



Gender neutral drafting: Gender equality or an unnecessary burden?

by Constanza Toro

“Language does not merely reflect the way we think: it also shapes our thinking. If words and expressions that imply that women are inferior to men are constantly used, that assumption of inferiority tends to become part of our mindset. Hence the need to adjust our language when our ideas evolve. Language is a powerful tool”.¹

“History

Herstory

My story

Introducing gender neutral titles at HSBC”.²

Abstract

Gender neutral policies are almost unanimously defended nowadays. However, legal drafting is not always up to date regarding this challenge. This article examines the different type of reasons to defend a gender neutral drafting, highlighting that there are both justice reasons (inclusiveness) and methodological ones (clarity, precision and unambiguity) to embrace such policy. However, the author warns that gender neutral drafting is only a necessary but an insufficient tool to achieve the broader goal of gender equality. The article approaches the different drafting techniques available to achieve gender neutral drafting and, in this context, analyse the recent Chilean instruction on this matter.

I. Introduction

Since the second wave of feminism, there has been an increasing focus on the relationship between gender and language, acknowledging that language itself can be an instrument of oppression, by silencing women.³ This can also be applied to the specific context of legal language, if we consider that “legal discourse systematically excludes, devalues, trivializes and ignore women”.⁴ Hence, the importance of analysing the language in which the law is expressed, and more specifically the type of language in which we should draft legislation.

The need of drawing attention to gender neutral drafting has been progressively supported during the last decades. However, there are still some people that argue against it, considering it unnecessarily complicated or artificial. In this context, the hypothesis guiding this article is that gender neutral drafting must be embraced, both for justice (inclusiveness) and methodological reasons (clarity, precision and unambiguity); nonetheless, it is not enough on its own to achieve gender equality across the law.

¹ UNESCO Guidelines on Gender-Neutral Language [1999] 4

² Sign displayed by HSBC truck at Pride Parade London, 8th July 2017.

³ Jennifer Hornsby, ‘Feminism in Philosophy of Language: Communicative Speech Acts’, In: Fricker M and Hornsby J (Eds), *The Cambridge Companion to Feminism in Philosophy* [2000] 87.

⁴ Karen Busby, ‘The maleness of legal language’ (1989) 18 *Manitoba Law Journal* 210.

The methodology followed in the article is the following: section II explains the concept of gender neutral and its link with other similar notions used in the literature; section III presents the arguments of those against it, which will be then contrasted in section IV with the reasons to support gender neutral drafting; section V analyse some gender neutral drafting techniques and guidelines, with specific reference to the recent Chilean instruction on the issue, in order to further clarify these arguments. Finally, section VI presents the conclusions, emphasizing that gender neutral drafting must be supported for both justice and methodological reasons, but it must also be distinguished from gender equality across the law, for which it can be regarded as a necessary but insufficient tool.

II. Concepts linked to gender neutrality

There are several concepts in the literature that focus on gender in language. A common denominator to refer to sexist language or exclusive language is the notion of *gender biased* language, which refers to "language that represents the male as the norm".⁵ The opposite concept is referred as *gender neutral* or non-sexist language, to emphasize its avoidance of a gender bias. A related concept that is usually used as a synonym of gender neutral is *gender inclusive*. However, there are not exactly the same. As its names suggest, the focus of gender neutral is avoid any bias towards gender; while gender inclusive looks for an explicit consideration of every gender possible in the use of language.⁶ Another way of pointing out the need to avoid gender bias is often referred as *gender free*. This concept is used when supporting the need to avoid de pronouns entirely, instead of alternating or adding the female pronoun.⁷ On the other hand, it is also emphasized that a truly gender sensitive approach must ensure a *gender specific* language when it is indeed needed. If not, the generic use of language could actually be more harmful by hiding differences that demands a differentiated approach.

All these concepts can be applied to the specific context of legal drafting, in search for a language that does not assume the male form as the generic addressee of law, achieving that women may be visible as well. As Margaret Wilson has recognized, legal language is one of the most formal uses of language, which is why changes are more difficult to be introduced and require a strong commitment from policy makers towards the decision to adopt a gender neutral style of legal drafting.⁸ When faced with the dilemma of gender neutrality in law, the challenge is how to depart from *the masculine rule*. This rule was contained in several Interpretation Acts and it established that male gender words must be understood as including also the feminine. This rule was adopted in several countries since the 1980s, but it has been repealed or amended in several of those jurisdictions.⁹ The alternatives for the masculine rule are mainly the *two-way rule* or the *all gender rule*. The former is the chosen by UK and established in the Interpretation Act 1978 as follows:

- "In any Act, unless the contrary intention appears,—
 (a) Words importing the masculine gender include the feminine;
 (b) Words importing the feminine gender include the masculine".¹⁰

According to this rule, either masculine or feminine words include also the other gender. Although it has been adopted by at least eight jurisdictions, this rule has been criticized due to its

⁵ Judith Fischer, 'Framing Gender: Federal Appellate Judges' Choices about Gender-Neutral Language' (2008-2009) 43 *University Of San Francisco Law Review* 475.

