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NATASCIA TOSEL 

Modelling Institutions, Instituting Models

The Juridification of Politics and the Performative Power of Naming

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ABSTRACT: Starting from Deleuze's claim that institutions perform a social activity of creating and imposing models of conduct, the chapter analyses the various ways in which this modelling activity has been conceptualized in political theory. It identifies three main paradigms of the performativity of institutions available in the literature: the sovereign, the subversive, and properly instituting performativity. The chapter argues that the latter, wherein models are construed as previsions of the world, enables a better understanding of the current juridification of politics.

KEYWORDS: institution; Bourdieu; Butler; juridification; politics; performativity; sovereignty

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Institution [is] a positive *model* for action.
[...] Every institution imposes a series of *models* on our bodies, even in its involuntary structures, and offers our intelligence a sort of knowledge, a possibility of foresight as project. We come to the following conclusion: humans have no instincts, they build institutions.

Gilles Deleuze¹

THE INTERSECTION BETWEEN MODELS AND INSTITUTIONS

Institution and *model* are not synonymous terms, nor are they strictly interchangeable. However, within the framework of modern philosophical thought, they have been conceptualized as two intersecting semantic planes. They share a conceptual constellation that links them, on the one hand, to the idea of stability and, on the other hand, to that of representation. An institution, as Gilles Deleuze writes, is that which promotes a norm or a ‘model for action’ that must be followed

1 Gilles Deleuze, ‘Instincts and Institutions’, in Deleuze, *Desert Islands and Other Texts 1953–1974* (New York: Semiotext(e), 2004), pp. 19–21, my emphasis.

and repeated. On the other hand, a model is here understood as the standardization of a conduct and the codification of a social behaviour destined to guide action and to be imitated by those who inhabit the same social field. Models and institutions are, therefore, dispositives designed to anchor any of their objects to stable duration and constant repetition. In this regard, both have often been reduced to a static task: maintaining the established order.² At the same time, the repeatability of the object (an action, a conduct, a social behaviour) is ensured by the ability of both the model and the institution to represent it adequately, providing a proper definition and a clear identification. This involves selecting which elements will be included in the representation and which can be considered irrelevant. The model and the institution, in this sense, are placed in a normative position of dominance, both real and symbolic, over their object: they occupy the role of what modern political theory has defined as the ‘sovereign subject’, capable of exerting the force of its will through a recognized authority.

It is not surprising, then, that the crisis that in recent decades has affected both the authority of institutions (especially the state) and the legitimacy of the cultural, social, political, and also scientific models they promote, is interpreted by most critics as the decline of modern sovereignty.³ The institutional capacity to represent the political body and to ensure the stability of the social fabric appears inadequate today. This inadequacy is evident both at the level of critical theory, with the proliferation of deconstructionist tendencies, and at the level of common sense, where disaffection towards institutions and the questioning of their credibility are increasingly frequent.⁴ The cri-

2 In the modern political lexicon, the notion of institution resonates more with the etymology of the French term *établissement* — which refers to the idea of stability — rather than with the Latin term *institutio*, which more closely related to the practical sphere. *Institutio* was in fact a polysemantic term indicating established customs and habits, acts of naming, as well as consolidated rules and methods especially inherent to the sphere of education. See Alain Guéry, ‘Institution: Histoire d’une notion et de ses utilisations dans l’histoire avant les institutionnalismes’, *Cahiers d’économie politique*, 44.1 (2003), pp. 7–18 <<https://doi.org/10.3917/cep.044.0007>>; and Roberto Esposito, *Institution*, trans. by Zakiya Hanafi (Cambridge: Polity Press, 2022).

3 See *Sovereignty in Ruins: A Politics of Crisis*, ed. by George Edmondson and Klaus Mladek (Durham, NC: Duke University Press, 2017) <<https://doi.org/10.1215/9780822373391>>.

4 This sense of disaffection and disillusionment towards institutions and the worldviews they promote has been highlighted by Bruno Latour, among others. See Bruno Latour,

sis involves the entire conceptual framework through which the model and the institution have been conceived, leading most experts to conclude that if institutions and models can no longer effectively perform a stabilizing and representational function, then this is indicative of a complete loss of power and connection within the social body.

Rather than repositing this conventional thesis, this chapter suggests an alternative viewpoint. It argues, in particular, that while a crisis of the sovereign role of both models and institutions is certainly underway, it is symptomatic of an intensification of exchanges between each of these and the social sphere. Instead of considering models and institutions as ‘defective’⁵ mechanisms, due to their perceived weakness in comparison to an ideal of maximum efficiency, their vulnerability can be attributed to their nature as social processes. As such, models and institutions engage in constant exchanges with the milieu in which they operate, often experiencing ‘irritation’ from external social dynamics that redirect their ‘semantics.’⁶ Far from occupying the position of sovereign and autonomous subjects capable of acting successfully solely according to their position of authority, models and institutions must be able to ‘pass’ in the social fabric. This perspective necessarily requires a reconsideration of the conceptual framework intersecting these two notions: as Bruno Latour claims, institutions and models should be associated with the idea of subsistence rather than substance.⁷ Drawing on the distinction that Alfred North Whitehead identifies between these two concepts, Latour argues that what exists as substance is by definition ossified in the status quo and antagonistic to any transformative movement.⁸ On the contrary, what

‘Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern’, *Critical Inquiry*, 30.2 (2004), pp. 225–48 <<https://doi.org/10.1086/421123>>.

