**Quod non est in actis non est in mundo.**

*Legal words, unspeakability and the same-sex marriage issue*

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(Author's own version)

*Abstract*

This article centres on the legal recognition of same-sex marriage with a view to exploring the issue of unspeakability, that is, the condition whereby some questions cannot be articulated because of a lack of words. More specifically, the article will explore what happens to those social practices that are not given legal speakability and thereby legal recognition/protection. To this end, I first focus on how words are produced in the sphere of everyday life and their dependence on the existence of a widespread normality (sec. 1). I then discuss how the law sees to the preservation and the reproduction of normality by providing a set of categories which are made available to law-abiders to settle disputes when they arise. In doing so, I elucidate the twofold role played by law as both a selective and a creative device (sec. 2). To cast some light on the particular way law operates, I discuss an important decision by the Italian Constitutional Court in 2010, which provides a telling example of how legal officials are able to seal off the set of legal categories and to leave some issues in the sphere of the unspeakable (sec. 3). I then unearth a paradox: while unspeakability reveals a condition of powerlessness, the acquisition of speakability could bring about even harsher exclusionary effects (sec. 4). I conclude by arguing that the entry into the sphere of official law is always a Janus-faced achievement, but can play as an effective instrument of critique.

The question of whether or not the recognition of same-sex marriage represents a significant step forward for lesbians, gays, and bisexuals is today a subject of controversy. At least since the 1990s a voluminous literature has carefully scrutinised the advantages and the drawbacks of what can be described as a momentous transition in the notions of family and marriage in a growing number of countries around the globe. Advocates of same-sex marriage celebrate the emancipatory force of political measures and legal decisions that defy heterosexuals' monopoly on a key institution of social life and provide evidence that many gay couples do benefit from the legal, social and political rights that marriage grants (Snyder 2006; Badgett 2009). On the other hand, critics of the "domesticating" effects of lesbians, gays, and bisexuals seeking access to marriage excoriate the remarkable change in attitudes involved in this epochal turn: While previous outward-looking struggles to defy a multiplicity of oppressions (not exclusively related to sexual behaviour) could intersect with the struggles of other excluded subjectivities and groups, today's inward-looking battle for marriage makes homosexuals a self-interested community whose members pursue specific goals and aspire to be accepted within mainstream society (Richardson 2005; Roseneil et al. 2013).

This article plunges into this debate in a particular way: I will advance a critical-theoretical reading of the way in which legal words confer *speakability* on the issues that are brought into the legal field and, in doing so, transform them and relegate others to the sphere of the *unspeakable*. I will make the claim that since words confer meaningfulness and intelligibility on something, they profoundly affect the nature of the latter and simultaneously confine something else in a condition of wordlessness and worthlessness. By building on a semiotic view of law, I will analyse how this process takes place within the legal field and affects the recognition of same-sex sexualities and their relationships.

To this end, I will initially concentrate on the way words in general (seen as meaning-conferring and intelligibility-granting tools) are produced and will claim that their existence is conditional upon sameness and normality (sec. 1). I will then discuss how the law sees to the preservation, reproduction, and revision of sameness and normality by providing a set of categories which are made available to

law-abiders for them to settle disputes when they arise. In this framework, I will look at the way *legal* words allow a "process of conversion" from the language of everyday life to the special language of the law (sec. 2). In that respect, I will examine a recent decision of the Italian Constitutional Court and will shed some light on the way legal officials deal with the borderline between speakability and unspeakability within the legal realm (sec. 3). This will lead me to unearth a paradox: While unspeakability betrays a status of powerlessness whereby people lack words to articulate their condition of abjection and marginalisation, the acquisition of speakability may entrap them in an even harsher wretched condition (sec. 4). I will conclude by arguing that the entry into the sphere of official law is always a Janus-faced achievement, but can play as an effective instrument of critique insofar as people's claims are not inspired by the jargon of sameness.

*Words and rules*

Words have a mighty power: They lump together a given set of contents and subsume them under a label, which is meant to be used in the same way by a multitude of people in different occurrences. Nevertheless, by no means is the connection between contents and the label a mere activity of mirroring. Words are not trapped in a referential relation of a signifier to a signified; nor are words meant to capture and reflect states of things. While debunking the idea of a language based on naming, denotation and ostention, Ludwig Wittgenstein (1953/2009) shows that words stem from the sedimentation of uses, that is to say, the reiterated way people use a given word within a given practice, where the former and the latter interact in a relation of mutual determination. On this reading, a word aspires to give an account of a series of actions that are performed in relation to a given object in a given time and place. A word aims to grapple with these actions and to fix them through a material sign. The latter assures that what one is doing in the here and the now is just *the same* her/his co-agents are doing in the here and the now, and is *the same* as what they were doing yesterday and will

do tomorrow.[1] This is why, Wittgenstein insists, words should be regarded as instances of rule-following: a word is something that has to do with human activities and contributes to shaping them. The word signposts the place of an object within a practice and its multiple relationships with other objects within this practice. The meaning of a word is thus the accretion of uses. If this is so, then words are never isolated atoms. They are always placed in a relation of mutual reference to each other. One's use of words like "brother", "husband", "money", "constitution", and "state" does not conjure up the picture of motionless objects ensnared in the dead body of a label; rather, one mobilises a vast range of intertwined practices and rules, which in a loose and never-entirely-articulable way indicates the place and role of a given object by implicitly referring to the multiple set of relations to other objects. In summary, words are entwined threads in the tapestry of social practices.