⁶ In this sense, a truly gender inclusive language face the challenge of considering not only male and female, but also the rest of the spectrum of gender, which includes LGBT+.

⁷ British Columbia Law Institute (BCLI), Gender- Free Legal Writing: Managing the Personal Pronouns, [1998] 6 <<http://www.bcli.org/sites/default/files/GenderFree.pdf>> Accessed on the 30th June 2017.

⁸ Margaret Wilson, 'Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation' Sir William Dale Annual Memorial Lecture (2011) 13(2) *European Journal of Law Reform* 203.

⁹ For an historical review see Sandra Petersson, 'Gender Neutral Drafting: Historical Perspective' (1998) 19(2) *Statute Law Review* 93. For UK rules specific history, see Daniel Greenberg, 'The Techniques of Gender-neutral Drafting', In: Stefanou C and Xanthaki H (Eds), *Drafting Legislation. A Modern Approach* [2008] 63.

¹⁰ UK Interpretation Act 1978, Section 6.

"false neutrality", since it does not alter the drafting style nor the interpretation of existing legislation.¹¹ On the other hand, the all gender rule allows for "words importing a gender [to] include every other gender".¹² Although broader than the previous alternative (it goes beyond the male/female dichotomy), it is still considered neutral but ineffective, because it fails in changing the drafting style.¹³ A third alternative would be the so called *separate gender rule*, according to which nor the masculine nor the feminine, should be used to include the other. This rule would demand a change in legal drafting, but it has not been widely used.¹⁴

Beside these interpretation rules, further impact can be achieved with gender neutral drafting policies, where several techniques are available. Section V describes some of them, including the most recent Chilean Instruction on the matter.¹⁵ But before considering the specific techniques it is necessary to analyse the arguments for and against gender neutral drafting.

III. Reasons against gender neutral drafting

There are different set of reasons argued for those who opposed to a gender neutral style of legal drafting. The first type of critic consists on "the issue [being] too trivial to warrant the effort required to change writing habits".¹⁶ Arguing that visibility and non-discrimination of half of the world population is "too trivial" is worrying. But since this argument is rarely use insolation, I will group it with those who believe that legal language is too entrenched in tradition and therefore too rigid to incorporate gender neutral drafting. Indeed, legal language is a formal and technical language, which can explain why changes might be more difficult to introduce, but this does not prevent us to address the issue. As we will analyse in section V, there are several available techniques for a gender neutral drafting, so it is hard to say it really demands a high effort and if it does, I would reply it is a worthwhile effort.

A second type of critiques is focused on the aesthetics of gender neutral drafting.¹⁷The argument in this case is that gender neutral drafting is too repetitive, too long, or just too awkward. Some official publications specifically warn about these types of critiques as the "arguments that should be avoided in this discussion".¹⁸ According to them, these arguments are not strong enough to discard the need to include women in language. Others counterargument explaining that the several gender neutral techniques should be combined to avoid these potential threats.¹⁹ Above all, I consider that style arguments should be considered of second order in comparison with the main virtues legal drafting should pursue (precision, clarity and unambiguity),²⁰ which is why it is pertinent to examine the third type of critique that argues that gender neutral drafting would be unclear and can distract and ultimately confuse the reader.

An example of this last type of critique can be found on the position of the Spanish Real Academy, as it was expressed by Ignacio Bosque in reaction to the several gender neutral drafting

¹¹ Sandra Petersson, 'Gender-Neutral Drafting: Recent Commonwealth Developments' (1999) 20(1) *Statute Law Review* 40.

¹² Australia Acts Interpretation Act 1901, Section 23.

¹³ Petersson (n 11) 44.

¹⁴ Wilson (n 8) 206.

