

Gender Neutral Legal Language: A Comparative Overview

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Abstract: The intent of this article is that of analyzing how influential language can be in carrying out discrimination and inequalities. More precisely, the essay elaborates on legal language and the importance of drafting legislation in a gender-neutral legal language. Through concrete examples and a comparative overview, which overlooks six different countries, it is shown how easily language can create discrimination and inequalities. This study on legal language, and particularly gender-neutral legal language, offers an effective way of avoiding biases and providing a stronger and broader protection for human rights. The different experiences all around the world bring different element to the conversation on legal language and legal drafting, each one of them offering viable solutions to the problem of discrimination through language. Moreover, even though relevant issues are present in the different systems taken into consideration, the problem themselves have proven to be a useful starting point for an improvement in drafting and favouring equality and non-discrimination. The aim of the contribution is that of showing that alternatives to the legal language currently used are possible and effective.

Keywords: Gender neutrality, Legal language, Comparative law, Non-discrimination, Legal drafting.

Summary: 1. Introduction: gender, gender neutrality and legal language; 2. Legal language in the United States of America: navigating the uncharted sea of gender-neutral legal language; 3. A champion of inclusivity and equality: Canada; 4. Different approaches across Europe; 5. The leading example of Malta: groundbreaking legislation and its power; 6. The struggle of Italy with gender issues and gender equality; 7. Testimonies from Mali: the importance of oral tradition and language in law; 8. The role of non-binary gender roles in the Indian legal panorama; 9. Conclusions.

1. Introduction: gender, gender neutrality and legal language

Legal language occupies a key position in the domain of juridical sciences and its importance grows continuously. The vocabulary used in the legal domain is considered to be extremely peculiar, rich, complicated and unique, and for this reason it has gained the nickname *legalese*. Because of its complexity, numerous scholars, judges and professors have dedicated their studies and work to the drafting of legislations and documents that are available and comprehensible to all citizens. Such interest, of creating more accessible laws and regulations is directly connected to the creation of a more inclusive and non-discriminatory legal panorama.

Attention to language and vocabulary in laws can make an immense, and greatly positive, impact and difference in society. It is for this precise reason that the focus on drafting in a gender-neutral legal language becomes such an important and current matter. Gender neutrality in language is also directly linked to human rights and their protection. Within the broader domain of human rights, gender related issues and more in particular gender bias and gender discrimination, have become steadily more analyzed, researched and the protection of such, implemented. For these specific reasons, fighting discrimination and protecting human rights, it is possible to prove that there is an actual need for legal sources to be drafted in a gender-neutral legal language.

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When it comes to gender and gender-neutrality each and every language appears to be different and characterized by specific attributes and features. Languages can in fact be categorized in different groups based on how they behave towards gender. Three groups can be identified: gendered languages, natural gender languages and genderless languages. Gendered languages are those in which a grammatical gender is present. The grammatical gender is a specific form of noun class system in which the division of noun classes forms an agreement system with another aspect of the language, such as adjective, articles, pronouns or verbs. Examples of gendered languages are Spanish, Arabic and Hindi. Natural gender is the phenomenon in a language that resembles grammatical gender but is not.² In natural gender the choice of pronouns, adjectives and so on, related to a specific noun is not based on the noun but is indeed based on the actual sex of the person to whom the noun refers, languages such as the Scandinavian ones belong to this class. Lastly genderless languages are the ones that have no distinctions of grammatical gender, that is, no categories requiring morphological agreement for gender between nouns and associated pronouns, adjectives, articles, or verbs. This last category of languages does have multiple means of recognizing natural gender, such as gender-specific words, as well as gender-specific context, both biological and cultural. This structure is present in Estonian, Finnish and Hungarian, to name a few. It is of the utmost importance not to confuse genderless languages with gender-neutral language. Gender-neutral language is neutral with regard to natural gender, whereas a genderless language does not need to be gender-neutral, and vice versa.

The importance of gender in words and, more broadly, in language is demonstrated also by the fact that experts have found that words can have impact and influence on thoughts and images which are created in the audience's mind. Cognitive effects of features involving grammatical gender have been consistently demonstrated.³ It has been shown that when native speakers of gendered languages are asked to imagine an inanimate object speaking, the fact that its voice is male, or female usually corresponds to the grammatical gender of the object in their language.⁴ The results of these studies done by linguists clearly demonstrate how crucial the role of language is, and what kind of influence it has on our minds and consequently on our behaviors. This element is particularly relevant when it comes to gender-neutral language, specifically to explain why its use should be supported and implemented.

In order to understand the reasons why gender-neutral language, and gender-neutral legal language in particular, should be vastly utilized, it is necessary to define and describe this specific language. Gender-neutral language, also referred to as gender-inclusive language, is a language that avoids bias towards a particular sex or social gender. It is a language that is not gender-specific and which considers people in general, with no reference to women or men.⁵ For what concerns gender-neutral legal language there is no specific definition to be found. So far, legal scholars, legal experts, lawyers and judges, have been working on developing this language more and more. The concepts on which the language is based are the principle of fairness, that of inclusivity, and that of equality. The way in which gender-neutral legal language is enforced is that of drafting legislation, contracts, case law and legal opinions in universal terms, actively ignoring and/or avoiding gender-specific situations and power relations between women and men that underpin sex and gender-based discrimination, including gender-based violence, in particular against women.⁶

In recent times, interest towards gender-neutral legal language has grown significantly. This technical vocabulary is the most faithful way in which legal language can represent society and its issues. With the steady enhancement of the voice of the LGBTQIA+ community, the growing support for more inclusive legislation, and recognition, towards intersexual people, and the steadily growing number of people identifying themselves as non-binary, gender-neutral legal language has seen a thriving support in the legal domain.

The path towards gender-neutral legal language dates back to the 12th Century. However, present efforts have been inspired by the modern feminist movement of the 1970s, which started a wave for a renewed look at non-inclusive language. A groundbreaking event took place in 1980, when Casey Miller and Kate Swift published their book "The Handbook of Nonsexist Writing", whose purpose was to

² *Natural Gender*, in *Merriam-Webster.com dictionary*, 2022.

³ C. HOCKETT, *A Course in Modern Linguistics*, New York, 1958, p. 231.

⁴ J. H. MCWHORTER, *The Language Hoax*, New York, 2014, pp. 1–224.

⁵ European Institute for Gender Equality, Glossary & Thesaurus, <https://eige.europa.eu/thesaurus/terms/1191>.

⁶ European Institute for Gender Equality, Glossary & Thesaurus, <https://eige.europa.eu/thesaurus/terms/1192>.

provide an aid to writers, editors and speakers to free their language from unconscious semantic bias⁷ and to supply practical possibilities to subjects who already committed to use an equal and clear style of language. In 2000 Strunk and White acknowledged in their book “The Elements of Style”, that numerous writers find generic masculine pronouns limiting or offensive,⁸ and the authors offered alternatives to such themselves. Various researchers reported a trend toward nonsexism, a trend sparked by the social and cultural movements that started in the seventies and eighties. This trend was well displayed in the authors’ efforts to make the wording of the definitions and illustrative examples gender-neutral, and to point up, in relevant Usage notes, current usage, choices, and attitudes regarding gender-neutral and gender-specific terms.⁹

Currently the request for a Gender-neutral Legal Language is growing exponentially. Clients of legal experts are actively requesting for their documents to be drafted using gender-neutral language, and these requests have been increasing.¹⁰ Moreover, discussions on gender and gender-neutral language are become more and more mainstream. An example is that most modern legal writing texts and style manuals recommend that writers use gender-neutral language, which is achieved by avoiding the use of “gendered generics”.¹¹

Gender as it is portrayed in laws is a result of historical and cultural processes. It is easy to assume the “artificial” nature of gender and how it has been exploited in a discriminatory way, in family and marriage laws all over the world, just to give an example. Through the analysis of law, it is crystal clear how sexism and discrimination are vehiculated through language, and language is the most fundamental element of law. The strengthening of Gender-neutral Legal Language and its diffusion could slowly but surely allow more inclusive and less discriminatory legislations and regulations, providing subjects with higher level of protection and freedom. Legal experts have listed specific reasons for which non-discriminatory language should be used in the legal domain: it would promote accuracy in legal speech and writing; it would help to conform to requirements of professional responsibility; and it would satisfy equality guarantees in laws and constitutions.¹² Moreover, when discrimination happens through language, and particularly the legal language, it becomes a legal issue.

