

GENDERED LANGUAGE IN THE CONSTITUTION OF NIGERIA – REPHRASING TO ACHIEVE GENDER NEUTRAL DRAFTING

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Abstract: *The use of words to portray gender and therefore apportion benefits or disadvantages is true in both verbal and written communication. This is even truer in legislative drafting, as the use of gendered language may depict a more serious problem of sexism, discrimination and paternalism in the society. Using the doctrinal approach, this paper examined gendered language in the Constitution of the Federal Republic of Nigeria 1999 relating to the qualification and appointment of judicial officers, to analyse the effect of such gendered language on the interpretation of the constitution and the likelihood of the female gender suffering disadvantage thereby. The paper found that the gendered language used in the 1999 constitution of Nigeria in the qualification and appointment of judicial officers, is gender insensitive, ambiguous and capable of excluding the female gender from consideration for appointment to such offices. It also found that the gendered language in the relevant constitutional provisions exhibit masculinity and does not promote the required gender equality in a legal draft. The paper recommended amendment to reconstruct the language of the constitution to achieve gender neutrality.*

Keywords: *Gender, gendered language, gender sensitivity, gender neutrality, gender inclusiveness, sexism*

Introduction

In its broadest sense, gender refers to socially and culturally defined roles and expressions that are usually labeled as ‘male’ or ‘female’ (Blackstone 2003: 335). In other words, ‘gender’ means the fact of being male or female, especially; when considered with reference to judicial and cultural differences and not differences in biology or issues of class or race (Hornby, 2015: 650). Gender sensitivity is the process by which people are made aware of how gender plays a role in life through their treatment of others (Potter, 2008: 55).

Gender generic, also known as ‘gender generic masculinity’ is a linguistic phenomenon that covers a situation where the gender is deemed not of concern and a word is used to refer to two genders as one, in order to save time and space (Gabriel and Mellenberger, 2004:273). Gender Identity refers to a person’s deeply held belief or knowledge of himself or herself that

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may or may not be visibly identifiable (Byrne, 2023: 2709). Gender expression is the way a person may represent himself or herself using various modes of expression that are commonly culturally associated with gender, such as name or pronoun (PEI Human rights Commission, 2018). A gendered language is commonly understood to mean a language that is bias towards a particular sex or social gender (Davis and Reynolds, 2018: 46; Abdalgane, 2021: 204). A gender neutral or inclusive language is a language that respects a person's gender identity regardless of the sex assigned at birth. It includes pronouns, not names, titles, honorifics and other forms of address (Ludbrook, 2022). Therefore, a gender neutral or inclusive language is any language that avoids assumption about the social gender or biological sex of people referred to in a speech or writing.

Gender neutral or inclusive language promotes gender sensitivity, gender identity and gender expression because, the concept of gender neutral or inclusive language is based on the idea that policies, language and other political institutions should avoid distinguishing roles according to people's sex or gender (Peters, 2020: 186). A lack of gender neutral or inclusive writing or speech breeds gender insensitivity, which in turn encourages gender discrimination. Historically, the masculinization of society has been the norm since evolution of human society (Valsecchi et al, 2023: 146). Examples of the masculinization of human society can be seen in the way we talk about humans and refer to humans as mankind as if women do not exist or are not part of the human society. Masculine bias also exists in positions and occupations that historically were only available to men hence, phrases such as policeman, fireman, or chairman instead of police officer, fire officer and chairperson (Prewitt-Freilino et al, 2012: 268).

