
The Risky Temptation Of Wanting to be the Legislator of Language

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ABSTRACT

In criticizing the modern, rationalistic temptation to legislate on language, this article argues that issues of “political correctness” are an aspect of the eternal problem of definitions in law. This problem has in its turn profound connections, on the one hand, with the need, entirely human, for a correct (not one-sided or arbitrary) relationship with reality; and, on the other hand, with the insidious attempt – which is all the same typically human – to deny reality, with its conflicts and ambiguities, and to replace it with a false, less challenging reality of “objective” certainties. In law, the problem of definitions has historically followed many and different itineraries; this article briefly traces some of them, trying to show that the ideal of an objective definition – an ideal epitomized in the “norm” idealized by legal positivism – has always co-existed,

in the legal experience, with the different ideal of a subjective definition (dialectical, controversial, negative, and refutative), of which the ancient maxims of equity, the *regulae iuris*, offer a model. Thus, the problem of legal definitions in law is a matter of forms of reason that confront each other throughout the history of law, the one investing on a calculating and instrumental rationality, the other relying on a more porous and flexible reason. In the legacy of the second point of view – which, the article maintains, has more than one analogy with the paths of contemporary Feminist “Radical” Thought – antidotes can be found to the temptation to legislate on language, which is risky. If objectivity tries to suppress subjectivity, in fact, this is in the name of the illusion that problems troubling the human conditions can be fixed, defined, and solved once and for all. It is instead the open texture of these problems, which cannot be defined once and for all, which encourages the work of language and thought. And the latter are the resources for a living together really capable of freedom and equality, of change and future.

KEYWORDS:

political correctness, sex, gender, feminism, norms and rules, legal definitions, legal maxims, *regulae iuris*

1. Quarrelling about Words. – The list of politically incorrect words is increasing; recently, the term “woman” has joined the group. It may be argued indeed that this word reflects a cultural construct (“woman” is not but a role socially ascribed to a biological sex) which has exclusionary effects, particularly towards those who, although biologically female, do not recognize themselves in the corresponding social role, as it is in the case of transgender people. Therefore, the word “woman” should give way – in some contexts at least (as in medical or statistical analyses and reports) – to more inclusive words, such as “individuals with a cervix”, or “people who menstruate”¹.

It makes sense, however, that medical research on cervical cancer targets those who have a cervix, independently from whether or not they perceive/express themselves as women. But it is nevertheless a fact, that as far as male persons are concerned, no comparable new linguistic uses have been until now signaled to the public opinion (assuming that they exist). No one has never heard of medical research on prostate cancer investigating “individuals with a prostate”; and the word “man” is not accused to be exclusionary, or, at least, it is not accused so loudly as “woman” is (more precisely, and as I will recall in the following, “man” is, if anything, accused of being exclusionary to the extent that it is coupled with “woman” to designate an allegedly natural sexual binarism).

“Radical feminists” claim that the attack toward the word “woman” has a symbolical scope, because it attempts to cancel, with the word that designates it, the female subjectivity. The latter, historically, has assumed a texture just through the choice of concrete women of saying “I am a woman”, putting into discussion, by this means, the neutrality of the “subject” built on a male subjectivity proposed as universal, whilst it does not include the female experience (Ferrando 2017, 211).

Comparable linguistic issues are emerging in relation to the terms “homosexual” and “transsexual”. In Italy, a law project is under parliamentary exam, aiming to introduce, according to its original intentions at least, the crime of homophobia and transphobia. The text that has been actually submitted to Parliament and started the exam in August 2020, however, does not

¹ In the first half of 2020, the guidance of the American Cancer Association addressed to “individuals with a cervix” was reported by the CNN; a website used the expression ‘people who menstruate’ when describing new equality needs following the Covid-19 pandemic. A large debate spread around both tweets, particularly after J.K. Rowling posted an opinion article which costed to the Harry Potter’s author the accuse of transphobia.

mention homosexuality nor trans-sexuality. Instead, it punishes incitement to hate and discrimination on the ground of “sex, gender, sexual orientation, gender identity”. Like the word “woman”, the words “homosexuality” and “transsexuality” are deemed exclusionary.

In the parliamentary debate, spokesman Mr. Zan, drawing on a Foucault-Derrida style vocabulary, explained that, because the new law is a matter of “devices”, it must adopt the most inclusive possible definitions². Arguably, the words sex, gender, sexual orientation and gender identity adopted by the law refers to gender-neutral concepts rotating around, on the one hand, of the definition of sex as a merely “biological” aspect of a person, and, on the other hand, of the notion of gender, which indicates the social roles connected to a given sex (Niccolai 2020, 6). Gender studies teach that “gender identity” pertains to the “internal perception” of belonging to one of the two “genders” or to none of them, and, that, on the whole, people can be or cis-gender or trans-gender persons. Cisgenders manifest themselves conforming to social roles and expectation connected with their biological sex. Transgenders are the non-conforming ones.

The notions of cisgender and transgender people do provide a bipartition of humanity that should take the place of the bipartition male/female, which is deemed discriminatory (because loaded with sexual binarism and mandatory heterosexuality), and scientifically wrong (because not correspondent to the plural manifestations of sexual identities). Many words common in language (“mother”, to say one) are in this light condemnable.

2. Constitutional Cultures and Feminist Cultures (in Italy). – Reducing sex to mere biology is certainly a novelty, at least for the Italian legal culture. Art. 3 of the Italian Constitution (enforced in 1948) prevents the law from introducing any discrimination on the ground of sex and, according to the Italian Constitutional Court, “sex” has a profound psychological and social meaning, it is not only “biological”. The Court considers the “sexual identity” a fundamental constitutional good, pertaining to the “free development of personality” (It. Const. Art. 2).