The elements and reasons cited so far allow us to understand which is the main pillar, and at the same time the main goal, of gender-neutral legal language: the principle of fairness. Through a broad legal interpretation of the term fairness, we can confidently state that it means uniformity of the application of the law. Fairness is the key to overcoming arbitrary application and interpretation of the law, actions that can be facilitated by a not gender-neutral legal language. The main goal of gender-neutral legal language is that of avoiding discrimination and facilitating and improving inclusion. In order to achieve these aims fairness is necessary. Continuing to use a language which favors, even simply numerically, one gender over the other cannot be considered fair, which is why gender-neutral legal language demonstrates to be the right approach with language.

The following paragraphs have the intent of briefly analyzing the different approaches present in multiple countries towards legal language and more precisely gender-neutral legal language. In order to have an organic representation of the different legal systems and their experiences with language, the countries analyzed are situated in different continents and all have seen their legal panorama to be influenced in different ways by history, culture, language and society. The comparison among the different states proves to be very effective when deducting an analysis on a specific topic such as language: it allows to highlight the differences, but at the same time it brings out the similarities and the ways in which the different systems can take inspiration from one another in order to improve their legal drafting and the protection of rights. The following paragraphs will show how in the case of The United States of America, Canada and more broadly the European Union, English and the neutrality of it has

⁷ C. MILLER, SWIFT K., *The Handbook of Nonsexist Writing*, New York, 1980, pp. 1–196.

⁸ W. JR. STRUNK, E. B. WHITE, *The Elements of Style*, New York, 2000, pp. 1–109.

⁹ *Random House Webster’s Unabridged Dictionary*, 2nd edition, New York, 1999.

¹⁰ K. I. PAJAK, *How to Write Gender-Neutral Contracts*, in *National Law Review*, vol. 9, n. 294, 2019, <https://www.natlawreview.com/article/how-to-write-gender-neutral-contracts>.

¹¹ L. M. ROSE, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, in *Duke Journal of Gender Law & Policy*, vol. 20, 2019, pp. 101-150.

¹² M. J. MOSSMAN, *Use of Non-Discriminatory Language in Law*, in *Canadian Bar Review*, vol. 73, n. 3, 1994, pp. 8–14.

allowed for a very effective use and development of the gender-neutral legal language and has also proven to be very effective and contagious because of its simplicity and numerous possibilities for gender-neutrality. The study of the case of Malta results very important because of the groundbreaking steps taken by the small country, in particular being the first one to ever issue gender-neutral identification documents. The article also highlights how in countries like Italy, even though part of the western legal tradition, culture has a very strong and deep impact on the legal language and the grammatical gender of Italian itself have made the road to gender-neutral legal language very complicated. Moreover, cases such as those of Mali and India, that do not belong to the western legal tradition, show how the cultural, and sometimes religious, factor can have a significant impact on both the law and its language and particularly how specific language and social elements can provide an important input for inclusion and a different perspective on non-discriminatory language, even in countries that still struggle with gender-equality.

Language is at the base of the law and given the society we live in change is always necessary, in order to have a legal language which actually represents and protects the citizens of the world. It is of the utmost importance to be able to draft and to be able to benefit of gender-neutral legal language, because only through such vocabulary efficient and adequate protection and representation can be granted to all individuals.

2. *Legal language in the United States of America: navigating the uncharted sea of gender-neutral legal language*

All legal systems develop certain linguistic features that differ from those of ordinary language.¹³ It is interesting to notice how Americans have rejected many features of the British tradition, but they retained the common law system, including the notion of precedent.¹⁴ The American legal experience is different than that of other ex-British colonies such as Australia and New Zealand, and this can be pointed out by analyzing the legal language: American Legal English is in fact quite different from British Legal English than that of the other English-speaking countries.

Legal English in the United States developed both on a written and spoken (oral) level, differentiating itself from the language used in the British legal domain. Another element to keep into consideration is the discourse in the US courtroom. The way discourse developed inside courtrooms shows, once again, how difficult, complex and elitist Legal Language is. The key role that power plays in courtroom shows just how fundamental it is for laypeople to understand legal English, especially in the United States where the legitimacy of law derives from this understanding. If trial language moves further away from ordinary language, the need for explanations to laypeople increases.¹⁵

The specific development that courts had in the United States shaped the way in which courts of any and every level work. It is well known how influential case law is in such systems, which means that the way in which cases are written and interpreted sets a standard for the whole system. It is not surprising to see how the courts' language has evolved and become unique in the United States: both in the writing and in the oral discourse. When studying case law, the precise vocabulary must be learned. This is even more important when approaching the American Legal System, because the language contains extremely specific words, that are not present in any other context. Examples are those of holding and dicta. The first one represents the rule of law or legal principle that comes from the decision or judgement plus the material facts of the case, and this is an example of binding authority. The second is any other statement in the decision that do not form a part of the holding, and it is a type of persuasive authority (non-mandatory). These specific elements of the American Legal System allow us to understand how the system works and why language is so important, in particular that of the courts.

It has to be noted that in the American experience with legal language considerable efforts have been made in order to broaden the use and development of gender-neutral legal language. Starting in the 1980s, a significant number of gender task-force studies appeared in various American jurisdictions,

¹³ P. M. TIERSMA, L.M. SOLAN, *The Oxford Handbook of Language and Law*, New York, 2016, pp. 1–557.

¹⁴ P. M. TIERSMA, L.M. SOLAN, *op. cit.*, pp. 1–557.

¹⁵ P. M. TIERSMA, L.M. SOLAN, *op. cit.*, pp. 1–557.



both at a state and at a federal level.¹⁶ Taskforces had been created at a State Legislature level, or within judicial committees and so on. These groups of experts were in charge of analyzing the way language was used within the legal field, and in particular to highlight how gender was used. The final reports often showed that the use of gender-neutral language was to be stressed and implemented, especially to avoid gender-bias, sexual discrimination and unequal treatments of subjects. Following this wave of specific studies on gender-neutral legal language, legal institutions moved forward. Some states adopted gender-neutral language in their constitutions¹⁷, statutes, or other legal discourse, and sections on gender-neutral language began to appear in legal writing textbooks.¹⁸

As stated earlier, the relationship between courts and the importance of language is very tight, which consequently allows the judges to play a very important role in the United States legal system. The growing significance and position of the courts is directly linked to the caseload that has been steadily assigned to judges for more than fifty years. Courts have responded to people's needs and they have reinforced them, expanding legal rights and reducing institutional barriers to litigation.¹⁹ Landmark cases have been decided by the Supreme Court and have shaped the legal panorama in the United States and it is precisely these cases that represent how powerful the courts and the language they use are. Because of the impact that case law has, language has to be precise, inclusive, correct, fair and non-discriminatory at all times.

Two important studies have analyzed the language use by the Supreme Court Justices, and that of Federal Appellate Judges. The authors chose to analyze the Supreme Court language and that of the Courts of Appeals, because they are considered to be the most influential courts in the American legal field. Both analyses consider a temporal evolution, meaning opinions from two different time frames have been compared, in order to establish if there has been a positive trend in the use of gender-neutral legal language. Another element taken into account is that of the sex of the justices. Parallel evaluations are done to identify a possible pattern of differences between the language of female justices and that of male justices. For what concerns the study on the Justices of the Supreme Court, the author found that the court, as a whole, presents a fragmented picture. On the spectrum of gender-neutral language it does very well in the aspect of occupational titles and other nouns, and by fiercely avoiding the generic use of the word man, by itself or as a compound. In many of the cases analyzed the phrasing itself suggested that judges made conscious efforts to use gender-neutral language.²⁰

Although a big step forward has been done towards gender-neutral legal language, it is safe to say that as of today most judges in the U.S. still use male-gendered generics regularly and biased language still continues to appear. Thus, indicating a need for continued progress. The lack of gender-neutrality in the choice of language freezes the Supreme Court, the courts of appeals, and all other judges, in the non-inclusive and imprecise writing style of *Marbury* and *Lochner*. Not to mention that it perpetuates a style of communication that no longer suits the needs of modern legal practice.²¹ In this day and age, many states have created jury instructions in a gender-neutral language and others have issued state court style manuals that advise attorneys to use gender-neutral language.²² Justices acknowledge that it

¹⁶ J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, in *University of San Francisco Law Review*, vol. 43, issue 3, 2009, pp. 475–476.

¹⁷ D. MCGRATH, *Six State Constitutions Use Gender-Neutral Wording*, in *Women's ENews*, 09.12.2001, <https://womensenews.org/2001/12/six-state-constitutions-use-gender-neutral-wording/>.

¹⁸ See, e.g., L. H. EDWARDS, in *Legal Writing: Process, Analysis, and Organization*, 2006, pp. 217–221; R. K. NEUMAN, S. SIMON, *Legal Writing*, 2008, pp. 157–158; L. CURRIE OATES, A. ENQUIST, *The Legal Writing Handbook: Analysis, Research, and Writing*, 2006, pp. 681–685.