¹⁵ However, it must be also noticed that gender neutrality in law goes beyond the mere syntax of legislation. There are also several sexist legal concepts and sexist implications on semantic and metaphor constructions throughout the law. See Karen Busby K, 'The maleness of legal language' (1989) 18 *Manitoba Law Journal* 197.

¹⁶ Leslie Rose, 'The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?' (2010) 17 *Duke Journal of Gender Law & Policy* 112. Also mentioned by Fischer (n 5) 481.

¹⁷ According to Steven Shavell, gender neutral language could be criticized for being "stilted and unnatural, upsetting to our aesthetic sensibilities". Rose (n 16) 113.

¹⁸ Guerrero Ch and Lledo E, 'En femenino y en masculino. Hablamos de leyes' (2008) Instituto de la Mujer, Ministerio de Igualdad, 6 *Serie Lenguaje* 51.

¹⁹ Fischer (n 5) 489.

²⁰ Simplicity, plain language and gender neutral drafting, must be used as long as it serve the purpose of efficiency, marked by those three virtues. See Helen Xanthaki, 'Quality of legislation: an achievable universal concept or a utopian pursuit?' In: *Quality of Legislation. Principles and Instruments: Proceedings of the Ninth Congress of the International Association of Legislation (IAL)* [2001] 79.

guidelines in Spain.²¹ According to him, the position taken in most of these guidelines, that recommends rejecting every masculine expression that includes the feminine as well, is against Spanish grammar and syntax and it is a mistake to necessarily identify it with sexism. Moreover, strictly following these recommendations would “force” the language and make it impossible to naturally speak Spanish, which also goes against the tendency of using plain language in official drafting. In my opinion, this discussion is probably more about the specific techniques mentioned throughout his examples, rather than against the general policy of gender neutral drafting. Nevertheless, it is crucial to analyse the reasons to support gender neutral drafting to really dismiss this critique.

IV. Reasons for gender neutral drafting

There are two different types of reasons to support gender neutral drafting. A substantive or justice-based reason, build upon the fact that it is necessary to avoid the invisibility behind the use of generic masculine and to recognize the discrimination implied in this practice. The feminist literature has extensively developed these arguments; but I will briefly explore this point to examine how gender neutral drafting contribute to gender equality across the law. But first, it is necessary to present the methodological argument to defend the need for a gender neutral drafting.

a) As a tool for precision, clarity and unambiguity

As Professor Helen Xanthaki has clearly stated, “one of the two tools serving clarity, precision and unambiguity, and ultimately effectiveness of legislation is gender neutral drafting”.²² Other authors also agree on this appreciation.²³ The logic is that if masculine gender is used as a generic, it is not clear whether a particular provision is addressed only for men or for men and women also. In this context, gender neutral drafting is a basic way to ensure accuracy in legal writing.²⁴

The studies documenting how the judges have been deciding on women rights and obligations based on generic male based provisions are strong empirical evidence in favour of this argument. As these studies have shown, judges not always interpret those provisions in the same way, confirming therefore that gender biased drafting is ambiguous. Fischer examined the federal appellate judges’ use of gender neutral language and found that “problems with clarity have been exacerbated by courts’ inconsistent treatment of male-linked generic pronouns. Courts sometimes hold that the generic *he* refers to only males and sometimes hold that it refers to both sexes”.²⁵ Rose did a similar study with Supreme Court judges and demonstrated that “most members of the United States Supreme Court still use male-gendered generics regularly [and that] This practice freezes the Court in the non-inclusive and imprecise writing style”.²⁶

It is important to emphasise, that contrasted with the arguments against gender neutral drafting that we have called “aesthetics”, the need for clarity, precision and unambiguity prevails. These virtues are more important for the efficiency of legal drafting, than elegance or style of legislative drafting.²⁷ And although gender neutral drafting could be considered by some confusing,

²¹ Ignacio Bosque, *Sexismo lingüístico y visibilidad de la mujer* [2012] Real Academia Española <http://www.rae.es/sites/default/files/Sexismo_linguistico_y_visibilidad_de_la_mujer_0.pdf> Accessed on the 3rd July 2017.

²² Helen Xanthaki, *Drafting Legislation. Art and Technology of Rules for Regulation* [2014] 103.

²³ See Kadija Kabba, ‘Gender-neutral language: an essential language tool to serve precision, clarity and unambiguity’ (2011) 37(3) *Commonwealth Law Bulletin* 427.

²⁴ Mary Jane Mossman, ‘Use of Non-Discriminatory Language in Law’ (1995) 20(1) *International Legal Practitioner* 8.

