Perspectives and Critique of Realism in the Law
An Introduction to Law and Realism

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This book examines the question of the existence of norms, legal orders, and of the law in general. At a first glance, the question seems trivial because it is evident that the law exists in some way. Legal orders always have some degree of social recognition; legal texts have been an unquestionable aspect of the heritage of a wide variety of different cultures throughout history, and legal norms are subject to interpretation and dispute in our political life. However, it suffices to frame the question in terms of ultimate criteria in order to demonstrate why the controversial character of this topic has become evident. If the law exists, does it ultimately exist as a mental state of individuals, as an abstract entity such as mathematical objects, or as a semantic (textual) entity; or is it perhaps a purely normative (or counterfactual) type of reasoning? It is remarkable that theories that have both denied and asserted autonomous existence of law regarding observers have been ascribed the title of 'realism' in the history of jurisprudence. On the one hand, if the question of the existence of law is answered in a superficial way that embraces everything that is only passingly related to social norms, such as the statement that 'law is a cultural phenomenon', or 'law is a social fact', then that which distinguishes law from other types of social contexts is blurred, especially within the contexts of morality and politics but also in terms of other normative social practices such as arts, sport and games. After all, these are also cultural phenomena and social facts. Furthermore, if one departs from a rather superficial notion of the existence of law, both the claim to the objective existence and to the non-existence some individual right such as the freedom of speech would be equally embraced by what exists as law, whereby both a claim and its negation would be the law, and the existence of law would signify nothing with regard to the validity of a fundamental right.

On the other hand, if the answer is narrowed to the extent that it embraces only specific types of phenomena such as legislative statutes, judicial decisions, or the social

recognition by the majority of citizens in a coherent and unified way, some decision about what *should* exclusively be regarded as law seems to be already taken by the legal theorist himself, and the question of existence easily turns out to be a matter of *correct criteria*, thus presupposing for example logical coherence, some moral or political conception of society, and ultimately, moral truth. Now, can the objective existence of an entity, regardless of its type, depend on moral or political reasons?

Anyone who pays special attention to culture and has some acquaintance with epistemology can notice that the term realism has an extraordinary positive connotation in contemporary science and philosophy. After the advent and predominance of the intellectual and political movement known as the Enlightenment, no one wishes to be naïve and believe in something that does not exist. The same is the case regarding jurisprudence. The question of the real meaning of realism and its ultimate consequences in the field of law is deeply disputed, and in our view, has still not been sufficiently investigated. Does it mean that the law can be described from an 'external point of view' without being even partially constructed by the observer's evaluations? What is the very point of being a realist about the law? Does this consist in the attempt to identify the ultimate set of norms that are distinct from mere morality, but are nevertheless binding for all, or does it consist in the merely practical procedure of employing the empirical methods of the natural sciences? Many opposing views in ontology and epistemology have been held to be realisms, most remarkably many versions of 'social constructivism' on the one hand, and 'idealism' on the other.

However, to investigate realism in its many versions and connotations is not simply to attach to a word many different discussions that do not have anything in common with each other. This weak type of nominalist objection is easily countered by the fact that there are reasons why some positions in particular are considered to be realism instead of others, and that there is something in common that underlies the many versions, precisely because they are different versions of the same thing. It is in this spirit that not only legal realism, but also moral realism, philosophical realism and their consequences for practical legal fields are examined here, and why this volume is titled Law *and* Realism.

The contributors address questions of existence, perspective and reasoning in law from the point of view of different fields of legal theory and philosophy. Both defenses and criticism of different versions of realism in law are provided. The purpose is to achieve a competent account of existence and realism that combines diverse perspectives of legal theory and that accounts for the most important properties of the law, such as validity, efficacy, forward-orientation and justice. In this respect, the book is both general and specific: it follows the central issue of realism and existence in law but presents this from different fields of research. In this way, the book fills some gaps that until now have existed in the realism debate. The reader will find intellectually independent analyses and arguments from a direct approach, as well as comprehensive reflections on thinkers who have not yet been sufficiently investigated in the context

of realism, such as Gottlob Frege and Michel Troper. The articles are the product of real debate and fundamental disagreements, which accounts for the plurality of views presented. The four parts of the book address the topic from the point of view of Legal Realism (I), Legal Reasoning and Realism (II), Realism and Semantics (III), and Law and Nature (IV).

