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# Gender and Language

## A Public Law Perspective

Maria De Benedetto\*

### Abstract

*The article adopts a public law perspective in order to focus on Gender-Fair Language (GFL) policies and drafting, by considering both language neutralization and language differentiation in some legal systems characterized by different languages.*

*The article argues that the real problem is whether it is possible to coerce legislative and administrative language as a tool for policies. In fact, coercion of language produces administrative costs and side effects on freedoms (such as freedom of speech and freedom to teach); controls and sanctions are needed for enforcement; but, overall, language (as an institution) is not a proper object of regulation.*

**Keywords:** gender language, drafting, language, coercion, linguistic policies.

### A Introduction

The relationship between language<sup>1</sup> and gender has gained relevance from a legal perspective since it started to be regulated by legal prescriptions via legislative and administrative drafting. A huge number of guidelines, circulars and regulations have been adopted by international organizations, European institutions, parliaments and governments, as well as by municipalities and administrative bodies (such as universities), nurturing (or being inspired by) a public debate ori-

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1 English uses a single word (*language*) to indicate what in Italian, French and Spanish is indicated with two different words: *lingua* and *linguaggio*, *langue* and *langage*, *lengua* and *lenguaje*. In this article, I refer both to language as *langue* and to language as *langage*. In this regard it could be useful to quote F. De Saussure, *Cours de linguistique générale*, Paris, Payot, 1916, English translation Course in General Linguistic, edited by Charles Bally and Albert Sechehaye, third edition, 1961, p. 9: “But what is language [*langue*]? It is not to be confused with human speech [*langage*] of which it is only a definite part, though certainly an essential one. It is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty.”

ented to changing language in order to be more respectful of gender equality: the so-called *Gender-Fair Language* (GFL).<sup>2</sup>

Despite the relevance of this question to many aspects of public law – since both lawmaking and administration fall under its influence – scholars and academics have rarely developed a public law perspective to analyse gender policies that consider language instrumentally – as a tool to achieve anti-discriminatory results.

The present article intends to adopt a public law point of view in examining GFL. To this end, I will refer to language modifications between gender and culture (Section B). Then, I will analyse language neutralization and differentiation as well as their common elements (Section C). Moreover, I will argue that the real issue at stake is the possibility of coercing language as a tool for policies (Section D), shortly considering the impact of GFL policies on public law, freedoms (such as freedom of speech and freedom to teach) and administrative organization (Section E). The article concludes that coercing language always has administrative costs and side effects that should be carefully considered.

## **B Gender, Language, Culture: A Triangle for Gender-Fair Drafting**

The relationship between gender, language and culture should always be contextualized by developing different reasoning for different languages (and for different countries in which languages are spoken)<sup>3</sup> and also because it influences drafting activities. Each drafter, independently of the legal system in which he or she operates, has to move in the aforementioned triangle: gender (by choosing if neutralizing or differentiating), language (by considering its gender structure) and culture (by taking into account the social impact of language changes). In the following sections, some examples from English-speaking and other countries will be given.

### *I English-Speaking Countries*

As is well known, English-speaking countries (and international organizations) are operating in order to achieve gender neutrality in legislative and administrative language and to eliminate references to ‘men’ and ‘women’ from prescriptive formulations and official documents.

The UK *Interpretation Act* of 1850<sup>4</sup> (confirmed in 1889) established the rule of *masculine as default* (“words importing the masculine gender shall include

2 Other ways to refer to GFL, in literature, documents and guidelines, are: *gender-neutral language*, *gender-inclusive language* and *non-sexist language*. On this point see S. Sczesny, M. Formanowicz, & F. Moser, ‘Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?’, *Frontiers in Psychology*, Vol. 7, 2016, p. 25.

3 See P. Eckert & S. McConnell-Ginet, ‘Think Practically and Look Locally: Language and Gender as Community-Based Practice’, *Annual Review of Anthropology*, Vol. 21, 1992, p. 461.

4 Interpretation Act 1850 (13 & 14 Vict. c. 21), *An Act for Shortening the Language Used in Acts of Parliament*.

females”), changing only in 1978.<sup>5</sup> The anti-discriminatory perspective has recently been integrated for purposes of language clarity<sup>6</sup> into the wider framework of the *plain language movement*<sup>7</sup>: *gender-neutral drafting* aspires to “accuracy in legal writing and speech”<sup>8</sup> and to “achieve clarity and minimise ambiguity”<sup>9</sup> because “it is better to be inelegant than uncertain”.<sup>10</sup>

In Australia, *gender-neutral drafting* regards “new drafting” and “amendments of existing legislation”.<sup>11</sup> The enormous work of revision of the statute books is managed with a pragmatic and prudent approach: “legislation needs to be treated with considerable care”,<sup>12</sup> following a “case by case” evaluation.