On the other hand, however, Wittgenstein clarifies that, as long as words are the accretion of uses, they are inevitably "conservative". From this vantage point, words are "institutions".[2] And institutions always involve a certain degree of *reification*, in its twofold meaning of *constituting the thing itself* and, at the same time, *concealing its character of artefact*. This explains why, if words are meant to determine what counts as *the same* in a given context, then *sameness* eventuates in *normality*: *words signify what people normally do in a given context*. Reiteration and normality, as it were, are cognate phenomena.

This is the leap from language to reality that challenges every ban on the passage from 'ought' to 'is'. Peter Berger and Thomas Luckmann (1966) nicely describe this process as a transition from the 'There we go again' to the 'This is how these things are done'. 'A world so regarded – they comment – attains a firmness in consciousness; it becomes real' (Berger and Luckmann 1966, p. 77). This process of reification, which every word inescapably undergoes, can be described as the 'extreme step in the process of objectivation, whereby the objectivated world loses its

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[1] 'The use of the word "rule" and the use of the word "same" are interwoven', Wittgenstein (1953/2009, § 225) avers. Regarding this, see Baker and Hacker 2009, p. 146.

[2] This term should be understood here in its etymological sense of "stabilising." The Latin verb "instituere," comprised of "in" and "statuere," meant "establish," "put inside" and "plant." The idea of fixing and stabilising also referred to the activity of ordering. In this light, attributing a place to something also implies shaping this something.

comprehensibility as a human enterprise and becomes fixated as a non-human, non-humanizable, inert facticity' (Berger and Luckmann 1966, p. 106). In this framework, the 'world of institutions appears to merge with the world of nature. It becomes necessity and fate, and is lived through as such' (Berger and Luckmann 1966, p. 108).

In sum, the micro-history which brings words into life tends to be covered by a reifying process of de-historicisation, which is key to their task to secure mutual and (as far as possible) smooth understanding and interaction. Nevertheless, such an 'effect of concealment' also produces exclusion and marginalisation: If a word has to cover a given set of cases and applications, some other cases and applications must be ruled out in order to assure meaningfulness. All uses and applications that defy normality and jeopardise sameness must be classified as *deviations*. This is an aspect that Wittgenstein fails to appreciate in all its significance: The production, reproduction and stabilisation of the word is never the natural and unreflective activity of training pupils and getting them accustomed to regular patterns that he portrays. The process whereby words are produced and stabilised is a much tougher and socially expensive activity, which always requires the protection of the *boundaries of meaningfulness* and the *warding off of the perils of meaninglessness*.

In effect, in the capricious flexibility of everyday life words are exposed to the risk of frequent changes and ongoing rearticulations. Words need protection precisely because they are artificial products. This is why the activity of producing and protecting words closely resembles what Carl Schmitt in his works of the 1930s deems to be the central task of the legal order.[3] Having abandoned the artificial view of politics he had endorsed in the early 1920s, Schmitt became aware that normality was key to the existence of every political community. Normality cannot be miraculously created out of nothingness by a sovereign decision, as his previous exceptionalism assumed. Rather, normality requires a community developing and reiterating a set of mainstream practices which someone has to

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[3] In Croce and Salvatore (2013) Andrea Salvatore and I provide an interpretation of Schmitt's understanding of law and politics which does justice to the comprehensive revisions he himself made of his former decisionist paradigm. We eventually claim that in his works of the 1930s, where Schmitt develops an institutional theory of law, he actually managed to unravel a series of conundrums he had left unsolved in the 1920s. Needless to say, although theoretically more robust, Schmitt's institutionalism is severely affected by political biases and opportunistic concerns.

select, protect, and promote as standards endowed with binding force. Precisely because of this, Schmitt insists, the real threat to normality is humans' own innate tendency to overproduce ways to solve practical problems and thereby to create new practices. To restrain what he considers as a pernicious tendency, something must be preserved and something else must be excluded and effaced by way of legal provisions. The disposable residue of this activity is *de facto* made utterly "unspoken" and "unspeakable".[4]

### *The semiotic circuit*

I would now like to expand Schmitt's insight in order to pin down the relationship between the process of "wordification" in the sphere of everyday life and the key task law performs to support it. On the one hand, seldom does law operate as a purely creative device. More often than not, the law selects and incorporates those products of society which meet with widespread success within the population of law-abiders, with an eye to sheltering them from unexpected changes. In this regard, as Karl Llewellyn (1948, pp. 1359-1362) pointed out, legal rules serve as generalisations designed to project something beyond the actual and to subtract it from the flexibility of everyday life: 'To see that something is *right*, or that something is a right, is to generalize […] every normative generalization contains *some* quantum of idealization, of projection beyond the actual'. On the other hand, Llewellyn

