IMPLICIT LEGAL NORMS

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1. Introduction

This Chapter aims to provide further insight into implicit legal norms, building on previous studies on "cryptotypes" (Sacco 1980, 1989) on the one hand, and on "implicatures" (Grice 1975) on the other. In its background lies the idea that law is a socially valuable practice of regulation in a given time and place, a practice that reflects the variability of socio-legal conditions (Cotterrell 2015: 51): in such a practice, what counts in defining what is legal are particular social settings, namely the context. Endorsing this perspective allows seeing that different types of implicit legal norms serve the *prudentia* (carefulness) of jurists in different ways, their juristic experience in all its practical complexity, ethical ambiguity and contextual specificity. What should be understood in practice and in a particular time and place by the idea of law may be of special interest to judges and lawyers: as interpreters of the law, they are involved in a peculiar *inter-action* with the legislature and cannot ignore the fact that a legal text will imply more than it says. Legal communication, indeed, goes well beyond written texts or spoken words and extends to images, rituals, feelings and public performances as modes of human interpretation (Wagner and Sherwin 2014; Boehme-Neßler 2011). Furthermore, performance of an action, or of a duty, is normative in itself (Sacco 1995, 2015): hence, non-text law has a normative dimension (Sacco 1980; Kasirer 2002; Thompson 1993). In this perspective, the Chapter analyses two cases of gender discrimination: the text of the Italian Civil Code, Book I, on marriage and a well-known judgment of the Constitutional Court relying on the implicit assumption that *marriage* is essentially linked to a heterosexual paradigm as enshrined in the Italian Constitution; and the Californian Family Code that was amended in order to reject the implicit premise on which it relied, namely the idea of a *parent and child relationship* can be instantiated by no more than two persons. From a methodological point of view, this analysis combines a functionalist approach, which emphasises law-as-rules, with a pure-hermeneutic-approach in which rules and concepts are merely the signifiers of a much deeper *mentalité* (cognitive structures that support and anchor positive law), so that it may be elsewhere than in legal texts that one may find the meaning of law. Such a combinatorial approach presupposes pluralising legal epistemology: it involves a shift from a single disciplinary focus on the law to a trans-disciplinary orientation.

2. Implicit dimension in law

Law contributes to the constitution of social facts by providing cognitive frames through which social actors apprehend social realities. At the same time, law is in itself an institutional fact, that is to say legal actors operate within an interpretative practice that the legal community created (Bell 1983). Law and society are aspects of a single reality. Thus, we are no longer tied to the conventional idea of law as an artefact of State power. Law is not only what law officials do and say they are doing, but it is also a reflection of social values, educational conditioning, ideology and economics (Twining 1997; 2005).

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Such a premise means, among other things, that law is not only about the content of detailed legal rules and the structures and concepts used by doctrine and legal actors, but also about other implicit sources, foundational principles and values, assumptions underpinning them, and about the interaction of socio-economic and political values with the idea of law itself[1]. Discovering and engaging with legal rules, and more generally with the law as a whole, is an interpretative practice.

Interpretation is an "embedded and embodied practice by which interpreters recognise the contingency and plurality of law" (MacDonald 1998, 2000; McDonald and MacLean 2005: 725; Kleinhaus and MacDonald 1997; Sidnell 2003; Falk Moore 1978). Legal interpretative activity, in particular, is a relational and social practice that involves cognitive elements, some related to personal beliefs (MacDonald 1992: 61). Through an open-ended exploration of the multiple sites of normativity and of the multiple forms of legal communication we can understand law better. Roderick MacDonald called this approach *plurijuralism.* In the same vein, according to Rodolfo Sacco's theory of *legal formants* (Sacco 1980, 1991)[2], legal rules found in written constitutions, ordinary laws, court adjudications, and in non-text law in general (customs, for example) are composed, on the one hand, of formulated normative beliefs, and on the other, of unformulated assumptions. Close to these views, Brian Tamanaha coined a non-essentialist definition of law: "law is whatever people identify and treat through their social practice as law" (Tamanaha 2000: 296) and Ugo Mattei intended "law as a constantly negotiated process of making cultural connections (…) which "captures the complex relationship among parts (individuals, duties, rights, powers) and the whole (law)" (Mattei and Capra 2015: 132). The interpretative practice by which interpreters recognize the plurality of law includes "both the process of devising and designing the law, and the process of decoding the law" (MacDonald and MacLean 2005: 757). To understand the phenomenon of law, we must then address the issue of multiple forms of communication within the legal sphere, forms which involve various social ordering situations (such as adjudication, legislation, and party autonomy), various actors (individuals, collective agents), and various modes of justification (such as legal rules, precedents, customary practices, authority, and equity)[3]. Moreover, legal communication mediated through texts not produced by judges or legislators (such as stories, letters, posters, or websites) is just as important, if not more so, in contributing to constituting law - all these texts are interpretative sites in law. The same claim can be made about oral legal communication (i.e. trial practice, appellate pleading, public presentations to parliamentary committees or to corporate boards, client interviews, press conferences, and conversation with legal content).

The sense of the words in a legal message is bound up with and constitutive of the matrix of social relations through which they are generated and read (Grossi 2013: 27): all interpretation involves then practices that are inseparable from our embedded experience as social beings. Inquiring on these connections raises questions about the implicit normative dimension that permeates law, and induces a search of the implicit meanings hidden beneath the language that the law today is mainly expressed through. The research questions are

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[1] So the question is neither structural (what comprises law?), nor functional (what is law good for?), nor ontological (what is law?). The fundamental epistemological issue is that looking at the methods employed in legal reasoning brings to our attention a set of subjects distinct from traditional subjects in comparative research: not only rules, norms and functions, but also many different legal actors: legislators, judges, practitioners as lawyers or continental notaries, academics etc.

[2] His seminal work (Sacco 1980) is in Italian: *Introduzione al diritto comparato*.

[3] With some major differences: while, for instance, the judiciary shares a habitus which has its roots in the professional culture developed over generations, reflecting the legal knowledge of a certain place in a given time, the legislature has no reference community: the legislature has to translate contingent political, economic and social programs into textual propositions.

whether it is possible to identify tacit rules that underlie and control social life in different legal communities and whether it is possible to understand how much they interfere with legal interpretation (Morra and Pasa 2015; Pasa 2015). It may be useful, if not necessary, to reveal patterns which are implicit but which have outward effects.