The ‘gender-neutralization’ movement of legislative and administrative language is particularly strong in the United States, where the states have carried out a sort of very costly deputation of their legal systems, according to *Drafting Manuals* conceived in the common context of the *National Conference of State Legislatures*.<sup>13</sup> Some states have operated “forcing revisers to go through State laws line by line to purge it of gender bias”,<sup>14</sup> sometimes alternating masculine and feminine pronouns “by book chapter, by page, or by actor”.<sup>15</sup> A research paper on the U.S. Supreme Court language analysed 105 cases (2006-2008)<sup>16</sup> highlighting (among other things) that some judges use “male-gendered pronouns when referring generally to criminal defendant and female-gendered pronouns when referring generally to judges”.<sup>17</sup>

Sometimes GFL drafting has produced a certain degree of unpredictability in the use of institutional language. Let us consider the paradigmatic case of the word ‘ombudsman’, “which is generally accepted as having an origin unrelated to the English use of ‘man’ as a suffix” (because it has a Scandinavian origin) and –

- 5 In 1978, the *Interpretation Act* stated also that “words importing the feminine gender include the masculine”. On this point, see M.E. Ritchie, ‘Alice through the Statutes’, *McGill Law Journal*, Vol. 21, 1975, p. 685.
- 6 See H. Xantachi & C. Stefanou (eds.), *Drafting Legislation: A Modern Approach*, London, Routledge, 2016 (first edition 2008), p. 107.
- 7 See M. Adler, ‘The Plain Language Movement’, in L.M. Solan & P.M. Tiersma (eds.), *The Oxford Handbook of Language and Law*, Oxford, Oxford University Press, 2012.
- 8 M.J. Mossmann, ‘Use of Non-Discriminatory Language in Law’, *Canadian Bar Review*, Vol. 73, 1994, p. 349; J. Holmes & M. Meyerhoff (eds.), *The Handbook of Language and Gender*, Oxford, Blackwell, 2003.
- 9 H. Xantachi, *Drafting Legislation. Art and Technology of Rules for Regulation*, London, Hart Publishing, 2014, p. 104.
- 10 *Ibid.*, p. 107.
- 11 Australian Parliamentary Council, *Drafting Direction* No. 2.1, reissued 1 March 2016, English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling.
- 12 *Ibid.*, sections on ‘Gender-specific’ terms.
- 13 See G.E. Hart, ‘State Legislative Drafting Manuals and Statutory Interpretation’, *The Yale Law Journal*, Vol. 126, 2016, p. 464, footnote n. 153.
- 14 K. Steinmetz, ‘Down the Manhole: State Officials Grapple with Gender-Neutral Language’, *Time*, 5 February 2013.
- 15 See L.M. Rose, ‘The Supreme Court and Gender-Neutral Language: Setting the Standards or Lagging Behind?’, *Duke Journal of Gender Law & Policy*, Vol. 81, 2010, p. 86.
- 16 *Ibid.*, p. 100.
- 17 *Ibid.*, p. 86.

for this reason – maintained in Australia.<sup>18</sup> On the contrary, in the State of Washington<sup>19</sup> a replacement was proposed in 2013, with the suggestion that the neutralized word ‘ombuds’ be used instead. In 2015, the Northern Ireland legislative assembly<sup>20</sup> remembered that “a female ombudsman might prefer to be called an ombudswoman” as well as the possibility to use the word ‘ombudsperson’ (as in the case of university-based ombudsman offices).<sup>21</sup>

At the end of the day, for GFL reasons, an uncontested and long used word is now different in legal systems characterized by the same language: *ombudsman*, *ombuds*, *ombudsperson*, *ombudswoman*.