- 5 I take the expression from Jacques Lezra’s book, *Defective Institutions: A Protocol for the Republic* (New York: Fordham University Press, 2024) <<https://doi.org/10.5422/fordham/9781531506902.001.0001>>.
- 6 Gunther Teubner, ‘Self-subversive Justice: Contingency or Transcendence Formula of Law?’, *Modern Law Review*, 72 (2009), pp. 1–23 (p. 7) <<https://doi.org/10.1111/j.1468-2230.2009.00731.x>>.
- 7 Bruno Latour, ‘No Transformation without Institution’, online video recording, YouTube, 17 October 2015 <<https://www.youtube.com/watch?v=2RCLTxUaWV0>> [accessed 10 January 2024].
- 8 Alfred North Whitehead, *Process and Reality: An Essay in Cosmology* [1929] (New York: The Free Press, 1978).

subsists is what requires continuous maintenance and repair in order to exist. This work is not only a transformative process in itself but also implies the ability of that which subsists to attract actors and agents that will gather and collectively take care of it. If the composition and maintenance of these assemblages constitute the conditions of existence for both a model and an institution, they can be reconceived as agents of transformation and mobilization rather than mere guarantors of stability. Moreover, they exercise a power that is not only representative but also performative, as they produce effects of social composition which are vital for their subsistence.

In order to test this conceptual constellation, which replaces stability and representation with the transformation and performativity of models and institutions, I will analyse a phenomenon that is becoming increasingly relevant on a global scale and has so far been interpreted primarily as a symptom of an irreversible crisis of political institutions, to wit, of their loss of force of attraction on the socio-political fabric. This phenomenon is the juridification of politics, which can be described as a general turn to law (to legal norms, mechanisms, and arguments) as a privileged means to defend one's interests and articulate social and political demands.⁹ As I will discuss in the next paragraphs, despite the involvement of various social actors in this process, it has primarily been interpreted as a futile, if not dangerous, attempt to resurrect the sovereign subject through the figure of the judge. On the contrary, by analysing the juridification of gender politics, particularly through a case in the Supreme Court of Kenya, I will highlight how this phenomenon also involves bottom-up processes aimed at challen-

9 The term *juridification* was used for the first time by Otto Kirchheimer in order to define the gradual contractualization of class struggles during the Weimar Republic. The concept was later brought to the attention of contemporary philosophical and political debate through the works of Jürgen Habermas. See Jürgen Habermas, *The Theory of Communicative Action*, trans. by Thomas McCarthy, 2 vols (Boston: Beacon Press, 1984–87), II: *Lifeworld and System: A Critique of Functionalist Reason* [1981] (1987); and *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, ed. by Gunther Teubner (Berlin: De Gruyter, 1987) <<https://doi.org/10.1515/9783110921472>>. I discuss a more detailed history of the concept in Natascia Tosel, 'State, Law, and Institutions: A Study on Juridification', *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, 9.2 (2022), pp. 156–73 <<https://www.softpowerjournal.com/state-law-and-institutions-a-study-on-juridification/>> [accessed 6 August 2024].

ging and changing the legal categories through which we understand reality.¹⁰ Far from indicating a total rupture between institutions and social actors, these processes show the possibility of transformation and, therefore, social mobilization within models and institutions.

LAW AND PERFORMATIVITY: THE PHANTOM OF THE SOVEREIGN SUBJECT

The French sociologist Pierre Bourdieu, in his book *Language and Symbolic Power*, addresses the question of the performativity of the act — or, as he also refers to it, the rite — of institution. He claims, in particular, that instituting ‘is an act of social magic’,¹¹ precisely for its ability to ‘bring into existence that which it utters.’¹² Drawing on Émile Benveniste’s observation that ‘all the words relating to the law

10 Lars Blichner and Anders Molander, in their essay ‘Mapping Juridification’, distinguish five dimensions of the process of juridification: (a) legalization; (b) law’s expansion and differentiation; (c) increased conflict solving by reference to law; (d) increased judicial power; and (e) the emergence of a legal framework. While the majority of political and legal literature tends to emphasize dimension (d) — using the concept of ‘judicialization’ that I will discuss below — in the field of legal anthropology, there is a greater emphasis on dimension (c). See Lars C. Blichner and Anders Molander, ‘Mapping Juridification’, *European Law Journal*, 14.1 (2008), pp. 36–54 <<https://doi.org/10.1111/j.1468-0386.2007.00405.x>>. See also, for instance, John L. Comaroff and Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: University of Chicago Press, 1981); *Law and Globalization from Below: Towards a Cosmopolitan Legality*, ed. by Boaventura de Sousa Santos and César A. Rodríguez-Garavito (Cambridge: Cambridge University Press, 2005) <<https://doi.org/10.1017/CBO9780511494093>>; and *Law Against the State: Ethnographic Forays into Law’s Transformations*, ed. by Julia Eckert and others (Cambridge: Cambridge University Press, 2012) <<https://doi.org/10.1017/CBO9781139043786>>. My focus in this chapter, by contrast, will be on dimension (e), namely the growing use of law as a language and categorical apparatus through which social actors tend to define themselves and others, and to perceive themselves as legal subjects, attributing to law the meaning of a social practice. Needless to say, the construction of this legal framework, just like the other four dimensions of juridification, is not exempt from a fundamental ambivalence since the boundary between subjectivation and subjection is particularly fragile within the juridical semiotic field. In relation to current processes of juridification in Kenya, see Kipkoech Cheruiyot, ‘Judicial Activism, Judicial Restraint and Constitutional Interpretation in Kenya: The Post-2010 Era’, SSRN, published online 24 March 2022 <<https://doi.org/10.2139/ssrn.4032620>>; and Martin Mwenda, ‘The Context of Transformative Constitutionalism in Kenya’, SSRN, published online 30 June 2015 <<https://doi.org/10.2139/ssrn.2624928>>.

11 Pierre Bourdieu, *Language and Symbolic Power* [1982], trans. by Gino Raymond and Matthew Adamson (Cambridge: Polity Press, 1991), p. 119.