1. The possible modes of existence of legal orders

Most legal philosophies of the past and present acknowledge that the law has some kind of existence, but do not engage in an extensive discussion about what *existence* precisely consists in. Our first task is, thus, to identify what kinds of existence are at our disposal and what we would conceivably obtain given that such an answer would be correctly provided. In *The Attenuated Reality of Law*, Lorenz Kaehler analyzes in a clear and didactic way (1) the modes of existence that come into question when the law is addressed, (2) what it would mean to reduce the law into each type, and (3) what parcel of truth must be acknowledged to every mode of existence in order to make sense of law in its entirety. Many modes of existence that have been promoted in legal philosophy are described and criticized in a comprehensive manner, most particularly (a) law as a mental state; (b) law as an empirical reality as described by the methods of the natural sciences; (c) law as past and current acts of legislation; (d) law as the current practice of a social group; (e) law as the empirical prediction of future decision-making by courts; and (f) law as an ontological ideality. This analysis makes clear that the different modes of existence account for properties that are commonly ascribed to the law in different ways, but not for all properties altogether. While the empirical existence of law in social practice accounts for real effects in shaping social reality, this dimension leaves aside the future-oriented, or properly normative character of legal norms, since the mere fact that legal practice has existed in a certain way until now, does not predict how the next case should be decided. Conversely, if legal norms are claimed to exist in the mode of ontological idealism (i. e., as an abstract entity), valid laws could not be distinguished from invalid ones, since both would be equally existing entities. This is the type of difficulty that is involved in the quest for a unifying mode of existence that accounts for properties such as validity, efficacy, forward-orientation, semantic content, institutionalization, and creation and abrogation by legislators. Kaehler links the discussion with different thinkers such as Hobbes, Frege, Olivecrona and H. L. A. Hart, and concludes that although ontological idealism does account for the existence of law at its most fundamental level, it can only account for existence in the weak sense of an *attenuated* reality, which is why in the field of law, validity and efficacy would perhaps be more appropriate categories than existence.

2. Legal realism under conditions of social complexity

The different versions of legal realism that have existed in the 20th century have been attempts to acknowledge the constitutive role of judges and of social practice in shaping the contents of law. In this sense, legal realism, especially in the Anglo-Saxon and Scandinavian versions, has created an awareness of many *real factors* that condition legal systems beyond legislation, such as the mental states of judges and other participants, the cultural embeddedness of legal institutions, and the social recognition of rules. However, the postmodern social condition of multiculturalism, complexity and globalization has changed the reality of legal systems to the extent of making evident that some features of classical legal realism have become anachronic and require a revision. In *The Normativistic Trap: Complex Normativity and Legal Realism's Unexplored Potential*, Leonardo J. B. Amorim shows how realistic thinking in jurisprudence, in spite of its empirical and descriptive orientation, has been profoundly influenced by normative and prescriptive thinking, especially when it seeks for transparency, logical coherence and unity in a legal practice that has become indeterminate and complex. In this vein, Amorim highlights the misunderstandings caused by the idea that 'legal science' (as exemplified by the way in which Hans Kelsen has conceived of jurisprudence) would have the constructive function of unifying and deliberating about the logical correctness of a legal system rather than dealing with it as it really is, i. e., rather than acknowledging its complexity and contradictions. As a matter of fact, vagueness and opposing ideas are sometimes even intended by legislators due to political compromises in law-making. The consequence is that in the attempt to describe the reality of law in practice without prescriptive intent, legal realism ends up implicitly assuming prescriptive premises for the decision of future cases. This is shown by means of analysis and criticism of some aspects of the legal theories of Hans Kelsen, Michel Troper and Alf Ross. An authentic legal realism would have to acknowledge the highly complex and disordered character of legal practice. Amorim shows that in order to provide adequate prediction and explanation, the internal point of view of normative discourse in jurisprudence is not sufficient, as the US Supreme Court's decisions on cases of freedom of speech and the case Chevron vs. Ecuador exemplify. As he puts it, "if the meaning of the legal text was not given before the interpretative act, it will also not be given after it".