## II Other Countries (Italy, France, Spain)

The Italian language has two grammatical genders that can be expressed in the greater part of the cases by changing the final vowel of a word. In theory, a change from masculine to feminine is always possible, but in practice in many cases it can sound strange (sometime cacophonous and inelegant, even ridiculous).<sup>22</sup>

At the end of the 1980s, a very well-known research paper was the basis of the Recommendations directed to Public Administrations for non-sexist use of the Italian language (*Raccomandazioni per un uso non sessista della lingua italiana*<sup>23</sup>). Some documents on administrative drafting have made references to these Recommendations. In 2007, a Directive (Ministry for Administrative Reforms together with the Ministry for Equal Opportunities) required that Public Administrations use a non-discriminatory language in all working documents (reports, circulars, decrees and other administrative regulations), without establishing consequences for possible infringements.

However, in Italy legislative *drafting* is short of prescriptions in matters of GFL.<sup>24</sup> Some regions have legislation; the Ministry of Education adopted guidelines directed at ministerial offices and specifically at schools; some universities

18 Australian Parliamentary Council, 2016, n. 24.

19 State of Washington, ‘An Act Relating to Technical Corrections to Gender-Based Terms’, 9 April 2013.

20 See Northern Ireland Assembly, ‘Research and Information Service Briefing Paper’, paper 81/15, T. Moore, ‘Ombudsman Gender-Neutral?’, 9 June 2015.

21 *Ibid.*, p. 4.

22 On this point see Sczesny *et al.*, 2016, p. 3: “The Italian feminine suffix *-essa* [...] has a slightly derogatory connotation. Accordingly, a woman introduced as *professoressa* ‘female professor’ was perceived as less persuasive than a man or than a woman referred to with the masculine form *professore*”. See also A. Mucchi Faina, ‘Visible or Influential? Language Reforms and Gender (In)equality’, *Social Science Information*, Vol. 44, No. 1, 2005, p. 189.

23 A. Sabatini, *Il sessismo nella lingua italiana*, Commissione Nazionale per la realizzazione della parità tra uomo e donna, Roma, Presidenza del Consiglio dei Ministri, 1987. See also C. Robustelli, ‘Lingua e identità di genere’, *Studi Italiani di Linguistica Teorica e Applicata*, Vol. XXIX, 2000, p. 507.

24 There are no references to gender in circulars on legislative drafting (Circolari dei Presidenti del Senato e della Camera dei Deputati, 20 aprile 2001, *Regole e raccomandazioni per la formulazione tecnica dei testi legislativi*, Circolare del Presidente del Consiglio dei Ministri, 20 aprile 2001, n. 1.1.26/10888/9.92 and Circolare 2 maggio 2001, *Guida alla redazione dei testi normativi Regole e suggerimenti per la redazione dei testi normativi*).

adopted guidelines too. The official position of the highest Linguistic Academy in Italy (Accademia della Crusca) summarizes the current chaotic situation with the suggestion (more or less) that an extemporaneous (almost anarchic) use of language<sup>25</sup> should be accepted.

In France, the question involves mainly the aspect of job titles. After a troubled agreement, beginning in 1998 it was considered necessary for the word that indicates an institutional role to be preceded by *Madame la* or *Monsieur le*.<sup>26</sup> However, in 2014 the *Académie française* confirmed the need to distinguish the neutral and abstract character of the institutional function (which is expressed by the inclusive or generic male form) from individuals who are temporarily in charge of the role. The idea is that the circular must be signed by the minister, who can be a woman, because the circular will be in force also when *Madame X's* term of office expires.<sup>27</sup> The position of the *Académie* has been contested, also arguing that different solutions have been implemented in other French-speaking countries,<sup>28</sup> such as Quebec,<sup>29</sup> Belgium<sup>30</sup> and Switzerland.<sup>31</sup>

In Spain, jobs and titles seem to pose no particular problems; in fact, there is widespread use of feminine versions of a word that indicates institutional roles. However, there are other issues, with particular reference to inclusive masculine forms. On this topic, the *Real Academia de España*, the highest linguistic institution in Spain, stigmatized the double use of gender as a way to replace the inclusive masculine,<sup>32</sup> considering the generic/inclusive use of masculine as the correct way to refer to a mixed groups.<sup>33</sup>

25 C. Marazzini, 'Postfazione', in C. Robustelli (Ed.), *Sindaco e sindacata: il linguaggio di genere*, n. 4, Florence, Accademia della Crusca, 2016.

26 Circulaire du Premier Ministre, 11 March 1986 "relative à la féminisation des noms de métier, fonction, grade ou titre" and Circulaire, 6 March 1998, with the same object. See also, more recently, Circulaire, 21 November 2017 "relative aux règles de féminisation et de rédaction des textes publiés au Journal officiel de la République française".