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[4] I should like to note that the theme of 'unspeakability' is usually tackled with reference to a different literature. One of the authors who convincingly take up this issue is Judith Butler (to whom I will refer later on). She draws on a psychoanalytic model of "subjectification" that sees subjects as formed by the inception of a lack, or rather, an exclusion that produces a realm of "unspeakability". In this view, an original activity of censorship is the source of subjectivity: 'If a subject becomes a subject by entering the normativity of language, then in some important ways, these rules precede and orchestrate the very formation of the subject. Although the subject enters the normativity of language, the subject exists only as a grammatical fiction prior to that very entrance. Moreover, as Lacan and Lacanians have argued, that entrance into language comes at a price: the norms that govern the inception of the speaking subject differentiate the subject from the unspeakable, that is, produce an unspeakability as the condition of subject formation' (Butler 1997, p. 135). Butler also draws on the ground-breaking works of Louis Althusser and Michel Foucault, to whom Gayatri Chakravorty Spivak (1994) refers in a thoughtful analysis of the possibility of speaking, where the focus is the position of the subaltern in the postcolonial scenario. The notion of unspeakability is also at the core of the feminist legal theory developed by Nicola Lacey (1998). Although all these works are undoubtedly central to a sound understanding of the issue of unspeakability, I think that this condition or status can be explained with recourse to the particular conception of meaning and its role in the construction of social reality that I have briefly reconstructed so far.

(1948, pp. 1362-1363) himself emphasises that generalisation of this kind always entails a process of "creative selectivity", in that 'normative generalizations do not make themselves. *Somebody* makes them […] [T]his means the persistent production of generalizations selected for their basis, and shaped for their content, color, and direction, to serve *some,* and against *others*'. In other words, law does not merely observes, describes, collects, and verbalises, as though it were a neutral observer. The words "family" and "marriage" which appear in legal texts should not be regarded as the mere reflection of the words "family" and "marriage" in the realm of everyday life. Hardly do the former merely represent formalised ways to ward off unexpected and hasty changes in given conducts or practices. When law encapsulates and sanctions a given word (and thus the practice it signposts), this undergoes a special "process of conversion", which constitutes the very core of the legal practice. It is worth exploring this aspect in more detail.

In the never-ending debate over the nature of law, many views about what constitutes law have been put forward: law as a set of binding rules issued by a legislator and backed up by the threat for noncompliance, law as a set of coercive rules regulating force, law as the union between primary and secondary rules, law as the activity of the courts, and many others. However, despite ongoing disagreements over the nature of law, what many authors seem to agree on is the intuition that law is a *very special, limited domain*.[5] Some scholars pay heed to the particular type of reasoning that takes place in the legal field, others to the distinctiveness of the legal code, which categorises all social entities according to the binary code legal/illegal. I rather tend to regard law's being a special domain as a constitutive property of law, which is secured by a set of variables. Among others (which may vary from context to context), crucial ones are the *presence of experts*, the *trans-sectional nature* of its knowledge, and the *formulaic character* of legal language.

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[5] See, for example, Schauer 2004 and Tomlins 2007. These articles explore a copious literature of different schools of thought in order to demonstrate that many key authors, whether thoughtfully or not, treated law as a special field or domain, clearly separated from others.

I will now try to summarise a comprehensive view of law that I developed elsewhere.[6] Law emerges as a practice rooted in a *trans-sectional stock of knowledge*, distinct from, and independent of, every other kind of knowledge that is present in society. The decisions and settlements produced within the legal field are regarded as valid because they are founded upon a common trans-sectional basis, which is to say, a basis that claims to transcend the opposite interests of those who turn to law so as to settle their conflicts. Law fulfils this task in a very special manner. Unlike other institutions and organisations that organise the life of a population in the geo-historical context where law operates,[7] law *constitutively* claims to be *trans-sectional*.[8] Indeed law contends to be grounded on a stock of knowledge, to employ a language and to deploy categories[9] that can be (at least transitorily) adopted by all members of the other social institutions and organisations in order to settle disputes that arise either within or among them. This is why I contend that, unlike other rule-governed practices located in the social realm, the core of the legal practice rests on its being based on a *self-sufficient knowledge* consisting of rigid conceptual categories and a formulaic language. These latter features are precisely instrumental in the insulation of law and the consolidation of its boundaries. In virtue of

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[6] See Croce 2012.

[7] Needless to say, law is by no means the sole organisation regulating conducts. Law is placed in a continuum comprised of many other rule-governed practices; see, for example, Galanter 1981.

[8] As it will become clearer as we go along, the adjective 'trans-sectional' aims to denote law's typical claim to be grounded on a stock of knowledge, to employ a language and to deploy categories that can be (at least transitorily) *adopted by all members of a given geo-historical context* in order to settle the disputes that arise therein. In other words, trans-sectional is the complex repertoire of knowledge and norms that the different "sections" or "sub-cells" of a given collectivity can rely on when conflicts within and among them arise. To clarify this notion, I would like to recall John G. Peristiany's (1954) intuition, based on the study of some primitive societies, that every collectivity needs a set of procedures meant to settle the possible disputes emerging among their different social units. What such procedures have in common is the attempt at solving conflicts with peaceful means (from oath and haruspication to confrontation before a third party) which hinge upon a trans-sectional background (whether it is comprised of primeval customs, or traditional values, or indisputable principles, or formalised rules). Peristiany argues that the employment of all these methods, in effect, is primarily meant to find non-sectional strategies for solving a dispute. The author concludes that 'when a society lacks specialized organs whose status both transcends and links its sectional interests, the conflict is resolved by the recognition of common values, by an appeal to a common *religio*' (Peristiany 1954, p. 48). To put it differently, every society needs an agreed upon and trans-sectional set of values that transcend intra-unit conflicts and, because of this, might be able to settle these conflicts with peaceful means.