3. Cryptotypes and implicits in law: past and present

The *cryptotype* (a term imported from linguistics into law by Sacco) is the underlying pattern to be revealed, or made visible by logical or non-logical inferences from an explicit rule. A cryptotype amounts to a legal formant without an explicit linguistic formulation (Sacco 1991). The discovery of a cryptotype is facilitated when, as happens, a legal rule, a concept, or a principle implicit in one legal system is explicit in another legal system. Normally, jurists belonging to a given system find greater difficulty in freeing themselves from the cryptotypes of their system than in abandoning the rules of which they are fully aware. For some scholars, the subjection to cryptotypes constitutes the mentality of the jurist of a given country at a given time, and such differences in mentality are the greatest obstacle to mutual understanding between legal actors of different legal systems (Legrand 1999). We should thus try to unveil cryptotypes to foster better understanding of differences and similarities in a globalised world. Cryptotypes, however, are difficult to identify (Sacco 1991). Although a cryptotype can be intended as a part of the mentality, it does not coincide with it. Individuals often follow rules which they are not aware of, or which they would not be able to articulate or explain. For instance, few would be able to formulate the language rule we follow when we say *three dark suits* and not *three suits dark* (Sacco 1991). Individuals often operate on the basis of a "sense of what would be morally wrong or right, or even illegal or legal", even in the absence of knowledge of the relevant rules or laws, and without being able to conceptualise what would be wrong about the relevant course of action. They can have "a feeling of entering forbidden territory without having a conception of the boundaries of that territory" (Schmitz 2013: 117).

Nonconceptual forms of intentionality and normativity, senses and feelings of what is familiar or unfamiliar, appropriate or inappropriate, right or wrong, have a social dimension and this means they may partially embody the identity of a group and its institutions, communal practices, and ways of living. They can express the shared background of a group because (and to the extent that) the background skills, tendencies, and habits that they display have been introduced and established in the joint interactions of the group[4]. These implicit patterns played a fundamental role in the law of so-called primitive societies[5]: where the law was unformulated, sources were implicit, acts were unspoken and the dichotomy between law and enforcement did not exist. The law was performed through acts accepted by others (Sacco 1995: 455): that was *mute law*[6]. Unacceptable acts immediately triggered

[4] The crucial point is that having a sense that somebody is a potential cooperation-partner or that something is right or wrong, familiar or unfamiliar, is clearly different from having the corresponding concepts or beliefs (so called "background assumptions" in the language of Searle), which are both mental and physiological, more precisely neurophysiological, and unconscious and nonintentional: see Schmitz (2013). "Background assumptions" are those dispositions that become manifest in mental events with nonconceptual intentional contents: see Searle (1995: 133, 145). They produce behavior that is generally consonant with the rules, but they are entirely physiological.

[5] And still today within the so-called "Chthonic legal tradition": Glenn (2010).

[6] Legal Anthropology has traced back the origins of the basic structures of law far beyond the recent past covered by conventional legal history. The new historical perspective is *Macro-History*. The law of the fifth millennium B.C. was not the same as that in force 50,000 years before. The development of magical arts was a vital force of unprecedented vigor, able to produce radical innovations. Magic rituals made it possible to establish facts: ordeals were (and still are in the Chthonic tradition) the last

reactions and measures taken for self-protection. Thus, performing acts and ceremonies, such as those for appropriation of land or for marriage, constituted the law: adherence to a rule was manifested by the spontaneous conduct of the members of the group. Although a major legal revolution took place when descendants of *Homo Habilis* began to use language, and a second revolution happened in the 19th century with the doctrine of the declaration of intent, unspoken acts and implicit sources continue to operate today. The law has become a theoretical exercise, but social order and performance always have a practical dimension. Thus the recognition and study of implicit norms is an important area in current scholarship (Sacco 2015, 1980; Morra and Pasa 2015; Visconti 2010; Caterina 2012, 2009; Di Lucia 2009; Fiori 2009; Francavilla 2009; Graziadei 2009).

For example we occupy, we own, we abandon things[7], or we follow certain uses and customary rules. We cannot deny that customary law is still a source of law in contemporary legal orders: a custom is grounded on instinctive behaviours infinitely stronger, in terms of persuasive power, than a group of legal scholars combined with a set of legal precedents. Since factual situations do not precede duties and rights, or create them (e.g., while I am performing an act, I am observing a rule not yet in existence, but since the rule is not yet in existence, it cannot yet legitimate the conforming behavior, Sacco 1995), performance of an act, acquiescence, and respect for another's individuality are self-justifying. Only when cryptotypes are explicitly verbalised, are duties and rights clearly perceived as rules (and then we know we are exercising a right, or performing a duty) and passed on from one generation of jurists to another *as rules*. But how can cryptotypes be brought to the surface?

The tools of pragmatics offer a method[8]. When applied to key contemporary legal texts, such as statutes and judicial decisions, they bring to the surface not only implicit beliefs, but

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in a long line of methods of proof with connections to the supernatural, to identify the person against whom the community had to proceed, and to find remedies to cure social noncompliance. Magic rituals were used to reinstate property owners, since magic spells were believed to be able to make objects deter misappropriations. Nobody has been able to establish the date of creation of magic, nor when it began to rule human beings' lives. We assume that it started to play a larger role as man transitioned from Inferior Paleolithic to Superior Paleolithic, but we do not know for certain. Nonetheless law existed even before magic, if we assume that law provides a means to prevent and solve conflicts throughout society. Wherever we find a society, we find law.

[7] As Sacco (1995) suggested, for example, jurists do not like to admit that the purpose of the law of property is possession; that the concept of ownership has been created to safeguard what individuals possess (by means of imposing exclusionary obligations on others); that those who claim ownership of property invoke the logical medium of possession; that the focal point of the law is ultimately possession, and not ownership.

[8] Here we can only hint to the discussed concept of "defeasibility" and to the related topic of "defeasible inferences" - pragmatic inferences are typically defeasible: cf. Ferrer Beltrán (2012). Cf. also García Figueroa (2009); García-Yzaguirre (2012); recently: Marmor (2016); Macagno, Walton and Tindale (2016).

If we adopt a "soft defeasibility thesis", in which defeasibility is defined as a pragmatic tool of legal interpretation within legal reasoning (cf. Alchourrón 2012), and we consider legal defeasibility as an "essential feature of law" (cf. Sartor 2012), then defeasible reasoning cannot be intended anymore as defective, or inadequate, but it must be considered as a "natural way in which an agent can cope with a complex and changing environment" (Sartor 2012: 116). Guastini understands defeasibility as a consequence of the act of interpretation (Guastini 2012: 182). He describes a defeasible norm as a norm susceptible to implicit exceptions, which cannot be explicitly stated in advance; this in turn means that it is impossible to delimit circumstances that would represent genuine sufficient conditions for its use. For the author, "literal interpretation is still interpretation" (Guastini 2012: 188), so there cannot be any neutral or value-free interpretation. He distinguishes then implicit norms in the strict sense, positive although unexpressed (because the interpreter can infer them from

specific cryptotypes: those habits, background skills, feelings and social practices and rules of conduct that people follow within groups, that ultimately guide the actions of the members of a community. When applied to legal texts, pragmatics tools unveil the connections between what lies outside the text and what is inside it: the tacit normative dimension is connected to the legal text through the halo of implicit meaning that intersects the "living law" where the legal text suggests, implies, or alludes. "The living law" Ehrlich wrote, is "the law which dominates life itself even though it has not been posited in legal propositions (…)" (Ehrlich 1913: 493), and the courts' concern about living law is becoming apparent[9]. The outside/inside perspectives being permeable[10], the implicit halo of legal texts is in fact one of the major vehicles through which both social and personal beliefs and values contribute to legal interpretation, in shaping the meaning legal texts have in a given context of adjudication.