27 Académie française, *La féminisation des noms de métiers, fonctions, grades ou titres – Mise au point de l'Académie française*, Déclaration, 10 octobre 2014.

28 On this point see P. Bouchard, N. Guillon, P. Vachon-L'Heureux, J.-F. De Pietro, M.-J. Béguelin, M.-J. Mathieu, & M.-L. Moreau, *La féminisation des noms de métiers, fonctions, grades ou titres au Québec, en Suisse romande, en France et en Communauté française de Belgique, Français et Société*, Louvain-la-Neuve, Duculot, 1999.

29 Office québécois de la langue française, *Avis de recommandation* du 28 juillet 1979.

30 See Décret du Conseil de la Communauté française du 21 juin 1993 "relatif à la féminisation des noms de métier, fonction, grade ou titre". The *Conseil supérieur de la langue française* prepared in 1994 a *Guide Mettre au féminin*.

31 Office Fédéral de la Justice, *Guide pour l'élaboration de la législation fédérale*, 2007, in particular section on "Formulation non sexiste des actes législatifs", p. 383.

32 Real Academia Española, Los ciudadanos y las ciudadanas, los niños y las niñas, [www.rae.es/consultas/los-ciudadanos-y-las-ciudadanas-los-ninos-y-las-ninas](http://www.rae.es/consultas/los-ciudadanos-y-las-ciudadanas-los-ninos-y-las-ninas).

33 On this point see I. Bosque, 'Sexismo lingüístico y visibilidad de la mujer', *Boletín de Información Lingüística de la Real Academia Española*, No. 1, 2012.

### C Neutralization versus Differentiation of Gender in Legislative and Administrative Drafting

As we have seen, the strategy of neutralization of language via drafting is the way proposed mainly in English-speaking countries (a *genderless language*), while other languages (*grammatical gender languages*, such as Italian, French and Spanish) are following different paths, *i.e.* differentiation in language. A certain influence has been exerted also by conceptions of equality:<sup>34</sup> making the gender as visible as possible or making gender neutral (as less visible as possible). In this framework, GFL drafting has connections with some relevant academic fields of study.<sup>35</sup>

On one side, *egalitarian feminism*, which considers women as equal and undifferentiated by men, aims to eliminate differences in regulation in order to achieve full equality as well as full indifference for gender connotation.<sup>36</sup> With a good degree of approximation, this has inspired gender-neutral language in drafting.

On the other side, *differentialist feminism* considers that language must include difference<sup>37</sup> in order to make the feminine gender ever more relevant, progressively modifying a masculine conception of reality and power and influencing social structures. When Irigaray wrote (in the book *To speak is never neutral*) “another economy of the whole requir[es] a new language”,<sup>38</sup> she was probably advocating GFL. However, the path of feminization is not exactly the same in all non-English-speaking countries; rather it expresses different solutions and social implications, so it was found that “feminization is not always advantageous for women”.<sup>39</sup>

In reality, the two approaches<sup>40</sup> have more elements in common than would appear at first glance. The first element is *relevance given to language as indicator of equality* (or inequality). The second is *an affirmative action approach to language* as a tool for policies.<sup>41</sup> The third and last element is *drafting as the most important tool to change language* and (through this) social structures. Above all, they have a *common enemy*: the already mentioned masculine as ‘default’ (also defined as ‘generic’ or ‘inclusive’ masculine) carried out by many practices that are poten-

34 See R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978, p. 351. See also J.W. Nickel, ‘Dworkin on the nature and consequences of rights’, in special issue of *Georgia Law Review*, 1977, p. 1130: “A conception gives an account of the meaning of a concept which relates the meaning to the case in question”.

35 See Xantachi, 2014, p. 103.

36 On this point see M. Humm, *The Dictionary of Feminist Theory*, Columbus, OH, Ohio State University Press, 1990, p. 251.

37 See A. Weatherall, *Gender, Language and Discourse*, London, Routledge, 2002, p. 5: “language not only reflects and perpetuates gender but language constitutes gender and produces sexism as a social reality”.

38 See L. Irigaray, *Parler n'est jamais neutre*, Les éditions de minuit, Paris, Les Editions de Minuit, 1985, English translation by G. Schwab, *To Speak is Never Neutral*, London and New York, Continuum, 2002, p. 241. See also D. Cameron, *Feminism and Linguistic Theory*, Basingstoke and London, MacMillan, 1985.

