Are Statutes Written for Men Only?

I read with interest Miss Marguerite E. Ritchie's article *Alice Through the Statutes* in your Journal,[1] in which she castigates male legislative draftsmen for demeaning women by writing laws as if only men existed. She singles out me, and me alone, for special mention, but while I appreciate the honour, I must decline it and plead not guilty.

There is a slight inaccuracy in her second sentence when she says that in a Memorandum I wrote over twenty-five years ago on the drafting of statutes[2] I adopted *without criticism or comment the* provision of the *Interpretation Act,*[2a] which provides that words importing male persons include female persons and corporations, and which she likens to excessively artificial definitions such as " 'dog' includes 'cat' ". I did not *adopt* anything; I simply drew attention to the existence of this provision. A comment on or criticism of the substance or policy of that provision would have been wholly out of place in that Memorandum. However, I do now decline to "adopt", for the reason given at the end of this article, but I accept the invitation to criticize and comment.

Miss Ritchie's problem is not one that was created or is curable by legislative draftsmen, male or female. It is rooted in a defect in the English language; it exists in all English speech or writing and is not confined to legislation.

The problem lies with pronouns. We have common-sex general words such as *person, every person, any person, anyone, no person,* or sexless class words, such as *beneficiary, contributor, shareholder, employee.* But in a sentence, whether in a statute or elsewhere, these nouns must often be referred to by a pronoun. The plural personal pronouns, *they, their, them,* are common-sex, but there is no common-sex personal pronoun in the singular. In statutes the masculine *he, his, him* are used and it is this fact that generates the complaint that male terms are used to apply to both sexes, that legislation is written as if only men exist, or written in terms of the male.

Otto Jesperson says one of three makeshift expedients must be used:

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[1] (1975) 21 McGill L.J. 685.

[2] Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation (1951), Ottawa.

[2a] R.S.C. 1970, c.I-23, s.31 (1)(i).

The reader's heart — if *he* or *she* have any (Fielding).
He that hath eares to heare, let *him* heare (AV).
Nobody prevents you, do *they* (Thackeray).[3]

English is an uninflected language, and gender declensions have disappeared except in the personal pronouns singular. Since nouns do not have gender recognizable by their forms or endings, the result is that the personal pronouns, which follow natural sex lines, have become strongly identified with sex.

The situation is quite different in inflected languages, such as German and French. In those languages gender is not equated to sex; masculine is not necessarily male, feminine is not necessarily female, and an inaminate thing could be masculine or feminine instead of neuter. "Gender" says Eric Partridge "refers to words; as a synonym for sex it is jocular and archaic."[4]

Thus, in German, words denoting persons in general without regard to sex, are masculine gender — *Mann, Jeder, Jemand, Niemand, Ein* — and they must be followed by a masculine pronoun. But the masculine pronoun denotes gender and not sex. Similarly in French, *chacun* and *un* (corresponding to the English *one*) mean everybody, but they are masculine gender and the pronoun referring to them must be masculine in the nominative and accusative. By way of contrast, however, *personne* is feminine, although it embraces both male and female persons. It must therefore be referred to by the feminine pronoun in the nominative and accusative; I am sure no Frenchman would object and he would never associate this gender with sex.

Old English was also an inflected language with three genders independent of sex; for example, *wif* (wife, woman) was neuter, *wifmoon* (woman) masculine, *mona* (moon) masculine and *sunne* (sun) feminine.

The problem in modern English is that it is difficult to dissociate gender from sex in personal pronouns. In referring to words that denote persons in general, when sex is inconspicuous or unimportant, what should we say — *he, she, it* or something else?

What is the solution? Jespersen's first example would be hopeless in statutes, especially since we must add *it*. No one could seriously suggest that we must now in our statutes substitute *he, she or it* for *he*; and *his, her or its* for *his*; and *him, her or it* for *him*. Jespersen's second example is akin to the usage of the masculine in the inflected languages, where it denotes only gender and not sex. This

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[3] *Essentials of English Grammar* (1950), 193.
[4] *Usage and Abusage: A Guide to Good English* (1969), 130.

is a perfectly correct use of the pronoun. The *Shorter Oxford Dictionary*, for example, gives *person* as one of the meanings of *he;* and in *Funk and Wagnalls Standard College Dictionary, he* is defined as including *that person; anyone.* Jespersen's third example, although common in speech and used occasionally in writing, is grammatically incorrect. And it would be hopeless to try to speak and write only with the plural personal pronoun and thus in effect expunge the singular pronouns from the English language.

