



Das eJournal der Europäischen Rechtslinguistik (ERL)
Universität zu Köln

5. Europäisches Symposium zur Verständlichkeit von Rechtsvorschriften

herausgegeben vom Bundesministerium der Justiz und
für Verbraucherschutz, 2021

Poster-Session

Gender Representation in Austrian Legislative Texts: The Challenge of Gender Equality Comprehensibility, and Practicality in German

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30. September 2021
urn:nbn.de:hbz:38-535649
www.zerl.uni-koeln.de

Art. 7 para 1 of the Austrian Federal Constitutional Act decrees: “All **citizens** are equal before the law. Privileges of birth, **gender**, civil status, class and creed are ruled out” (original: „Alle **Staatsbürger** sind vor dem Gesetz gleich. Vorrechte der Geburt, des **Geschlechtes**, des Standes, der Klasse und des Bekenntnisses sind ausgeschlossen“, authors’ emphasis and translation). Research on the representation of gender in normative texts is scarce for legislative drafting in Austria. This paper focuses on the three interconnected issues of comprehensibility, gender inclusivity and practicality in legislative drafting. 600 Austrian normative texts were collected by random sampling and subsequently XML-annotated. The texts were then subjected to a corpus-aided quantitative and qualitative analysis of all gender references attested. The following research questions form the basis of the inquiry:

- RQ₁: Which tendencies of gender representation are identifiable in normative texts currently in effect?
- RQ₂: Can the predominance of androcentric representation in Austrian normative texts be empirically observable? If so, how?

It is found that representation of gender in Austrian normative texts tends to be encoded by means of the generic masculine (GM) and only in exceptional cases by a generic feminine (GF). The GM functions as an umbrella concept used to refer to all legal subjects. This in turn creates groups of those who are named in the law and those who remain silenced or marginalised. It is therefore argued that a critique of the masculine used in general such as citizen (*Staatsbürger* M) is reasonable in legislative drafting practices. The high frequency of the GM in normative texts may be explained by the socially constructed gender-sex congruence and the morpho-semantic coincidence of the nomen agentis with the GM.

Acknowledgement

This article is based on our presentation “Gender Representation in Austrian Legislative Texts: How Legal Drafters Strike a Balance Between Comprehensibility, Gender Equality and Practicality” delivered at the 5th European Symposium on the Comprehensibility of Legal Provisions in March 2021. The project was supported by the Austrian Association for Legal Linguistics (AALL), Vienna. We express our appreciation and gratitude to Luke Green for his helpful feedback and commentary to the final version of this article. We would also like to thank the editors for their valuable and detailed feedback in the reviewing process.

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1 Introduction

<1>

Research on gender representation (henceforth GR) in normative texts is scarce for legislative drafting in Austria. Art. 10 of the Guidelines for Legislative Drafting (BUNDESKANZLERAMT, Legistische Richtlinien 1990: 6) decrees that unobjective differentiations between women and men are to be avoided in legal provisions. If the need for a distinction between men and women arises, it must be examined critically whether the different treatment between the genders is necessary for objective reasons. However, what is constructed to be **(un)objective** and **(un)necessary** in GR presents itself as embedded in a net of androcentrist discourses and subdiscourses. SPITZMÜLLER/FLUBACHER/BENDL (2017) provide a succinct description of the concept of positioning, which was developed in the context of social psychology and discursive psychology.¹ LACLAU/MOUFFE (1985) propose that the process of meaning-making is never completed but rather remains instable, causing the subject to remain contingent and precarious (SPITZMÜLLER/FLUBACHER/BENDL 2017: 3). HOLLWAY (1984: 233) argues that positions open for subjects who relate back to each other “through the meanings which a particular discourse makes available.”