The understanding of “sex” as not limited to biology which distinguishes Italian Law is an interesting example of the encounter between constitutional

² Detailed documentation on the reported law project (T.U. 107-569-868-2171-2255) can be found at the Italian Chamber of Deputies website (www.camera.it).

cultures and feminist cultures (Di Martino 2020). “Sex” is in fact a word highly valued also by the most important Italian feminist movement, known as The Thought of the Sexual Difference or The Thought of the Symbolic, the Italian “radical” feminism (Fanciullacci 2019, 111)³. This feminist conception understands “sex” as a history and a genealogy, with which every woman, being born woman, finds herself *in relation*; a living matter of vicissitudes and contingencies, that each woman can take upon herself, of which she can make what she wants, but which she cannot leave aside, ignore, deny. Not without paying the cost of *alienation*; the cost of losing the contact with reality, and, together with the latter, the strength to modify it.

Convinced that transforming reality depends on the capability of staying anchored to it, the Feminism of the Symbolic promotes the “free sense of the sexual difference”: everybody can take on their sex and can leverage it in order to become other, to introduce the unexpected, the diverse.

It is fairly difficult to think this way, however, when sex is fixed at a mute “biological” level and all the rest in any individual is “social construction” (gender). Therefore, exponents of this Feminist Thought oppose to the word “gender” and its derivatives. The same goes for some lesbian associations, persuaded that new political correctness in language is bound to cancel lesbian identity and experience under a general label of transgenderism (Gramolini 2020).

Although it arose in the 1960s, the Feminist Thought of the Symbolic has strong connections with the cultural orientations critical towards modernity, or even pre-modern, which this Thought inventively elaborates together with many other components, among which a prominent attention to the unconscious and psychoanalysis.

Thus, the “real”, which this Feminism refers to, is clearly rooted in Vico’s *verum ipsum factum*. Sex is a word that describes a fact, a reality; but facts are not mere “material given”, they are interpreted by living human beings: humans shape the human experience and for that reason “reality” always brings within, with its constants, an opening to something unexpected and new.

The idea that reality exists, but at the same time *it is not all what can exist*, bridges to the Symbolic, a key concept in this feminist thought, where the word, coming from Lacan’s vocabulary, also recalls a pre-modern idea

³ Philosopher Riccardo Fanciullacci is a sensible male interpreter of the Italian Feminist Thought of the Symbolic.

of the notion of “conscience”: not a solipsistic dimension but a relational, intersubjective process, which has thereby a degree of “objectivity” and could also be called “intellect”.

The Symbolic is thereby the fabric through which the human beings, with the resources of their intellect – sense and reason, memory and imagination – do interact, perceive each other, incessantly modifying these perceptions, by naming their experience, the meaning and value of it. Therefore, changing the meaning (the value), of being a woman entails fighting on the terrain, and with the instruments, of the Symbolic, the first of which is language: “a living language is an always open bargaining in which a shared reality is formed and changed” in contact with life, as the main exponent of this Thought, philosopher Luisa Muraro, puts it (Muraro 2003, 59). In a nutshell, far from thinking that humans are mere social products, this Feminist Thought claims that we are all creative generators of our sociability, which is to say, of our world. This means investing on “the possibility of a subjective thought, capable of thinking the reality of lived experience”, which is to say, capable of opening to relations with the others. After all, “being real” means accepting that “reality is never a private property” and it always brings within it the conflicts and pitfalls that come “from the reality of the existence of the other”, psychoanalysis reveals (Faccincani 2009, 35). The Feminism of the Symbolic calls “*politics*” these conflicts, through which humans make, and change, the sense and value of their experience (the sense and value of being a woman, for example).

Considering sex not an “essence” but a “quality”, this Feminism refuses the accuse of “essentialism”⁴ but not the appellative of “radical”: it is a radical thought indeed, in that as it goes to the “roots” of the problems (which is to say, in the literal meaning of the term), as Fanciullacci (2019, 143) exactly acknowledges, stressing that this Feminism teaches “an alternative” to the dominant idea of politics and political change.

This alternative consists “in focusing on the potentiality for change offered by single and concrete contexts of relations and experiences, and in keeping into mind that always, at the center of political conflicts, there

⁴ “The Thought of Difference is not an absolutization of the fact that I am a woman. Saying ‘I am a woman’ goes hand in hand with accepting a series of interpretative acts referring to me” (Muraro 2011, 63). The English reader can see on these points Muraro (1994).

are some “untreatable issues”, which is to say issues that will never be settled once and for all by the means of some procedure” (Fanciullacci 2019, 147). From psychoanalysis comes indeed the awareness that reality is a sense (the sense of reality), which stems from the continuous effort to search for a correspondence between words and things but also from the acceptance that such a correspondence will never be absolute, ideally perfect and objectively certain. If it were so, there would be no future, no change, no diverse possibility: the “becoming” would disappear and individuals would fall in the sense of unreality, risking to falling hostages to discourses, that, pretending to take the place of reality, do paralyze the resources for liberty that the effort to “think the reality” entails (Faccincani 2009, 37).

3. Definitions. Or Therapies? – The fascination for the exact, *certain* correspondence between words and things, the fascination for the *right definition* is what emerges resolutely from the discussion on the Italian law’s project on homophobia and transphobia and from the global movement aiming at substituting the word “woman” with another, more correct, abstract, objective and neuter; less burdened with history, subjectivity, experience. Those who want to speak of “persons with a cervix”, and those who aim at defining (in the most inclusive way) the words “sex”, “gender”, “sexual orientation”, “gender identity” are convinced that a good definition, or a complex of good definitions, can settle not only the problems connected to the redaction and application of a legal text but also a good deal of the problems of our societies. Arguably, such a belief is premised on the convincement that conflicts are problems much more than opportunities, and thereby they need a cure, they must be *treated*: definitions are therapies, and in a late sense, “procedures” (for governing the language, the ideas, the symbolic) granting a “correct” relation between the things and the words, an exact description of reality. At the cost of canceling the evocative strength of the words, and the reality of the subjective experience they relate to⁵, which are reduced to mere, erroneous, *opinions*.