Throughout the history of the human race, the impact of disparity in gender equality is glaring. This is why, in recent times, there has been several policies and legal initiatives aim at advancing inclusive language and equality all in an attempt to ensure gender neutral or inclusive drafting. One of the most important international legal instruments that prohibit discrimination against women in whatever form, is the United Nations Convention on Elimination of All Forms of Discrimination against Women. Article 1 of this convention prohibits:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The convention in its Article 3 enjoins all state parties, which Nigeria is one, to take all appropriate measures that will ensure the full development and advancement of women for the purpose of guaranteeing women the exercise and enjoyment of human rights and fundamental freedom on a basis of equal rights with men. In *Miss Yetunde Zainab Tolani v. Kwara State Judicial Service Commission & Ors.*, (2009) Satonye Denton-West JCA stated that 'women rights have been unduly subjected to the background and they have sutured all sorts of discrimination arising from this unwholesome act of relegation in their place of employment'. The Learned Judge therefore, opined that:

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

According to Justice Anthony Kennedy of the United States Supreme Court, “the law lives through language and we must be careful about the language we use” (Rose, 2010: 81). This admonition has particular relevance in the construction of legal instruments that tend to discriminate or even exclude women from the common good provided in a piece of legislation. This paper examines certain provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) relating to the qualification and appointment of judicial officers in Nigeria, to analyse the effect of gendered language on the interpretation of these provisions, and to determine the best way to reconstruct them to achieve gender neutrality. Section 1 of the paper deals with the origin of gendered language in legislation generally. Section 2 examines the gendered language in the constitution of Nigeria and analyses its effect in excluding the female gender from appointment as judicial officers in Nigeria. Finally, section 3 deals with the best way to reconstruct the provisions of the Nigerian constitution to ensure gender inclusivity and sensitiveness.

1. Origin of Gendered Language in Legislation

The use of masculine words to cover people regardless of gender or sex is a 19th century creation of an English law. Prior to the mid-19th century, it was relatively common to find legislation drafted in gender neutral language. However, that changed in 1850 when the Parliament of the United Kingdom passed an Act “For Shortening the Language Used in Acts of Parliament”. Article IV of the Act stated that:

In all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided.

The above provision gave rise to the legal assumption that the generic ‘he’ in a legislation, connotes universality which shelters a man and a woman (Olomjobi, 2016: 31). Section 14(a) of the Nigerian Interpretation Act also adopted the use of the pronoun “he” as referring to a man and a woman, hence the use of gendered language in the constitution.

2. Gendered Language in the Constitution of Nigeria

Language is a tool to convey meaning; it is also sometimes, the meaning itself. Gender language casts the mold of the law in addition to conveying the intention of the legislature. For instance, in *Muller v. Oregon* (1908), the law regulating the hours of work of female employees ‘in any mechanical establishment, factory or laundry’ was held not to be unconstitutional because it rests on the police power and right to preserve the health of women of the State of Oregon, and it did not conflict with the due process or equal protection clauses of the Fourteenth Amendment. This case gave impetus to the use of gender language to deliberately create a different legal status between the sexes (Erickson, 1989: 228). In *Bradwell v. The State* (1873), the State of Illinois legislation used the gender word ‘he’ in describing persons who can be admitted to practice law. The court refused to allow a woman the right to practice, on account of the language, which tend to exclude women. The court ruled that:

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if we were to admit them (woman) we would be exercising the authority conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature...In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.

The Constitution of the Federal Republic of Nigeria 1999 uses gendered language in all sections that provide for the qualification and appointment of superior court judges in Nigeria. The relevant subsections will be discussed for ease of understanding and to ensure a free flow of thought. For instance, while section 231(1) of the constitution provides for the appointment of the Chief Justice and Justices of the Supreme Court (Odike, 2010: 42), section 231(3) provides for the qualification of the aforementioned judicial officers as follows:

A person shall not be appointed to the office of the Chief Justice of Nigeria or of a justice of the Supreme Court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.

This extract from the Nigerian Constitution clearly shows that only a man (he) can be appointed to the office of the Chief Justice of Nigeria or of a Justice of the Supreme Court. This pronouncement excludes women from assuming such offices. On the other hand, sections 238(1) and 238(3) of the constitution provides for the appointment of the President and Justices of the Court of Appeal and the qualification of persons to be appointed to such offices respectively. Section 238(3) provides as follows:

A person shall not be qualified to hold the office of the President and a Justice of the Court of Appeal unless he is qualified to practice as a legal practitioner in Nigeria for not less than twelve years.