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Normative spaces (in the sense of EWALD 2010) such as the law may not only be perceived as controlling systems of social prescription but also as an interwoven bundle of narratives and metanarratives. They never only **prescribe**, they also create the illusion to **describe** and, in doing so, one may argue such texts construct particular realities.² The question at hand is whether the conveyance of gender in normative texts by means of the generic masculine (henceforth GM) perpetuates a heteroandrocentrist order of society. We use the term “heteroandrocentrism” from ZELDER’s (1993: 1591) review of POSNER’s (1992) influential work on “Sex and Reason” and define it as an ideology of heteromale normativity and privilege that renders other gender identities not equivalent or even inferior (Pober 2007). For instance, section 5 of the Austrian Criminal Code (§ 5 StGB) provides a legal definition of the term “intent” (authors’ emphasis and annotation):

(1) Vorsätzlich handelt, wer (M SG) ³ einen Sachverhalt verwirklichen will, der einem gesetzlichen Tatbild entspricht;	Anyone who (M SG) wants to bring about a situation that corresponds to a legal deed acts wilfully; for this it is sufficient
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- 1 They point towards the notion of “subject” in the sense of FOUCAULT (1982) and LACLAU/MOUFFE (1985), as an entity that is not outside of discourse or that actively produces discourse, but that becomes a hybrid product of various discourses. It is those discourses which according to FOUCAULT assign “subject positions” to individuals, a never-ending process he calls subjectivation (SPITZMÜLLER/FLUBACHER/BENDL 2017: 3).
- 2 Following HOLLWAY’s (1984) line of argument, GR in normative texts could thus be conceived of as a discursive practice that places individuals in relation to each other through meanings encoded as gender categories available within a particular narrative. It could be argued that the availability or non-availability of subject positions mirrors and co-influences the social order through indexicality.
- 3 In German, the indefinite pronoun ‘who’ can only be realised with masculine proforms, such as *wer* (‘anyone M’) and *der* (‘who M’), The form *wer* and its case forms have the fixed-feature combination masculine singular. Semantically, *wer* can refer equally to men and women, to a single person or to several persons (DUDEN 2009: 306, authors’ translation).

dazu genügt es, daß der Täter (M SG) diese Verwirklichung ernstlich für möglich hält und sich mit ihr abfindet.	that the perpetrator (M SG) seriously considers this realisation possible and comes to terms with it.
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In the example above, the GM functions as an umbrella concept used to refer to all legal subjects, which creates groups of those who are named and those who are silenced or marginalised. Feminine or non-binary forms were omitted entirely in the Austrian Criminal Code when enacted in 1974. It was the aim of this project to answer the following research questions which we consider to be of academic as well as of practical significance for legislative drafting as a practice that is socially constitutive:

RQ1: Which tendencies of GR are identifiable in normative texts currently in effect?

RQ2: Can the predominance of heteroandrocentric representation in Austrian normative texts be empirically observable? If so, how?

2 GR in legislative drafting: concepts and consideration concerning German

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Normative texts, such as Austrian federal laws (Bundesgesetze) and regulations (Verordnungen), may be grouped with regard to the function they fulfil in society. As previously mentioned, normative texts serve to prescribe human conduct, but they may, whether intended or not, also have secondary effects on the structure of society at large that exceed their original legislative purpose. In a nutshell, normative texts appear to be Janus-faced in that they carry a primary or original meaning encoded at the time of creation and a set of statements representing the discourses operative in society, e.g. the gender realities at a certain point in time. The drafters of a given normative text may not have sought to discriminate against a certain social group or marginalise another, and yet such discrimination and/or marginalisation may still be operative through structural omission. The narrative of society encountered in legal texts from the past century is one largely written by **men** for other **men** who ruled women in a heteronormative gender order. It is thus safe to assume that the structural use of the GM mirrors such feminine or, more precisely, non-heteromasculine dependence on masculine hegemony. While the social and material conditions within society have certainly changed, the notion of gender-inclusive language in normative texts and in legal proceedings is still contested.

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The GM as a form of GR is described as generic since it is used to subsume all individuals, while morphologically, grammatically, and semantically reflecting a discourse of heteroandrocentrism. In German, the current discussion on gender in normative texts and in legal practice does not revolve around the question as to **whether** gender should be represented but rather **how** this should be achieved in a manner that is adequate, standardisable and translatable within the European legal systems and the various agents involved in it.