12 *Ibid.*, p. 42.

have an etymological root meaning *to say*,¹³ Bourdieu argues that ‘the limiting case of the performative utterance is the legal act which, when it is pronounced, [...] can replace action with speech, which will, as they say, have an effect.’¹⁴ Thus, ‘legal discourse’ is the paradigm of a ‘creative speech’ able to institute ‘in the sense of calling into being, by an enforceable saying, what one says, of making the future that one utters come into being.’¹⁵ Considering this effective performativity of legal discourse, it should not be surprising then that the law is increasingly used by social actors not only as a means to assert their political demands but also to create the conditions for their visions of the world to come into being. This is certainly true of political elites, who increasingly use legal language and juridical tools to implement their agendas. However, juridification does not only coincide with an increase in the power of legal and political elites. It is a broader phenomenon that also captures the tendency of citizens, ‘slum-dwellers, peasants, Indigenous Peoples, and women resisting patriarchal violence’, to demand ‘respect for their rights’ and to frame ‘their claims with reference to legal discourses.’¹⁶

13 Ibid., p. 173. See also Émile Benveniste, *Le Vocabulaire des institutions indo-européennes* (Paris: Les Éditions de Minuit, 1969).

14 Pierre Bourdieu, *Language and Symbolic Power*, p. 75. It is interesting to note that the ‘juridical’ character of every performative statement is affirmed also by Deleuze and Guattari, both in their text on Kafka and in the fourth chapter of *A Thousand Plateaus*, dedicated to the ‘Postulates of Linguistics’. Here, in particular, their primary reference remains Émile Benveniste, and they build upon his work through the interpretation provided by Oswald Ducrot. Drawing on Benveniste’s and Ducrot’s insights, Deleuze and Guattari argue that the illocutionary (constituting the implicit presuppositions of the performative) ‘is in turn explained by collective assemblages of enunciation, by *juridical acts* or equivalents of juridical acts, which, far from depending on subjectification proceedings or assignations of subjects in language, in fact determine their distribution’. Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* [1980], trans. by Brian Massumi (Minneapolis: University of Minnesota Press, 2005), p. 77, my emphasis.

15 Pierre Bourdieu, *Language and Symbolic Power*, pp. 42, 222.

16 Rachel Sieder, ‘The Juridification of Politics’, in *The Oxford Handbook of Law and Anthropology*, ed. by Marie-Claire Foblets and others (Oxford: Oxford University Press, 2020), pp. 701–15 (p. 701) <<https://doi.org/10.1093/oxfordhb/9780198840534.013.41>>. In this case, the performativity of the legal act extends beyond court litigations. The translation of political demands into legal questions (which also takes place outside of legal institutions, in practices of political and social mobilization) has effects on the everyday perception and understanding of our social relations.

The assessment of the impact that this process of the juridification of politics may have in the long run largely depends on how the ‘social magic’ produced by legal discourse is interpreted. It is indeed possible to explain the instituting performativity of the law in two very different ways that also lead to two different judgements on the potentials and limits of the phenomenon of juridification. These two different ways of conceiving the force of legal discourse can both be found in Bourdieu’s work, albeit in different texts. This internal tension in Bourdieusian thought does not undermine the importance of his sociological theory; on the contrary, it paves the way for new possible actualizations. I will analyse Bourdieu’s idea of institutional performativity as an act of authority, of which — drawing on Judith Butler’s critique — I will highlight the limits. The following section considers a second and less-discussed conception of performative power found in Bourdieu’s reflections on the sociology of the juridical field, in which the law is assigned the semiotic task of making and unmaking the social.¹⁷

In order to highlight the first possible understanding of legal performativity, it is worth turning to the essay titled ‘Authorized Language’ (collected in *Language and Symbolic Power*), where Bourdieu attributes the ‘magic’ of the act of institution to the authoritative position of the subject who speaks. He claims, in particular, that:

Most of the conditions that have to be fulfilled in order for a performative utterance to succeed come down to the question of the appropriateness of the speaker — or, better still, his social function — and of the discourse he utters. A performative utterance is destined to fail each time that it is not pronounced by a person who has the ‘power’ to pronounce it, [...] in short, each time that the speaker does not have the authority to emit the words that he utters.¹⁸

In this passage, the act of institution is reduced to an act of authority: its conditions of felicity depend entirely on the social function of the

17 I draw this second model of performativity from Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, trans. by Richard Terdiman, *The Hastings Law Journal*, 38 (1987), pp. 805–53 <https://repository.uclawsf.edu/hastings_law_journal/vol38/iss5/3> [accessed 6 August 2024]; and the chapter ‘Description and Prescription: *The Conditions of Possibility and the Limits of Political Effectiveness*’, in Bourdieu, *Language and Symbolic Power*, pp. 127–36.

18 Bourdieu, *Language and Symbolic Power*, p. 111.

subject of the speech act. According to this perspective, the law is considered emblematic of performative power due to the force of authority invested in legal actors. Needless to say, the most striking example is that of the judge — a case already deemed highly paradigmatic by John Austin's reflections on the illocutionary force of words.¹⁹ In Bourdieusian terms, 'the judge need say no more than "I find you guilty" because there is a set of agents and institutions which guarantee that the sentence will be executed.'²⁰ A legal act 'when it is pronounced, as it should be, by someone who has the right to do so',²¹ will produce as a sure effect the action that has been uttered. Therefore, the force of law is nothing but the binding power exerted by an authoritative subject, an individual who, by virtue of a delegation, is constituted as 'the legitimate representative.'²² This agent is 'capable of acting on the social world through words',²³ since he operates 'as a substitute for the group which gives him a mandate.'²⁴ Thus, concludes Bourdieu, 'the real source of the magic of performative utterances lies in the mystery of ministry', to wit, in the institution or nomination of an agent who becomes 'a medium between the group and the social world.'²⁵

In line with this understanding of legal performativity as the power of a subject occupying a position of authority in the social field, the juridification currently underway has often been interpreted as a process of 'judicialization' — a notion that focuses entirely on the figure of judges and courts, underlining the authoritative force of their speech acts. Scholars who support this interpretation view the expansion of law as symptomatic of an enhancement of judicial authority.²⁶ Both domestic and international courts are accused of usurping pol-

19 John L. Austin, *How to Do Things with Words* [1962] (Oxford: Oxford University Press, 1976) <<https://doi.org/10.1093/acprof:oso/9780198245537.001.0001>>.