[9] I am using the term "categories" in a very broad sense, in order for it to cover different types of rules and definitions within the body of law. Legal categories can be coercive commands or imperatives prohibiting given types of conduct; they can also be the rules conferring power or the ones specifying the legal consequences that follow from voluntary forms of conduct. Other categories simply work as definitions designed to spell out the meaning of concepts employed within the law, precisely like "family" or "marriage." Needless to say, this is not meant to be an exhaustive list of the types of legal categories. My limited aim is to point up some of the shapes that they can take on. In all of these types of categories, a specific fact-type (say, murder, libel, divorce) is defined and specific legal consequences are attached to it (say, conviction, fine, voidance).

law's special status and in virtue of law's claim to transcend sectional interests, the discussions taking place within its field and the decisions made in its light have a *restorative effect* on social reality. This claim on self-sufficiency (which can obviously be a pretension, but can never be *just* a pretension[10]) makes legal knowledge, legal categories, and legal language usable by all those who enter the legal field and ask for their conflicts to be resolved.

Pierre Bourdieu (1987) identifies the core of the legal practice: The entrance into the legal field is already-and-always backed up by a performative acceptance of the "field's fundamental law." For people's recourse to legal experts and their knowledge is *ipso facto* accompanied by their acceptance of conflicts being resolved through legal categories. This is why, Bourdieu (1987, p. 831) averred as follows:

*[S]uch entry completely redefines ordinary experience and the whole situation at stake in any litigation.* […] To join the game, to agree to play the game, to accept the law for the resolution of the conflict, is tacitly to adopt a mode of expression and discussion implying the renunciation of physical violence and of elementary forms of symbolic violence, such as insults. It is above all to recognize the specific requirements of the *juridical construction of the issue*.[11]

In a few lines, Bourdieu captures a key element of the legal practice. By entering the legal field, the parties commit themselves to outlining a "paradigm of argument"[12] on whose basis they can

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[10] I cannot delve into this issue here, but I suggest looking at Bruno Latour's (2010) criticisms of the view that law is a mere camouflage for other forces operating behind it. In discussing law's 'strange form of autonomy', Latour criticises all scholars who take the law to conceal and legitimise something which is outside the legal field, such as power relations or socioeconomic differentials. In particular he attacks Bourdieu's article to which I referred above because it finally relies on non-legal factors in order to explain what law is. Latour claims that this and suchlike positions fail to capture the genuine autonomy of law. He denies that law's autonomy is merely apparent, that it is nothing but a veil that conceals something else. With Latour's (2010, pp. 259-260) own words: "[H]ow can law be explained in terms of the influence of the social context, when law itself secretes an original form of contextual networking of people, acts and texts, so that it would be very difficult to define the notion of social context without resorting to legal concepts?".

[11] Emphasis added.

[12] See Comaroff, Roberts 1981.

reframe their account of the relevant facts by employing the words of the law. Facts are *semiotically* deconstructed and revised by means of a set of categories managed by a group of experts who supervise this process and see to it that the activity of semiotic reconstruction be in accordance with legal categories. With the mediation of these categories and the supervision of experts, the parties end up transcending both their personal view of things and locating themselves into a "semiotic circuit," in which the conflict is rephrased and, as a result, transformed. This process triggers off a productive *circular interplay* between the individual viewpoint of the parties (who bring within the legal field the set of problems they experience outside it) and legal categories (under which the experience of parties must be subsumed in order for it to be *legally* rephrased). The supervision of experts, Bourdieu points out, is nevertheless a crucial ingredient of this recipe. They are qualified actors who possess suitable knowledge in order to accomplish the conversion from the language of everyday life into the language of the law. Only officials, who possess appropriate expertise, can redefine 'problems expressed in ordinary language as *legal* problems' (Bourdieu 1987, p. 834). In this way, Bourdieu (1987, p. 834) concludes, professionals bring about an "effect of closure", whereby legal 'categories of perception and judgment […] can never be completely translated into those of the nonprofessional.'[13]

Based on this rushed journey into the nature of law, I can return to the role played by words. In effect, the presence of a category within the body of law is essential to the process of deconstruction and reconstruction that I have illustrated so far. The outcomes of the activity of conversion from one language (the language of everyday life) to another (the special language of law) is necessarily dependent upon the type of categories available. If this is true, then the absence of categories has a significant impact on the process of conversion. Some facts cannot be talked about in the legal field. Some issues cannot be tackled. Some disputes cannot be solved. Here we are left with a lack of words,

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[13] Despite this, I would like to note that one should not be too dismissive of the role of lay people in the legal field, even though they lack specific competences and their claims are often mediated by other experts. Yet, the discussion of the centrality of lay people's actions to the work of the legal practice would broaden the scope of the present article.

to the extent that the process of conversion from a language to another cannot be carried out. It is worth providing an example.

