus clarifying to them what action they are expected to take in order to bring to effect law and ultimately policy reform. At the macro-level, legislation as a means of communication can make the user party to the rationale of regulatory choices, thus inviting the users to buy into regulatory efforts and reinstating respect to the regulators. But this is another story for another chapter. For the purposes of this one, legislation is the carrier of communication from the state to the users.

In order to communicate clearly the regulatory and legislative message, drafters have learnt from linguists. Legislative texts, as written communications, must convey its messages in a manner that the recipients, namely the users, understand. In order to achieve this accuracy of communication, drafters need to know who their users are, and what level of sophistication they possess with reference to law and subject. But there is not a single category of users. The Good Law empirical study of legislation has demonstrated that, normally, it is used by a diverse audience of three main groups: lay users, non-law professionals and law professionals. These three groups have diverse levels of legal and topic-related awareness.

Conveying the often complex regulatory messages of legislative texts can be achieved either via a text-centred interpretation method or via a user-centred one. The first interprets a single-dimensional text by pursuing a flat but common meaning. 'Ordinary' meaning becomes topical and interpretation is achieved by guessing what the 'average man' would understand from the text. This has been the traditional

approach in drafting, and remains the current approach in statutory interpretation. The consequences of such an approach include alienation of diverse users from legislative texts, and interpretation by learned lawyers and judges who attempt to speculate what the 'average man' without legal training would understand when reading the text. But, of course, the 'average man' does not read the text, which is foreign and therefore detached from them. As for the non-average, non-men, well they are marginalised from the law, and, by extension, the regulation. The law becomes an elitist product and the opportunity to regulate via participation is lost. Our judges seem displeased with this traditional approach and are looking to address the issues deriving from the choice of text-centred interpretation through a support of 'ordinary' meaning.

The second choice of interpretation is the user-centred one. Regulators and drafters, as their raconteurs, have found it impossible to accommodate all relevant diverse user groups in a single tool of communication. Instead of pursuing a single inclusive language as our judges do, they attempt to pinpoint the particular layers of language understood by each of the diverse group of users of the particular text. And so, instead of flattening the legislative language to be understood by the 'average man', drafters layer language and text to reach out to its multi-layered audiences. Borrowing from linguistics, drafters easify language, whereas judges determining ordinary meaning simplify language. And this lies at the core of their alienation and detachment from each other.

The misfortune for regulatory communication is that drafters draft in easified language, and judges interpret ordinary meaning in simplified language. In a neutral statutory environment, the two approaches could work in parallel. But purposive interpretation accentuates the antithesis.

Is there anything that can harmonise the two approaches? Perhaps a start could be the mutual realisation that judges are part of the third group of legislative users: drafters remain assigned with the task to convey the regulatory message to them too. Equally, the 'ordinary' meaning of the text for the 'average man' cannot be too far from the lay users of group 1. So there is some embryonic common ground there.

But there are concrete steps that can lead to a convergence between construction and interpretation. First, 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, and must be privy to the factors of choice used by the drafter and to any user testing results. Purposive interpretation, which brings 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. 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 are identified, their linguistic and legislative awareness reported and demonstrated by examples from user testing, and their influence on choice of construction detailed and analysed.

Second, the new United Kingdom style of long title of legislation can offer judges real context when it comes to a new Act. By detailing factually the main mechanisms of law reform, the long title can offer judges an understanding of how the law changes, and how it relates to existing legislation.

Third, a purpose clause, and here I agree with Greenberg and Berry, can delimit purposive interpretation and have the effect of making it a less creative discipline by identifying clearly the regulatory aims of the policy process, which the legislation attempts to put to effect. Doing so in a concrete manner via the introduction of measurable criteria of effectiveness can not only contribute to concrete, legislative-led post legislative scrutiny, but can bring statutory interpretation back to the hands, or should I say the pens, of the drafters, who are the exclusive raconteurs of the legislative story.

Finally, a 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 eased manner) could be of great assistance for an accurate interpretation. Currently legislative texts are structured in application to Lord Thring's Five Rules of Drafting 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 and temporary provisions, provisions relating to the repeal of Acts, and provisions relating to procedure and matters of detail should be set apart. But there is much scope for a departure, from this text-centred approach to structure, to a user-centred one. As each of the three user groups has its individual requirements for legislative information, drafters can begin to think what regulatory message is relevant to each group, and gather the group of messages per group for the three parts of the Act. Part 1, for lay persons, introduces the main regulatory messages in simple language. Part 2, for the non-legally trained professionals who use the legislation in the course of their employment, addresses administration and procedure in a semi-specialised language. And, Part 3, for legal professionals, addresses legal interpretation and technical details such as consequential amendments and transitional arrangements in a legal language. It is worth noting that the new style of explanatory notes in the United Kingdom (showcased accompanying the Armed Forces (Service Complaints and Financial Assistance) Bill 2014-16 [HL])<sup>31</sup> 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. With reference to judicial interpretation, the layered approach can alert judges to the diverse audiences of legislation, and can guide them to the level of 'ordinary' according to the placement of the word in the structure of the layered Act.

To conclude this chapter, let us revisit its hypothesis: the exclusion of statutory interpretation from the recent trend of accentuation of cohesions in the conceptualisation of regulation and legislative expression has detached legislative drafting from statutory interpretation even more. The chapter described the chasm between the two currently parallel approaches of interpretation: text-centred statutory interpretation deriving from a single-dimensional 'ordinary' meaning of words as understood by the 'average man' versus a user-centred construction deriving from the multi-layered understanding of words by the diverse user groups of legislation. The chapter went on to alert readers to the dangers inherent in the detachment between construction (ie, drafting) and interpretation, between drafters and judges. And it attempted to propose four possible routes for convergence:

31 See <<https://services.parliament.uk/>>.

- (a) the provision of context for judges in factually listed introductory texts; and
- (b) the guidance of judges in purposive interpretation through well-drafted purpose clauses; and
- (c) the use of a layered structure as a means of alerting judges to the user groups of the legislative text, their legal awareness, and their language; and
- (d) perhaps more importantly than anything else, the inclusion of judges in legislative studies debates.

Statutory interpretation has fallen through the sieves of legislative studies. This chapter, and of course, this book is the beginning of its eventual inclusion.