This is another example of gendered language in the Nigerian Constitution. The use of the masculine pronoun 'he' implies that only males can be the President and Justice of the Court of Appeal. This shows gender inequality in the constitution. Again section 250(1) of the constitution provides for the appointment of the Chief Judge and Judges of the Federal High Court, while section 250(3) provides for the qualification of the afore mentioned judicial officers in the following words:

A person shall not be qualified to hold the office of Chief Judge and a Judge of the Federal High Court unless, he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years.

A literal interpretation of the masculine pronoun, 'he' in this section means that only males can be appointed the Chief Judge and a Judge of the Federal High Court in Nigeria. This clearly demonstrates gender inequality in the Nigerian Constitution. The same language is used in sections 256(1) and 256(3) of the constitution for the appointment of the Chief Judge and Judges of the High court of the Federal Capital Territory, Abuja and qualification for appointment to such offices, respectively (see also sections 271(1) and 271(3) of the constitution on the appointment and qualification of the Chief Judge and Judges of the different state High Courts in Nigeria). In the case of appointment of the Grand Kadi and Kadis of Sharia Court of Appeal of the Federal Capital Territory (Odike, 2009: 176), section 261(3) of the

constitution provides for the qualification of persons to be appointed to such offices in the following words:

A person shall not be qualified to hold the office of Grand Kadi and a Kadi of the Sharia Court of Appeal of the Federal Capital territory, Abuja unless,

- a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial council ;or
- b) he has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial council and has held the qualification for a period of not less than twelve years.
 - i) he either has considerable experience in the practice of Islamic law; or
 - ii) he is a distinguished scholar of Islamic law.

This section borders on the Islamic religion, and like the other extracts discussed above, the language used in the section could be literally interpreted to mean that only males can be appointed as the Grand Kadi or Kadis of the Sharia Court of Appeal of the Federal Capital Territory, Abuja. The provision is categorical in the use of the phrases ‘he is a legal...’, ‘he has attended...’, ‘he either has...’, and ‘he is a distinguished...’ to show that only ‘he’ (male) can be appointed in the position (see also sections 276(1) and 276(3) of the constitution on the appointment and qualification of the Grand Kadi and Kadis of the different states in Nigeria). The exact same words are used in sections 266(1) and 266(3) of the constitution in the appointment of the President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja and the qualification of persons to be appointed to such offices respectively (see also sections 281(1) and 281(3) of the constitution on the appointment and qualification of the President and Judges of the Customary Courts of Appeal of the different states in Nigeria).

According to Ugoala (2022: 171) language is vital in maintaining cordial relationships between individuals, groups and countries. Thus, the use of language in the above provisions of the Nigerian constitution reveals an unbalanced and disturbing trend towards gender insensitivity and bias. Nigeria as a country is not just occupied by men alone; women also exist in the society. This paper argues that the use of only ‘he’ in stating the person that can hold judicial positions in Nigeria is not right, it can demean women who are qualified to hold such positions. Thus, there is a need to amend the constitution to revise the language in order to accommodate females in general by using gender neutral pronouns.

To begin with, a gendered language such as the use of the pronoun ‘he’ in providing for the qualification of senior judicial officers in Nigeria communicates subtle sexism (Gabriel & Gyax, 2016: 177). In addition, it can breed ambiguity. The use of particular words heavily influences the understanding ascribed to the words. Thus, barring an interpretative provision in the law, a reader may assume that gendered language has a specific purpose and meaning. In *Kennedy v. Louisiana* (2008), Justice Alito of the US Supreme Court opined in his dissenting judgment that gendered language are not precise unlike gender neutral language that are both precise and powerful.