⁵ One could say for example that the word “trans-sexual” is linked in the common mind to prostitution and social marginalization and for that it is stigmatizing. In this regard, it is worth mentioning the opinion of the Italian trans activist Porpora Marcasciano, who has reflected on how the freedom and equality for trans people depends on whether theirs is recognized as a “meaningful human experience” (2018, 101); to her, in order to become so, trans people experience’s needs history (or a story) that gives sense to it while

In this, there is something troubling, however. No one would deny that, at least from Olympe de Gouges' Declaration of the Rights of Woman (1791) onwards, women have contributed to shape the meaning of the word "woman". Then, it is true or the one or the other thing: or the "political correctness" that considers the word "woman" exclusionary denies feminist struggles, or it equates these latter – and all what they have brought – to the "errors" that characterize the common sense and stain the ordinary language⁶.

Looking at the ongoing flourishing of newest and more correct definitions, the jurist cannot help recalling that the problem of definitions goes together with our science from the origins, signaling the different moments of it, in its relationships with the various epochs of the philosophical and political thought. The legislator (not only the Italian one) of the 2000s assumes indeed the same attitude that led modern philosophers (and in their wake the jurists) to mistrust common opinion and the current language, which they regarded as burdened with errors and in need of a scientific purification (or even "epuration").

But jurists have not *always* thought this way.

Everyone knows Javolenus' warning (*Omnis definitio in iure periculosa est*); and even more significant is Paulus' remark, admonishing that a rule should never be taken for granted. If it is *in aliquo vitiata* (under some respects flawed), the rule is better let aside⁷. And when is a rule "flawed"? Arguably, when there is no correspondence between the words it uses and the things

narrating it. Therefore, Marcasciano has advocated the theory of the "Fabulous Identity" of Trans People. According to Marcasciano, trans people should not deny nor remove the origins of trans experience in prostitution and social marginality; instead, they should recognize in the Prostituted Trans the courageous and transgressive "symbolical mothers" of the liberties of all trans. In Marcasciano's ideas does resonate something similar to the views of the Feminist Thought of the Symbolic: being trans is a "fact" (as it is a fact being a woman), but the meaning of this fact is the result of a creative dialectics through which the living experience and the point of view of trans persons (as well as that of women) can shape the sense of the words that name them. Although Marcasciano numbers today among the sustainers of LGBTQ+ instances, it is apparent that the neuter word "trans-gender" severely neutralizes the Fabulous Trans Identity and normalizes the trans experience.

⁶ Prof. Paola Rudan, a historical of the Modernity, vigorously reacts to these implications of today's suggested setting aside of the word 'woman' (2020). Focusing especially on the Anglo-American feminist debate from the XVII Century to now, Rudan argues that "woman" is a "polemical concept" that takes life from the fights and the transforming social operations that women have practiced in the course of time, particularly the contestation of capitalistic exploitation. Therefore, the suppression of the word "woman" suppresses a criticism, which, internal to the modern concept of subjectivity (neuter because pivoting on the false male universal), also puts in question its capitalistic stamp.

⁷ These two rules are part of the *regulae iuris*, to which I will refer in the text. In particular, the Paulus' rule opens the Book V of the Digest, *De antiquis regulis iuris*. About the *regulae iuris* see Peter Stein (1966).

which it refers to. In those cases, the rule is not able to respond to a need or to a relation that *exists in the reality*, it loses contact with the latter and, with it, it loses its function of tool to reach an end, which is of actual interest to someone⁸. Artificial concepts are to be avoided and living words are to be preferred, words to which people do attach sense, this was the warning.

Of course, Paulus' remark is true to the extent in which law is seen "*ex parte homini*", as classical jurists did; which is to say *subjectively*, as an instrument, or a means, through which individuals try to reach their ends and thereby they regulate their relations, observing the effects and consequences of the various human (inter-)actions.

The more law is seen *objectively*, which is to say, from the part of the power, from the point of view of the governmental actors that lead the society, the less it is important that a definition, or a rule, concretely serves to a given human being and is meaningful to him⁹. What matters, in this case, is that the rule serves to realize *a social goal* (which can be, among others, that of governing the mentalities, the ways of thinking of people, their sense of needs and of the means apt to satisfy them)¹⁰.

The necessity (or the temptation) to rule on language can thereby be seen as a peculiar propension of the modern, rationalistic conceptions, which see law as an instrument for the reform of society, and the past (which forms a large part of language) as what must be continuously reformed. There is something authoritarian in such an inclination: when adopting "scientific" words and

⁸ In Paulus' maxim, the rule which is said '*in aliquo vitata*' is the "Catonian rule", according to which a will was valid only if it could have been executed at the death of the testator. This made impossible to emancipate a slave by testament (because the *manumissio* demanded the presence of the master). In Paulus' point of view the Catonian Rule on testamentary wills was "*in aliquo vitate*" because in some concrete cases, like the *mancipatio* of the slave, it did not fit the reasons, for which wills actually exist. According to Paolo, in order to establish if a rule is useful (thus "valid") the jurist must take the point of view of those who make use of the rule.

⁹ In today's prevailing "objective" notion of law, an example of rules given to people, notwithstanding these rules can even contravene to individual interests (being tuned on public, general, objective interests) is offered by European anti-discrimination Law (which was born as 'gender' anti-discrimination). Violations of the EU anti-discriminatory law can be denounced not only by those, who feel themselves victim of a discrimination, but also by the EU Commission, as infringements of the duties of the Member States (to implement and respect EU law). Discrimination, in this context, transforms from a subjective harm (of which only the victim can complain: Cerri [1984, 164]) to an objective offense, that is, a harm to an interest of the legal system, that the latter identifies regardless of whether the person concerned feels it as such. About the public or objective nature of EU anti-discrimination law and its functionality to the market economy interests see Somek (2010).