¹⁹ A. CHAYES, *The Role of the Judge in Public Law Litigation*, in *Harvard Law Review*, vol. 8, issue 7, 1976, pp. 1281–1316.

²⁰ J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, *op. cit.*, pp. 475–476.

²¹ L. M. ROSE, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, *op. cit.*, p. 102.

²² See Cal. Rules of Court, Rule 2.1058, 2009; State of Connecticut Judicial Branch, Criminal Jury Instructions, 2001; Maryland State bar Association, Inc., Standing Committee on Pattern Jury Instructions, Maryland Criminal Pattern Jury Instructions, 2006; State Bar of Michigan, State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and Legal Profession Executive Summary, 8, 1997; New York State Unified Court

is their responsibility to make their opinions accessible to a broader audience, beyond the legal community.²³ Their use of the language is extremely important because in addition to reflecting their own views, judges' language can also influence their readers' cognitive schema. Framing theory has demonstrated that if judges use gender-biased language, they construct a frame through which all individuals see men as the dominant norm.²⁴ This is an element that once again stresses the important role that judges have as legal writers and experts.

3. *A champion of inclusivity and equality: Canada*

I am a Canadian, free to speak without fear, free to worship in my own way, free to stand for what I think right, free to oppose what I believe wrong, or free to choose those who shall govern my country. This heritage of freedom I pledge to uphold for myself and all mankind.²⁵

Canada is considered to be a mixed legal system, and it is based on a combination of Common Law and Civil Law.²⁶ This peculiar, but defining, characteristic of the Canadian legal system dates back centuries. It originated after the British gained control over the mostly French province of Quebec. After the incorporation Quebec was allowed to maintain its pre-existing legal system, which then led Canada to have a dual legal system. The Constitution of Canada includes the Constitution Act of 1867, with which what we call today Canada was officially created; and the Constitution Act of 1982, which reaffirms the dual legal system and includes Aboriginal rights and treaty rights.²⁷ This specific recognition in 1982 is the first of many steps taken by the Canadian government to protect and affirm specific rights for specific groups in the Country. In 1977 Canada enacted the Canadian Human Rights Act that protects human rights in the federal public and private sectors. In particular the act strongly protects the right to equality and non-discrimination in the areas of employment, housing and the provision of services.²⁸ In 1982 the Canadian Charter of Rights and Freedoms was signed, assuring a broader and more efficient protection of rights and freedoms, in particular freedom of expression and the right to equality. The Charter has been an invaluable source of change, progress, protection of rights, and the affirmation of societal values. Courts have rendered numerous decisions in which the Charter is applied to bring laws in line with the principles and values of society. In particular the Charter has been of fundamental relevance with respect to language rights, the Charter has in fact reinforced the rights of official language minorities, and in regard of equality rights, by leading to the recognition and enforcement of the rights of a number of minorities and disadvantaged groups.²⁹

The Charter is particularly important because it is a very specific and detailed source of law. This was one of the first steps that outlined Canada as a pioneer government with regard to inclusivity, equality, protection and representation for its citizens. In particular, equality of rights is at the core of the Charter. They are meant to ensure that everyone is treated with the same respect, dignity, consideration, without discrimination, regardless of personal characteristics such as race, national or ethnic origin, color, sex, age, mental or physical disability, sexual orientation, gender identity, marital

System, Criminal Jury Instructions, 2D, 2001; Arkansas Judiciary, Style and Usage Guide, 20, 2008; Colorado Office of Legislative Legal Service, Colorado Legislative Drafting Manual, 11–5 to 11–10, 2008; Legislative Council, Maine State Legislature, Maine Legislative Drafting Manual, 83–89, 2004; Office of the Revisor of Statutes, Minnesota Rules: Drafting Manual with Styles and Forms, 269, 2002; Oregon Appellate Courts, Style Manual, 14–15, 2002; Texas Legislative Counsel, Texas Legislative Council Drafting Manual, 103, 2008.

²³ The Supreme Court, *Kennedy Interview*, Part I; see also *Thomas Interview*, Part I; *Ginsburg Interview*, Part II, and *Alito Interview*, Part I.

²⁴ J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, *op. cit.*, pp. 475–476.

²⁵ J. Diefenbaker, House of Commons Debates, 01.07.1960.

²⁶ Department of Justice of Canada, *Canada's System of Justice*, 2015, <https://www.justice.gc.ca/eng/>.

²⁷ Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

²⁸ Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

²⁹ Constitution Act, Part I, *Canadian Charter of Rights and Freedoms*, 1982.

status or citizenship.³⁰ Normally this means that people are treated the same by the law, and that individuals deserve the same benefits. What is of the utmost importance though, is that the government of Canada in interpreting and explaining the provisions of the charter stated that it is not required to always treat people in the same way. More precisely, protecting equality might mean that rules and standards must be reasonably adapted to take account of people's differences, including allowing people to observe different religious holidays without losing their jobs, or creating specific supports to enable people with disabilities to access government's services. Furthermore, the Government stated that it is a constitutional duty for it to put in place programs to improve the situation of individuals belonging to groups that have historically been discriminated in Canada.³¹

The early development of such broad protection of a large variety of human rights, allowed the Canadian Government to pursue an even wider range of protection of rights. For some years now, Canada has been establishing new policies, and continues to do so, in order to implement inclusion, non-discrimination and equality through the sources of the law. One of the most pressing issues today is that of gender-neutrality in language. As of today, the Canadian government has launched multiple initiatives in order to reach the goal of a current and continuous use of gender-neutral legal language. For starters the department of justice has published multiple articles describing how to obtain gender-neutrality when expressing themselves. This guide aims to provide an input both, in and out of the legal context, bluntly stating that one of the goals of the department is that of achieving gender-neutrality in language. The institution when explaining the use of *they*, states that achieving gender-neutrality in language allows to eliminate gender-specific language and a heavy or awkward repetition of nouns³². The document details the way in which the pronoun *they/them* can be used, the appropriate linguistic situations in which to use it, and also offers a table of graphic examples. At a National level, Canada's Government has been defending employees asking to use gender-neutral terms for many years now, and the federal agency that links citizens to government services and benefits issued guidelines on how to use gender-neutral and gender-inclusive language, in order to avoid portraying a perceived bias towards a specific gender, or sex. The Canadian Government's Accessibility Resource Centre has published guides explaining how to use a correct and respectful language in regard of people with disabilities, and the Government has also launched the Centre for Gender, Diversity and Inclusion Statistics. The purpose of this research center is to allow citizens to access information in order to promote gender equality, inclusivity and diversity. Another significant effort is that of the Translation Bureau of Canada. The Institution is concerned with the official languages of Canada, English and French, and it supports the Government's efforts in communicating with citizens correctly in both languages. The Office issues linguistic recommendations, and it has published specific ones for gender-inclusive writing: both in English and French.³³

One relevant and peculiar characteristic of gender-neutral and gender-inclusive language in Canada is the presence of words and terms adopted from indigenous culture and language. In Canada inclusive language involves the use of correct terms to refer to indigenous people, and indigenous people themselves have a specific way of expressing in gender-neutral language. Many different Aboriginal tribes did in fact use gender-neutral terms a long time before Canada was colonized.³⁴ The most used term was, and still is today, "Two-Spirit", which is a translation of the Anishinaabemowin term *niizh manidoowag*, and it refers to a person who embodies both a masculine and feminine spirit.³⁵ In indigenous culture gender and sexual orientation were openly discussed and accepted, the clash with the colonizers and the bans imposed on Aboriginal made it so that certain terms and tradition could not be performed anymore. With the evolution of the relations between the Canadian Government and Indigenous people, and the recognition of more and more indigenous rights, many concepts and traditions have been reestablished. As of today, there is a fervent and strong LGBTQ2S community within Aboriginal tribes, and with the contribution of First Nations members, queer people of both

³⁰ Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

³¹ Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

³² Government of Canada, Department of Justice, Reports and Publications, *Legistics Singular "They"*, 2020.

³³ Public Works and Government Services of Canada, Translation Bureau, *Writing Tips*, 2015, <https://www.tpsgc-pwgsc.gc.ca/bt-tb/index-eng.html>.

³⁴ M. FILICE, *Two Spirited*, in *The Canadian Encyclopedia*, <https://www.thecanadianencyclopedia.ca/en/article/two-spirit>.

³⁵ M. FILICE, *Two Spirited*, *op. cit.*

Aboriginal and European descent can benefit from gender-neutral language and inclusive tradition of the Indigenous populations.