39 See Sczesny *et al.*, 2016, p. 3.

40 See S.A. Gambaudo, ‘French Feminism vs Anglo-American Feminism: A Reconstruction’, *European Journal of Women's Studies*, Vol. 14, No. 2, 2007, p. 93.

41 On this point see Dworkin, 1978, especially p. 223 onwards (“reverse discriminations”).

tially offensive: use of masculine pronouns as ‘default’; plural masculine nouns; male words for jobs and titles.<sup>42</sup>

#### D The Real Question: Can Language Be Coerced as a Tool for Policies?

Traditional affirmative action programmes imply the possibility of limiting individual freedom or rights in order to achieve anti-discriminatory objectives, for example, by establishing quotas to ensure race-based access to university or female representation in public bodies.<sup>43</sup> GFL policies have been considered in the framework of affirmative actions as a way to redefine social structures affected by gender biases and to achieve anti-discriminatory results.<sup>44</sup> This has recently produced<sup>45</sup> pressure to include language modification in the toolbox of gender equality policies,<sup>46</sup> a method that is much more complex than traditional mechanisms as quotas<sup>47</sup> because it implies combining linguistic policy tools with gender equality objectives.

A comparative report on *Guidelines for Gender-Fair Language* in 2011 highlighted difficulties in adopting Guidelines on GFL and also in evaluating their prescriptivity.<sup>48</sup> They often constitute *soft law* and operate as recommendations or suggestions, and so compliance is, in a certain way, voluntary<sup>49</sup> because they

42 See Xantachi & Stefanou, 2016, p. 67.

43 On this point see S.D. Clayton & F.J. Crosby, *Justice, Gender and Affirmative Action*, Ann Arbor, The University of Michigan Press, 1992. The Unesco *Guidelines on Gender-Neutral Language* (1999) intends “to make people aware about the advantages of a neutral language which provides a higher degree of precision, in order to promote gender sensitivity and sustain gender equality and gender equity”. See finally, P.L. Fetzer, ‘Reverse Discrimination: The Political Use of Language’, *National Black Law Journal*, Vol. 12, No. 3, 1993, p. 212.

44 See C. Miller & K. Swift, *Words and Women: New Language in New Times*, Garden City, NY, Anchor Press, 1976, 2001; S. Mills, *Language and Sexism*, Cambridge, Cambridge University Press, 2008.

45 In the entry S. Sincharoen & F.J. Crosby, ‘Affirmative Action’, in J. Worell (Ed.), *Encyclopedia of Women and Gender, Sex Similarities and Differences and the Impact of Society on Gender*, San Diego, CA, Academic Press, 2002, Vol. I, p. 125 ss. there are no references to “language”, which is analysed in a different entry of S.A. Basow, ‘Androcentrism’, *ibid.*, p. 127 ss.

46 See also R. Tolmach Lakoff, *Language and Woman’s Place: Text and Commentaries*, Oxford, Oxford University Press, 2004, first published in 1975: this book has been defined in the book review V. Acuña Ferreira, *Sociolinguistic Studies*, Vol. 6, No. 2, June 2007, p. 294, as “pioneer and most influential works within the field of language and gender studies”. See, finally, R. Lakoff, ‘Language and Woman’s Place’, *Language in Society*, Vol. 2, No. 1, April 1973, p. 45.

47 On this topic, see F.J. Crosby, L. Sabattini, & M. Aizawa, ‘Affirmative Action and Gender Equality’, in C. Harland et al. (eds.), *The Sage Handbook of Gender & Psychology*, London, Sage, 2013, p. 484.

48 See F. Moser, S. Sato, T. Chiarini, K. Dmitrow-Devold, & E. Kuhn, ‘Comparative Analysis of Existing Guidelines for Gender-Fair Language within the ITN LCG Network’, cit., p. 7.

49 See Xantachi, 2014, p. 107, where she wrote about “education of the public on the changed policy”.



indicate values<sup>50</sup> expressing a symbolic utility.<sup>51</sup> When guidelines and directives establish consequences as sanctions (even if slight<sup>52</sup>), public law issues arise. In fact, any kind of sanction needs enforcement, controls, procedures to apply penalties as well as procedures to contest them. Furthermore, sanctions for the use of language may ‘touch’ protected freedoms, such as freedom of speech and the freedom to teach. Moreover, guidelines and directives on GFL drafting may have an impact on administrative organization.