20 Bourdieu, *Language and Symbolic Power*, p. 75.

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid., p. 206.

25 Ibid., p. 75.

26 See *The Global Expansion of Judicial Power*, ed. by C. Neal Tate and Torbjorn Vallinder (New York: New York University Press, 1995); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002); and Ran Hirschl, 'The Judicialization of Politics', in *The Oxford Handbook of Law and Politics*, ed. by Gregory A. Caldeira and others (Oxford: Oxford University Press, 2008), pp. 119–41 <<https://doi.org/10.1093/oxfordhb/9780199208425.003.0008>>.

itical power, since — as the president of the Constitutional Court of Belgium, Marc Bossuyt, affirms, referring to the European Court of Justice and the European Court for Human Rights — they are creating the threat of a ‘government by judges.’²⁷ In a nutshell, ‘the meaning of juridification’ refers to this extent ‘to increased judicial power’, which exploits ‘the indeterminacy concerning the application of rules to specific cases’ in order to decrease the transparency of law and to enlarge the decision-making power of professional legal actors.²⁸ This process therefore appears to alter the relation between the political and legal realms significantly. More specifically, it is categorized as a process of depoliticization that contributes to the crisis of political institutions and attempts to replace political with legal decision-making.

However, a possible criticism of this understanding of the juridification of politics lies precisely in its flattening of legal performativity on the figure of judges or professional elites. Here, performativity is once again reduced to a mechanism of representation in such a manner that, as Judith Butler argues in *Excitable Speech*, the phantom of the sovereign subject, which was linked to the political vocabulary of the modern age rather than the contemporary period, is brought back in through the window. In particular, the fantasy of its return ‘takes place in language, in the figure of the performative’,²⁹ and more precisely in that of the speaking subject. As Butler states, Bourdieu describes the life of the social solely ‘in spatialized terms’:³⁰

This becomes a problem for Bourdieu’s account of performative speech acts because he tends to assume that the subject who utters the performative is positioned on a map of social power in a fairly fixed way, and that this performative will or will not work depending on whether the subject who performs the utterance is already authorized to make it work by the position of social power it occupies.³¹

27 Marc Bossuyt, ‘Bossuyt waarschuwt voor “regering door rechters”’, *Het Belang van Limburg*, 17 February 2011 <<https://www.hbvl.be/cnt/aid1019380>> [accessed 10 January 2024].

28 Blichner and Molander, ‘Mapping Juridification’, p. 45.

29 Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997), p. 78.

30 Judith Butler, ‘Performativity’s Social Magic’, in *Bourdieu: A Critical Reader*, ed. by Richard Shusterman (Oxford: Blackwell, 1999), pp. 113–28 (p. 125).

31 *Ibid.*, p. 122.

What Butler emphasizes is that this way of understanding performative power is only suitable for top-down processes, where the success of a speech act depends on the fact that the speaker is already delegated to perform it. This not only drastically reduces the agency of those who are not already authorized to speak (making any resistance attempts ineffective) but also forgets a fundamental dimension of the act of institution, namely its temporality. The social performative — as Bourdieu himself affirmed — is ‘a social ritual’; as such, Butler claims, it needs to be constantly repeated, or, in Derridean terms, reiterated.³² According to this perspective, performativity differs from the mere mechanism of representation that characterizes sovereign power precisely because there is a gap, a temporal deferral, between the enunciation of the norm and its execution.³³

Performativity cannot be understood outside of a process of iterability, a regularized and constrained repetition of norms. And this repetition is not performed by a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject. This iterability implies that ‘performance’ is not a singular ‘act’ or event, but a ritualized production.³⁴

Not surprisingly, Butler uses the example of the judge precisely in order to demonstrate that even in this case, the performativity of the act cannot be ascribed as a direct and immediate causal effect of a sovereign will. ‘As one who efficaciously speaks in the name of the law, the judge does not originate the law or its authority; rather, he “cites” the law, consults and reinvokes the law, and, in that reinvocation, reconstitutes the law.’³⁵ Thus, the judge ‘is not himself the authority who invests the law with its power to bind’; on the contrary, he is ‘installed in the midst of a signifying chain, receiving and reciting the law’.³⁶

32 Jacques Derrida, ‘Signature Événement Contexte’, in Derrida, *Marges de la Philosophie* (Paris: Les Éditions de Minuit, 1972), pp. 365–93.

33 For an analysis of the relationship between normativity and temporality that draws on Butler’s theory, see Ritu Birla, ‘Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power’, *Columbia Journal of Gender and Law*, 21.2 (2011) <<https://doi.org/10.7916/cjgl.v21i2.2636>>. See also Martha Merrill Umphrey, ‘Law in Drag: Trials and Legal Performativity’, *Columbia Journal of Gender and Law*, 21.2 (2011) <<https://doi.org/10.7916/cjgl.v21i2.2638>>.

34 Judith Butler, *Bodies that Matter: On the Discursive Limits of “Sex”* (New York: Routledge, 1993), p. 95.

35 *Ibid.*, p. 107.