As for any text, also for legal texts (whether statutes, decrees or judicial decisions) elaborating this implicit halo proves necessary in interpretation, and calls for knowledge and values to be retrieved outside those expressed by both the literal surface of the text and the conceptual background shared by the legal community the text belongs to.

4. Unveiling implicit norms: the tools of pragmatics

As two examples will show (§§ 6.1 and 6.2), some implicit norms that silently rule the actions of a community may in fact be unveiled applying Paul Grice's theory of conversation (Grice 1975: 41–58) to legal texts.

In Grice's perspective, speakers engaged in a verbal interaction may assume their exchange as ruled by expectations and restrictions for verbal production and interpretation that each party will respect and use to enrich the meaning of its utterances and to understand communicated content. On the background of these rules (or maxims), [11] the implicit meaning of the texts speakers produce may be rationally retrieved and analysed.

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expressed rules), from implicit norms in a broad sense, the outcome of a creative activity in gap-filling by the interpreter: see Guastini (2014, 2010).

[9] Cf., for instance, the order no. 4701 of the *Tribunale dei minorenni di Bologna* (Bologna Juvenile Court), 10 November 2014, in which the court interpreted legal rules according to "the living law": it was a second parent adoption case, in which the mother of a child conceived by means of artificial insemination consented to the adoption of the daughter by her lesbian partner (they got married in the United States). Available at http://www.articolo29.it/wp-content/uploads/2014/11/14_11_10-Trib-minori-Bo-Ord-134-Cost.pdf (accessed 7 July 2017). The most relevant participant in the making of the Italian actual "living law" is the *Sezioni Unite della Corte di Cassazione* (the Supreme Court when it sits in Joined Chambers), as it has been recognized by the Constitutional Court in the decision of 11 February 2015, n. 11; confirmed by the *Cassazione* (Italian Supreme Court), 22 February 2016, n. 3376; and 13 May 2010, n. 18288. Cf. Salvaneschi (2016); Evangelista and Canzio (2005); Canzio (2008).

[10] A different opinion is sustained by textualists: according to Justice Scalia: "legislation is a speech act and act of communication whereby the legislature by voting on a bill communicate a certain legal content, and that legal content is the content of the statutory law". Cf. Scalia and Garner (2012), and also Marmor (2014).

[11] The maxims in which Grice articulated his principle of cooperation are presumptions about utterances that listeners rely on and speakers use in communication. In cooperative exchanges of information, Grice argued, parties to conversation are guided by expectations of informativeness, truthfulness, relevance, and manner of the utterance they process. Grice treated "these rules not as arbitrary conventions, but as instances of more general rules governing rational, cooperative behavior". Cf. Davis (2014). Poggi (2011: 27) defines maxims as "formulations of customary hermeneutic, technical rules. According to von Wright's classification, technical rules (or directives) indicate a means to reach a certain goal, aiming not at directing the will of the receivers, but at

In order to understand how such a structure of mutual expectations is instantiated in the communicative exchange between the legislature and its recipients, differences between natural and legal communication have been analysed (Sinclair 1985; Miller 1990; Chiassoni 1999; Walton 2002; Marmor 2005, 2011, 2014; Neale 2007; Soames 2009, 2011, 2013; Poggi 2011; Morra 2011, 2015b; Carston 2013; Endicott 2014). In the first place, the time that elapses between the 'utterance' of the legislature's proposition and its interpretations by recipients (courts, practitioners, public officials, academics, and citizens) provides legal language with a (descriptively challenging) trans-contextual character that suggests to consider the exchange between the legislature and the courts as a monologue formed by two principal independent agents, the legislature and the judicial authorities (Shaer 2013)[12]. Some scholars have also pointed out that the legislature and the judiciary make a strategic rather than cooperative use of language (Marmor 2005, 2011, 2014)[13]. Furthermore, the plurality of recipients makes it unclear who the parties to the conversation are, and, finally, the legislature's intention is not merely informative, but also normative: its communicative goal is to inform the audience of its normative intention so that citizens are provided with reasons for obeying the enacted laws[14].

The set of these features make the communicative exchange between the legislature and the judiciary very different from ordinary conversations, and yet it cannot be denied that also the parties to this peculiar kind of speech act linguistically do inter-act with a minimal common aim - the effectiveness of the legal order in which they operate, enacting laws and applying a plurality of sources. This means that a peculiar kind of co-operation holds even in their conversation,[15] although different from the principle that Grice exemplified for ordinary and collaborative conversation (Morra 2015b, 2016b; Morra and Pasa 2015).

A further *caveat* is necessary: analysing legal texts through a Gricean approach does not presuppose the endorsement of a particular theory of legal interpretation. It is a neutral practice that, *per se*, does not support any specific perspective on the relationship between the legislature and the courts (Morra 2016b). Detecting in a rational way the nuances of implicit meanings surrounding legal texts cannot (and should not) be considered as a method for solving interpretive problems that may arise in adjudication[16]. In fact, the Gricean approach

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indicating to them that their will is conditioned: in other words, that if they want to reach a certain goal, then they must maintain certain behavior".

[12] Amongst them, Ronald Dworkin, William Eskridge and Justice Antonin Scalia. Mark Greenberg advanced a radical position in Greenberg (2011). Marmor faced Greenberg's issues in Marmor (2014: 11-20).

[13] A thesis Marmor mantained in all his works. The view is endorsed with *distinguo* by Poggi (2011), and by Skoczeń (2015).

[14] Sometimes the legislature's inability to be (more) informative as regards specific behaviors or realities may be due to the unpredictability of the facts of specific cases that will be decided by the judges. But sometimes the legislature, although perfectly able to be maximally informative and to enact complex regulations in a specific domain, refrains from doing so, especially when detailed regulations could lead to controversial effects and it seems more reasonable to introduce vague concepts leaving the courts an amount of discretion and enabling them to decide on a case by case basis.

[15] "In legislation, if cooperation breaks down, the rule of law breaks down. And the separation of powers between legislature and court depends on adherence by the courts to legal analogues of the conversational maxims." (Endicott 2014: 8).