3 Method

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During this study, two subcorpora were taken from the reference corpus of Austrian legal texts (Referenzkorpus österreichischer Rechtstexte, RÖR), an ongoing project by the Austrian Association for Legal Linguistics (AALL, German: ÖGRL). Subcorpus 1 consists of 361 federal laws and amounts to approximately 4.64 million tokens. Subcorpus 2 contains 239 regulations and comprises approximately 889,000 tokens. The federal laws and regulations used to construct the reference corpus for the study were chosen by random sampling with the exception of crucial codifications, such as the Civil Code, the Procedural Codes in Civil and Criminal Matters, and the Business Code to name but a few examples, which were included beforehand. The process of analysis was conducted in three phases.⁴

4 Results

4.1 Quantitative analysis

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The quantitative analysis shows two main results regarding GR in normative texts. A comparison of the fourteen most frequently occurring forms encoding masculine and feminine gender respectively across subcorpus 1 (federal laws) and subcorpus 2 (regulations) reveals that the GM subsists as the most dominant form of GR in references to human beings. The contrastive analysis shows that where feminine forms were used in the drafting process, they clearly occur less frequently than masculine forms, e.g. *Bundesminister* ('federal minister M SG') as opposed to *Bundesministerin* ('federal minister F SG'). Though it should be emphasised that the normative texts in the corpora reflect long intervals of legislative history, it is safe to assume that the GM is the most dominant form of GR, subsuming the feminine and all other forms of gender identity (STAHLBERG/SCZESNY 2001). The analysis of the regulations revealed that GR tends to occur in specific legislative co-texts only.⁵ While this may also be explicable by the random sampling of the data, the uneven distribution of feminine and masculine forms across contexts in both corpora seems to suggest a

4 In phase 1, XML-annotation was applied to the plain TXT files so as to ensure a hierarchically structured dataset, including corresponding metadata. All gender references recognisable by nominal suffixation and articles used were detected. Phase 2 focused on the corpus-aided analysis of the dataset, the comparison of the subcorpora and the description of the results with a view to showing the distribution of gender references across the data. In phase 3, a social critique was formulated based on the empirical findings gathered in the previous phase.

5 For instance, the term *Arbeitnehmer* ('employee M SG') is featured 78 times throughout ten different regulations, whereas *Arbeitnehmerin* ('employee F SG') is also used twice in the *Bildschirmarbeitsverordnung* (BS-V) and the *Verordnung Persönliche Schutzausrüstung* (PSA-V). The term *Arbeitnehmer/in* ('employee M/F SG'), in contrast, occurs 33 times in five different regulations. Similarly, the form *Stellvertreter* ('representative M SG') occurs 920 times in 109 different federal laws, whereas the form *Stellvertreterin* ('representative F SG') is only attestable 117 times in twenty federal laws.

representation interdiction.⁶ The dominance of the GM is clearly evident in the use of suffixation and articles to mark non-masculinity in the normative texts.⁷ As for the order of references to gender where both male and female forms are given, the data suggests that male forms tend to be named first, which is also visible when a slash is used. 3% of articles used along with a slash (e.g. *die/der Ehegattin* F SG/*Ehegatte* M SG ‘the F/M spouse’) deviate from this tendency (see below).