36 *Ibid.*

What interests Butler in this temporality of performative action is that it makes it impossible to ascribe its success solely to the ‘the fabrication of the performer’s “will” or “choice”’.³⁷ The felicitous conditions of a rite of institution can never be fully determined in advance but only from the effects of the act itself, namely from its capacity to establish a ‘model for action’ that will be (re)cognized as such and that will gather around itself social entities that adhere to it. Since there is no causal or linear relationship between authority and performative power, the act of institution opens up to the possibility of its infelicity,³⁸ that is, the possibility that performative utterances (and the models they promote) can ‘go wrong, be misapplied or misinvoked’,³⁹ taking a non-ordinary meaning, or being used in a context where they do not belong. In this way, Butler sets the stage for rethinking the performativity of law outside the paradigm of authority. This does not mean denying the fact that legal actors also exercise and reiterate their authority through their speech acts. However, Butler breaks with the conception of performativity linked to the instantaneity between an order or a decision and its execution. As they write in *Bodies that Matter*, the legal ‘discourse’, in which the judge cites the law, ‘becomes a site for the reconstitution and resignification of the law’.⁴⁰ The possibility of a subversive resignification is thus part of the normative functioning itself.

Despite the importance of this emphasis on the ritual temporality of law, Butler’s conception of the performative cannot be used any further for our purposes, since it presents two internal limits that make its application to legal discourse difficult. The first consists in its identification of the conditions of possibility for resignification, that is, the rupture between the speech act and its social context, mostly in the expropriation of the authorization to speak by those who do not have it.⁴¹ The subversive potential of legal discourse is indeed only appropriable

37 Ibid., p. 234.

38 On the relationship between normativity and infelicity (in the Austinian sense), see Sandra Laugier, ‘Performativité, normativité et droit’, *Archives de Philosophie*, 64.4 (2004), pp. 607–27 <<https://doi.org/10.3917/aphi.674.0607>>.

39 Butler, *Excitable Speech*, p. 151.

40 Butler, *Bodies that Matter*, p. 107.

41 See, for instance, Butler’s analysis of Rosa Parks’s subversive gesture of sitting at the front of the bus (*Excitable Speech*, p. 147). Butler insists that this insurrectionary process of overthrowing the established codes of legitimacy largely depended on the

by actors who are not authorized to speak through the law; on the contrary, it seems a priori foreclosed for those who are authorized to use it, such as judges. Here, Butler runs the risk of echoing the mistake made by Bourdieu, explaining performative power only through the social position (this time of illegitimacy rather than authority) occupied by the speaker.⁴² Secondly, drawing on Austin's distinction between illocutionary and perlocutionary, Butler inscribes the act of resignification in the latter, arguing that 'whereas illocutionary performatives produce ontological effects (bringing something into "being"), perlocutionary performatives alter an ongoing situation.'⁴³ On the contrary, as we saw at the beginning of this paragraph, the instituting force of law, to which more and more social actors appeal, consists precisely in what Bourdieu calls an 'ontological glorification', to wit, its capacity to call into being what is named.⁴⁴ Legal performativity, therefore, must be imagined beyond the simple resignification and recontextualization of a name; it is, rather, a power of naming, which — as I will explain in the next section — cannot be separated from a power of form.

FROM NAME TO NOMOS: THE JURIDIFICATION OF 'GAY' AND 'LESBIAN' IN A CASE OF THE SUPREME COURT OF KENYA

In 2013, Kenyan activist and law teacher Eric Gitari requested permission from the NGOs Co-ordination Board to register a Non-Governmental Organization (NGO) with the aim of advocating for 'the rights of Lesbian, Gay, Bisexual, Transgender, Queer or Question-

fact that Parks 'had no prior right to do so', that 'she had no prior authorization', and that this is paradoxically the reason why 'she endowed a certain authority on the act'.

42 On this point, see Steph Lawler, 'Rules of Engagement: Habitus, Power and Resistance', in *Feminism after Bourdieu*, ed. by Lisa Adkins and Beverley Skeggs (Oxford: Blackwell, 2004), pp. 110–28. On the disjunction between naming and social position and on the possibility of transformation that lies not in the intentional actions of subjects, but in their ability to operate within the fractures of the relationship between language and society, see Iracema Dulle, 'Naming Others: Translation and Subject Constitution in the Central Highlands of Angola (1926–1961)', *Comparative Studies in Society and History*, 64.2 (2022), pp. 363–93 <<https://doi.org/10.1017/S0010417522000056>>.

43 Judith Butler, 'Performative Agency', *Journal of Cultural Economy*, 3.2 (2010), pp. 148–61 (p. 151) <<https://doi.org/10.1080/17530350.2010.494117>>. As is well known, Austin defines *illocutionary* as the act performed in saying something, and *perlocutionary* as the act performed by or as a result of saying something. See Austin, *How to Do Things with Words*.

44 Bourdieu, 'The Force of Law', p. 846.

ing (LGBTIQ) persons in Kenya.’ He proposed five different names for the NGO, all including the terms *gay* and *lesbian*.⁴⁵ In response, the NGOs Co-ordination Board sent a letter signed by the executive director, asserting that none of the proposed names could be approved due to their violation of Sections 162, 163, and 165 of the Kenyan Penal Code, which criminalize ‘gay and lesbian liaisons’. Gitari filed a High Court petition, alleging that the refusal to register the intended NGO contravened several articles of the Kenyan Constitution, including Article 36, which guarantees the right to freedom of association. The High Court concurred, finding that the actions of the NGOs Co-ordination Board constituted a violation of Article 36.⁴⁶ The article explicitly specifies that the right to freedom of association must be ensured for ‘every person’, without any reference to their sexual orientation. Dissatisfied with the judgement of the High Court, the NGOs Co-ordination Board lodged an appeal first at the Court of Appeal in Nairobi and then at the Supreme Court of Kenya, stating that the judges erred in law ‘by failing to uphold the provisions of the Penal Code that outlaw homosexual behavior, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes’, and ‘by effectively reading into the Constitution’s non-discrimination clause the ground of sexual orientation’. Both the courts dismissed the appeal,⁴⁷ affirming the judgement of the High Court and confirming that all the people ‘in this country who answer to any of the descriptions in the acronym LBGTIQ, [...] just like everyone else, have a right to freedom of association which includes the right to form an association of any kind.’⁴⁸

45 The proposed names were: ‘Gay and Lesbian Human Rights Council’; ‘Gay and Lesbian Human Rights Observancy’; ‘Gay and Lesbian Human Rights Organization’; ‘Gay and Lesbian Human Rights Commission’; ‘Gay and Lesbian Human Rights Council’; and ‘Gay and Lesbian Human Rights Collective’.