### *Lack of words: something remains unspeakable*

In the city of Venice, after the refusal to publish the banns, two people of the same sex who wanted to get married, appealed to the Court of Venice. The Civil State official had refused to emit the certificate of the wedding banns because the marriage involved two individuals of the same sex, which is expressly forbidden by the Italian law. The Act in question (3 July 2008) cited the advice of the Minister of Interior (28 July 2004) stating that it is not possible to transcribe a foreign marriage between individuals of the same sex because this kind of marriage is not provided by the Italian legal system, as it is contrary to public order. Then the Court of Venice referred to the Constitutional Court, whose decision n. 138/2010 brings to light something salient as regards the triadic relation among words, normality, and the law. Let me expose what I believe to be the most relevant passages.[14]

The Justices explained that the Civil State official thought the publication of the banns to be contrary to both constitutional and ordinary law, which define the diversity of sexes as one of the essential properties of the institution of marriage in Italy. Such a conclusion, however, can hardly be founded on a *literal* interpretation of the law. For no formal definition of marriage is provided within the Italian legal body. Rather – the sitting judges argued by drawing of the findings of the Court of Venice – the diversity of sex being a prerequisite can be indirectly inferred by a few articles of the Italian Civil Code (such as, for example, legitimate filiation, Arts. 231 ff.).

Then the sitting judges discussed the conclusion reached by the Court of Venice, according to which the union between a man and a woman is a 'consolidated and ultra-millennial notion of

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[14] The analysis of this decision is particularly relevant to my argument because the Constitutional Justices' legal reasoning is entirely and overtly founded upon the idea that all that lacks a legal definition cannot be talked about in the legal field by legal officials. Such an argumentative strategy makes the Court's decision interesting in its own right, as it shows how unspeakability serves as an *effective boundary marker* within the legal discourse.

marriage.' It is well known, the Justices maintained, that Article 29 of the Italian Constitution 'recognises the rights of the family as a natural society founded on marriage' and that the latter 'is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.'[15] About this crucial passage, the Court makes an enlightening comment:

> [I]t is true that the concepts of family and marriage cannot be considered to be "crystallised" with reference to the time in which the Constitution entered into force, since they are characterised by the ductility typical of constitutional principles and therefore have to be interpreted by taking into account not only the transformations of the legal order, but also the evolutions of society and habits. Such an interpretation, however, cannot go as far as to affect the kernel of the norm, and to modify it in such a way that it ends up covering phenomena and issues that were by no means taken into consideration when it was enacted. […] while elaborating Article 29, [The Constituent Assembly] was discussing an institution which had a precise conformation and an articulated discipline within the civil order. Therefore, short of other references, it is inevitable to conclude that they took into consideration the notion of marriage defined by the Civil Code entered into force in 1942, which […] established (and still establishes) that the spouses ought to be persons of different sex (sentenza 138, 14/04/2010, giudizio di legittimità costituzionale in via incidentale).[16]

Albeit this may seem a classical example of constitutional reasoning, the problem rather concerns the *production of a new category*, a new word that may get a new model of relationship to enter the sphere of the law in order for it to take a place in the semiotic grammar of the legal language.

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[15] http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed on March 9, 2014).
[16] Available at www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138 (accessed on April 5, 2014). Author's translation.

In effect, the Justices claimed that such a constitutional constraint on the revision of the notion of the family could hardly be removed by way of an exercise in legal hermeneutics. Indeed, this would not simply entail doing away with a mere practice. The sitting judges would be forced to provide 'a creative interpretation,' which is at odds with the Constitution itself. Evidently, the strategy they adopted rested on the ban on every kind of jurisdictional law (that is, the law created by judges) emphatically stressed in the Constitution. In fact, as they said with reference to the opinion of the Avvocatura dello Stato (Attorney General), the inclusion of same-sex marriage within the scope of the articles of the Civil Code mentioning the difference of sexes could not be achieved through a mere substitution of the words "husband" and "wife" for the word "spouses": '[T]his would amount to operating a new design of the normative framework of the code, in the light of a constitutional norm that in point of fact refers to them' (sentenza 138/2010).[17]

In these words the effect of closure described by Bourdieu vividly comes to surface: a circuit of norms that justify themselves by referring to themselves. Norms that cannot be questioned unless one wants the whole legal framework to collapse. The Court claims that constitutional norms must be read in the light of what its makers wanted them to be. This is why the judges aimed to grasp both the contours and the substance of the institution that the fathers of the Constitution had in mind: the institution that they wanted to capture and protect. The constitutional judges wanted to get to the kernel of this institution, which, they insisted, needs special protection and cannot be brought into question.

I would now like to reframe the issue in the following terms: the constitutional fathers were obviously aware of the existence of same-sex unions (as the Justices acknowledged in their decision), but they decided to leave the issue in the sphere of the unspeakable. Those who drafted the constitution did not think the available provisions in matters of family types should be extended and did not craft any new legal word that might confer on same-sex unions the status of a *legal* problem.

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[17] Author's translation.

Because of this, the Constitutional Court seems to reason, much as it can hardly deny the issue of same-sex unions being socially relevant, *nothing can be said about it within the legal field* since there is no legal word to talk about them in a legal way. If the time has come to deal with the same-sex unions issue in *legal* terms, the Justices argue, then the legislator has to create a category, or to revise the old ones, so as to empower legal officials to deal with it.