4. *Different approaches across Europe*

“In Varietate Concordia” is the European Union’s motto—“United in Diversity”. While through the years a sense, and an actual, European Citizenship were born, this never meant that single States ceased to be such or lost their integrity or distinctiveness. Diversity actually made the Union stronger. Recognizing and valuing each Member State characteristics, needs and ideals allowed the Union to become more united and more competitive at an international level in multiple domains. The importance given to every state’s culture, history, and language went a long way. The appreciation given to these fundamental elements of society made a significance difference for the outcomes and success of the EU. Members did not feel stripped of their identities, rights, and uniqueness, but they rather felt closer because they shared common goals, ideals and values.

Diversity is one of the winning and most characterizing factors of the European Union, and this can be perfectly seen when one encounters multilingualism. The protection of diversity in many different domain, cultural, social, historic, legal and linguistic, allows the EU to be extremely competitive and appealing as an actor in the international politics stage. Linguistic diversity is one of the essential contributions to the European project. Through languages people have the opportunity to communicate, they make other countries and cultures accessible, and they allow and strengthen intercultural understanding. Multilingualism goes hand in hand with one of the pillars of European identity, culture and legal principles, which is that of the free movement of persons.³⁶ This principle allows European citizens to move, and subsequently establish themselves, freely within the borders of the European Union. Needless to say, multilingualism is a greatly important tool that has given more and more people the chance to learn multiple language and therefore it has facilitated individuals to move, travel, and work in different countries, easily integrating themselves thanks to the knowledge of the language of that specific country.

As of today, the European Union continues to work on its behavior towards language, showing how language can be the perfect carrier for a broader and more appropriate protection of rights. Law and languages represent community, and each language as well as each legal system carries the elements of a particular culture and tradition.³⁷ The EU has demonstrated its steady efforts and progress towards the creation of the most welcoming, inclusive, and accepting environment for its residents. European Institutions first, and Member States later, learnt how change happens through language and have since been advocates for an appropriate way of expression, in every field of human life. This is particularly true for the legal field, since all of its elements, such as values, standards, judicial knowledge and living law, are closely connected to language and are studied in relation to it. In Europe the importance of language is such that words itself allowed stronger protections of rights, and this has been strengthened by the interconnection among Member States and the role played by the European Court of Justice and the European Parliament.

5. *The leading example of Malta: groundbreaking legislation and its power*

The Republic of Malta has always been a pioneer in regard to equality and non-discrimination rights in the European Union. Throughout the years the Republic has put into place many reforms, modifications, guidelines, tools and legislative acts in order to achieve a substantial and significant level of gender equality and non-discrimination. As early as 1973 changes were to the Civil Code in order to amend certain gender discriminatory provisions presents, and to grant rights to women that were not previously at their disposal. With Act XIX of 1991 protection against discrimination on the basis of sex was introduced in the Constitution of Malta. Subsequently, Act XXI of 1993 made other significant changes to the Maltese Civil Code, such as the introduction of the concept of *equal partners in marriage*,

³⁶ Art. 32 of the Treaty on European Union (TEU), Art. 21 of the Treaty on the Functioning of the European Union (TFEU), Art. 45 of the Charter of Fundamental Rights of the European Union.

³⁷ M. BAJČIĆ, *The Role of EU Legal English in Shaping EU Legal Culture*, in *International Journal of Language and Law*, vol. 7, 2018, pp. 8–24.

a gender-neutral wording that later on easily allowed the inclusion of same-sex marriages. The legislative power of Malta did not stop here though but made many other changes in laws and even enacted specific acts in the domain of employment, equality and labor law.³⁸ Malta has long been committed to creating strong legal basis for gender-equality and non-discrimination, in particular using as preferred mean changes in the legal language. The Government did not stop at modifying laws or putting reforms into place, Malta enacted an entire act called Gender Identity, Gender Expression and Sex Characteristics Act³⁹ in 2015. The law mainly focused on the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.⁴⁰ Such legislative Act represents a one-of-a-kind approach of legislation in the European panorama and demonstrates Malta's commitment in keeping up with social developments and citizens' needs. The law focuses on granting protection and non-discrimination to all individuals, indiscriminately from the gender and/or sex. The Gender Identity, Gender Expression and Sex Characteristics Act represents the culmination of the Country's continuous efforts to achieve gender-equality.

Up to today one of the most remarkable steps taken by the Maltese government towards inclusivity and gender-equality is that of establishing the possibility for Maltese citizens to choose the alternative gender marker "X" on their Identity Card or Passport. The introduction of alternative gender marker was a commitment undertaken by the government when adopting the LGBTIQ Action Plan 2015-2017. The "X" marker was officially introduced in September 2017 and is available to all persons who are entitled to hold a Maltese ID Card or Passport.⁴¹ Even though the legal gender of the individual remains that of the birth or adoption certificate, official and valid identification documents will not show it and there is no need to specify it. The procedure to choose such option is very easy, and the government also created the possibility for foreign residents to have access to the alternative gender marker on their Residence Card. The attention given, by the Maltese government, to what is considered to be a small detail shows how important wording and language are, and what deeper legal consequences it entails. Gender-neutral legal language provides all individuals recognition and protection under the law. Establishing gender-neutral legal language as the ordinary in administrative documents, such as IDs and certificates, is an important step towards more inclusive legislation and governmental institutions, a step towards a more respectful and attentive society. The possibility for individuals to choose the alternative gender marker is particularly significant, for at least a few main reasons. Firstly, any and every individual can choose to have the "X" as their gender marker, and even this might not seem like an important detail, it is in fact such. Initially only intersex people (individuals who are born with any of several variations in sex characteristics, not necessarily falling under the female or male category) were allowed to choose such element of identification, but following the Gender Identity, Gender Expression and Sex Characteristics Act of 2015, all citizens are able to choose the third gender marker for themselves. The new possibility has granted intersex people, who already received great protection under Maltese law, more safeguard knowing that they do not need to necessarily identify in one of the two binary genders and will not need to provide medical history to have a specific marker. The same could be said for transgender people, which are discriminated and whose rights are violated in many European countries. With the possibility of a third gender marker, they will not need to provide medical proof of surgeries and other procedures in order to choose their gender marker. Finally, new parents are now made able to choose to use the alternative gender marker "X" at their baby's birth as well. These examples help understanding why a third gender marker is so important and even more why a neutral gender marker can guarantee a wider protection of human rights.

The specific articles dedicated to the rights of intersex people in the Gender Identity, Gender Expression and Sex Characteristics Act of 2015, provide a stronger and more appropriate protection for such individuals. The ban on normalizing surgeries and medical interventions on intersex children was

³⁸ National Commission for the Promotion of Equality, *Gender Mainstreaming for the legal Sector Toolkit, The Gender Aspect from a Legal Perspective*, ESF/no. 46, 2008.

³⁹ Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540).

⁴⁰ ILO International Labour Organization, NATLEX, *Database of National Labour, Social Security and Related Human Rights Legislation*, https://www.ilo.org/dyn/natlex/natlex4.home?p_lang=en.

⁴¹ Legal Gender Recognition and Bodily Integrity, Constitutional Provisions, Government of Malta, <https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx>.

the first ever of this kind in the world. Such provisions allow for the legal recognition of gender neutrality, showing how an individual does not need to choose or legally determine between genders: neither in regard of physical features nor legal gender marker elements.

Following the enactment of the Act many changes have been brought about in legal texts, but not only. Other institutions such as the University of Malta have taken a great interest in language and its relationship with equality. For what concerns the legal amendments an example is the ACT No. LXV of 2020, whose preamble states that it is “an act to amend the provisions of the Civil Code, Cap. 16, and Various Other Laws in connection with the choice of surnames and to provide for other matters dealing with it or ancillary thereto and other matters in relation to the Public Registry”.⁴²

The linguistic element is another piece that denotes Malta’s unique experience. Bilingualism facilitated the development and use of gender-neutral legal language, thanks to the intake of the English language. Nonetheless, the peculiarity of Maltese demonstrated how any language, even a particularly peculiar one, can be made to convey gender-neutrality, therefore dismissing the point that many use against gender-neutrality: that of the impossibility of being neutral because of the grammatical gender structure of the language. The absence of a neutral element in language does not necessarily imply the inability of expressing gender-neutrality. Malta can be an example for English speaking countries, and for gender-neutrality in English, but it can also show Countries that speak gendered languages that alternative solutions can be found. One must simply look beyond the ordinary and conservative rules of language.

In conclusion the actions taken by Malta on the theme of gender-neutrality and equality, for the most part involved the government and legislative bodies of the country, showing that leading the way in written sources of law allow for an easier and better integration of development at judicial and administrative levels.