[16] The form of Gricean approach here endorsed shares with textualism the idea that relevant communications are understood as they "would be grasped by a reasonable hearer aware of the legal and other background conditions of legislation" (Marmor 2014: 116-117); however it differs from a textualist approach in several crucial respects, first and foremost in its belief that, although implicatures depend also on the exact wording of the statute, many other factors beyond linguistic

considers the maxims of conversation in force in a communicative exchange as conducive to different and possibly conflicting *implicatures* when applied to the same portion of text; and in fact, rather than giving guidance for retrieving *the* implicit meaning of a text, Grice's theory aimed at providing tools for rationally motivating the meaning chosen from among a text's possible *implicata*. So, when applied to statutes, a Gricean approach cannot lead to univocal solutions when specific cases reveal the existence of an informative gap in a statute: it may only rationalise the interpretative options the text offers. Furthermore, when it is applied to judicial decisions, such an approach makes some implicit aspects of the architecture of legal reasoning detectable. It is precisely in this vein that some legal scholars have adopted it (Sinclair 1985; Miller 1990; Walton 2002).

5. Presuppositions and implicatures in legal texts

The normative variant of Gricean theory developed by Marina Sbisà (Sbisà 2007, 2015) appears particularly suited for analysing normative texts and their interpretations, and for extracting the implicit norms they are linked to. While the focus of Grice's theory was mainly on the speaker's communicative intention, in Sbisà's approach the emphasis is shifted onto the communicative intention of the text. Attributing a communicative agency [the capacity to act] to the text not only downscales the problem of the opacity of the communicative intention of the speaker (*speaker* referring in most contemporary Western legal orders to the legislature); it means that presuppositions and implicatures can be considered as additional information that interpreters must and may, respectively, retrieve in the text.

Presuppositions[17] are additional pieces of information suggested by lexical elements and syntactical constructions of a text: they are statements that are unexpressed but whose truth, nevertheless, must be assumed by interpreters when they accept as appropriate the utterance of the text. Holding a presupposition of a text as true is an interpretative restriction accepted by interpreters engaged in a communicative enterprise in which raising doubts about the status of the information given by the text would be inappropriate; in such circumstances, interpreters are likely to take into account the content of the presupposition without objection.

Implicatures, on the other hand, are pieces of information suggested by a text that enrich it without impacting on its truth value. While a conventional implicature is suggested by the use of a certain expression instead of another logically equivalent one, a conversational implicature can be inferred from the way in which a text is structured together with the assumption that it was produced in the specific context as a contribution fit for the purposes of the conversation in which the participants agreed to engage. When the inference is rationally motivated through argumentation, the piece of information vehicled by the

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competence are relevant in deciding whether their inference is warranted in the particular context of interpretation (Morra 2015b; Morra and Pasa 2015; Moreso and Chilovi 2015).

[17] There is also a technical legal meaning of the term *presupposition*, which dates back to Windscheid and his writings (among others, Windscheid 1892 S. 161, 201). The doctrine of tacit presupposition refers to contract law, with the aim of restricting the will of the contractual parties. The intention of a person is always related to a certain given set of facts; it has been formed on the basis of certain suppositions: if these suppositions are wrong, it is not always fair to hold that person to her words. On the other side, there is the community's interest in the certainty and predictability of the law. Thus, according to the doctrine of presupposition, the parties' expectations become an element of the contract as long as they formed a part of the contractual intention ("I want but I would not want if not" said Windscheid): in the case of non-fulfilment of the contract, these expectations are frustrated and the party has the *exceptio doli* to reclaim what she had given to the other party in order to perform the contractual obligation. Cf. Their (2011: 29). In our paper only *linguistic* presuppositions will be considered, namely presuppositions inferable from the text and its utterance.

implicature can plausibly be considered as part of what a text communicated when it was produced. In enacting a statute, members of the collective agency known as 'the legislature' acknowledge that its formulation will express not only the implicatures they meant when they drafted it, but the implicatures the text will plausibly suggest in any context of interpretation (which they cannot know a priori); interpreters, for their part, accept the text as a formal container for their interpretations shaped by a multiplicity of varying contextual factors (Morra 2015b).

When used in textual analysis of statutes and judicial decisions, Sbisà's analytic tools prove useful for identifying characteristics, functions and uses of the implicit information that these texts convey (Morra 2011, 2015a, 2015b, 2016b; Morra and Pasa 2015; Sbisà 2015; Bairati 2015; Cassone 2015; Long 2015). Distinguishing what legal texts say, presuppose or suggest from what they do not communicate promotes awareness of the functions carried out by the different shades of implicit information surrounding them. Further, it makes it possible to justify the attribution of implicit meaning to these texts, linking the inference to a specific part of them; using argumentation and reasoning, interpreters may specify why they support one interpretative option instead of another one, making that attribution of meaning transparent and reasoned (Pasa 2015: 63). The tools of pragmatics applied to legal texts show how the implicit sense surrounding these texts modulates their applicability, and make transparent the reasoning that led the courts to attribute one implicit meaning instead of another possible one, according to rational criteria.

6. Implicit norms in gender issue: two examples

Connecting the *outside* to the *inside* dimension of law through a transparent and reasoned attribution of meanings proves particularly urgent when legal texts affect sensitive social issues. This is the case of *gender issues*[18]. As two examples will show, the awareness of what a cryptotype is in Sacco's terms, combined with the *normative* variant of Gricean theory developed by Sbisà for analysing legal texts, contributes to the emersion of traditional paradigms linked both to the social-symbolic organisation of sexuality and to our biological urge to reproduce and become parents, and makes the evolution of those paradigms detectable (Harding 2010; Pezzini 2012; Morra and Pasa 2015).

The first example concerns the possibility for same-sex couples to get married under Italian law after Constitutional court judgment no. 138/2010 and after the enactment of Act no. 76/2016. The second example focuses on the question of what *parenthood* meant under the Family Code of California before and after an amendment enacted in 2014. In both examples, deliberately chosen to represent civil as well as common law systems, the questions

[18] By this expression, scholars of different disciplines usually refer to a plurality of questions. With regard to gender identity, many aspects are socially constructed, precisely how individuals perceive themselves as male or female or both or neither (one's internal sense of self). Gender expression is also socially constructed: one's outward presentation and behaviours are related to the set of roles and expectations assigned to males and females by the community. Finally gender roles do not imply any specific sexual orientation. Individuals whose gender identity does not match their assigned birth gender are called transgender. Being trans does not imply any specific sexual orientation, i.e. any attraction to people of a specific gender. When biological sex, gender identity and gender expression align, there is a level of congruence with the world around the individuals to the point that they feel part of the norm (they are also called gender-normative). The term *cisgender* usually refers to people whose sex assignment at birth corresponds to their gender identity and expression. The point here is that social privileges and their legitimization through law come from the assumption that the cisgender perspective is congruent and universal, not exceptional like the perspective of the transgender, agender, etc.

raised by gender issues proved to be crucial in unveiling *cryptotypes* that covertly and/or unconsciously – implicitly - 'drive' legal interpretative practice.