¹⁰ The words I am using (means, ends) can recall Jhering definition of law "as a means to an end" (Jhering 1913, 108); but it goes with no saying that Jhering saw law no longer as a means to individual ends; instead, he portrayed law as an instrument to *cause* people to act functionally to societal ends.

concepts in order to replace those in use in the current language the ruler ensures to itself a space, wherein it can operate without being controlled by the ruled. Common speakers can't control nor the sense neither the scope of words and of concepts that they have not contributed to mold, and once subjected to a process of purification, language does not lose its normative character and its contact with the world of opinions and values does not diminish. What happens instead, is only that *the single value, that is imposed by those who claim to make language more rational, is strengthened* (Giuliani 1953, 189).

Social sciences, particularly sociology, are the best and most willing suppliers of the legislators of the language. It is not by chance if these disciplines were defined “nomothetic”. Of course a long time has passed since Wilhelm Windelband in the late 1800s introduced this wording, but social sciences remain “nomothetic” also nowadays, to the extent in which they adhere to the positivistic conviction (an unwavering conviction indeed) that not only there are “laws” that rule society – laws that can be discovered, and must be, in order to condition the development of society – but also that such a work is “scientific” (which is to say “objective”, “neutral” and, at the very end, “true” and leading to “certain” results). For example, an Italian gender studies handbook asserts that dissent towards gender theories is rooted in a “kind of thought and reasoning based on an ‘intuitive tradition’, which is to say a scheme of reasoning pre-critical and pre-scientific” (Ferrari et al. 2017, 15). This is too much a simplistic rhetorical expedient, however, which pretends ignoring that, in the course of time, severe and extremely serious objections have been addressed toward the social sciences, if constructed in a normative way and following criteria still adhering to positivistic methods. To mention a famous one, Horkheimer and Adorno harshly criticized the belief that everything in the human being is determined by life in society, and therefore the humans can be directed, conditioned, entirely shaped with the tools of society (e.g. criminal laws, or social models and theories). Their question was: what does remain, in such a framework, of the very idea of freedom?¹¹

The question was precise and it remains unavoidable (it is *radical* indeed); it is so, at least, if one understands “liberty” as the capability of humans of originating the “unforeseen”, as the capability of individuals of putting into the world, into reality, something that is not already established by someone

¹¹ See Adorno and Horkheimer's critique of the “technical reason” (1980, 127 ff.).

else in advance and which stems, instead, from their subjective experience, from the way they interpret it. This is exactly what the Italian “radical” feminism thinks, when it says that the possibility for overcoming social conventions (otherwise called “gender norms”) comes from the capability of putting in free words the experience of being born woman¹².

The words addressed by Ateius Capito to Emperor Tiberius: *Tu enim civitatem potes dare hominibus, non verbis*, come straight into mind¹³. Since the very moment it was pronounced, this warning has meant nothing but this: the liberty of language is the liberty of humanity. Because it is the liberty of *thinking* freely, of giving sense and meaning to the experience we live, autonomously from what the power establishes, rules, admits or support. And thereby, it is the liberty to change it.

Likewise, radical feminism, convinced that language is the first tool for subversion¹⁴, thinks that a woman who could no longer say “I am a woman” would lose her liberty to interpreting her experience from within and, by this way, to change the “external”, “objective” meaning, the meaning socially attached to what being a woman means. And this would imply a loss of liberty for everyone.

Of course, such a point of view is at odds with the essence, if not of Modernity, of the abuses of Reason to which it can lead, when “Reason” eclipses in the merely “instrumental” conception, according to which the subjective experience has no sense, it does not produce knowledge, it can receive meaning only by the outside (particularly by the means of norms that “define” that experience) and its scope is limited to merely adaptive and calculating operations¹⁵.

4. Another Idea of “Definition” (Antique and Ever New): the Dialectical Definitions. – According to Horkheimer, the modern, instrumental reason

¹² Instead, positivist conceptions fall into the error of “absolutizing what we know”, preventing us from seeing that there is something beyond “the reality constructed with the mediations in force, beyond the ‘conventional’ reality that reflects only relations of power” (Muraro 2003, 76, 70).

¹³ The jurist was recalling that, if it was in the Emperor’s power to grant citizenship to individuals, he had no analogous power over their words: see the quotation in Giuliani, who explains: “Law is, like language, something that cannot be changed by the will or whim of those who temporarily hold political power” (1953, 193).

¹⁴ “Speaking a living language is not combining words according to established rules, but inventing always new combinations” (Muraro 2003, 46).

¹⁵ I am referring transparently to Horkheimer’s description of the Eclipse of Reason (1969).

perpetrates abuses when it distrusts the subjective/intersubjective experience as a form of knowledge. When the subjective experiences are denied intellect, humans are reduced to the mere objects of norms.

To such abuses, the studies of the Italian law philosopher Alessandro Giuliani propose an antidote. Modernity is corroded by a terrible anxiety for error, Giuliani maintains; the antidote consists in moderating such a destructive anxiety. It is a matter of a better “cohabitation” with our humanity. This latter is surely limited and leads us to error; but, on the other hand, it also gives us the resource, by the means of which we can reduce our errors. This resource is offered mainly by language, which is where we reason and confront each another’s opinions and sensations, the meaning of our actions and their value, also in the dimension of time (Giuliani 1975, 25).

We could live better with ourselves, Giuliani says, if instead of distrusting the language, the vehicle of the common opinion, we learned to relate to it critically, but also with confidence. Of such an attitude, Giuliani maintains, the legal experience has been the training ground over the centuries.