6. *The struggle of Italy with gender issues and gender-equality*

All citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition. It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.⁴³

Italy is one of the original members of the European Union, and it has always shared and enriched the ideals and values of the Union. At the same time its efforts in respecting obligations deriving from European commitments have not always been steady and adequate, or equivalent to those of the other Member States. This can be seen even from a gender equality perspective, where most progress has stemmed directly from the need to adopting to EU directives and the use of European funds where equal opportunities were the main theme.⁴⁴ Italy has seldom adopted laws or promoted legal texts towards inclusion and equality in an autonomous and independent manner and has not been a groundbreaker with regard to human rights and their protection.

The Italian legal history shows that the country has not yet reached gender equality, nor that Italian efforts towards it have reached their peak. In 2006 the National Code of Equal Opportunities⁴⁵ has been enacted and it is considered to be the Italian legal framework on gender equality. In the code eleven

⁴² ACT No. LXV of 2020, <https://legislation.mt/eli/act/2020/65/eng/pdf>.

⁴³ ITALY CONST., Art. 3.

⁴⁴ European Institute for Gender Equality, Gender Mainstreaming, Country specific information, Italy, <https://eige.europa.eu/gender-mainstreaming/countries/italy>.

⁴⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 5 July 2006.

laws on equal opportunities are gathered, with the aim of rationalizing and harmonizing the legislative texts on gender equality and promoting equal opportunities between women and men (specifically) in the areas of ethical, social and economic relations, civil and political rights. The concept of gender mainstreaming was also introduced, which obliged the government to take it into account in their work.⁴⁶ Nevertheless, Italy lacks a specific national strategy on gender-equality and non-discrimination, and if the problem originally only concerned the relation between man and women, currently the lack of an agenda for equal rights and protection involves the LGBTQIA+ community as well. The latter often being targets of discrimination in the workplace, politics and healthcare as well. To today the only protection granted to members of the community against discrimination is a law enacted following the Directive 2000/78/CE, which protects individuals from being discriminated based on their sexual orientation in the workplace.⁴⁷

The lack of legislative sources that provide wide protection from discrimination and violence to all individuals creates a significant gap in the recognition of rights and their subsequent defense. This problem arises principally from the letter of the law. When analyzing Italian norms and administrative acts it is in fact striking to encounter exclusively masculine pronouns and male specific terms. Such wording even though is said to be referred to the general public and to be inclusive of all individuals cannot be considered such, especially because it makes it even harder for judges to provide adequate protections, decisions, opinions and legal statements. This happens for two main reasons: one being the structure of the Italian legal system, and the role that judges have; and the other one being the morphology and grammar of the Italian language. These two elements together make it almost impossible for protection, defense or care to be granted to individuals or are not specifically and precisely included in the text of the law. The Italian experience lacks judicial examples in which judges have granted protection to individuals through the so called *interpretazione estensiva* (one of the principles of interpretation established for Italian law). The Italian language does not provide for words to be interpreted in multiple ways, unless they are words who can be referred to both sexes by their definition. This characteristic together with the extremely high technicality of the letter of the law⁴⁸, make it almost impossible to guarantee protection or equality to subjects who are not specifically mentioned in the legal provision involved in the particular situation. The linguistic elements, the legal language elements, and the lack of case law and law itself on equality and non-discrimination, create a legal environment which is highly dangerous for some persons and that does not provide its citizens with the protection and trust they should expect from the legal system.

When analyzing gender, and gender issues, in legal language a couple of relevant elements arise: the obvious lack of interest and effort from the legislators, the linguistic elements of the Italian language, and lastly the difficulties that arise when modifying law in Italy. Firstly, it is extremely easy to detect the disregard of the Italian political class towards gender issues, and this unfortunately mirrors a cultural and societal perspective of the country. Studies conducted by the Eurispes Research Institute have focused on the approach that Italians have towards the LGBTQIA+ community, on how women feel living in Italy (safety, employment, domestic violence etc.), on what Italians think about father staying at home with their kids and so on. As a result, it has been seen that even though Italians' opinions are changing, as people they tend to be conservative and do not necessarily believe that there are gender issues, obstacles, or discrimination and do not feel like there is an actual need for reforms in legislation.⁴⁹ In addition to the lack of this sentiment from the population, modifying legislation appears to be

⁴⁶ Joint Practical Guide of the European Parliament, *the Council and the Commission for persons involved in the drafting of European Union Legislation*, pp. 1–75.

⁴⁷ Decreto legislativo n. 216 (attuazione della Direttiva 2000/78/CE per la Parità di Trattamento in Materia di Occupazione e di Condizioni di Lavoro) del 9 luglio 2003.

⁴⁸ E. IORIATTI FERRARI, *Linguaggio Giuridico e Genere*, in *Diritto e Genere. Analisi Interdisciplinare e Comparata*, 2nd edition, 2016, pp. 51–62.

⁴⁹ *Gli Italiani e i Gay: Il Diritto Alla Differenza*, <https://eurispes.eu/ricerca-rapporto/gli-italiani-e-i-gay-il-diritto-alla-differenza-2003/>; *Temî Etici: L'Opinione degli Italiani*, https://eurispes.eu/wp-content/uploads/2020/07/2020_eurispes_indagine-temi-etici.pdf.

particularly complicated. Such difficulty is due to the fact the legislative reform procedure is particularly long and because legal concepts and language itself tend to be static and hard to change.⁵⁰

Nonetheless at a regional level multiple documents have been enacted showing that local administrations do take gender-neutrality and gender issues into account. The documents enacted by local governing organs and by national administrations focus precisely and specifically on language and gender in language. Through language not only reality is described but we also contribute to the creation and the enforcement of cultural models and their developments.⁵¹ The authors describe how the constant use of masculine as the generic is alienating individuals and is picturing a distorted reality. Moreover, such use of male terms allows mistakes, confusion and little clarity in legal and administrative contexts.⁵² Domain such as the legal one where precision to the detail is crucial, cannot carry out their tasks adequately if the language favors loopholes, lack inclusion and does not grant protection to all individuals.

Such efforts have demonstrated that a change in language is possible, and this development started from the local level can be transposed at national level as well. Nowadays equal rights and equality are vehiculated in language, their recognition comes from the language used.⁵³ Gender differences must be acknowledged to be eliminated or taken into account in the correct way. Only one official and relevant document has been published by the central administration, the only one at a national level. The study shows an effort from the Italian central administration towards the interest to work on gender issues, and the way in which legal language expresses concepts, it is titled “Sexism in the Italian Language”.⁵⁴ This research was brought about by the Commission for the realization of equality between women and men, whose aim was that of erase all of the prejudices present in regard of women.⁵⁵ In the document it is clearly stated that for things to change actions have to be taken at a legislative level in order to eradicate discrimination. Through the letter and the language of the law solutions can be found, but one must first acknowledge the differences in treatment that are actually present in society. Analyzing linguistic elements, especially in relation to gender, allow us to understand how a wrong use of words, such as the generic use of masculine to refer to all individuals, perpetrate an incorrect depiction of reality.⁵⁶ It is necessary for all individuals to be represented through language, because the borrowing of language created for another subject does not guarantee protection, representation and inclusion.⁵⁷

Italy surely has taken steps forward, but it did not change and reform its laws and language enough. Scholars, professors, activists and youth are the main actors of this change and this path towards gender-neutrality. Often these individuals have a more sensitive outlook and a more pragmatic approach, being the first ones to actually put gender-neutral language into use. The route to satisfying protection and equality is still long and one wonders if the actions taken by the academics and the younger generation will be enough, but at this time it is too soon to tell what the future of gender-neutral legal language in Italy will be.

7. Testimonies from Mali: the significance of oral tradition and language in law

“Musò kòni danbe ye cede yè” is a Bambara saying that translates into “It is the man who makes a woman’s dignity”. Bambara is the most common language in Mali with a forty percent of the population

⁵⁰ *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation*, pp. 1–75.

⁵¹ Agenzia delle Entrate, Comitato Unico di Garanzia, *Linee Guida per l’Uso di un Linguaggio Rispettoso delle Differenze di Genere*, in *Piano Triennale di Azioni Positive dell’Agenzia delle Entrate*, https://www.agenziaentrate.gov.it/portale/documents/20143/1742359/Linee_guida_linguaggio_genere_2020.pdf/0327598d-9607-4929-ceae-a3760b081ab4.

⁵² Agenzia delle Entrate, Comitato Unico di Garanzia, *Linee Guida per l’Uso di un Linguaggio Rispettoso delle Differenze di Genere*, *op. cit.*

⁵³ R. COPERSINO, A. DI NICOLA, *Guida all’Utilizzo Corretto del Genere nel Linguaggio Amministrativo*, 2019.