6.1. Marriage and same-sex couples in Italian law

The first example concerns the implicit norms relating to the heterosexuality of the couple in the text of the Italian Civil Code (hereinafter CC), Book I, on marriage (Morra 2011; Bairati 2015; Lorusso 2015).

Although most of the articles of the CC refer to those who want to marry or those who have already married with gender-neutral expressions, such as *spouse*, a few articles use the words *husband* and *wife* (Art. 107, 108, 143, 143bis, 143 ter 156 bis Italian CC). In particular, Article 107 CC, concerning the form of the marriage ceremony, considered as pivotal for interpretation, states that: "The registrar (*ufficiale dello stato civile*) declares the parties married only after each of them has declared their intention to take the other to be his/her wife/husband."

The literal or ordinary meaning of the words *husband* and *wife* is connected to the physical structure of reproductive organs used to assign sex at birth. Since nothing in the Civil Code indicates that *husband* and *wife* must be understood differently, that Y is a male is a condition for the effectiveness of the declaration of X, and vice versa: both statements are presuppositions underlying the text of Art. 107 CC. The declaration of the registrar subsequent to both X's and Y's declarations presupposes those conditions (*X is a female* and *Y is a male*) have been satisfied, thus implying that the registrar can marry only individuals of the opposite sex.

The further question then arises as to whether the presupposition underlying Art. 107 CC extends to all the other CC articles on marriage that do not use the gender-specific words *husband* and *wife*. This seems logical, because if only couples consisting of a male and a female may make the declarations required by Art. 107 CC, then, as a consequence, people of the same sex cannot marry. However, interpreters can apply this reasoning only after having activated an implicature with the purpose of preventing the incoherence and non-cohesion of the whole text on marriage contained in the CC. Since they can presume that Book I of the CC is a coherent text in which terms and their lexical analogues are used with a consistent meaning, in order to preserve this coherence and consistency they can assume that the specific meaning of *spouses* conveyed by the text of Art. 107 CC (a heterosexual couple) modifies the gender-neutral meaning the term has in most articles of Book I of the CC on marriage (a couple). Namely, they activate a specific implicature (I_1: "the presupposition peculiar to art. 107 CC that the couple must be composed of a male and female is transferred to all the articles of the Book I of the CC"), and this activation implies that marriage is open only to heterosexual couples.

Implicature I_1 – which reflects the communicative intention with which the legislature enacted the rules on marriage in 1942 – had been activated by all recipients until same-sex couples challenged the *status quo* asking for admission to marriage. When these couples raised such a question before the Italian courts, judges could have retrieved another implicature in order to both preserved the coherence of the whole Civil Code's text on marriage and opened marriage to same-sex couples, namely I_2: "the gender-neutral meaning of the terms *spouses* and *married couple* used in most articles of the CC broadens the specific meaning the terms have in Arts. 107 CC, 108, 143, 143bis, 143 ter and 156 bis". This inference is mainly grounded on the fact that, when the Italian legislature enacted the Civil Code containing the rules on marriage, same-sex couples were not included in the list of couples that cannot marry according to Art. 87 CC - that is, those couples formed by individuals related by blood or by adoption. However, when required to evaluate whether the text of the Civil Code allows homosexual couples to marry, Italian courts always decided that it does not.

They generally considered that, although the CC does not say explicitly that only couples formed by one male and one female can marry, it nevertheless gives sufficient indications to retrieve this piece of information and recognize it as an essential presupposition of the institution of marriage, a *core part of the norm* that cannot be erased *via* interpretation. In conclusion, Italian trial courts held that the gender-neutral meaning of *spouse* and *married couple* could not have been extended to the whole Book I of the CC on marriage by substituting the terms *wife* and *husband* with gender-neutral words not related to biological sex (such as *spouse*) in the Articles with gender-specific terms[19]. Dissatisfied with such a solution that did not recognise to same-sex couples rights and duties, some judges raised the question of constitutional validity of Articles 107, 108, 143, 143bis, 143 ter and 156bis CC that they had to apply to the case before them[20]. When asked to consider the incompatibility of these Articles with the Constitution, the Constitutional Court, in its judgment no. 138/2010, declared the question of constitutional legitimacy manifestly unfounded and refused to rule upon the constitutionality of the challenged Articles, holding that its gap-filling activity would have redesigned the *core of those provisions*, a prerogative pertaining only to the legislature[21]. Although conservative,[22] the Court's interpretation unveiled a cryptotype - the exclusion of same-sex couples from marriage -, and thus made it available to legal discussion. The attribution of this meaning to the legal text on marriage is, indeed, based on a cryptotype (Pasa 2015: 59) which requires a tacit compliance both with the "millennial tradition based on common sense", namely a natural order that considers marriage as the union between a male and a female - a tradition that the Italian Constitution recognises as the "*foundation* of the rights of the family as a *natural*, spontaneous *society*" (art. 29 Const.)[23] -, and with the historical meaning the legislature had in mind when it produced both the text of the Constitution and of Book I of the CC on marriage in the '40s[24]. As a matter of fact, after the abovementioned judgment of the Constitutional Court which unveiled the cryptotype, the Italian Supreme Court (*Cassazione*), in its judgment no. 8097 of 21 April 2015, acknowledged that the heterosexual nature of marriage has legally lost its status of immutable paradigm (Pezzini, 2015b)[25] since it has proven to be a standard which is subject to variation[26].

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[19] As was proposed by some parts, and as was done, for example, in Spain in 2005: *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, Boletín Oficial del Estado (BOE),* n. 157, 2.7.2005, pp. 23632-23634.

[20] On the peculiarities of the Italian Constitutional Court and its adjudication process, in English, see Barsotti et al. (2016).

[21] Cf. judgment no. 138/2010 and judgment no. 170/2014 of the Italian Constitutional Court available at http://www.cortecostituzionale.it/default.do

[22] The Constitutional Court recognized the heterosexuality of the couple as a fundamental, although only presupposed, condition of marriage at the time of the enactment of Book I of the CC on marriage.

[23] "The Republic recognises the rights of the family as a natural society founded on marriage. Marriage 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".

[24] A cryptotype which suggested to our Constitutional Fathers to draft an explicit patriarchal rule according to which: "The Republic protects mothers [*but not the fathers*!], children and the young by adopting necessary provisions". Art. 31 (2) Italian Const.

[25] As in an earlier decision dealing with the registration of a same-sex marriage celebrated abroad: *Cassazione* (Supreme Court) judgment no. 4182/2012, on which among others see Torino (2013).