Dear to Giuliani is the idea of “dialectical definition”, with which he re-reads in an original way the Aristotelian Logic. Aristotle’s definition of justice, Giuliani maintains, is a practical example of dialectical definition (Giuliani 1971, 59, 72; 1972, 129). This starts from common opinions conveyed by language, tries to see how they are valid and convincing, and what instead in those opinions deserves to be abandoned. Giuliani argues that, doing so, Aristotle, on the one hand, succeeds in going beyond the idea of a mathematical, quantitative, solely formal idea of justice, which was that of the Pythagoreans, but, on the other hands, he avoids the risk of canceling the valid intuition which is contained in the common opinion; the intuition, logical and emotional at the same time, which recognizes the link between the desire of justice and the desire of revenge (Giuliani 1971, 80).

Giuliani’s point is that Aristotle, by putting the definition in a dialectical relation with the common opinion and the ordinary language, succeeds in elaborating a more comprehensive idea of justice; the “justice as reciprocity”, which expresses strong isonomic values (“what applies to one applies to the other”, [Giuliani 1971, 108]).

It is apparent that, similarly to equity that moderates the rigor of law, the dialectical definition moderates (corrects) those aspects of the common opinion, of what is commonly said, which result, at the examination, less justifiable, which do not resist to confutation (in that they lead to abuse or

excesses, if brought to their consequences). At the same time, however, the dialectical definition does not sweep the common opinion away, because it does not doubt that, being it the common opinion, it has some grounds and can be useful to a better understanding of the thing at stake. There is a great profit in reasoning in this manner: for example, the awareness is kept that we never do justice among angels, but only and always among human beings, who can be (humanly) eager for revenge and who for that reason, or others (the extreme sorrow they feel, for example), can incur in the vice of the “abuse of redress”, which is to say in the (abusive) desire of “having more”. This is the reason why Giuliani’s Aristotle retains that a mathematical, scientifically exact measure of justice, wherein is only up to the will of the offended to establish the right redress (as the Pythagoreans thought), is not reliable. The point of view of others – with its moderating, because dialectical, effect – is instead needed in issues of justice. Only with the help of others (by confronting, debating, reflecting intersubjectively and thus achieving “the degree of objectivity that is possible in the field of opinion”, which is the field of human action and relations¹⁶) we can hopefully find the “right mean”, without losing (as it could instead happen to an abstract and formalistic rationalism), the sense of reality, which warns us that justice is rooted in the human passions.

According to Giuliani, the *regulae iuris* – which were at the core of the European common law until the age of codification (and beyond) and are recognizable under many traditional maxims of the Common Law – were in their turn dialectical definitions. To quote a famous example of *regulae* let us just think to *audiatur et altera pars* (listen to the other part).

Giuliani gives the greatest importance to the fact that a *regula* originates as an *observation and interpretation of behaviors* (it is the traditional to say that the *regulae* come from a “long series of observations” [Gargiulo 1905, 1]). One can *observe* that a decision taken after having carefully listened to both parts is normally better than one taken unilaterally. The making of a *regula* consists indeed in the operation (mental and linguistical, ethical and social) of assigning value, which is to say *sense*, to human actions and relations (to facts) by other humans who observe these facts and consider their implications and consequences. Fueled by an ethics of reciprocity, a

¹⁶ On these aspects of Giuliani’s thought, which draw into Aristotelian themes, see Cerrone (2012, 622), Mootz et al. (2013).

regula is posed by an observer which is impartial, but also involved: a human among humans, plunged in the same reality, of which no one is the master¹⁷.

Then, a *regula* tells what, by the means of an intersubjective exchange, in the course of time, has appeared preferable; in this sense - which is qualitative - a *regula* expresses the probable and the normal. In its turn, a *regula* is never shielded from a dialectics, which verifies its relevance and usefulness to a better understanding of a given problem. Only, who affirms that the normal (the preferable, the probable) does not apply to a given case, has the bound to prove it¹⁸.

For these reasons a *regula* is comparable to a dialectical definition: on the one side the *regula* is shaped with reference to concrete actions and behaviors and to their justifications (all vehicles of opinions expressed in words); on the other side, the *regula* does not prescribe a given conduct, it does not depict a “precise” case and a “certain” consequence expected to be always the same. The *regula* is instead *a position taken*, a choice, in its turn *an opinion*: the opinion which appears the preferable one after a careful, fair debate. It is preferable, for example, that people do not enrich from their frauds (and one easily understands why), as the maxim *Nemo locupletior ex aliena iactura* says. And *regulae* do express the preferable in *negative terms*: they only say what preferably should *not happen*, what preferably should *be avoided* (e.g. the *favor rei* rule means: the judge or the other party in trial should never abuse of the position of inferiority, in which the accused finds himself [Giuliani 1971, 103]). For the rest, it is the responsibility of those who use the rule to ascertain the practical consequences to which it leads in the concreteness of the cases¹⁹.

A *regula* forms itself throughout confutation and negation, in the dispute, by the means of arguments aiming to justify and explain motives and reasons: and a *regula*, which forms itself in the exchange of opinions on what

¹⁷ It is easy to understand the moral inherent to Giuliani’s interpretation of the *regulae*: law can be seen as a means for the living together among people rather than as a means for governing over people. The choice among the two alternatives is in its turn a matter of the ‘preferable’ and Giuliani, who strongly opposes to instrumental conceptions of law, certainly prefers the first.

¹⁸ Then, a *regula* is never true nor false, it is never valid nor invalid: what counts, is whether it is relevant or not to understand a problem (also the Catonian Rule for Paulus was vitiated only in some cases, but valid elsewhere). The *regulae iuris* are a constant reference in Giuliani’s work; for some of his opinions, on which I rely particularly in this article, see Giuliani (1953, 17, 119).