²⁵ Fischer (n 5) 488.

²⁶ Rose (n 16) 102. More cases explaining the need to move away from “he” as a generic pronoun for reasons of clarity and precision can also be in Olva Aldeola, *The Masculine Rule And Its Alternatives: A Comprehensive Analysis* [2013], Research Paper Submitted in Partial Fulfilment of the Requirements for the LLM Degree (Advanced Legislative Studies) of the Institute of Advanced Legal Studies School of Advanced Study University of London.

²⁷ In other words: “If there is a conflict between gender-neutral language and plain language, again the deciding factor is clarity, precision unambiguity and ultimately effectiveness in legislation”. Helen Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’, In: Stefanou C and Xanthaki H (Eds.), *Drafting Legislation: A Modern Approach* [2008] 17.

due to long or artificial constructions, the empirical evidence shows that the alternative of gender biased drafting is ambiguous in its application.

b) Gender neutral drafting and gender equality

Additionally, gender neutral drafting should be supported for the justice of enforcing anti-discrimination and inclusiveness values. Mossman phrase it in terms of professional responsibility and equality guarantees throughout laws and Constitutions.²⁸ She considered that the legal professional conduct codes, should embrace gender neutral language as a way of reflecting current ideas on integrity, respect and non-discrimination. Similarly, laws and the Constitution should be expressed in gender neutral language as a way of reaffirming these values of gender equality.²⁹

However, is it gender equality in law mainly an issue of legal drafting? Venessa Mclean points out that “the technique of gender-neutral drafting on its own is not an effective tool in the fight against deep-rooted gender inequality within our legal system”.³⁰ She analysed several areas of law (women as workers, domestic violence, sexual offences) to explain that interpretation of the law is still done through masculine rule lens, hence reproducing patriarchal structures of society. According to her, gender neutral drafting may miss some gender specific problems, for example, failing to characterize domestic violence as a gender specific crime or taken the focus off the real victims of rape.³¹ In this context, she highlights the need to differentiate gender neutralization from gender awareness.³²

Therefore, although we should promote gender neutral drafting for justice reasons, as long as it “help construct a frame of the legal system that includes and empowers both genders”,³³ we should at the same time acknowledge that gender inequality has deeper roots in the legal system, and it can sometimes be entrenched on some of its theoretical concepts,³⁴ rules of interpretation and application structures. In this context, gender neutral drafting may be considered as a necessary but insufficient condition -by itself- to overcome gender inequality across law.

V. Gender neutral drafting techniques and guidelines

Regarding how gender neutral drafting should be applied, it is necessary to make a brief reference to the existing techniques and guidelines. Daniel Greenberg mentions five possible gender neutral drafting techniques: (i) repetition; (ii) omission; (iii) reorganization (passive voice); (iv) alternative pronouns; and (v) tagging.³⁵ Helen Xanthaki refers to the possibility of avoiding gender specific terminology and use neutral terms instead, repeating the noun, omitting the pronoun, converting the noun to a verb form, use the passive voice, use a relative clause, replacing the noun by a letter, or using the plural or singular noun plus “they”.³⁶ Other authors also present a similar list of possible techniques³⁷ and the British Columbia Law Institute devoted a report on various gender free writing techniques.³⁸

²⁸ Mossman (n 24) 9.

²⁹ Ibid.

³⁰ Venessa Mclean, ‘Is gender-neutral drafting an effective tool against gender inequality within the legal system?’ (2013) 39(3) *Commonwealth Law Bulletin* 443.

³¹ Ibid 447.

³² Ibid 454.

³³ Fischer (n 5) 487.

³⁴ Busby (n 15) 197.

³⁵ Greenberg (n 9) 67. However, at the Conference on Gender Neutrality in Legislative Drafting, held at the Institute of Advanced Legal Studies the 5th July 2017, Greenberg was cautious with the practice of creating manuals and guidelines to cover gender neutral drafting techniques, warning that they could eventually freeze good practices.

³⁶ Xanthaki (n 22) 106.

³⁷ Fischer (n 5) 489; and Rose (n 16) 105. Eleonor Furniss, from the Office of Parliamentary Counsel, also mentioned the several gender neutral drafting techniques at the Conference on Gender Neutrality in Legislative Drafting, held at the Institute of Advanced Legal Studies the 5th July 2017.

³⁸ BCLI, (n 7) Part II.