⁵⁴ A. SABATINI, *Il Sessimo Nella Lingua Italiana*, Roma, 1987, pp. 9–122.

⁵⁵ A. SABATINI, *Il Sessimo Nella Lingua Italiana*, *op. cit.*

⁵⁶ S. CAVAGNOLI, *Linguaggio Giuridico e Lingua di Genere: Una Simbiosi Possibile*, Alessandria, 2013, pp. 1–159.

⁵⁷ A. CAVARERO, *Costruiamo un Linguaggio Sessuato al Femminile*, in *Diotima: Il Pensiero della Differenza Sessuale*, Milano, 1987, pp. 43–63.

speaking the language. Other twelve languages are recognized as national languages, which are sénoufo, songai, peul or fulfuldé, maninka, soninké, dogon, bozo, tamasheq, khassonké, bomu, poular and hassanya. These languages represent the rich variety of people living in Mali and each of them is linked to a specific area of the state and is connected to a particular ethnic group. Despite the presence of such a diverse linguistic panorama the only official language of Mali is French.⁵⁸ This is a direct effect of the almost 70 years of European occupation. Although French is the only official language recognized, most Malians do not speak it nor understand it, as it is learnt only by the most educated and rich part of the population, making French the language of the intellectual elite. This is demonstrated also by the fact that around 70% of the population of Mali lives in rural areas⁵⁹, and agriculture is to this day the number one source of GDP in the country. The fact that most individuals in Mali speak Bambara, but this is not recognized as an official language, creates a significant gap between social classes.

All of the legal sources, government and administrative documents, trials, international communication and much more are done in French, a language that is often unknown and disliked by Malians. Mali is considered to be the least francophone country out of all of the ex-French colonies of Africa. The French occupation has left deep scars in the country, thus making French the language of the colonizer, which has been violently imposed.⁶⁰ A relationship of this sort between the people and their official language has not made it easy for diplomatic connections or even for citizens to know the laws and to be involved in the public life. Bambara remains to this day the most important language of Mali and for this reason through the years its study and knowledge has been implemented.

The first element that is considered when approaching a language is its vocabulary and the generative capacity of such. Linguists consider the alphabet to be the vocabulary of a natural language, at the same time the vocabulary itself can be identified as a language therefore allowing to study and understand the generative capacity of the language. The Bambara language has a weak generative capacity.⁶¹ This is related to the fact that Bambara was born as an exclusively oral language, with no written transcription whatsoever, and to the fact that its construction is in the form of *Noun o Noun*, meaning that two nouns have the same form. Virtually the language and all of its constructions, the agentive one and the nominal one, have no restrictions on the choice of the words, they are recursive, meaning that the terms in the constructions can be of the same form. The only real restriction could be that of interpretability.⁶² All of these characteristics together make up for a complex and out of the ordinary language, whose tradition is that of oral literature and tales passed on orally from one individual to another. Such characteristics make it particularly hard to allow good interpretation and translation, and even more they impede the possibility of Bambara becoming the official language, the language used in the legal and administrative domains.

The Republic of Mali is among the countries where traditions and customary laws are still extremely important and relevant to this day. Because of the geographical distribution of the population, mostly in rural areas, the low level of literacy and education and its history of European colonization, customary norms are still one of the most significant sources of law. There is a strong connection between the Bambara language and these sociological norms, because these rules are passed on orally, through tales in Bambara-Malinké oral literature. Such characteristic emphasizes the nature of orality of the Bambara language and shows the way in which customary law is structured and works. Most of the tales of the oral literature focuses on gender roles, family relationships, marriage and social standards. In tales some of the most important and basic social rules are formulated, in particular marriage and its social nature, thus making tales a fully-fledged source of law in Mali. Through the depiction of marriage in Bambara tales some specific social norms are created, social norms that are considered part of the customary law.

⁵⁸ A. CLARK, *Mali*, in *Encyclopaedia Britannica*, 2022, <https://www.britannica.com/place/Mali> .

⁵⁹ Food and Agriculture Organization of the United Nations, *Gender and Land Rights Database, Country Profiles*, <https://www.fao.org/gender-landrights-database/country-profiles/en/> .

⁶⁰ D. DOUYON, *Le Mali, le Pays le Moins Francophone d'Afrique*, in *Infosud Tribune de Droit Humains*, 2010, <https://droits-humains-geneve.info/Le-Mali-le-pays-le-moins,9100> .

⁶¹ C. CULY, *The Complexity of the Vocabulary of Bambara*, in *Linguistics and Philosophy*, vol. 8, n.3, 1985, pp. 345–351.

⁶² C. CULY, *The Complexity of the Vocabulary of Bambara*, *op. cit.*, pp. 345–351.

For instance, in tales the prohibition of marriage among blood relatives is explicitly stated.⁶³ The role of the father, the prominent situation that men occupy in the Malian society, a strongly patriarchal one, the position of the woman in social situations and the fact that she is always seen either as good or bad and the fact that women are always taken into account in connection to men, are all elements with some legal value that are transposed into narrative images through the oral literature.

The language and stories that make up the tales vehiculate the domination and power of men over women. The events described in oral literature are the representation of the ideological discourse, which is a product of societies, especially of the collective representations that are then manipulated in religious texts, traditions and folklore.⁶⁴ Male control is practiced through means of patriarchal, patrilineal and virilocal family organization. This practice results in the image of the woman being one coming from an exclusively male vision of social and gender relations. Men's control is unlimited over the imaginary is unlimited and this favors male dominance in many other domains, particularly that of actions and standards of social behavior. The male supremacy is a social norm that is traditionally and historically accepted and is spread largely through initiation. Initiation is the process through which adults are obliged to respect fundamental values and ideals, that are taught to the rising generation with songs, proverbs and tales.⁶⁵ Initiation is a group of principles that are instilled in young people, and they establish that an individual's main social duty is that of actively participating in a network of relations that include blood relatives and the relatives acquired through marriage. Such element represents the fact that the collective interest is always superior to the individual and personal ones. Moreover, the subordination to the collective level also reflects the authority structure, teaching the young generation that it owes respect to people to which superiority was designated, because of age or because of social status.⁶⁶

The striking degree of subordination to which women are subdued seems to be partially compensated by the relevance that is recognized to the maternal role of women in society. In many tales, motherhood is depicted in a positive and uplifting way, traditionally interpreted as the way in which feminine destiny is fully achieved. Positive social recognition comes with a numerous offspring and often in tales women's suffering is linked to their inability or impossibility of becoming mothers.⁶⁷ The language used in tales to describe women is one that creates a negative discourse about them, seldom stating that women are not to be trusted or that they are the reason for bad happenings. This rhetoric is used to convey the general message that social regulations should be chosen over individual impulses, always, especially in crucial decisions about one's life.

Custom and collective norms vehiculated in tales are considered equivalent to legal sources, to wisdom, therefore they must be preferred over personal desires. These elements represent a real form of legal norms that are strongly protected by the Bambara people, norms that are passed on only through the Bambara language. The connection between language and rules is one-of-a-kind in the case of Bambara, precisely for the reason that tales contain social norms and customary law which are strictly respected by the Bambara people. The fact that it is a mainly oral language and the most spoken in the Republic of Mali, even more than colonial French, demonstrates how important oral literature and tales are in Malian society. A dual spirit lives within Mali: that of post-colonial French era, and that of tribal Mali and its indigenous people.

The analysis of Bambara language and its tales should spark a discussion at a legal level, where customary law should be considered in a more adequate way, especially when it comes to gender issues, social stereotypes, and gender equality. French is still the only official language, but how can the government pretend to enact and enforce positive legal sources when less than half of the population

⁶³ V. GÖRÖG-KARADY, *The Law of The Father: Paternal Authority and Marriage in Bambara Malinké Tales*, in *Merveilles & Contes, Interpreting Folktales: Marriage Tests and Marriage Quest in African Oral Literature*, vol.6 n. 2, 1992, pp. 60–82.

⁶⁴ V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, in *Oral Tradition*, vol. 9, issue 1, 1994, pp. 607–682.

⁶⁵ V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, cit., pp. 607–682.

⁶⁶ V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, cit., pp. 607–682.

⁶⁷ A. CLARK, *Mali*, op. cit.

speaks or understands French? There is a need for a connection between the most tribal and traditional elements of Malian culture, exemplified in the Bambara language, and national legal sources. All individuals should have the right to access law and understand the rules that could potentially be enforced against them.