A choice must be made. Theodore M. Bernstein, Assistant Managing Editor of the *New York Times* has opted for common usage:

> The use of *their* in such contexts is common enough in spontaneous, casual speech, and even occurs occasionally in the work of reputable writers. Yet the writer of craftsmanship and taste will reject the grammatical inconsistency of the combination of a singular noun and a plural pronoun. He will examine the possibilities available. They are either to use *his or her* or to use simply *his.* The first alternative is stilted and is to be shunned except when the issue of sex is present and pointed, as in, "The pool is open to both men and women, but everyone must pay for his or her towel". Commonly, however, the word to be used is *his,* as the nearest approach in this imperfect language of ours to a neutral pronoun in such a situation, Therefore: "Give everyone credit for having the courage of his convictions".[5]

Fowler's Modern English Usage approves of the use of *his,* which it says has become a convention of the language.

> There are three makeshifts: first, *as anybody can see for himself or herself;* second, *as anybody can see for themselves;* and third, *as anybody can see for himself.* No one who can help it chooses the first; it is correct, and is sometimes necessary, but it is so clumsy as to be ridiculous except when explicitness is urgent, and it usually sounds like a bit of pedantic humour. The second is the popular solution; it sets the literary man's teeth on edge, and he exerts himself to give the same meaning in some entirely different way if he is not prepared to risk the third, which is here recommended. It involves the convention (statutory in the interpretation of documents) that where the matter of sex is not conspicuous or important the masculine form shall be allowed to represent a person instead of a man, or say a man (homo) instead of a man (vir.)[6]

The masculine singular personal pronoun has been used in English literature since its very beginnings. Take, for example, Chaucer's "The Knight's Tale":

> And whan a beest is dead, he hath no peyne;
> But *man* after *his* deeth moot wepe and peyne[7] (italics added).

Shakespeare begins scene ii of Act IV of Cymbeline with this interesting dialogue:

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[5] *The Careful Writer* (1973), 351.
[6] *A Dictionary of Modern English Usage* 2d ed. (1965), 404.
[7] *Oxford Dictionary of Quotations* 2d ed. (1953), 137.

Belarius (To Imogen, *daughter* of Cymbeline);
You are not well: remain here in the cave;
We'll come to you after hunting.
Arviragus (To Imogen): *Brother*, stay here;
Are we not *brothers*?
Imogen: So *man* and *man* should be (italics added).

Or, in proverbs we find:

Every *man* for *himself*
He laughs best who laughs last
He who hides can find
He who pays the piper may call the tune.

No one would say that proverbial wisdom applies only to half the population.

But why *he?* Why not *she* or, as in the French, sometimes *he* and sometimes *she?* The answer is probably that English simply follows its ancestor languages. A comparison of English and its closest European relative, German, is very illuminating. I have selected a passage (John viii.7) from the New Testament, as I believe we can all agree that Martin Luther and the authors of the Authorized Version or the Revised Standard Version knew their language.

Wer under euch ohne Sünde ist, *der* werfe den ersten Stein. (Luther)

He that is without sin among you, let *him* cast the first stone. (Authorized Version)

Let *him* who is without sin among you cast the first stone. (Revised Standard) (italics added)

In the German, the *wer* means everybody, but its gender is masculine; therefore the pronoun *der* is also masculine because it must agree. No one who reads the German would ever say or think that it is addressed to men only. The English has the same meaning; the *He* stands for *man* (homo), and means everybody. The German *Mann* has two meanings — a human being or a male person. In both meanings it is masculine gender. In English also *man* may mean a male person, or a human being of either sex. The masculine gender here has no sexual connotation whatever; no more than the use of the neuter gender for *girl* has in German or the masculine gender for *woman* had in Old English.