However, more generally, the problem is whether language can be coercively used as a tool for policies.

It might be useful, in this regard, to remember that language has been considered as a tool for imposing ideology: linguistic prescriptivism used to make reference to ‘standard language’<sup>53</sup> and has been criticized because every definition of ‘standard’ regularly used to favour the upper classes and consequently expressed social exclusion.<sup>54</sup> In any case, this traditional linguistic prescriptivism operates “*in the name of language*” and has language standardization as its objective.<sup>55</sup>

Another kind of linguistic prescriptivism operates “*in the name of other values*”, in this case ‘in the name of gender equality’. This prescriptivism has anti-discriminatory objectives, and language stops being a purpose and becomes patently a tool.<sup>56</sup> Furthermore, this kind of prescriptivism is managed by political institutions (instead of linguistic institutions) and imposes a certain use of language ‘before’ use: in so doing, it subverts the ordinary path of language evolution, which usually records changes after changes have occurred in practice.

50 See C.R. Sunstein, ‘On the Expressive Function of Law’, *University of Pennsylvania Law Review*, Vol. 144, 1996, p. 2024: “the expressive function of law—the function of law in ‘making statements’ as opposed to controlling behaviour directly”.

51 See R. Nozick, *The Nature of Rationality*, Princeton, NJ, Princeton University Press, 1993, p. 33 (“symbolic utility”).

52 Conseil d’Etat, *Le droit souple*, 2013.

53 See U. Ammon, ‘On the Social Forces that Determine What is Standard in a Language and On Conditions of Successful Implementation’, *Sociolinguistica*, Vol. 17, 2003, p. 1.

54 A summary of this problem is in A. Curzan, *Fixing English: Prescriptivism and Language History*, Cambridge, Cambridge University Press, 2014. See the entry ‘Descriptivism and Prescriptivism’, *Oxford Companion to the English Language*, 1992, p. 286: “Descriptivism is an approach that propose the objective and systematic description of language, in which investigation confine themselves to facts and they can be observed: particularly the approach favoured by mid-20c US linguists known as *descriptivists*. Prescriptivism is an approach, especially to grammar, that sets out rules for what is regarded as correct in language”.

55 Among other criticisms to linguistic prescriptivism, see the “newspeak”, G. Orwell, 1984, 1949, Errich Spot Limited, 2016, especially the Appendix, “Principles of newspeak”, p. 344: “the purpose of newspeak [was] to make all other modes of thoughts impossible”. See also N. Chomsky, ‘A Comment on Noam Chomsky’s “The Current Scene in Linguistic: Present Directions”’: Reply (to R. Wardhaugh)’, *College English*, Vol. 28, No. 6, March 1967, p. 468: “a concern for the literary standard language – prescriptivism in its more sensible manifestations – is as legitimate as an interest in colloquial speech”.

56 In this regard, see U. Ammon, N. Dittmar, K.J. Mattheier, & P. Trudgill (eds.), *Sociolinguistics: An International Handbook of the Science of Language and Society*, 2nd ed., Vol. 3, Berlin, Walter de Gruyter, 2006, in particular p. 2397 where in “language planning-language determination”, “motivations and goals” are mentioned (linguistic pluralism, linguistic assimilation, vernacularization, internationalization) affirming that “they also reflect non-linguistic, political goals”.

At this point, a problem arises.

Law and language, in fact, are “institutions” with a mutual and very complex relationship defined as “parallelism”.<sup>57</sup> Law depends on language, rules are “language dependent”<sup>58</sup> but legal language can be manipulated by legal practitioners. In any case, law and language share the nature of “institutions”<sup>59</sup>: language has its own prescriptions (grammar rules), its own judges (Linguistic Academies) and its own procedures.

If law lives through language and if via language it is possible to impose obligations, we should be cautious in imposing obligations on language<sup>60</sup>: language is very difficult to coerce; in a certain way it could be considered an “improper” object of regulation.

## E Some Public Law Issues about Gender Drafting

If language and thought are so strictly related as psychologists, linguists<sup>61</sup> and gender studies believe and if language is an institution characterized by its own logic that works in parallel with the logic of law,<sup>62</sup> any possible authoritative

57 See P. Piovani, ‘Mobilità, sistematicità, istituzionalità della lingua e del diritto’, in *Raccolta di Scritti in onore di Arturo Carlo Jemolo*, IV, Milano, Giuffrè, 1963, in particular p. 509.