Such complexity in the Malian legal domain is related to the many decades of French occupation and the imposition of western legal tradition, which did not care for traditions and customary law, that were in fact seen as archaic.⁶⁸ As of today, Mali has adopted and uses codes of law that are of European origin, but at the same time another very important feature of the legal system is that of legal pluralism.⁶⁹ Pluralism consists in what has been previously stated: the presence of a state law, strictly derived from European legal tradition; and other many normative orders deriving from customary law. Even though there is a state law, all over the country other different means are used to solve conflicts and as an order according to which individuals conduct their lives. The interconnection between the state level and the local/customary one is very strong, and an indicator is the fact that in contemporary courts experts on the custom involved are present and providing information to assist and help judges.⁷⁰ Another very important source of law is the Sharia, or Islamic law, which has been incorporated even within the Bambara language, in which the term *sàriya* literally means law. Current family law and marriage law is the result of the combination of rules imported or imposed by the Europeans, Islamic law, and customary law.

The language used for legal sources is French, as French is the only official language of Mali. Nevertheless, the legal language has been deeply influenced by Bambara customs and Islamic laws because it had to convey certain rules, and they had to be in French because, as just stated, it is the only official language. At the same time many Islamic sources have been translated into Bambara in order to reach a wider audience and to distribute more broadly the fundamentals of Islam.⁷¹ Such a pluralistic panorama often opens the path to conflicts, especially between customs or Islamic law and post-colonial, of European origin, Malian legislation. These conflicts are particularly frequent in the domain of land tenure and family law. It is interesting to notice that regardless of Islamic and customary law, Malian state law recognizes gender equality and is set as a legal principle. Unfortunately, even though gender equality is specifically established in Mali's 1992 Constitution, which states that "Every Malian shall be born and remain free and equal in rights and obligations. All discrimination founded on social origin, color, language, race, sex, religion and political opinion shall be prohibited"⁷², many laws, in particular those in the domain of family, land and inheritance, do not treat individuals as equals. For instance, in the *Code du mariage et de la tutelle*, which is still in effect today, the husband is considered to be the head of the family and the provider for the family.⁷³ The entirety of legal sources is filled with gender stereotypes, and even the legal provisions which are supposed to be the most modern ones have surrendered to the influence of custom or Islamic law.

To this day orality is such an important part of Malian culture, as much as the word of the Sharia is important, therefore there is a need for such languages to be revised and reformed in order to allow an improvement in terms of gender equality, non-discrimination and inclusivity. Through the experience of the French occupation, it has been demonstrated that words cannot simply be imported from one legal system to another for the purpose of enacting new legal rules. Bambara language has survived through centuries without an alphabet or without being written, and the integration of French in the country has not changed the central role that Bambara has in Malian culture. This analysis strongly supports the necessity of the reform of the legal systems and the legal sources towards a legal domain that includes

⁶⁸ A. CLARK, *Mali, op. cit.*

⁶⁹ B. F. SOARES, *The Attempt to Reform Family Law in Mali*, in *Die Welt Islams, Islam in Contemporary West Africa: Literature, orality and Law*, vol. 49, issue 3–4, 2009, pp. 398–428.

⁷⁰ M. DE LANGEN, *Les Assesseurs at la Justice, Configuration du Droit et de la Coutume Dans Les Conflits Fonciers à Douentza*, in *Mali Rapport d'une Recherche de terrain*, The Hague, 2001, pp. 10–66.

⁷¹ F. ZAPPA, *Ecrire l'Islam en Bambara: Lieux, Réseaux et Enjeux de l'Entreprise d'al-Hajj Modibo Diarra*, *Archives des Sciences Sociales del Religions*, 54e année numéro 147, 2004, pp. 167–186.

⁷² THE REPUBLIC OF MALI CONST., Art. 2, https://www.constituteproject.org/constitution/Mali_1992.pdf?lang=en.

⁷³ C. CULY, *The Complexity of the Vocabulary of Bambara*, in *Linguistic and Philosophy*, vol. 8, n. 3, 1985, pp. 345–351.

customary law to achieve gender equality.⁷⁴ The experience of Mali shows how strong a language can be and how relevant its presence is, especially in an unwritten cultural and legal tradition. Reforms based on the coexistence of French imported state law and customary and Islamic laws is necessary to be able to improve towards gender equality. But such step forward cannot be taken unless language is put at the center of the discussion.

8. *The role of non-binary gender roles in the Indian legal panorama*

Hindi is constitutionally recognized as the main language of the Republic of India. It is spoken by more than half of the population, considering both native speakers and second language speakers, and it is the main language used for official administration, judiciary matters, legislative work and political affairs. The Indian government has endorsed its use together with that of English, which following the long British colonization, has remained a widely spoken language in the country, so much that it has been recognized as the “associate official language”.⁷⁵

Linguistic anthropologists have researched and showed the connection between social classes and linguistic elements. Differences have been identified between dialects and the social stratification, pointing out how castes, typical characteristic of Indian society, influence Hindi. Together with castes other elements such as religion, social relations, place of residence and work occupation surface and must be taken into consideration.⁷⁶ What is interest to notice when approaching Hindi, is that for example it has three second-person pronouns, which have to be used correctly based on the consideration of multiple social aspects, therefore showing that this Indian language does not rely on static social roles or identity.⁷⁷ There needs to be a constant pondering on the choice of words, because the expression in Hindi language involves social positions, the topic of the discourse, marital status, age, intentions and gender, in very important ways. The identification of such elements, of both linguistic and social nature, allows to understand how strong of a connection there is between language and social structures in India.

Discrimination is very much common, especially gender-based one, but at the same time there has always been protection and consideration for a particular group of people, the *hijras*. Hijras are people of non-binary gender expression that have played an important role in society for more than 2000 years. They are called the third gender and the evidence of their presence and existence can be easily found in religious and holy texts of the Hindu society.⁷⁸ This is a striking difference with the western world, where the key role played by Christianity deeply influenced gender roles, gender bias and gender-based discrimination, strongly supporting the binary system of gender. Hijras individuals are often born as biologically male, more rarely they are intersex individuals, but they dress, speak and have manners that are of feminine nature. Regardless of their biological sex, hijras recognize themselves as being a third gender altogether.⁷⁹

Hijras were always respected and protected in Hindu culture, but following the British colonization such relationship with the rest of society was deeply changed. British made hijras criminals in 1871, such decision taken based on Christian beliefs, that clearly clashed with the existence of a third gender. For almost 200 years hijras were stigmatized, but they never ceased to be present and to fight for their rights. By 2014 India, and other neighboring countries, had officially recognized third gender people as ordinary citizens deserving of equal rights and treatments.⁸⁰

It is important to highlight a linguistic element regarding the hijra community. Hindi is a gendered language, meaning that nouns are divided into feminine and masculine classes. Hijras identify

⁷⁴ T. MOR, *Why Gender Equality Must Include Customary Laws*, World Economic Forum, Gender Parity, 2015, <https://www.weforum.org/agenda/2015/08/why-gender-equality-must-include-customary-laws/>.

⁷⁵ K. HALL, “Unnatural” Gender in Hindi, in *Gender Across Languages: The Linguistic Representation of Women and Men*, vol. 2, 2002, pp. 425–440.

⁷⁶ J. J. GUMPERZ, *Dialect Differences and Social Stratification in a North Indian Village*, in *American Anthropologist*, vol. 60, issue 4, 1958, pp. 668–682.

⁷⁷ N. W. JABBARA, *Sex Roles and Language in Lebanon*, in *Ethnology*, vol. 19, n. 4, 1980, pp. 459–474.

⁷⁸ Hinduism Case Study – Gender, *The Third Gender and Hijras*, 2018, pp. 1–3.

⁷⁹ S. NANDA, *Neither Man nor Woman: The Hijras of India*, 2nd edition, Belmont, 1998, pp. 1–158.