The Justices knew that a choice had to be made, one that would allow someone a possibility by precluding it to others. They openly recognised the exclusive power of the words "husband" and "wife" and explained that the word "marriage" is placed in a relation of mutual determination with them within the complex body of the Italian law: "Marriage" has a precise meaning only insofar as the other two words determine the scope of its use and application. This is the reason why the Justices are right when they say that replacing "husband" and "wife" with "spouses" would be tantamount to issuing a new law, which they are explicitly prevented from doing. The point is that, within the legal field, the term "marriage" is designed to elicit and sanctify a practice to the detriment of others. The special status conferred on such a "ultra-millennial notion" is the exclusive entry into the corpus of the law.

What is at stake here is precisely the *boundary between the social and the legal domains* which I discussed at the beginning of the second section: Something has to be dragged into the legal field by an act of creation, by the production of new words, or the revision of old ones. Here the twofold role of boundaries as both access and restrictions is laid bare. On the one hand, the decision of the Court reaffirms the special nature of the legal field, whose boundaries are protected by wise and learned guardians. As shown above, this is one of the possibility conditions for the existence of a special stock of knowledge that may mend the rifts produced by social conflicts. On the other hand, this decision demonstrates that social practices which lack corresponding legal words just cannot be talked about in the legal field. As a consequence, the unspoken remains not cognisable as a *legal* entity. From a legal point of view, unspeakable issues that cannot be brought *in actis* (in the

documents) are not *in mundo* (in the world). Issues that cannot be rephrased in legal terms simply do not exist in the legal world.[18]

### *From unspeakability to normalisation?*

The scene I painted in the preceding section can be regarded as a further instance of what Marianne Constable (2005, p. 176) calls 'silences of the modern law', where the 'unsaid may signify an absence or constitute a denial that is an effect of power or powerlessness', where the 'unspeakable may point to an absence of words that indicates a lack of power on the part of language or of its speakers'. This silence, therefore, is not a mere act of misrecognition, but plays as a serious constraint on law's claim to trans-sectionality. And yet, a paradox materialises the very moment one tries to find out how this silence should be evened up. On the one hand, the absence of a category conferring legal speakability on homosexual unions bans them from the legal field and deprives them of legal protection/recognition. On the other hand, however, some critics contend that the costs of legal speakability through marriage can be very high, to the extent that exclusion turns out to be less detrimental than the bare assimilation into the body of the law. These arguments deserve to be analysed further.

Judith Butler (2004, p. 3) notes that sometimes there may be 'advantages to remaining less than intelligible, if intelligibility is understood as that which is produced as a consequence of recognition according to prevailing social norms'. By saying so, she casts light on the dark side of norms conferring speakability,[19] as they exert a twofold effect on homosexual sexualities. On the one hand,

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[18] Important developments occurred between 2010 and 2012, which, at least in part, challenged the judgment of Constitutional Court. More precisely, in 2012 the Court of Cassation declared the Constitutional Court's pre-emptive strategy to be obsolete because in *Schalk and Kopf v. Austria* (2010) the European Court of Human Rights stated that homosexual unions do fall under the scope of "family life" and thus are protected by Article 9 of the Charter of Fundamental Rights of the European Union. On this account, the Court of Cassation overturned the line of reasoning of the Constitutional Court to argue that same-sex unions are not inexistent (and hence legally unspeakable), but simply unable to produce valid legal effects.

[19] What I refer to in terms of words and categories, rather than norms.

like every device designed to attribute meaning and grant intelligibility, norms conferring speakability tend to colonise those spaces that, much as they remain in the sphere of the unspeakable, allow people to live in ways that 'maintain a critical and transformative relation to them' (Butler 2004, p. 3). On the other hand, just by rendering some people intelligible and making them "human", they deprive others of the possibility of achieving intelligibility and humanness. In other words, the very same deployment of categories of intelligibility has the inescapable though barely visible counter-effect of producing further unintelligibility and reinforcing the 'differential between the human and the less-than-human'.[20]

Let me first focus on the first horn of this twofold effect. As I pointed out at the very outset, in the last decades many queer authors have argued that same-sex marriage may eventually demean the disruptive force of the queer critique of conventional views of sex and kinship. The hypothesis is that typical and critical images of queer sexualities are falling apart in many Western countries where lesbians, gays, and bisexuals are seeking to get access to (once despised) non-heterosexual models of relationship. Lisa Duggan (2003) has coined the term "homonormativity" to signify the process whereby queer sexualities (and their erstwhile merciless attacks on ordinary sexual culture) are being substituted for domesticated same-sex ones. The maxim 'We get marriage and the military then we go home and cook dinner, forever' (Duggan 2003, p. 62) aims to draw our attention to a serious misgiving: Can the recognition of gay rights be a strategy of neoliberal politics to tame queer critique, to lessen it, and to close it in the domestic walls of the (new gay-)family? Some empirical studies actually attest to a growing convergence in the way homosexuals and heterosexuals conduct their lives under the aegis of a triumphant model of family, that is, the 'young, white, married, heterosexual, able-bodied, family with bread-winning husband, dependent wife and children who share a residence and whose central relationship will be monogamous and last forever' (Weeks et al. 1999, p. 706).