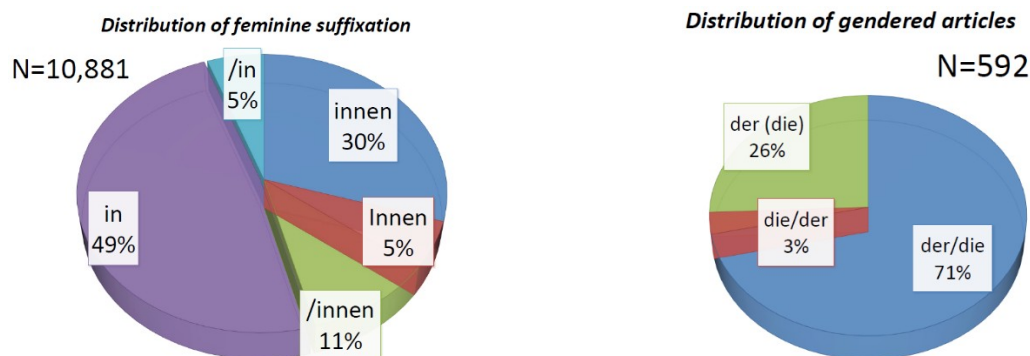


Fig. 1: Distribution of feminine suffixation and gendered articles

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The quantitative imbalance between masculine and feminine forms also suggests another problem in legislative drafting, i.e. the reinforcement of gender binarism. Here, however, it is important to bear in mind that the demand for non-binary forms is relatively recent and the normative texts analysed did not even implement gender symmetry, e.g. the Austrian Civil Code of 1811, something that has been demanded since the 1980s (GUENTHERODT 1984). Though not unexpected, another insight is that the normative texts under investigation confirm and potentially even reinforce binary GR, and, in doing so, present gender binarism as the normal, proper, correct and, perhaps, only order of society. It decrees that privileges of gender are not allowed, which is in diametric conflict with the linguistic subordination and marginalisation of individuals who identify as intersex that is evident in the normative texts. This shows the need for future sociolinguistic studies to ascertain whether this gap in gender representation also leads to an entrenchment of the participation gap in the normative space (see LEISSER 2018).

6 Building on WRIGHT'S (1975: 159) "precisification interdiction", we use this term to describe the phenomenon that legislative drafters in past and present do not lack instructions or awareness as to where to apply gender-inclusive or gender-neutral lexis, but that an interdiction is still operative according to which alternative GR is not to be implemented.

7 Overall, the most frequently occurring form of feminine GR is the addition of the feminine suffix -*in*, such as *Schülerin* ('student F SG') (49%). This tendency is also evident in the plural. The distribution of articles suggests the predominant use of articles marked for masculine gender (*der* M). 71% of articles are used in the pair form, e.g. *der/die eingetragene PartnerIn* ('registered partner M/F SG'). Parentheses are also used to represent feminine gender, e.g. *der (die) Angehörige* ('relative M (F) SG'), which constitutes 26% of binary article use.

4.2 Qualitative analysis

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In the qualitative analysis, focus was placed on the different types of GR in the subcorpora. It was found that pragmatic multifunctionality, hybridity and diversity are common features of GR in legislative drafting. To illustrate this point, the following four examples taken from different normative texts will be discussed further (authors' translation and gender annotation):

(1) In Verfahrensfragen kann der Vorsitzende (M SG) allein entscheiden, wenn die Parteien oder alle Mitglieder des Schiedsgerichts ihn (M SG) dazu ermächtigt haben (§ 604 ZPO).	In procedural questions, the president (M SG) alone can decide if the parties or all members of the arbitral tribunal have authorised him (M SG) to do so.
(2) [...] fachliche Anstellungserfordernisse für die von den Ländern, Gemeinden oder von Gemeindeverbänden anzustellenden Kindergärtnerinnen (F PL) und Erzieher (M PL) an Horten und an Schülerheimen (N PL), die ausschließlich oder vorwiegend für Schüler (M PL) von Pflichtschulen bestimmt sind (Art. 14 Abs. 3 lit. c B-VG).	[...] professional employment requirements for the nursery school teachers (F PL) and tutors (M PL) to be employed by the federal states, municipalities or associations of municipalities in after-school care centres and in student (M SG) dormitories that are exclusively or primarily intended for pupils (M PL) in compulsory schools.
(3) Wer Arzneimittel an Letztverbraucher/innen (M/F PL) abgibt, hat die im Arzneibuch vorgesehenen Identitätsprüfungen durchzuführen (§ 5 Abs. 3 lit. c ABG 2012).	Anyone who supplies medicinal products to end consumers (M/F) must carry out the identity checks provided for in the pharmacopoeia.
(4) Die Witwen(Witwer)beihilfe (F (M) SG) ist, wenn der (die) Verstorbene (M (F) SG) zur Zeit seines (ihres) (M (F) SG) Todes mehrere Versehrtenrenten nach diesem Bundesgesetz bezogen hat, nach der höchsten in Betracht kommenden Bemessungsgrundlage zu gewähren (§ 110 Abs. 2 B KUVG 1967).	The widow's (widower)'s allowance (F (M) SG) is to be granted according to the highest possible assessment basis if the deceased (M [F] SG) was receiving several disabled pensions under this federal law at the time of his (her) (M (F) SG) death.