58 G.H. Von Wright, *Norm and Action. A Logical Inquiry*, London, Routledge & Kegan Paul, 1963, p. 94.

59 See also W.D. Whitney, *The Life and Growth of Language. An Outline of Linguistic Sciences*, Henry S. King & Co., New York, D. Appleton and Co. 1887, p. 19: “[...] every word handed down in every human language is an arbitrary and conventional sign”.

60 On this point see G. Mannoury, *Le fondements psycho-linguistiques des mathématiques*, Neuchâtel, Éditions du Griffon, 1947, p. 15, where he quotes the intuitionistic mathematician L.E.J. Brouwer (Compte rendu, J.I. De Haan, Rechtskundige significa, Groot Nederland, sept 1916) translated from Dutch: “Par consequent, adresser la parole à quelqu’un n’est au fond qu’ordonner ou imposer, et comprendre n’est autre chose qu’obidir”. See also L. Wittgenstein, *Philosophische Untersuchungen*, 1953, English translation *Philosophical Investigations*, Oxford, Basil Blackwell, 1986, pp. 80-81 (n. 199): “Is what we call ‘obeying a rule’ something that it would be possible for only one man to do, and to do only once in his life? [...] It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so on. To obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions)”.

61 On a different possible vision about “thought and language” see J. Piaget, *Le langage et la pensée chez l’enfant*, Delachaux et Niestlé, Paris, 1923, English translation *The Language and Thought of the Child*, 3rd ed., London and New York, Routledge, 1959; L.S. Vygotskij, *Thought and Language*, Cambridge, MA, The MIT Press, 1962. See finally N. Chomsky, *Reflections on Language*, New York, Pantheon Books, 1975.

62 See M.G. Newberry, C.A. Ahern, R. Clark, & J.B. Plotkin, ‘Detecting Evolutionary Forces in Language Change’, *Nature*, 551, 2017, p. 223.

intervention on language (except for crimes carried out via language) can result in a compression of freedom of speech,<sup>63</sup> in the same way as the freedom to teach.

Furthermore, authoritative interventions on language from a gender perspective have an effect on administrative organization that should be carefully considered when regulating because *ex ante* evaluation is decisive for effectiveness of regulation and to justify *affirmative action*: in fact, the central “dilemma” of non-GFL is exactly difficulty of implementation and enforcement.<sup>64</sup>

From this perspective, among others, there are two relevant issues.

The first one concerns clarity of language, which is indicated as one of the most important elements in legislative and administrative drafting and one of the goals of GFL drafting. Any modification in common language towards GFL language could contradict the principle of simplification, determining a logical short circuit between the need to simplify legislative and administrative language and the need to overload language according to GFL drafting.

The second issue is that of communication as a tool to support effective rules and effective administration.<sup>65</sup> Communication does not consist of good quality verbal messages alone, nor is it a one-way process.<sup>66</sup> Alongside the verbal message of a rule<sup>67</sup> (its formulation, which establishes consequences for specific non-compliant behaviours), there is another message, non-verbal,<sup>68</sup> that comes from enforcement<sup>69</sup> and can be consistent or not with the first (for instance, because established penalties have/have not been imposed), influencing the credibility of

63 On this point *see* the quotation of G.K. Chesterton (“Why shouldn’t we quarrel about a word? What is the good of words if they aren’t important enough to quarrel over? Why do we choose one word more than another if there isn’t any difference between them?”), in R.C. Combow, “The Subverting of the Goeduck: Sex and Gender, Which and That, and Other Adventures in the Language of the Law”, *University of Puget Sound Law Review*, Vol. 14, 1991, p. 757: “Why We Fight: Gender and Sex”.

64 *See Moser et al.*, *cit.*, p. 7: “the central dilemma of gender-fair language is the difficulty to implement it”.

65 *See* L. Wittberg, ‘Can Communication Activities Improve Compliance?’, in H. Elffers, W. Huisman & P. Verboon (eds.), *Managing and Maintaining Compliance. Closing the Gap between Science and Practice*, Boom Legal Publishers, 2006, p. 25. *See also* L.M. Friedman, *Impact. How Law Affects Behaviour*, Cambridge, Harvard University Press, 2016, p. 33: communication “is a vital prerequisite to impact”. *See* A. Eisenberg, ‘Expressive Enforcement’, *UCLA Law Review*, Vol. 61, 2014, p. 860: “law sends messages”. Despite their imperative form, norms are “essentially a kind of persuasion”, A. Alcott, “The Effectiveness of Law”, *Valparaiso University Law Review*, Vol. 15, No. 2, 1981, p. 235.