46 *Eric Gitari v. NGOs Co-ordination Board & 4 Others*, Petition No. 440 of 2013, Kenya High Court, Judgement of 24 April 2015.

47 *NGOs Co-ordination Board v. E. G. & 5 Others*, Civil Appeal No. 145 of 2015, Nairobi Court of Appeal, Judgement of 22 March 2019.

48 *Eric Gitari v. NGOs Co-ordination Board & 3 Others*, Civil Appeal No. 16 of 2019, Kenya Supreme Court, Judgement of 24 February 2023, Judgement of the Court, § 16, p. 8. On the history of the case and its relevance for Kenyan ‘Transformative Constitutionalism’, see Joshua Malidzo Nyawa, ‘The Kenyan Constitution 2010, Gay

This case is of particular relevance not only because it constitutes a significant legal change for the recognition of LGBTQIA+ persons in Kenya, paving the way towards the decriminalization of sexual orientation,⁴⁹ but also because it allows us to observe the social performativity of legal language in the making. As the judge, William Ouko, pointed out in his dissenting opinion, ‘the central issue in this appeal is about the reservation of a *name* and whether the appellant’s decision in rejecting the names proposed was lawful, reasonable, proportionate and procedurally fair.’⁵⁰ On the one hand, the executive director of the NGOs Co-ordination Board experienced ‘discomfort with the use of the terms “gay” and “lesbian”’, while he was ‘ready and prepared to reserve any of the names so long as the two words were omitted from the proposed names.’⁵¹ On the other hand, for Gitari ‘the words “gay” and “lesbian” were the unique marks of identification of the proposed organization, without which its objectives, characteristics, affiliations, and social roles would be completely lost.’⁵² At this point, the judge embarks on a socio-ontological reflection, problematizing the force of a name:

What’s in a name? asked William Shakespeare through one of his characters in *Romeo and Juliet*, to signify the fact that a name may be a convenient concept for identification but the essence behind it is the distinctive and fundamental nature of identity. An organization will be identified by its unique name.⁵³

Despite the clear risk of essentialism in the judge’s words, they capture a fundamental point of juridical performativity: a name, once trans-

Sex (or Gay Rights?), and the Eric Gitari Ruling of 2019’, SSRN, published online 16 June 2019 <<https://doi.org/10.2139/ssrn.3396306>>.

49 On this point, see *Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts*, ed. by Godfrey Dalitso Kangaude (Pretoria: Pretoria University Law Press, 2017). For an analysis of how sexuality has been problematized in judicial decisions, see *Sexuality in the Legal Arena*, ed. by Carl Stychin and Didi Herman (London: The Athlone Press, 2000). For an inquiry that directly takes into account the connection between juridification, family law, and gender politics, see Mariano Croce, *The Juridification of Politics* (London: Routledge, 2018).

50 *Eric Gitari v. NGOs Co-ordination Board & 3 others*, Civil Appeal No. 16 of 2019, Kenya Supreme Court, Judgement of 24 February 2023, Dissenting opinion of W. Ouko, § 147, p. 49.

51 *Ibid.*, § 133, p. 45.

52 *Ibid.*, § 134, p. 46.

53 *Ibid.*, § 134, p. 46.

lated into the language of the law, changes the ontological status of what is named. Thus, the entire complexity of the case revolved around this power of naming that here — as Justice Ouko states — concerned two terms, *gay* and *lesbian*, ‘no doubt widely used today’ but that ‘are not defined in our laws.’⁵⁴ At this stage, the true nature of the legal problem becomes clear: the case is expressed in terms of ordinary language that does not yet have a correspondence in legal language. Hence, what is at stake goes beyond the simple application of rules; instead, it is an exercise of legal imagination.

As Bourdieu argues in ‘The Force of Law’ (in a way that is not necessarily fully consistent with the theorization of the ‘mystery of ministry’ that I have discussed earlier, since here the sovereigntist account of performativity is abandoned), legal acts, including the judgement of a court, belong to ‘the class of *acts of naming* or of *instituting*.’⁵⁵ These speech acts are certainly formulated by authorized agents, but the reason why they are ‘magical acts’ is that they perform ‘the entire practical activity of “worldmaking” (marriages, divorces, substitutions, associations, dissolutions) which constitutes social units’⁵⁶.

Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another [...]. The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world.⁵⁷

Contrary to what one might think, Bourdieu’s position here aligns more with a realistic than a radical constructivism because this world-making activity is not at all disconnected or detached from the material processes occurring in the social fabric. Indeed, the most specific effect of the legal act of naming, to wit, ‘the *vis formae*, the power of form’, or ‘the shaping of practices through juridical formalization’, can ‘succeed only to the extent that legal organization gives explicit form

54 Ibid., § 138, p. 50.

55 Bourdieu, ‘The Force of Law’, p. 838, emphasis in the original.

56 Ibid., p. 838.

57 Ibid., pp. 838–39.

to a tendency already immanent within those practices.⁵⁸ In order to understand this point, it is worth turning to Bourdieu's conception of the life of the social world. In his perspective, this latter is the stage for a constant struggle 'in which differing, indeed antagonistic world-views confront each other.'⁵⁹ What is at stake in this struggle is the monopoly on what Bourdieu calls the *nomos*: 'the Greek word for "law" or "custom"' that 'derives from *nemo*, meaning to separate, divide, distribute.'⁶⁰ Every vision of the world in fact includes a principle of division, that is, a social difference that, once named and instituted, becomes the legitimate criterion for the distribution of (real and symbolic) power. The legal work of worldmaking therefore concerns the 'worldviews' circulating and struggling within the social field; in particular, the translation of ordinary language into legal language can be useful 'to transform the world by transforming the words for naming it.'⁶¹ The act of naming here implies 'producing new categories of perception and judgment, and [...] dictating a new vision of social divisions and distributions',⁶² to wit, challenging and changing the *nomos*, or the dominant principle of classification.