The situation seems to be that although gender forms and declensions have disappeared, gender still remains, hidden but nevertheless active in a few situations. The result is that words like *man, one, everyone, each, every person* are, just like their ancestors, masculine gender. The pronoun representing these words must also be masculine, and all we have available is *he, his* and *him*. When

used in this way, these pronouns indicate the gender of the words they represent, and have nothing to do with sex.[8]

The provision in the *Interpretation Act* really does not do very much. The *Interpretation Act* is not a dog and cat definition; it merely confirms English usage for the statutes. Even if it were not there, correct English usage would require the use of the masculine pronoun to refer to all persons. It is intended to be a rule of gender or grammar, and not of sex. Removal of "unless the context otherwise requires" would also not solve anything because it would still be open to the courts to hold that the meaning or scope of words in a particular context differs from formal definitions.

Miss Ritchie says there are many examples in the *Criminal Code*[8a] where neutral words (*everyone, persons*) are used. That is no answer to the problem. That is the problem. She refers particularly with approval to section 157 of the 1953-54 *Criminal Code*, which begins with the words *Every one who*. If she will continue reading she will see that sections 159, 161, 162, 163, 164, for example, also begin with *Everyone who,* but in those sections she will find *his, him, he* and *himself,* but no *her, hers, she* or *herself,* or *it, its* or *itself*.

In the French version of the statutes the word *personne,* meaning everybody, appears countless times followed by feminine pronouns. No one would say or even think that these provisions are written as if only women existed. The situation is not that the English version applies only to males and the French only to females! Both apply to both as a matter of language.

Although I disagree with Miss Ritchie's arguments and conclusions, I think she must be commended for bringing this issue to the fore. I must confess I had never given much thought to this provision of the *Interpretation Act,* but now that I have I think that the Statute Revision Commission for the 1905 Revision made a mistake. Section 7(21) of the *Interpretation Act* in the Revised Statutes of 1886[9] read as follows:

> Words importing the singular number or the masculine gender only, include more persons, parties or things of the same kind than one, and females as well as males, and the converse.

It was perhaps inelegant to mix number and gender, but at least the male-female rule was reciprocal.

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[8] In *A Dictionary of Contemporary American Usage* (1957), Bergen and Cornelia Evans say that "[c]ompounds ending in *man* can be applied to women, as in *Madam Chairman* and *she was a good horseman* or *a good penman.* It is even possible to say *the boats were manned by women*" (at p.196).

[8a] R.S.C. 1970, c.C-34.

[9] R.S.C. 1886, c.1.

In the 1906 revision[10] this provision of the *Interpretation Act* was split in two by the Revision Commission:

31(i) words importing the masculine gender include females;
 (j) words in the singular include the plural, and words in the plural include the singular.

Now the provision became a one-way street, and it is quite understandable that women have grounds for complaint because this provision literally appears to deem women to be men. The 1906 version was carried into the 1927 revision[11] without change, but was amended in 1947[12] to read:

[W]ords importing male persons include female persons and corporations.

The main change was the addition of corporations, but because they are legal persons, "masculine gender" was changed to "male persons" and "females" to "female persons", presumably for the sake of parallelism. This section was carried forward unchanged into the 1952 revision[13] and was repeated in the new *Interpretation Act* of 1967.[14]

The present provision would appear to be defective, because it does not fit the French version of the statutes; a reciprocal provision is needed. Moreover, a reciprocal provision would put men and women on an equal footing. Something along the lines of the 1886 provision could do, but it would be desirable to separate number and gender, as was done in 1906, and provide that words importing the masculine gender include the feminine, and words importing the feminine gender include the masculine. However this rule would not include corporations, and to do so would complicate the provision to the point of inelegance. A better solution might be simply to provide that words importing one gender include all other genders; there could then be no suggestion of discrimination.

An amendment along these lines would not, however, solve the pronoun problem. We would still be stuck with the English and French languages as they exist. But such an amendment would assist in indicating that the masculine in English and the masculine or feminine in French, according to the respective rules of these languages, are universal and indicate gender rather than sex.

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[10] R.S.C. 1906, c.1.
[11] R.S.C. 1927, c.1, s.31(i).
[12] S.C. 1947, c.64, s.6.
[13] R.S.C. 1952, c.158, s.31(1)(i).
[14] S.C. 1967, c.7, s.26(6).

The "unless the context otherwise requires" rule would have to remain. A gender provision could not be absolute, because there are certainly instances where corporations would not in a particular context be included, and the same could be said of male or female persons.

The only other solution is to invent a new series of pronouns, but that is not something that draftsmen may do; they must take our languages as they are.

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