¹⁹ The *regulae* express mere advices, not prescriptions, modern Authors critically maintain. Bobbio (1966, 894) condemns for that reason the *regulae* as useless and pointless.

is normal and preferable, is not only not exempted from dialectics, but it is what allows a (fair and constructive) dialectic to take place.

The judicial controversy is then the space of dialectics, and the controversy is made possible by a “commonplace” in relation to which opposite arguments are made confrontable to each other. It is the commonplace indeed, that makes diverse opinions capable of mutually speaking. A *regula* offers a “center of arguments”, a “dialogical (topical) agreement” (“the substitute of an ontological order”, Giuliani calls it [1975, 29]) and has to be verified not in the light of the true/false alternative, but in the, more ductile, “porous” logic of the relevance: is a *regula* capable of favoring a better understanding of an issue? Has it or not to do with the problem at stake? Then the *regula*, which is dialectical because its making is confutative and justificative, resists to confutation while makes confutation possible, thus opening to change. It accompanies an effort to comprehension, not of *manipulation* of reality. What is the condition that makes all this possible? It is easy to recognize that this is what Vico called *veriloquium*, the mutual commitment to tell one’s own *subjective truth*.

5. Do We (Still) Reason in Law? – The *regula* is, in Giuliani’s view, an elementary unit of law, and an extremely valuable one. With its etymology rooted in the Latin verb *reor* (I think, I judge, I reason), the *regula* recalls the constitutive connection between law and the human experience, made of conscience and intellect (Giuliani 1953, 197). The “norm”, a modern concept (Orestano 1989, 74), is instead the moment of the split between the two. The norm renounces to the demanding engagement required by the *regula*, which is searching the preferable in the debate of opinions and pretends to belong instead to the field of necessity, of what *must* be. Thus the norm wants, so to say, to establish the *true nature* of things, without offering however any help to investigate it and often puts it even out of sight, because, concentrated as it is on the “essence”, the norm is not able to be a good companion in the qualitative problems, which are instead (it is a true paradox) the problems typical of law. The fact is that, unlike the norm, a *regula* is loaded with history – with human history – and, bringing with it a great deal of human vicissitudes and contingencies, a *regula* is far more familiar than a norm to the latter, and it is thereby a more ductile instrument for their understanding.

The *regula nemo audiatur allegans turpidudinem suam* (transparently correspondent to the maxim of equity “he who comes to justice must come with clean hands”) offer a useful example to clarify this. In Italy, in the XX

Century, the *regula* was interpreted in a modern key, as if it is was a norm. This pushed forward the need to previously establish in a positive, certain and clear way what is *turpis* (“shameful”), and it also brought to understand the rule as a “sanction” against those who perform “shameful acts”. Dealing with a *regula* which has (at a rationalistic view) the severe defect of not establishing exactly *what* the *turpitudes* are, and under the pressure of the need to *clearly define* them, in order not to leave any uncertainty and opacity in the law, the Italian scholars stated that “*turpis*” had *necessarily* to do with sexual behavior and with sexual behavior *only* (Rescigno 1966, 175). Such an interpretation of the word was intended to reduce the space of operation of the rule. However, this attempt to define the *regula* as much and as best as possible ended up denying it any space, given that over time the link between *turpitude* and sexuality has appeared steeped in old-fashioned moralism. Thereby the rule, considered aiming to “sanction” non-conforming sexual behaviors, was set aside and no longer used by Courts.

In the light of the dialectical definition, instead, we can never know “*a priori*”, once and for all, what is “*turpis*”: we need to make reference to the common sense, to the opinions, as they take relevance in relation to a given act or a concrete revendication, always taking into account the circumstances of time and space, all qualitative aspects. Besides, in the logic of the preferable, it appears clear that the meaning of the rule is not to sanction, punish or impede “*turpitudines*”, but to avoid that someone takes advantage from an illicit. The modern approach forgets all of this.

The point is, that by dint of defining the *turpis* and pushing it into the sexual sphere; by dint of wanting to deal with a maxim *as if it were a norm* (that is, as the prescription of certain behaviors to be kept and avoided, and of the related sanctions), a rule has been annulled which, if a morality it expressed, was in the civic field, not in the sexual one. In fact, in Italy, the *regula* had typically been used until the 1900s against corrupt and fraudulent commercial agreements, detrimental for the community. Interestingly enough, some authors have recently complained that with the disappearance of the maxim, a principle of “morality of the economy” has disappeared, of which the present times seem to be in strong need (Breccia 1999, 218 ff.). This is why I said that the effort to define can lead to losing sight of what a rule is for, what values it underlies; and perhaps this was what Javolenus wanted to communicate to us. Never put a “normative”, abstract formulation in the place of the living meaning of a precept, this was his advice.

Javolenus' admonishment notwithstanding, definitions have always been researched in law, and then it is important to understand what the advantage is of so much desired "certain" definitions. If all modern law explains what this advantage is, the merit of fixing the point in the most explicit and neat way goes to the standard bearers of legal positivism. According to them, a definition serves to suppress to the most possible extent the moment of the *reor*, when establishing, observing, applying or interpreting the law. Famously indeed, a legal norm is expected to be a sufficient "reason for action" (without thinking much about), thanks to the "exact" definitions which it gives to an actor, one who is always supposed to operate alone and only in order to "execute" or "apply" a will of the law²⁰. On the contrary, a *regula* asks us to reason, and to reason very much and thoroughly, to reason all of us (the ruled as the ruler, the judges as the parties); it asks to us, also, that we reason by taking into account the others, what is out and around us, including what has been said and done before, which is a benchmark for comprehending and valuing our choices, even the non-conforming, unexpected, new. This is the work of a commonplace.