[26] Bernaroli struggled with gender dysphoria, with the support of his wife. In 2009, they travelled to Thailand, where Bernaroli had sex reassignment surgery and became Alessandra. When Bernaroli officially changed her name and gender, and when she renewed her identity card, the Bologna Court annulled the marriage. The couple appealed the unwanted divorce and lost, but the Italian Supreme court overturned the ruling, allowing them to stay married, until the legislature enacts more appropriate legislation.

This contrastive dialogue between different judges (trial courts, the Constitutional court and the Supreme Court) ultimately prompted the Italian legislature to introduce the "civil union", a specific legal protection for same-sex couples.

Act no. 76 of 20 May 2016[27] reflects how difficult it may turn out for positive law to meet the needs of a changing society. In fact, notwithstanding the Italian Supreme Court judgment no. 8097/2015, the legislature endorsed the traditional paradigm of marriage, as interpreted by the Constitutional Court, and it hermeneutically locked the marriage, reserving to same-sex couples a different institution, the civil union. Although the legislature projected duties and rights of marriage onto civil unions, providing that the rules which refer to marriage and contain the words "spouse", "spouses", or their equivalents, apply also to "each party of a civil union between same-sex persons" (Article 1, paragraph 20, Act no. 76/2016), it excluded the equivalence of meaning in two crucial issues, filiation and adoption, which traditionally characterize marriage as a relation between a male and a female [28]. Once again, however, the shift towards a different paradigm is guided by the courts, which can keep on[29] applying the special rules on adoption (Art. 44, (1) letter d., Act no. 184/1983) that, as regards the so-called *second parent adoption*, protect the best interest of the child.

In a recent adjudication, indeed, the Turin Court of Appeal[30] protected the best interests of the child of two lesbians married in Spain and then divorced, consenting the transcription of the child's birth certificate where the child is stated to have two mothers. This is a new possibility that previously the courts had argued was "contrary to public order"[31]. Furthermore, the Juvenile Court of Rome[32] ruled on the second parent adoption admitting the full emotional and educational capacity of the adoptive mother in a same-sex couples, and the case reached the Italian Supreme Court, which in its judgment no. 12962 of the 22 June 2016 stated that: "the preferential treatment accorded to marriage should found a limit into the inviolable rights of the child, which cannot suffer harmful effects from a strict interpretation of the law". Italian case law is thus moving toward a new parenthood paradigm, which provides for the possibility of a child to have two mothers, or two fathers (but not more than

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[27] Cf. the Italian Act 20 May 2016, no. 76: *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze,* available at http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg (last access 10 September 2016). This statute is the outcome of several compromises between the promoters and the other parliamentarians, and it settled a new legal institution for same-sex couples: the so called "civil union" (*unione civile*); it also recognised a (low) level of protection to the "domestic partnerships" (*convivenze*).

[28] "For the sole purpose of making the protection of rights effective and the duties deriving from a civil union between same-sex persons fulfilled, the provisions referring to marriage and the provisions containing the words 'spouse', 'spouses' or their equivalents, wherever they occur in statutes, legislative decrees, decrees and regulations, as well as in administrative acts and in collective labour agreements, shall apply also to each party of a civil union between same-sex persons. The aforementioned provision shall not apply to the Civil Code rules not explicitly mentioned in the present Act, as well as to the provisions of Act No.1983/184. The foregoing shall be without prejudice of what is provided for and allowed by the current regulation on adoption".

[29] Because, as we said in the previous ft., the final sentence of Article 1(20) states that "the foregoing shall be without prejudice of what is provided for and allowed by the current regulation on adoption".

[30] Cf. *Corte d'Appello Torino, sez. famiglia*, decree of 29.10.2014, http://www.aiaf-avvocati.it/files/2015/01/Corte-appello-Torino-Decreto-ottobre-2014.pdf (accessed 12 September 2016).

[31] *Corte d'Appello Torino, sez. famiglia,* cit. previous ft.

[32] *Tribunale dei Minorenni di Roma*, judgment no. 299 of 30.07.2014, confirmed by the Rome Court of Appeal (Juvenile Chamber), judgment of 23.12.2015.

two parents) [33]. This shift is generated by the intention of guaranteeing both the best interests of the child and the expectations of homosexual and transgender individuals who desire to be parents. A party of a civil union can then ask the courts to adopt her/his partner's child because Act no. 76/2016 does not exclude (…but does not allow) the possibility for a party of a civil union between same-sex persons to create a legal and binding relationship with her/his partner's biological child. Another implicit meaning linked to the heterosexual paradigm of marriage, namely that children cannot have two mothers or two fathers, has been unveiled.

6.2. Meaning of "parenthood" under the Family Code of California

The second example of a pragmatic reading of legal texts concerns the definition of parenthood provided by a provision of the California Family Code and its interpretations in some 'hard cases' (Morra 2015a, 2016a). In the Seventies, in order to promote the best interests of a growing number of children born out of marriage, most western legal communities severed the concept of parenthood from the legal relationship between the parents of the child. Other tacit rules inferable from the paradigm traditionally ruling parenthood, such as the implicit definition of biologically determined (natural) parenthood as derived from the heterosexual paradigm of the couple, and the assumption that the terms *mother* and *father* identify unique parental roles, became explicit only when biotechnology made possible legal claims to which the traditional paradigm proved unable to provide a solution.

Before its amendment in January 2014, sec. 7601 of the California Family Code (FAM)[34] read as such:

> 'Parent and child relationship' as used in this part means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship.

In the last sentence, the presupposition (P) activated by the definite article [the term includes *the* mother and child relationship and *the* father and child relationship] asserts the existence of *only one* (legal) mother-and-child relationship and the existence of *only one* (legal) father-and-child relationship: by logical consequence, then, a child can (legally) have only one mother and only one father. The logical consequences of the information provided by the presupposition differ according to two competing implicatures arising from ambiguity in the meaning of the verb *include*. Since *to include* means *to have (someone or something) as part of a group or total*, and also *to contain (someone or something) in a group or as a part of something* (Merriam-Webster Online), in that particular circumstance of interpretation the statement [The term includes the mother and child relationship and the father and child relationship] could be read as saying either I_1 ('parent and child relationship' includes *only* the mother-and-child relationship and the father-and-child relationship), or I_2 ('parent and child relationship' includes *among other (parental) relationships* the mother-and-child relationship and the father-and-child relationship).

In 1975, when sec. 7601 FAM was enacted, it was not that, overtly or not, the legislature wanted the statute to remain vague;[35] rather, the legislature did not even detect the possible

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[33] On this point see Lucia Morra, Barbara Pasa, *Collective Agency, Intentionality And Communicative Intentions: The Case of the Legisla*ture, *forthcoming* 2017.

[34] Division 12. Parent and Child Relationship [7500 - 7961], Part 3. Uniform Parentage Act [7600 - 7730], Chapter 1. General Provisions [7600 - 7606].

ambiguity, because the context in which the statute was enacted excluded any implicature different from I_1. However, although in the Seventies socio-political circumstances did not suggest the activation of I_2, a few decades later the new political, social and legal context made it conceivable, desirable and possible, and thus the activation of I_1 was no longer automatic.