66 On the *feedback* of communication *see* P. Watzlawick, J.B. Beavin Bavelas, & D.D. Jackson, *Pragmatics of Human Communication. A Study of Interactional Patterns, Pathologies and Paradoxes*, Paperback, 2011, p. 12.

67 *See* W. Twining & D. Miers, *How to Do Things with Rules*, Cambridge, Cambridge University Press, 2010, p. 90.

68 On this point, *see* A. Mehrabian, *Nonverbal Communication*, New Brunswick, NJ, Aldine Transaction, 1972.

69 *See* A.J. Meltsner, *Policy Analysts in the Bureaucracy*, Berkeley, CA, University of California Press, 1976, p. 255: “Effective communication can lead to promotion or demotion, to acceptance or rejection of one’s ideas, to success or failure”.

government and the deterrence effect.<sup>70</sup> However, overabundance of administrative prescriptions generated by GFL drafting should not ignore the limited enforcement capacity of administrations and possible counterproductive effects that come from ineffective rules.

## F Coercing Language Is Never without Administrative Costs and Side Effects

There is no doubt that coercion to modify language with the aim of achieving political goals produces administrative costs and that these costs should be considered and compared with expected benefits. The Guidelines on GFL themselves (in the more general context of drafting) often suggest evaluating the neutralization of language only if practicable and only taking into account its costs.<sup>71</sup>

However, the question (as far as is relevant) is not only one of costs: gender equality policies have gone to the very heart of a sensible 'institution', such as language, spilling out of the traditional toolbox of *affirmative actions* and starting to make recourse also to further purposes such as quality of regulation, clarity and simplicity of administrative language in order to justify some degree of coercion.

On the other hand, GFL drafting has produced controversial results because in some cases its zeal has contributed to determining a sort of linguistic anarchy.

Therefore, from an administrative point of view GFL risks further widening the gap between common language and the legislative and administrative ones, exacerbating the distance between citizens and institutions. Thus, GFL policies and drafting are today in midstream.

If they are to progress towards full prescriptivity, they cannot avoid a confrontation with linguistic policies that have historically had recourse to coercion and be reconsidered in the light of their compatibility with protection of freedoms (such as freedom of speech and freedom to teach).

If considerations regarding administrative feasibility and effectiveness will prevail (as well as the idea that language is definitely an improper object of regulation), GFL policies may slow down or even reverse towards other more feasible kinds of affirmative actions.

In 1775, Samuel Johnson, in his preface to the Dictionary of the English Language, wrote that "sounds are too volatile and subtle for legal restraint" and that "French language has visibly changed under the inspection of the Academy".<sup>72</sup> It is not difficult to argue, starting from the same premises, that language can resist change even in the presence of inspections from any kind of authorities.

70 On this aspect, R. Nozick, 'Coercion', in S. Morgenbesser, P. Suppes, & M. White (eds.), *Philosophy, Science, and Method. Essays in Honor of Ernest Nagel*, New York, St Martin's Press, 1969, p. 440.

71 Office of the Parliamentary Counsel *Drafting guidance*, August 2015, part 2 (Language and style), par. 2.1 Gender neutrality, p. 7: "to draft primary legislation in a gender-neutral way, so far as it is practicable to do and without incurring unreasonable costs in terms of brevity or intelligibility".

72 S. Johnson, *Preface to a Dictionary of the English Language*, London, W. Strahan, 1775, p. 10.

Lastly, it could be useful to remember that public law protection does not regard only national language (*langue*) or the language of minorities (which belong to groups) but – with limits established by Constitutions themselves – regards language (*langage*), which belongs to each individual.<sup>73</sup>

73 Cf. F. de Saussure, *Course in General Linguistic*, Charles Bally and Albert Sechehaye (Eds.), third edition, 1961, p. 9: “Taken as a whole, speech is many-sided and heterogeneous; straddling several areas – simultaneously physical, physiological, and psychological – it belongs both to the individual and to society; we cannot put it into any category of human facts, for we cannot discover its unity.”