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[20] I would like to note in passing that, unlike other queer critics, Butler criticises same-sex marriage but refuses to oppose it, as this would 'institute a belief in the mono-culturalism of the norm and be antithetical to her own method' (Loizidou 2007, p. 154).

According to queer critics, the new pro-gay legislation is contributing remarkably to this convergence, as institutional norms about same-sex sexualities in the West are profoundly being revised. Sasha Roseneil et al. (2013) canvass some of the ways in which norms are changing and observe two main legal-institutional developments that are involved in this metamorphosis: the legitimation of same-sex sexual practices *within the couple-form* and the recognition of homosexual unions as *intimate relationships*.[21]

Albeit the variables invoked to explain these normalising tendencies are many, it is my claim that my analysis above helps illuminate how the law itself and the way it deals with social practices are playing a decisive part in this developmental trajectory. Law's claim to self-sufficiency, its rigid conceptual categories and its formulaic language exert a special force of attraction which makes sense of Butler's (2004, p. 105) speaking of 'desiring the state's desire'. If '[t]he state becomes the means by which a fantasy becomes literalized: desire and sexuality are ratified, justified, known, publicly instated, imagined as permanent, durable' (Butler 2004, p. 111), this has to do with law's capacity to get people to self-model on what the law ratifies and promotes. Marc Galanter's (1981) path-breaking inquiry into the relationship between official law and indigenous orderings explores the many ways in which official law radiates messages and symbols that *informally regulate what is outside the legal field*. He shows how subjects who operate in "the shadow of the law" tend to preadapt to official legal standards with no previous (open and coercive) pressure on the part of official institutions. This happens, I contended in my analysis above, because law plays a *restorative effect* on social reality which is key to the existence itself of social order.

As far as the recognition of homosexual unions is concerned, the oblivious magnetism which connects social conducts and practices to ratified and legitimised standards implies this activity of self-modelling, whereby homosexual relationships enter the field of intelligible and speakable sexuality by carrying out the twofold process described above: The moment same-sex people lay

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[21] On how it is coupledom and intimacy (as traditional features of a heterosexual/heterosexist grid) that are conferring respectability on same-sex practices, see Ruskola 2005, although the author's main concern is with the US scenario.

claims for the introduction of a legal category, they accept that the issue of homosexual sexuality be almost entirely reframed in terms of access to an institution imbued with heterosexist and patriarchal symbolism. It seems as though the abject condition to which non-mainstream sexualities continue to be subjected could be redressed through legal marriage. Such a glaring instance of "autological" gestures – that is, 'discourses, practices, and fantasies of self-making' (Povinelli 2007, p. 570) – makes the *issue of homosexuality* collapse into the *issue of homosexual marriage* and thus enhances the highly reified and seemingly natural relation between kinship practices in general and a set of rights, powers, and privileges contingently tied up with a transient institution.

This leads me to the second horn of the twofold effect of norms conferring speakability. Michael Warner's (1999) by now classical critical analysis brings out the exclusionary consequences ensuing the recognition of same-sex unions is through marriage. Warner (1999, p. 117) points out that marriage 'is never a private contract between two persons. It always involves the recognition of a third party – and not just a voluntary or neutral recognition, but an *enforceable* recognition'. His reference to enforceability emphasises the role played by the law and how its involvement affects the shape and contents of a practice. This is not to deny that, as he acknowledges, the restriction of marriage to heterosexual couples is a blatant discrimination. Rather, he aims to demonstrate that, insofar as homosexuals continue to frame the issue of homosexual discrimination in terms of claims to official recognition of same-sex marriage, they reinforce marriage's 'selective legitimacy' (Warner 1999, p. 82) whereby the state gets to 'regulate the sexual lives of those who do not marry' (Warner 1999, p. 96).[22]

Warner (1999, pp. 88-89) stresses how queer thought before the ascension of the marriage model was largely at odds with some of the flaws and vices of the traditional heterosexist culture: it

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[22] It is of course not possible for me in this context to account from the complexity of the struggles from gay rights and the one-sidedness of Warner's critique. For one thing, Carl Stychin (2004, p. 967) insists that, even though 'it is easy for gay politics to become politically conservative in an era of gay marriage and same-sex partnership benefits', 'the politics of rights activism is grounded in a recognition of the wider potential of human rights beyond the immediate claim itself' (Stychin 2004, p. 966). The complexities and ambiguities of law reform in this field and its impact on citizenship are explored in Stychin 2003.

aimed to unmask the mythology with which marriage is imbued; it required respect for the huge diversity in terms of sexual and intimate relationships; it fought the colonisation by the standards of straight culture; it was alert to the disciplinary force of institutions such as marriage. By giving up many of these causes, queer culture has lost sight of the crucial element whereby legal regulation and its monopoly on the symbolic force marriage allows institutions to confer legitimacy on *certain types* of unions – those which qualify as "apt to form a family" – and to excludes those family assemblages and alternative kin formations which do not conform to the benchmark of legitimate family life.