Differences between the informative content of the two implicatures can be appreciated by considering the different consequences of their merging with presupposition P, namely with the information that a child can have only one mother and only one father. Merged with I_1, P means that a child cannot have more than two legal parents, a mother and/or a father; if we assign a literal or ordinary meaning to the terms *mother* and *father* (since they are not legally defined), it follows that if a woman or a man is already in a parental relationship with a child, someone of the same sex as the parent already legally recognized cannot be attributed a further parental relationship with the child. Conversely, merged with I_2, P means that a child may have more than two legally recognised parents: a mother, a father, and others, and that someone the child is biologically unrelated to can have a parental relationship with the child; that the unspecified potential parent cannot be recognized as a further mother or father of a child who already has a child-and-mother or child-and-father relationship; this does not exclude the possibility of someone of the same sex as the child's legally recognised mother/father having a parental relationship with the child.

Standard readings of sec. 7601 FAM, endorsing a heterosexual and patriarchal model of parenthood, remained undisputed until some "hard cases" were judged by the Courts of the State of California. In one of them the Courts had to decide whether it was possible to attribute a 'natural parental relationship' to someone that met the criteria that in the FAM identified a presumed natural parent of a child, but could not be recognised either as the mother, since the child had already a (legally recognised) mother, or as the father, since this person was not a man. The question was decided in 2004 by the Court of Appeal of the Third District[36] that ruled that it was not possible, and then in 2005 by the Supreme Court of California[37] that reversed the decision of the Court of Appeal.

The facts of the case are as follows. Elisa and Emily lived together and decided to raise a family together. For this purpose, they both underwent artificial insemination and became pregnant by the same donor (Elisa gave birth to a girl, Emily to two twins). They parted two years after, and after some time Elisa stopped supporting Emily and the twins. The County (to which Emily had applied for financial help) sued Elisa. The trial court decided that she had to support the twins, but Elisa argued that under sec. 7601 she could not be considered as a 'natural parent' of the twins.

Questioned on the meaning of sec. 7601 of the California Family Code, the Court of Appeal adhered to the plausible original legislature's communicative intention, and stated that if a woman, or a man, already have a parental relationship with a child, someone of the same sex as the parent already legally recognised cannot be attributed a further parental relationship with the child. The Court argued that the precedents on which the trial court relied were inapposite for this case: they rather confirmed the heterosexual paradigm of parenthood since an individual biologically unrelated to a child was recognised as the child's natural parent only when she had the same sex as the lacking parent. Elisa, then, could not be considered a

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[35] The vagueness given by different implicatures made available by a legal text can be considered as *overtly intended* when the legislature deliberately left open the interpretation due to the impossibility or inappropriateness of using an expression with a precise meaning, as happens in general clauses and with legal metaphorical terms still open to interpretation (amongst others, Endicott 2001; Morra and Bazzanella 2002); as *covertly intended* when precisely the ambiguity of the statute made possible the compromise through which the statute was approved (Marmor 2005; Morra 2010).

[36] *Elisa Maria B.* v. *Superior Court*, 118 Cal. App. 4th 966.

[37] *Elisa B*. v. *Superior Court*, 37 Cal. 4th 108.

parent under sec. 7601 FAM. The Court acknowledged the unfairness of the consequences of its decision, but declared that a different judgment would have entailed an expansion "of the class of persons entitled to assert parental rights» reflecting a «public policy decision" that "should be left to the Legislature" due to the "complex practical, social and constitutional ramifications" it entailed[38].

The Supreme Court of California reversed the decision, rejecting both the heterosexual and the pluralistic paradigm of parenthood incorporated respectively by I_1+ P and by I_2+ P, an ambiguous interpretive choice that revealed the difficulties that the inter-action between judiciary and legislature was facing at the time in tracking a swiftly changing society. The Court wrote that its choice avoided discrimination between adoptive and natural parents[39] and was coherent with its previous decisions ruling on the possibility for a child to have a same-sex parent *only* when the child did not have a second recognised legal parent. Furthermore, the decision guaranteed the best interests of the twins, because rejecting the presumption that Elisa was their parent would have deprived them of the support of a second parent; furthermore, Emily being out of work, it spared the County the heavy financial burden of supporting the twins, a weight implicitly communicated only in the statement of facts that mentions the serious health problems affecting one of the twins (information reported by the trial court, but not mentioned by the Court of Appeal)[40].

In 2011 the judgment of the Court of Appeal *In re M.C.*[41] rejected once again the heterosexual paradigm of the couple of parents, recognising two women as parents. It justified its decision on the basis of the consequence of I_1 + P that a child cannot have more than two legal parents, a rule that the Californian Supreme Court made explicit as an *obiter dictum* in the *Elisa* case. In *In re M.C.* more than two persons could have been considered as presumed natural parents of M.C. under sec. 7611 FAM, but the Court of Appeal held that sec. 7601 forbids such recognition. Recognising as natural parents of M.C. only her mother and the woman her mother married shortly before her birth, the Court of Appeal regretted the consequences of its decision (since the M. C.'s biological mother was in jail and her spouse seriously ill, M.C. was taken into care by social services, and not by her willing biological father), but it held that recognising more than two parents would have proved disruptive for the text of sec. 7601 FAM. The Court of Appeal requested that the legislature change the text in order to enable fair rulings in all extraordinary circumstances.

In 2014, the Californian legislature recognized the uptake of I_2 and its consequences as closer to its actual communicative intention, and amended sec. 7601 FAM in order to prevent any interpretative choice that could prohibit members of a homosexual couple from being both natural parents of the same child, including holdings that limited the possibility of attributing a parent and child relationship to both members of a homosexual couple in circumstances where this acknowledgement did not entail the recognition of more than two parents. The new text of sec. 7601 FAM gives now a definition of the legal concept of natural parent irrespective of biological links, and detaches its implicit (legal) meaning from the idea

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[38] *Elisa Maria B.* v. *Superior Court*, 118 Cal. App. 4th 966, at 10.

[39] *Elisa B.* v. *Superior Court* 37 Cal. 4th 108, at 8. In 2003, the Californian Supreme Court had ruled on a "second parent" adoption in which the mother of a child conceived by means of artificial insemination consented to adoption of the child by the mother's lesbian partner: cf. *Sharon S.* v. *Superior Court*, 31 Cal.4th 417.

[40] Providing factual support to reinforce its arguments, the Californian Supreme Court wrote: "Elisa gave birth to Chance in November, 1997, and Emily gave birth to Ry and Kaia prematurely in March, 1998. Ry had medical problems; he suffered from Down's Syndrome, and required heart surgery." *Elisa B.* v. *Superior Court* 37 Cal. 4th 108, at 2.