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Example 1 features prototypical use of the GM, since the gender-neutral noun *der*die Vorsitzende* ('president M/F') appears to be intended to capture all gender identities of legal subjects regardless of their self-identification. This use of the masculine personal pronoun *ihm* ('him') in the subordinate clause corroborates this assumption. Example 2 features a very rare occurrence of the GF in the form *Kindergärtnerinnen* ('nursery school teachers F PL'), which as a construction is hardly attested in the subcorpora.⁸ Example 3 upholds gender binarism by adding *-innen* to the masculine form *Endverbraucher* ('end consumers M PL'). Similar to the previous one, example 4 uses parentheses to represent gender binarism not only with regard to references to human beings, but also within a compound. The qualitative analysis shows that the use of GR in legislative drafting is in urgent need of reform, establishing uniformity and consistency as well as inclusiveness. The dataset suggests a diverse landscape of GR in normative texts that contains hybrid forms of personal references, with the most dominant form of GR being the GM.

8 It is also evident that certain social groups are more likely to receive GR in normative texts than others, e.g. *Erzieher* ('tutors M PL') and *Schüler* ('students M PL'). Other groups, such as *Kindergärtnerinnen*, are represented as feminine entirely.

5 Concluding remarks

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The findings of the study suggest three main insights which merit further reflection from the perspective of applied legal linguistics. Firstly, androcentric GR is evident in both subcorpora; masculine forms clearly outnumber feminine forms. CONAGHAN (2013: 73) describes the ongoing controversy within legal scholarship about the extent to which gender is built into law and that it may play a larger role than scholarly orthodoxy assumes. The results of this study corroborate the assumption that GR in Austrian legal texts still shows a strong tendency towards the linguistic realisation of **male as default**. Secondly, the analysis of the normative texts shows that the “anything goes” approach to GR visible across the subcorpora is not expedient in legislative drafting and might likely impede comprehensibility. Where non-masculine GR is evident, those currently applying the law are faced with a plethora of styles and options due to the lack of legislative reform urgently required. Gender and sexuality are inherent aspects of law. The question is not as to **whether** law, or more precisely, normative texts, should be “gendered”, but rather **how** exactly the challenge of inclusive GR can be met.⁹ If normative texts in effect, e.g. the criminal code, entirely lack non-masculine forms of GR, the very fundament of the legal order, that is fairness and equality, is at stake. “Justice must be seen to be done” (Rex v. Sussex Justices, [1924] 1 KB 256) and, one may argue, justice in GR should also be seen to be done in legislative drafting.

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Thirdly and finally, we advise against the use of generic forms of GR (generic masculine and generic feminine), unless the legal context does not allow for a gender-neutral form (WILLIAMS 2008), e.g. in maternity regulation. It is no longer reasonable to use the GM simply on the grounds of practicality and comprehensibility, since conventional drafting norms are not eternal or natural but follow the aim of efficacy (XANTHAKI 2014). Drafting rules and legislative drafting practices are discursively constituted and socially constitutive. If the legislative reform of all personal references is not viable at this point, we strongly recommend replacing the instances of the generic forms in the normative texts with gender-neutral alternatives in the plural such as *Lehrende* (‘teachers M/F PL’) instead of *Lehrer* (‘teachers M PL’). Those in favour of amending the legislative texts in effect are often confronted with the criticism that such a reform is driven by political activism rather than practical necessity. One answer to this could be that maintaining the status quo is in itself a form of activism, political or otherwise, since there is no such thing as unpolitical decision-making in legislative drafting; much, if not all legislative drafting is a result of compromise, and it appears as though the time is right for the stakeholders involved to make mutual concessions when it comes to inclusive GR.

9 We assume legislative drafting as a social practice to be embedded in various discourses and sub-discourses, some of which pertain to the drafting process itself, e.g. norms of comprehensibility, (linguistic) efficiency, uniformity and systematics, abstraction, hyperonymy and hyponymy and compliance with the established rules of legislative drafting.

6 Abbreviations

GF	generic feminine
GM	generic masculine
GR	gender representation
F	feminine
M	masculine
N	neutral
PL	plural
SG	singular

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