**Conclusions**

In this paper I wanted to shed some light on the paradox of unspeakability, whereby a lack of words to articulate a status of abjection betrays a condition of powerlessness, while, at the same time, the entrance into the sphere of the speakable could result in a form of self-subjection which could reinforce those categories which constituted the root cause of the lack of words. This is why my analysis may be regarded as nothing other than the exploration of a double-bind.

On the one hand, the Wittgensteinian-Schmittian understanding of how words are brought into existence and the role they play in daily life, elaborated on in in the first section, foregrounds the vital connection between the creative activity performed by social actors in the social realm and the selective/protective task carried out by officials in the legal realm. Although words, and the practices they structure, arise out of reiteration and reification, they are continually exposed to the whimsical transformations of everyday life – which is to say, the flexibility that the Italian Constitutional Court's decision sets out to restrain by sealing off the available set of legal categories. On the other hand, however, as I claimed in the second section, law does not only sees to the conservation of everyday practices, but also plays as an active agent of a "bounded" transformation as long as it is called upon to rework the actual normality in order for it to accommodate new phenomena. Paradoxically, it is the need to preserve that sparks off the semiotic circuit through which normality gets partially altered.

In effecting this change, law always *tends to rely on "the available"*. On this reading, as I argued by integrating Butler's and Warner's analyses into my own theoretical framework, one's trying to get access to the institution of marriage as a strategy to redress the disadvantaged condition of homosexual sexualities entails the risk that one will be normalised, to the extent that speakability eventuates into one's adhesion to a grid that includes some homosexual couples and cuts out a vast range of non-conventional forms of sex and kinship.

Perhaps there is no way out of this double-bind. It pertains to the structure itself of law and its two conflicting functions: *conservation* and *transformation*. These two functions are imprisoned in an ambivalent dialectic: Stabilising words and fixing meanings entail discarding and excluding many uses and applications, and yet words are indispensable for changing other words when the latter prove to be inadequate, obsolete, and unsatisfactory. In much the same way, the production of legal category entails relying on a previous social normality that supports and gives content to them, but the special nature of law permits people to question and revise what they find inadequate, obsolete, unsatisfactory.

Perhaps there will always remain something unspeakable, something which is banned and abject, something which is not the same and is off the beaten track that people normally follow. People who *are not the same* should make use of law's twofold nature of conservation and transformation and eventually accept the ambiguity of this dialectic. This use, however, stands a better chance to exert more effective outcomes – more far-reaching and less inward-looking – if those who fight for their rights refrain from framing their claims with reference to the lexicon of normality and sameness. A strategic and defiant use of legal categories would then be *an exercise in social critique*, based on an 'interrogation of the terms by which life is constrained in order to open up the possibility of different modes of living' (Butler 2004, p. 4). Critique thus becomes the subversion and revision of the boundaries of normality through the semiotic tools that normality itself makes available, with an eye to changing its vocabulary. This is why those who claim same-sex unions should be legally recognised could make their struggle run in parallel with the ones of those who believe that the

transient tie between a set of rights, powers, privileges, and the relationship between two persons (no matter their sex) should be rethought. Insofar as the struggle for the recognition of same-sex unions is not framed in terms of a struggle for same-sex marriage *qua* marriage, it could really benefit from the "trans-situational applicability" of legal battles.[23] Legal struggles are in fact capable of exerting a special performativity on social reality, as they tend to trigger off a critical problematisation of social life. In this way, the legal struggle for same-sex unions would also serve the cause of those who have no particular interest in them, as it would create an awareness of the reification which affects the frame of significance through which they view and live their own practices.

This is the reason why I claim the struggle for the recognition of same-sex unions should be a struggle for the disentanglement of *unions* and *marriages*.[24] I do believe that this struggle should be carried out within the legal field and should be aimed at revising the traditional tools in the semiotic toolkit of the law. It is my contention that the legal field allows the type of critique I discussed above, as people are prompted to adopt a language which does not belong to anyone in particular and urges them to use a set of categories that make them intelligible to the general public. There is no way to prevent further unspeakability from being produced and further exclusion from being perpetrated. But insofar as critique remains alert to the harshness of boundaries and to the costs of drawing them, the struggles taken up in the legal field will always make room for further defiance.

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[23] The notion of 'trans-situational applicability' is developed by Lynn Mather and Barbara Yngvesson (1980) who view it as a key property of the struggles carried out within the legal field. They claim legal disputes are contests 'managed in predictable ways, in the framework of agreed-upon idioms for articulating and transforming conflict' (Mather and Yngvesson 1980, p. 784). Such a special idiom plays the role of a 'public discourse', which enables the production of 'definitions' that 'not only inform and affect social practice' but are also instrumental in providing 'the language for challenging that practice' (Mather and Yngvesson 1980, p. 821). By engaging in legal conflicts, social subjects contribute to the production of new legal categories for describing reality and for modifying the repertoire of meanings that law embodies and promotes. This process of contestation and revision – which is inevitably influenced and shaped by the multifarious viewpoints and interests of the range of actors involved, from disputants to their intermediaries, from the judges to the jury – is made possible by the fact that the legal language makes the outcomes of disputes applicable to other contexts and issues.

[24] This conclusion is convincingly vindicated in Redding 2010 where the author illuminates the convergences between same-sex rights and legal pluralism.

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