[41] *In re M.C.,* 195 Cal. App.4th 197.

of couple, since it licenses the courts to recognise more than two parents for a child, although only one mother and one father (the above-mentioned presupposition P is still maintained):

> (a) 'Natural parent' as used in this code means a non-adoptive parent established under this part, whether biologically related to the child or not.
> (b) 'Parent and child relationship' as used in this part means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship.
> (c) This part does not preclude a finding that a child has a parent and child relationship with more than two parents.
> (d) For purposes of state law, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, benefits, responsibilities, obligations, and duties of parents, any reference to two parents shall be interpreted to apply to every parent of a child where that child has been found to have more than two parents under this part.

In its evolution towards a new legal paradigm that promises both to guarantee the best interests of the child, whatever the circumstances, and to meet claims for recognition advanced by homosexual or transgender individuals who desire to be parents, the Californian legal system brought to the surface and finally rejected the implicit rule related to the number of possible parents, a rule lying at the core of the traditional heterosexual paradigm of marriage.

Another implicit norm linked to the heterosexual paradigm of marriage, namely 'marriages between same-sex persons are not allowed', was eliminated throughout the United States by the decision of the Federal Supreme Court, in *Obergefell v. Hodges* of 26 June 2015[42] (previously, same-sex marriage had been legally recognised in about three-quarters of the States)[43]. Interestingly enough, the decision legally unveiled a third implicit norm linked to hetero-marriage in western countries, that is the rule about the number of possible spouses. As about this implicit rule, scholars had already argued that an objective reading of the texts on marriage discloses the possibility of discussing the unconstitutionality of laws that

[42] The judgment is available at http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 21 July 2015).

[43] As of May 30, 2015, same-sex marriage existed in thirty-seven states (Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming and in the District of Columbia) Cf. *Marriage Center*, http://www.hrc.org/campaigns/marriage-center (accessed 1 July 2015). Quite differently from the Italian Constitution, the U.S. Constitution itself says nothing about marriage; therefore the States were entrusted with the whole matter of the domestic relations of husband and wife. The on-going debate about same-sex marriage is not only about gay and lesbian couples and their constitutional right; it is also about the legal definition of marriage and its extension to avoid the tendency to discriminate against different minorities.

implicitly limit civil marriage to couples (Den Otter 2015; Larcano 2006; Strassberg 2003):[44] as for the case of gender biased/gender free expressions used in the legal texts on marriage, very few articles make it explicit that the number of spouses is limited to two individuals, and as in the case of the heterosexuality of the couple, different implicatures can be drawn to preserve coherence and cohesion of the legal texts.

As a matter of fact, in his dissenting opinion in *Obergefell v. Hodges* Justice Roberts argued:[45] "It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices (...)" why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser (...)" why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability (...)" serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?"[46]

As Nussbaum states, articulating and protecting spheres of personal liberty has been a crucial task of our tradition of constitutional law (Nussbaum 2010: xvi). Thus the claim of a fundamental right to a *plural marriage* could be the next step: at any rate, one may guess that in the next few years the question of whether the United States may continue to prevent even fully informed, consenting adults from marrying more than one person at the same time will be thoroughly analysed[47].

7. Concluding remarks

The two examples illustrate how interpreters of legal texts may activate implicatures and their possible functions. More in general, they confirm that the law is not confined to the visible and usually written body of legal rules, although today professors and students still comfort themselves with the belief that texts comprehensively present the law in force. The retrieval of cryptotypes through the detection of presuppositions and implicatures and, more in general, the recognition of the tacit and implicit dimension of law, constitute one aspect of interpretative practice that cannot be explained in a straight and mere logical way, but nevertheless can be accounted for. Revealing the implicit information underlying legal provisions can help in tracing the way in which social and individual values contribute to the meaning given to legal texts in adjudication.

The two examples discussed in §6.1 and in §6.2 were both related to gender issues, but clearly the retrieval of cryptotypes through the tools of pragmatics may be a relevant exercise in all fields of law, to begin with migration law, criminal law, and labour law, where implicit beliefs and paradigms of action serving the socio-economic and political structure impinge on legal communities at large. This sort of exercise may well not retrieve *all* the shades of implicit

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[44] Den Otter makes clear the relevant terminology, he discusses reasonable concerns about how women are treated in polygynous relationships, about child development and possible adverse consequences of judicial recognition of a constitutional right to "plural marriage".

[45] 576 U. S. ___ (2015) 21 Roberts, C. J., dissenting, available at http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 1 July 2015).

[46] Justice Roberts quotes respectively Bennett (2009), Li (2014) and Den Otter (2015), estimating 500,000 polyamorous families in the United States.

[47] *Should Plural Marriage Be Legal?*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 17, 2013), http://www.nytimes.com/roomfordebate/2013/12/17/should-plural-marriage-be-legal.

meaning surrounding the norms, but it opens the retrieved cryptotypes to rational inquiry, which is possible only when statements become explicitly formulated.
From a comparative point of view, the application of such a methodology to gender issues highlights the circular relation between Law and Society: the existing body of legal doctrine and interpretive practices is a construct of relations of exclusion (such as those arising from history, gender, class and race) and, at the same time, legal institutions influence social structures and social knowledge. Moreover, the retrieval of the implicit dimension of law reveals the impact of cryptotypes into legal paradigms of 'marriage' and 'parenthood', which are shifting differently at national level. The emergence of cryptotypes silently shaping the traditional approaches to parenthood and marriage prompted in fact the research of new legal paradigms, with substantive differences in Western legal systems. As regards 'parenthood', as was seen, the Californian legislature settled that more than two parents can be legally recognised to a child, but the implicit rule that a child can have no more than one *mother* and no more than one *father*, presupposing a gender-biased distribution of parental responsibilities and duties, still holds in court decisions; as opposed, while the Italian legislature still stands by the traditional paradigm of parenthood, the Italian judiciary is developing a new paradigm in which a child may have two mothers, or two fathers (but no more than two parents), in order to protect the best interests of the child and the desire of same-sex couples to become parents. As regards 'marriage', as was seen, while the Italian legislature missed the opportunity to recognize gender-neutral *marriage* through Act no. 76/2016, the Federal Supreme Court of US not only legally wiped out the heterosexual character of this institution, but it also disclosed the possibility of discussing a pluralistic paradigm of marriage – at least, a right to plural marriage is becoming apparent.

Interpretation is a practice by which interpreters can discover and project their identity, a practice by which they recognise both the contingency and plurality of law and the use (and *abuse)* of law as a mechanism of privilege and domination. Revealing the implicit dimensions of law may help to overcome social exclusion and subordination. What equality and justice are, and what the relationship between ideas of inequality and discrimination is (Butler 1990), are questions that cannot be avoided by all participants in interpretative practice.

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