Each of these techniques has advantages and disadvantages, which is why most of the authors recommend looking for the one that best fit the specific case.³⁹ These techniques have been also picked up by several guidelines across jurisdictions, including New South Wales,⁴⁰ Australia,⁴¹ Canada,⁴² and UK.⁴³ Most recently, on May 2017, Chile followed this trend and the Government send an instruction to every Ministry to ensure gender consideration on the drafting of law bills.⁴⁴ However, unlike the other guidelines, the Chilean instruction does not include a complete reference to gender neutral drafting techniques, recommendations and examples. The instruction starts by declaring the Government commitment to gender equality and anti-discrimination, and consequently declares its decision to include a gender perspective, instructing the Ministries to: (i) draft with a gender neutral language; (ii) avoid any discriminatory treatment, whether directly or indirectly; and (iii) analyse the impact of their policies for women. Only the first aspect deals with gender neutral drafting and it just mention the need to use neutral terms or refer to men and women, in order to avoid sexist language. The only example it gives is the use of the inclusive word "citizenship".

The Chilean Executive Instruction can be considered a step forward, insofar it explicitly commits to a gender neutral policy, recognizing the justice reasons to support it. Nevertheless, the sole declaration of intention will most likely not help drafters in achieving this goal. It is necessary to complement it with a comprehensive guideline, including references to the various gender drafting techniques that are available and clarifying its application with real life examples. Only in that case, gender neutral drafting will be able to also serve as a tool for clarity, precision and unambiguity. The commonwealth tradition can be a helpful model to go forward in this direction.

VI. Conclusions

After reviewing the evolution and development of gender neutral drafting, it is important to highlight some distinctions. The first conclusion is that gender neutral drafting is both necessary and desirable. It is necessary for methodological reasons pointing to clarity, precision and unambiguity in legislation; as well as desirable for justice reasons linked to inclusion and non-discrimination. In this sense, it is more than just a matter of words, "the issue of non-discriminatory language in law needs to be understood in the context of power",⁴⁵ since it gives voice and recognition to women in the legal context.

However, gender neutral drafting is not the panacea for gender equality across the law. Unfortunately, sexism in law goes beyond syntax of legislation, reaching also theoretical concepts and interpretation of norms. Therefore, gender equality must be differentiated from gender neutrality; recognizing that the latter is only a necessary but insufficient condition to achieve the former goal. At the same time, we need to be able to identify those cases where a gender awareness approach demands a gender specific construction of law.

³⁹ Save for Xanthaki, who explicitly support the option of the "singular plural", since it "breaks the barriers of an inherent gender-specific language and uses a grammatically unconventional form to alert the user to the departure from gender specific to gender neutral". Xanthaki 107 (n 22). For Berry though, this use of "they" is still potentially ambiguous. See Duncan Berry, 'Professor Helen Xanthaki's Drafting Legislation: A Practitioner's Perspective' (2017) Commonwealth Association of Legislative Counsel 2 *Loophole* 16.

⁴⁰ See New South Wales Parliamentary Counsel's Office, *Policy relating to gender-neutral expression* [2000] <http://www.pco.nsw.gov.au/corporate/Gender%20Neutral%20Language%20Policy_May%202000.pdf> Accessed the 6th July 2017.

⁴¹ See Part 2 of the Australian Office of the Parliamentary Counsel, *Drafting Direction No. 2.1 English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling* [2016] <http://www.opc.gov.au/about/docs/drafting_series/dd2.1.pdf> Accessed the 10th July 2017.

⁴² See Canada Department of Justice, *Legistics Gender-neutral Language* [2015] <<http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html>> Accessed on 11th July 2017.

⁴³ See Section 2.1 of the Office of the Parliamentary Counsel, *Drafting Guidance* [2017] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/622457/drafting_guidance_june_2017.pdf> Accessed the 5th July 2017.

⁴⁴ Secretaria General de la Presidencia (SEGPRES), *Establece consideraciones de género en la formulación de proyectos de ley*, Oficio Num. 678, 18th May 2017.

⁴⁵ Mossman (n 24) 13.

Regarding specific gender neutral drafting techniques and guidelines, it is helpful to be aware of all the possible alternatives, in order to select the one “that best fits the overall goal of effectiveness (...) on the basis of two criteria: one, clear inclusion of the female; and two, education of the public on the changed policy”.⁴⁶ In the case of Chile, it is a valuable sign that the Government has compromised to a gender neutral drafting policy, but the instruction must be improved if it is expected to work as a useful drafting guideline.

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⁴⁶ Xanthaki (n 22) 107.