The success of this transformation of the *nomos* is not attributed in this case to the authoritative position of the subject who performs the act of naming. Instead, there is a specific force that belongs to the vision (and division) of the world that the name encloses. The 'social magic' here is 'the *sociosymbolic alchemy* whereby a mental construct, existing abstractly in the minds of individual persons, is turned into a concrete social reality.'⁶³ This does not happen as the consequence of the institution of a ministry; it is, rather, related to a process of group-making that emerges from the 'struggles over the monopoly of the power to make people see and believe, to get them to know and recognize, to impose the legitimate definition of the divisions of the

58 Ibid., p. 848.

59 Ibid., p. 837.

60 Ibid., p. 837, note 55.

61 Ibid., p. 839, my emphasis.

62 Ibid., p. 839.

63 Loïc Wacquant, 'Symbolic Power and Group-Making: On Pierre Bourdieu's Reframing of Class', *Journal of Classical Sociology*, 13.2 (2013), pp. 1–18 (p. 2), emphasis in the original <<https://doi.org/10.1177/1468795X12468737>>.

social world and, thereby, to *make and unmake groups*.⁶⁴ When legal discourse contributes to the process of group-making (which always implies the imposition of a *nomos*), law is used as a means to perform

the *labour of enunciation* which is necessary in order to [...] name the unnamed and to give the beginnings of objectification to pre-verbal and pre-reflexive dispositions and ineffable and unobservable experiences, through words which by their nature make them common and communicable, therefore meaningful and socially sanctioned.⁶⁵

As mentioned earlier, this work of naming and creating social reality cannot succeed simply by being performed by an authoritative figure. What determines its success is rather the ability of the enunciated vision to attract actors and groups: in other words, the name is what 'enables agents to discover within themselves common properties that lie beyond the diversity of particular situations which isolate, divide and demobilize'.⁶⁶ What is in common has to be named in order to become intelligible, cognizable, and recognizable. This means that, on the one hand, this labour of enunciation cannot be reduced to a mere description or representation of reality because it names what still remains unnamed in the dominant vision and division of the world. On the other hand, what is enunciated cannot be completely detached from reality, as, in that case, it would not be recognizable by social actors as a common element around which to gather. Names, therefore, become performative when they succeed in conveying models, 'previsions, anticipatory descriptions, [...] visions [that] only call forth what they proclaim — whether new practices, new mores or especially new social groupings — because they announce what is in the process of developing'.⁶⁷

Keeping that in mind, it is now possible to return to the case of the Supreme Court of Kenya discussed at the beginning of this section and to demonstrate how Bourdieu's understanding of the instituting power of naming can lead to an alternative reading of the process of the juridification of politics. The case in question, in fact, lends itself to multiple

64 Bourdieu, *Language and Symbolic Power*, p. 221, emphasis in the original.

65 Ibid., p. 129, emphasis in the original.

66 Ibid., p. 130.

67 Bourdieu, 'The Force of Law', p. 839.

possible readings. Firstly, supporters of judicialization would understand it as emblematic of the growing political and decision-making power of the courts. In this view, the recognition of rights for the LGBTQIA+ community in Kenya would be entirely ascribed to the will and (in this case, progressive) political agenda of the judges. To this extent, as for instance Wendy Brown suggests, the use of a legal framework for recognition can be problematized due to its paradoxicality, insofar as marginalized subjects find legal protection in the State's rights that had previously sustained the invisibility of their subordination.⁶⁸ However, following Butler's politics of resignification — which constitutes the theoretical basis for interpretations of law 'from below' primarily coming from legal anthropology — it would be possible to reverse this perspective on the case and highlight the predominant role of LGBTQIA+ activists such as Eric Gitari in the process. Here, the creative and subversive potential of legal discourse would emerge more prominently. Yet, this creative and subversive potential is mainly conceptualized in terms of a resignification of the name by which a group is traditionally stigmatized or excluded from power (in this case, *gay* and *lesbian*). Here, one can argue that such 'renaming' actually risks reinforcing the existing stigmatized representations of a group, as renaming does not itself modify the dominant principle of classification (*nomos*). In other words, resignifying a group's identifying name might exert a weak performative force, since it may not problematize and undo the reasons why a 'stigmatized' or 'discriminated' group is perceived as such.

On the contrary, what this chapter suggests, drawing on Bourdieu's analysis of the force of law, is a third, alternative reading of the case and, by extension, of juridification. The juridical speech act exerts a performative effect because it takes on the socio-semiotic work of the division, categorization, and composition of groups. This work is exactly what allows the social to be made and undone, potentially offering alternative ways of composing and grouping and thus becoming usable for a politics of mobilization rather than resignification. The legal institution previews and captures the new trends circulating in

68 Wendy Brown, 'Suffering Rights as Paradoxes', *Constellations*, 7.2 (2000), pp. 230–41 <<https://doi.org/10.1111/1467-8675.00183>>.

society that still lack a legal form. Specifically, in the case analysed here, Gitari's group appeals to the law so that their practices of assembly, in which homosexual conducts are openly liveable, cognizable, and recognizable, can be codified and translated in the juridical framework. Indeed, the case does not concern the recognition of sexual or gender identity, but rather the right of association. The names *gay* and *lesbian* serve here to institute new social compositions; to this extent, they are neither taken as universal signifiers nor merely semantically recontextualized, but, rather, they are used so that new forms of collective life 'come into being'.