Certainly, many readers of the Nigerian constitution would find it difficult to accept that a gendered generic word or the pronoun ‘he’ connotes universality, which shelters a man and a woman (Olomjobi, 2016: 31). Language matters and the use of a gendered language in

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the constitution in form of the pronoun ‘he’ may imply that the person referred to in the applicable section is a person of male gender. Indeed, the apparent validity given to the use of gendered language in the Nigerian constitution by section 14(a) of the Interpretation Act stands against the provision of section 42(1) & (2) of the same constitution, which provides for freedom from discrimination. In fact, the continuous use of gendered language in the Nigerian constitution violates the three foundational principles of the United Nations Convention on the Elimination of all Forms of Discrimination against Women, which are, non-discrimination, state obligation and substantive equality (Cusack & Pusey, 2013: 4). Thus, in spite of section 14(a) of the Interpretation Act, which tend to validate the gendered generic use of the pronoun ‘he’ in the Nigerian constitution to cover the female gender, we are of the opinion that this approach unnecessarily produces prejudice against females, and unduly confers advantage on the male gender, rendering the expression sexist, chauvinistic and discriminatory (DeFranza et al, 2020: 7).

Apart from the above, the use of gendered language in the Nigerian constitution violates the provisions of Articles 2 and 7 of the United Nations Universal Declaration of Human Rights, Articles 2 and 3 of the African Charter on Human and Peoples Rights, Articles 2 and 26 of the International Convention on Civil and Political rights, and Article 8 of the United Nations Charter.

3. Rephrasing Gendered Language in the Nigerian Constitution to Reflect Gender Neutral Drafting

The hallmark of legal drafting is precision and brevity (Shattah, 2019: 157). The legal profession values and celebrates wordsmithing that convey clear meaning and unambiguity (Osbeck, 2012:417; Turnbull, n.d.). The use of the gendered word ‘he’ in the Nigerian constitution has greatly undermined precision and unambiguity. Indeed, a judge that is determined to interpret words according to their ordinary or plain meaning would readily interpret the pronoun ‘he’ in the Constitution of the Federal Republic of Nigeria 1999, as referring only to the male gender and that is not gender sensitive (Odiye, 2016: 168). Thus, in order to ensure impartiality and avoid sexism, the gendered language in the current Nigerian constitution has to be rephrased to reflect gender-neutral drafting that accommodates the gender identity and expressions of all citizens of Nigeria. The provisions can be rephrased as follows:

Section 232(3)

A person shall not be appointed to the office of the Chief Justice of Nigeria or of a justice of the Supreme Court, unless the person is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.

Section 238(3):

A person shall not be qualified to hold the office of the President and a justice of the Court of Appeal unless the person is qualified to practice as a legal practitioner in Nigeria for not less than twelve years.

Section 250(3):

A person shall not be qualified to hold the office of Chief Judge and a judge of the Federal High Court unless, the person is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years.

Section 261(3):

A person shall not be qualified to hold the office of Grand Kadi and a Kadi of the Sharia Court of Appeal of the Federal Capital territory, Abuja unless,

- a) The person is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial council ;or
- b) The person has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial council and has held the qualification for a period of not less than twelve years.
 - i) The person either has considerable experience in the practice of Islamic law; or
 - ii) The person is a distinguished scholar of Islamic law

A gender neutral drafting such as the above rephrased sections create a society that is fair and equitable for everyone, regardless of gender expression or identity (Montano et al, 2024: 336). Again, a gender neutral or inclusive language in a legislation helps to eliminate gender-based violence and promote equality of all individuals regardless of gender differences (Sczesny et al, 2016: 6).

Conclusions

The use of gendered language in the constitution of Nigeria does not portray the constitution or the country as gender friendly, neutral, or even gender inclusive; rather, gendered language in the constitution portray the country as a masculine, paternalistic and sexist country, given to discrimination and oppression of the female gender. The paper showed that the incessant use of the pronoun 'he' in the Nigerian constitution could be interpreted to exclude the female gender in the qualification and appointment of persons into judicial offices in Nigeria, hence the need to amend the constitution to reconstruct the relevant provisions. The paper recommends the most appropriate way to rephrase the necessary provisions in order to achieve a gender neutral constitution.

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