6. The Subversive Strength of Commonplaces. – Parallels can be traced between the mentality premised to a *regulae*-centered idea of law and the views of the Italian Feminism of the Symbolic. To begin with, this latter conceives of the female freedom in a confutative and negative terms, as a sort of a dialectical definition. The Feminism of the Symbolic has always maintained, in fact, that the female freedom (and the freedom in general, indeed) has not a given content, is not definable (it is not, for example, wage-parity or sexual emancipation). If freedom was indeed definable, it would not be liberty at all²¹.

Nor is "sex" an *objective* fact, in the Feminist of the Symbolic' view; it is a fabric of history and experience with respect to which one takes a stand, also thanks to the commonplaces that define it. The notion of commonplace

²⁰ These theories mirror a "contemporary social life" that results in "making the ability of men to think superfluous", (Weil 1983, 108). I am referring in the text to a recent Italian apology of legal positivism (Civitarese Matteucci 2016, 708).

²¹ This is an expressed criticism against the ethical instrumentalism that often accompanies the claim of rights in favor of a social group (in an ethical instrumentalist view, women "deserve" wage-parity, for example, because they are as good as men at working, or because they will make the world better). See among many examples Muraro (2011, 31); Libreria delle donne di Milano (1987, 152). The English reader can see Milan Women's Bookstore Collective (1990).

is crucial for this feminist thought, according to which the words with which I freely express my subjectivity cannot but operate within a commonplace *already* offered by language. In order to say what of new I have to say, I can't but confront "what another has in mind" (Muraro 1991, 68). Are "common-places" what makes it possible for me to refute and confute them, because at the other term of a commonplace ("women are inferior to men, they have to stay at home, etc."), I meet someone else to whom I can show, with my words and actions, that things are not like that the commonplace says, that we can modify it. Or, also, that we can find within the commonplace the beginning, the "principle" or the possibility for a different truth, which has not yet been seen and pronounced²². At the other end of the commonplace, I meet reality, history, and so, dialectically entering the commonplace, I in turn take part in reality and history. Without the commonplace instead I have no interlocutors, and I carry out a pointless, sophisticated debate. Under these conditions my anxiety for freedom can become solipsism, fantasy, if not delirium; it is somewhat confined to *irrelevance*. If I do not want my intellect to be suppressed or made insignificant, in other words, I must attach myself to those social institutions in which the intellect lives and has manifested itself; and one of these, the main one, is the current language, the opinions it conveys, the judgments it makes possible to form and therefore also to modify. Of course, with commitment and effort²³.

Analogies can be traced between this order of ideas and the vision of law premised to the *regulae iuris*. Giuliani stresses that, in the light of the "dialectical reason" from which the *regulae* stem, a fact is never a mere material given, instead, it is always "the assignment of value to something"; a rule is a "testimony"; law is a collective/intersubjective commitment to veracity; and the *regula*, the *locus communis*, is what helps avoid sophistry, i.e. deceptive and fallacious speeches²⁴. There is a momentous reason for safeguarding the relationship between law and ordinary language, and both

²² The Feminism of the Symbolic famously reinvents the *locus communis* 'motherhood is a natural/ social destiny for women' finding within it the far different idea that women are the only human beings that have the *liberty* of becoming mothers (Muraro 1991, 111).

²³ "These are the burdens of thought, which are inherent in the very fact that words and things cannot coincide with reality and reality is there to testify itself, but, in order to this testimony exists, it is necessary that the profound crossing of doubt opens up, with its uncertainty, with the pain of lack, with all the insecurity deriving from the absence of any *a priori* guarantee, from the absence of any absolute certainty" (Faccincani 2009, 38).

²⁴ On these points, that recur many times in Giuliani's work, see esp. (1975, 16).

from an excess of objectifying rationalization: that relationship prevents law from being reduced to “someone’s will” and preserves law as “the result of an infinity of choices, of initiatives, of individual compromises”; as “something typically human that cannot be understood unless it is referred to the individual members in their continuous making up the community in which law is effective” (Giuliani 1953, 193). The point is, that there is not much difference between giving oneself rules and giving oneself words: they are different ways of doing the same thing, which is expressing and sharing among us what we think of a thing, a fact or an action, how we judge them, and thus making a living together possible.

All of this is at odds with the rationalistic idea of a Legislator of the Language, with the idea that things can be created with words. This idea is premised on the assumption that things, like words, are mere relative constructs at the basis of which there is not the spontaneous labor for liberty made by subjectivities thinking and feeling, but a rational, and merely instrumental, act of will (or of adaptation). In this second order of ideas – in philosophy, in political thought, as well as in law – the “certain” definition makes its way, taking the place of the lived experience. The success of these views is understandable; the “seductive discourse that claims to replace reality by eliminating its testimony” promises a “security based on the exclusion of fatigue and of the risk of thought, on the claim of a certainty achievable without any emotional travail” (Faccincani 2009, 37). Doing so, however the Legislator of the Language militates against the “subversive force” (to use a Marcuse’s expression) of history and memory. A severe danger then looms, when the legislator of language truly believes that its propositions are true. “Subject of the unreal discourse”, the legislator is then the “true slave”, therefore it cannot but subjugate: “the claim of absolute certainty in fact enchains to a condition of unreality which, enticing us, holds us hostage, acts as a form of slavery” (Faccincani 2009, 38).

7. *Reassessing the Concept of Political Correctness.* - The “person with cervix”, an “objective” concept without history, a definition that does not tell the experience of anybody, militates against “woman”, a “confused” concept mixed with the subjective experience of concrete women. It is the same labor of all the “operational” and objective concepts dear to the instrumental reason, in their fight against the “obscure words” like peace, freedom, justice (Marcuse 1966, 114). In the “obscurity” of these words there is the

possibility of opening new horizons; whereas scientific, objective, words, in their “exactness” have no “holes”, no “shadows”, through which unexpected possibilities can pass. In a too much “exact” word nothing *transitates*, capable of going beyond what has *already* been said, because its “objectivity” nullifies the contact with the lived, subjective experience.