CONCLUSIONS: MODELS, OR PREVISIONS OF THE WORLD

The exchanges between legal discourse and social processes, which through the phenomenon of juridification are increasingly intensifying, can only produce a continuous transformation: a never-ending making and remaking. Law transforms the understanding of the world for those who are named by its words, while, on the other hand, this process of 'jurisgenesis' — a term coined by Robert Cover — is a 'creative process' always 'collective or social'.⁶⁹ This by no means suggests that every legal change can be considered 'progressive'; on the contrary, it is about highlighting that any performative effect from the law cannot be explained solely as the product of an authoritative decision taken by a sovereign subject that can arbitrarily recognize or discriminate, condemn or absolve. Behind the law, more than a single act of authority, there is a continuous '*battle for the existence and legibility of different legal orders*',⁷⁰ of alternative models and *nomoi* — 'names' and 'nomos' underpinning different ontologies and unconventional worldviews.

In conclusion, I have discussed and analysed in this chapter the different ways in which the current and widely recognized crisis of institutions can be interpreted, depending on the conceptual framework through which both the institutions and the 'models of action'

69 Robert Cover, 'Nomos and Narrative', in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. by Michael Ryan and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), pp. 95–172 (p. 103).

70 Sieder, 'The Juridification of Politics', p. 705; emphasis in the original.

they convey in the social fabric are understood. On the one hand, the conceptual apparatus of modern political philosophy has consistently linked the performative success of acts of institution to a static and mimetic repetition of models, emphasizing a tendency to shape the social by representing it. On the other hand, analysis of the current juridification of politics, where it avoids reducing the phenomenon to a mere increase in judicial power, opens the way to rethinking acts of institution as the results of a socio-semantic battle over how to name and form reality. From this perspective, an institution — as Bourdieu claims — ‘exists, so to speak, twice, in things and in minds’,⁷¹ because it must convey a (pre)vision of the world whose performative success translates into the creation of a social alchemy. Modelling, then, rather than an internal semantic variation within the concept of representation, appears closer to the grammar of social processes and mobilizations, to that continuous making and unmaking through which a worldview is ‘called into being’ and subsists, until it is inevitably broken by the formation of new ‘semiotic’⁷² and social compositions.

71 Pierre Bourdieu and Loïc Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992), p. 127.

72 I am referring here to the notion of ‘semiotic groups’, initially introduced by the semiologist Algirdas Julius Greimas and further elucidated by Bernard Jackson. Semiotic groups are characterized as assemblies of people utilizing the same system of signification, thereby ensuring that their ‘speech behaviour is mutually intelligible’. Bernard Jackson, *Making Sense in Law* (Liverpool: Deborah Charles, 1995), p. 96.

Nataschia's essay, 'Modelling Institutions, Instituting Models: The Juridification of Politics and the Performative Power of Naming', offers a timely, imaginative, and crucial response to the ongoing disinclination towards both models and institutions that has accompanied the broader crisis of legitimacy of the sovereign subject, who, in Nataschia's words, is 'capable of exerting the force of its will through a recognized authority'. Indeed, if both models and institutions are approached with growing suspicion, it is because of their association with domination and control over their object. In this way, models and institutions could be seen as the embodiment of the sovereign subject whose autonomy and socially recognized authority enable them to model the future that they will and pronounce on behalf of others. Due to this association between models and the sovereign, modelling could indeed be seen as synonymous with mastery and control, exercised through prohibition or authorization of the kind that includes and precludes certain lived experiences and visions of the world.

Attempting to wrench institutions and models from the sovereign phantom, Nataschia turns to the phenomenon of juridification, through which we are invited to instead approach them as heterogeneous, open-ended, bottom-up social processes that — by continuously mobilizing the milieus within which they operate — model reality by transmitting previsions or anticipatory worldviews. Such a conceptualization and practice of modelling blurs the very distinction between subject and object. Indeed, in Nataschia's essay, modelling — displaced from the position of the sovereign individual — becomes a collective process and exercise of imagination that names something which does not (yet) exist in socially sanctioned reality and that, in this way, makes and unmakes social compositions. In naming what is not authorized and not yet present, modelling becomes linked to a (speech) act, which brings to mind perhaps a slightly unusual association with a psychoanalytic reading of an act: as a transmission of desire that involves risks because its effects in the world are unforeseeable, and because it is not interested in adapting to the status quo. In mobilizing the name beyond the sovereign pronouncement or commandment, modelling

ultimately involves an ongoing, shared task of testing the elasticity and capaciousness of language, and the latter's openness to repair. And because a model is inseparable from the social fabrics and realities that it makes and unmakes, it is itself also continuously made and broken.

In closing, I think that this turn to a new thinking of the model — beyond the sovereign — ultimately signals, or perhaps necessitates, a different model of subjectivity. Indeed, Natascia's essay raises the broader question of how the discussion of the model itself — especially the social, cultural, legal, or aesthetic model — is fundamentally intertwined with how we define its subject. This is especially important given the current crisis of legitimacy of models and institutions, which is happening in parallel with a growing urge to conceive new ways of being and inhabiting the social link. This crisis not only manifests the crisis of credibility of the sovereign subject, but is also linked more broadly to the disintegration of the very model of the sovereign, autonomous, self-governing individual, especially at the current moment, when cultural, social, political, and scientific discourses and formations seem less and less capable of supporting the fantasy of the solidity of the subject.

Nataschia Tosel, 'Modelling Institutions, Instituting Models: The Juridification of Politics and the Performative Power of Naming', in *Breaking and Making Models*, ed. by Christoph F. E. Holzhey, Marietta Kesting, and Claudia Peppel, Cultural Inquiry, 33 (Berlin: ICI Berlin Press, 2025), pp. 241–62 <https://doi.org/10.37050/ci-33_10>

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