⁸⁰ S. NANDA, *Neither Man nor Woman: The Hijras of Indi*, *op. cit.*, pp. 1–158.

themselves as belonging to a third gender, therefore not being female nor male. When it comes to hijras talking about themselves they alternate between the use of feminine and masculine linguistic reference reflecting through their speech local and dominant ideologies concerning the roles of the binary genders in Indian society.⁸¹ Such alternate use of feminine and masculine is a clear and conscious choice made by hijras that strongly state their belonging to a third gender. The alternating between male and female words is particularly significant in Hindi because, like many other languages, it carries an inherent gender bias. This can be proven by the fact that male terms are often used to compliment individuals and as words of endearment, whereas female words are used as an insult, especially in reference to male individuals or hijras, often attacked by the use of female terms to offend and humiliate them.⁸²

The attention to language given by the hijra is directly connected to their gender identity. Their identification as third gender has been so important that in 2014 it reached the Supreme Court of India, in which a landmark case was settled. A number of members of the transgender community in India was seeking the legal declaration of their gender identity, with hijras and eunuchs claiming the recognition of legal status as a third gender. The case was filed by the National Legal Services Authority (NALSA), in order to recognize individuals who, fall outside of the binary spectrum of gender, including people who identify as a third gender.⁸³

The judgement established that “gender identity is one of the most-fundamental aspects of life which refers to a person’s intrinsic sense of being male, female, or transgender or transsexual person. [...] Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth [...] Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category”.⁸⁴ The Court used this argument in order to enforce the fact that every individual should be allowed to enjoy human rights without being subdued to any type of discrimination, in particular those based on gender and sexual orientation. As stated in the Constitution of India “the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India”⁸⁵, and law should guarantee to everybody equal and effective protection from all sorts of discrimination, especially because “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”⁸⁶. In the decision judges clearly states that the main purpose and aim of justice and the laws should be that of protecting individuals and granting them the recognition and enjoyment of human rights. The rights to privacy, to life, to equality and non-discrimination, recognition before the law, the protection from medical abuse and others are mentioned in the judgement, and they are all taken into consideration. Finally, in the conclusion the judge states that transgender people should be treated as third gender, in particular in relation to the safeguard and enforcement of the Constitution and the rights that it grants.

The decision became a landmark event for LGBTQIA+ rights in India, because the Court openly established that local and state government need to recognize a third gender outside the binary and have to create adequate instrument for citizens to have access to such recognition. Moreover, the Court has held that it is a state responsibility to provide LGBTQIA+ members tools through which they can seek psychological and medical health of any kind, especially in regard to discrimination and gender identity issues. Such action taken by the Court was sparked by the concerns that the Supreme institution had over the mental trauma and mental suffering that the LGBTQIA+ community had, and has, to face. The Court was able to establish the protection of transgender people’s rights through the interpretation of Art. 21 of the Constitution, holding that the rights present in the article incorporated the safeguard of the LGBTQIA+ community and that the Constitutional Court has a duty to grant and protect such

⁸¹ S. NANDA, *Neither Man nor Woman: The Hijras of India*, *op. cit.*, pp. 1–158.

⁸² K. HALL, “Go suck your husband’s sugarcane!” *Hijras and the Use of Sexual Insult*, in LIVIA A., HALL K. (eds.), *Queerly Phrased: Language, Gender, and Sexuality*, New York, 1997, pp. 430–460.

⁸³ Supreme Court of India, judgment of 15 April 2014, National Legal Services Authority (NALSA) v. Union of India, case AIR 2014 SC 1863.

⁸⁴ Supreme Court of India, writ petition (civil) number 400 of 2012 with writ petition (civil) number 604 of 2013, National Legal Services Authority v. Union of India and others, par. 19.

⁸⁵ INDIA CONST., Part III, Art. 14.

⁸⁶ INDIA CONST., Part III, Art. 15.

rights.⁸⁷ The Court was able to express such judgement because of the language in which the article is written is gender-neutral language. The terms used in the Constitution are universal and generic, thus being able to refer to all individuals regardless of their biological gender and gender identity.

Even though there are still many cultural and social impasses to overcome, such as castes or the male dominance, many important steps forward have been taken in India. Sexist language is present in India as well, and it is a reality that strongly enhances gender-based discrimination. Such language is found in particular in textbooks, which represent gender bias both in content and in language itself. This demonstrates that language is an issue on many levels, and it has to be considered in different aspect of society. Language is a tool, but at the same time when we use it, we become used ourselves. This goes to show that sexist language is profoundly negative and vents, spreads and reinforces gender roles stereotypes.⁸⁸ Language in textbooks and laws deeply impacts our mindsets, and for this reason it should be the least reliant on gender stereotypes.

The Constitution has demonstrated once again to play a key role in granting rights and safeguarding citizens from gender-based violence and discrimination. Over again the gender-neutral formulation of the law has been crucial in the recognition of rights and protection of people, and although progress is still very much to be made, the direction is the right one. Language stays an essential element of law and only with its right use years of unreasonable and unjustifiable discrimination and inequalities can be addressed and solved. There is a need for policies initiatives to empower all individuals and to overthrow patrilineality cultural institution. Affirmative actions need to be developed in order to dismantle the system that favors males over everybody else and creates negative stereotypes⁸⁹. Only through legal positive actions such system can be dismantle and language represents the basement on which such change can flourish.

9. Conclusions

Legal language can be defined as being the variety of specific terms used by legal professionals in the legal field. Such vocabulary is different in every language, therefore there are no universal rules or characteristic that are applicable to every idiom, besides the fact that said vocabulary belongs specifically to the domain of juridical sciences.

A significant element that has emerged is the very important role played by judges and courts. This represents a shared characteristic between the two North American Legal systems, the European one and, surprisingly enough, the Indian one. Judges all over the world have been the first actors in the legal field to efficiently act against sexism and gender-based discrimination and inequalities; they were not the first experts to identify these negative characteristics very often disguised in legal sources. It was in fact sociolinguists, psychologists, feminists and anthropologists to first point out the presence of discriminatory and utterly sexist language and to describe how deeply rooted in laws gender stereotypes and gender norms were. Their observations sparked a debate which is still very much alive today. Since the topic was raised, judges have actively tried to make a difference and start important discussions that would lead to significant reforms.

The attention ensured to language, its detailed analysis and the steady efforts made by judges to achieve a consistent level of gender-neutrality have surely started to show their results, even if at times it only means that they have been able to spark a discussion about it. What has been highlighted by justices and courts all over the globe is that in order for justice to be more equal and less discriminatory, positive legal sources have to be directly drafted in a gender-neutral language. It has been in fact observed that the presence of legal provisions already drafted in a gender-neutral legal language would significantly improve and facilitate the work of courts and judges, thus allowing for a broader and more

⁸⁷ M. K. SAHU, *Case Comment on National Legal Services Authority v. Union of India & Others (Air 2014 SC 1863): A Ray of Hope for the LGBT Community*, in *BRICS Law Journal*, 2016, pp. 164–175.

⁸⁸ N. N. KALIA, *Women and Sexism: Language of Indian School Textbooks*, in *Economic and Political Weekly*, vol. 21, n. 18, 1986, pp. 794–797.

⁸⁹ S. SHARMA, *Achieving Gender Equality in India: What Works, and What Doesn't*, United Nations University, *Gender, Culture and Religions*, 2016, <https://unu.edu/publications/articles/achieving-gender-equality-in-india-what-works-and-what-doesnt.html>.

specific protection of rights. Lawmakers need to be intentional about the wording chosen when drafting legislation, so that interpretation can be easier, clearer and less conflicts of rules can arise from it. Although this approach has been welcomed by the majority of legal professionals, there are still many that are skeptical and oppose the development and common use of gender-neutral legal language.

Gender mainstreaming is the reorganization, development, improvement and evaluation of policy making processes, that ensure that a gender equality perspective is integrated into policies, particularly in legislation. The main aim is that of eliminating any form of gender gap, thus creating equal access, opportunities and protection for everyone. The reason why gender mainstreaming is so important, and I have considered it in this thesis, is that in order to tackle gender inequalities and gender-based discrimination they have to first be acknowledged, the differences identified by experts are in fact present, especially in certain legislative area, and the only way in which such gaps can be filled is if they are recognized and the discourse around gender changes. Gender mainstreaming policies take into account specific necessities and characteristics related to gender, because through a correct and detailed analysis of the gender-based differences an adequate step forward in laws can be made. As of today, in order to reach gender equality a specific empowerment needs to take place, because so far in history only a very small group of population has always been involved in political and legislative processes. Considering the peculiar needs of every different social group helps creating more satisfactory legislation, one that is aware of the variances, and it uses them to improve present rules.

As stated, and supported with examples throughout the whole thesis, gender-based discrimination is very easily conveyed in laws and regulations. Experience has shown that the most effective way to fight inequalities and said gender stereotypes is to have a completely different approach in the drafting of legislation. The opposite approach that is needed, is that of an acknowledgement of such discrimination and the efficient prohibition of it. The countries that have reached the most significant results in the fight of gender bias and gender-based discrimination, are those that have enacted rules that firmly, and actively, prohibit the support of gender inequalities and gender-based violence.

Today we find ourselves needing to make significant changes in our society, in order to live in a world that is a realistic reflection of its population. Gender issues have grown and are now under the spotlight, in particular in the legal domain. Language expresses gender, in many different ways, and only through a conscious choice in wording certain bias and discriminations can be fought and eliminated. Now more than ever there is a need for effective actions to be brought forward by legislators and the awaited results can be easily achieved, but the change needs to start with the acknowledgement of gender bias and gender-based discrimination. This starting point can lead the way toward inclusivity and gender equality and the perfect carrier of such message is nothing other than gender-neutral legal language.

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