We could therefore say that the advent of the “correct words” that pretend to define “exactly” the sphere of sexuality, brings to completion the trajectory of a form of reason, aiming to the confinement of experience within the limits of a private, irrelevant subjectivism, thus depriving any subjectivity of the first political resource: that of giving sense to reality, starting from one’s own experience.

Then, it becomes possible to reverse the problem of the political correctness of the definitions used in the language and sanctioned by the law. Is it “politically correct” for the legislator to establish for you and me how each of us must name our own experience, denying that we have competence, and knowledge, about it? Or is it not true, rather, that this threatens reciprocity and isonomy, and puts in question the fundamental political agreement of a civil coexistence, the principle according to which “what applies to one applies to the other”?

Indeed, in the law establishing how people must talk (about themselves and their most intimate experiences), in the law committed to denying the current language and the common opinion, we recognize the hard core of beliefs that would seem dated, and that reveal instead to be still current: the equality among the ruled is just an equality *below* the law, which is superior and thinks (and speaks) for all. The “political correctness” would then appear as the ultimate struggle of power against the political force of subjectivities, a struggle that has identified the terrain of sexual difference (and of the conflicts it opens up) as a field to be silenced.

“But what are you talking about?” One might ask to me. “Don’t you know that the very idea of ‘sexual difference’ is ‘essentialist’ and we must say ‘gender’?”

It is relevant here the opinion of philosopher and publicist Ida Dominijanni who, with reference to the law on hate speech I mentioned at the beginning, has found a very precise reason why the legislator should not use the word

“gender”. Because, she writes, it is *a political word*, a *word of struggle*, a word around which and with which many people conflict: feminism and transfeminism, LGBTQ+ movements and “radical feminism”, all those who debate on whether this term threatens the free sense of the sexual difference and of the human experience, or it is a tool for more liberty for all (Dominijanni 2020). Let’s leave its space to politics, says Dominijanni. She is a Feminist who, by politics, means the conflicts that stir and fill with meaning the human relationships, not the political power that rules *on* these relationships. In her analysis, the drum still rolls of Ateius’ warning: “*tu potes civitatem dare, non verbis*”.

Dominijanni also reflects on how deeply, in the battle for “exclusionary words” to be banned, the fascinating image of the law as an affirmative instrument of freedom and recognition enters the field (with women today playing the part of the “caste” that must be demolished, as a corollary of heteronormativity). She recalls why Italian feminist thinkers have long warned against the idea that freedom can be created by law²⁵. To start with, the “norm” always has a component that is suppressive of freedom, because the norm is supposed to be there to solve, in our place, the basic question of liberty (how should I act?). Of course, this ambiguous promise is great part of the seduction of power: but it has its costs. For example, when we ask the legislator to solve our problems with a law, we can stay certain that the law that will come out of political mediations will resemble little or nothing to the imaginary, ideal law that you or I would have dictated for ourselves; a deeply desired law can then disappoint our deepest aspirations. In Italy, LGBTQ+ associations have already felt disappointed, because an amendment introduced in the draft law on hate speech establishes that all what “falls within the normal pluralism of ideas and lifestyles” cannot be considered a crime. Lastly, one should never forget that a law is a thing that walks by itself, not without unwelcome repercussions. Recently in France, where a legislation similar to that is likely to be introduced in Italy is in force, an official of the Ministry for Equality denounced the author of a feminist book, deemed culpable of misandry²⁶.

²⁵ The theses summarized in the text are all from Libreria delle donne di Milano (1987).

²⁶ The French government official’s attempt to ban Pauline Armange’s book *I Hate Men*, is reported for example on the [dailymail.co.uk](https://www.dailymail.co.uk) (Jewers 2020).

There is a puzzling truth here: the traditionally stronger subjectivity, the male one, could profit from a law aimed to protect new and diverse subjectivities. After all: who could impede, under the new Italian hate-crimes law, to a group of heterosexual men keen on cultivating their “cis-gender” identity, to close their club to transgenders?

It may be argued (and it will surely be argued): no fear, the good sense of the judge will help avoiding excesses of any sort (and good sense will also be needed, that is sure, also to understand what falls within the “normal pluralism of opinions and lifestyles”). With good sense, the judge will wisely consider the circumstances and the concrete features of each single case; he will take into account the orientations of mentalities and widespread feelings, which are as many indicators of the existence and the extent of an offense or a claim. That will suffice to avoiding abuses, and pure stupidity.

If this is true, this only means that the rationalistic illusion of being able to do without common sense, which is to say of the shared experience, of current language and common opinion – the modern illusion of a lonely, omnipotent mind that governs a society purified from conflicts – is flawed from the start. In the very end, no matter how many rules can be dictated and objectively defined: “the honest man” remains the elemental source of the “rules of conduct” and these can be defined “only in negative terms” (Giuliani 1997,161); because, for sure, we know that we want to avoid abuse; but knowing when something is an abuse, that is another kettle of fish.

If we want to remedy the defects of our humanity, we cannot do without it; no heteronomous norm can make up for the autonomous capability to give oneself rules, and no norm can function without it, which is the capability of responding to the question: how should I behave? We should also not lose sight of the fact that all we can do in liberty issues is trying to reduce the errors, not to establish an absolute truth, if liberty we want preserve.

That is why the legislator – one aspiring to mold means for living together, not for dominating – and all those who want more freedom should take example from her, who started saying “I am a woman”. As when Aristotle recognized that, on the one hand, there is some truth in saying, that justice is linked to revenge, but, on the other hand, once this said *there is still much to say* – she too came to terms with prejudice and social conditioning without surrendering to them. How? By prying up that spark of reality and truth (a woman *is*) that, voyaging in the language, and generating *opinions*, provides the sole lever to change *the real*.

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