3. Reality, perception, and legal reasoning

Which types of objectivity do legal practitioners actually deal with while solving concrete legal cases? In recent decades there has been a gap between theories and systems that conceive of an objective legal reality on the one hand, and the common sensical patterns of reasoning as used by practitioners on the other. The tendency has been to focus on the objectivity of the justification of legal decisions rather than on the actu-

al process used by lawyers and judges to come to conclusions. The insufficiencies of such accounts are clear: studies are commonly limited to the activity of judges, i. e., legal reasoning is often equated with *judicial* decision-making. Furthermore, legal theorists commonly make a distinction between the contexts or processes of discovery and justification, focusing on the latter and considering the former to be arbitrary, subjective or even irrational. Within this line of thought, the thesis that legal reasoning is a complex process is usually defended, which seems to depend on the understanding of the epistemic capacities of the judges who carry out such processes. But is this really the way in which judges or lawyers work? In *Legal Reasoning and Objectivity Caught Between Two Worlds*, Bruce Anderson puts these presuppositions under scrutiny in the light of a realistic account. The paper deals primarily with the differences in the epistemological approach that individuals (even lawyers and judges) take when reflection about a certain state of affairs demands some readjustment in order to achieve a correct understanding of the world. He claims that even if individuals do not have at their disposal a complex theoretical background to help them understand their reasoning and its motivations, it is due to their *critical common sense* that reality and its transformations are taken into account, which in turn allows the person to adapt or react accordingly. This idea is opposed to complex philosophical reconstructions with respect to decision-making process and perception, and this not in order to show that one of these accounts would be unjustified or wrong, but to clarify that our epistemological capacities are not necessarily impeded because of some lack of awareness about the processes or reasons that drive them. Anderson presents a critique of the established notions of contexts of discovery and justification, suggesting that both elements are decisive when creating correct judicial decisions. It is precisely because of critical common sense, generalized conditions, and perceptible reality, all of which are present in the context of discovery, that it is possible to arrive at correct legal reasoning and to achieve good (legal) judgments. Anderson concludes that for both the decision-making practice and for everyday life, the treatment of objectivity and reasoning as critical common sense is sufficient. As a matter of fact, judges and lawyers do not know (nor should they know!) the theories behind their decision-making systems, and nor can they provide justifications for their epistemic capacities. In contrast, in the context of legal theory, it is necessary to request and offer the reasons that underlie such practices. It is specifically for the theoretical understanding of law that objectivity as the World-Already-Out-There-Now as the World-Already-Out-There-Now and critical common sense must be completed by reflected knowledge.

4. The perspectives of observers and participants within legal realism

Many influential conceptions of legal realism consist in the claim that the law is a psychic or social fact that can be described by empirical methods of natural sciences. In this context, engagement with claims about the correct interpretation of a legal statute

or about how judges should decide cases remain already from the beginning excluded from what a legal scientist could objectively assert about the law. In this sense, legal realism gives primacy to description over evaluation, and to the observer's perspective over the participant's perspective. Problems arise, however, when constant references are made to entities of a normative kind and typically normative vocabulary such as 'rights', 'obligation', 'contract', or 'validity' is thereby utilized. In order to describe how such entities emerge and perish within space-time (e. g., how a contract comes about, how an obligation is waived etc.) and how judges decide cases, even legal realists, in contrast to many of their own assumptions, commonly do not really use the methods of natural sciences that we know for example from biology or empirical sociology. For example, statutes are not said to be 'valid with a probability of 62.5 %'. On the other hand, since what counts for empiricists are not subjective and moral reasons, but empirical data of reality, they feel free to talk about normative issues without engaging in the kind of interpretative justification that is normally expected when claims such as that a certain statute *is* part of a certain legal order are made. In this way, empiricism in law regularly results in an odd position that is neither familiar to lawyers nor to scientists outside of jurisprudence, while claiming to be the only scientific one. In *The Magical Legal Realism of Tû-Tû: A Tale Told by an Obtuse Observer, Signifying Nothing*, João Andrade Neto provides an extensive analysis and criticism of empiricist legal realism in the version presented by the influential Danish realist Alf Ross. The pivotal point is the distinction between the perspectives of the participant and the observer, and an analysis of its many versions and implicit commitments. Neto points at the diverse methodological mistakes of empiricist realism that result in a subtle confusion of the differing points of view, which are according to him irreconcilable methodologies comparable with many aspects of the distinction between 'context of discovery' and 'context of justification' in the philosophy of science. Empiricist legal realism seems to take the impossible position of being an *obtuse observer*, as the metaphor goes: on the one hand, the realist does not admit to being a participant because he finds it too much of a subjective position, but on the other hand, he cannot engage in genuine empirical research due to the normative character of his area of study. Neto brings from linguistics the idea that actually *only participants exist*. It is not the discourse that would be within the social context, but the context that is inside the discourse, so that every participant by means of his acts of performative speech contributes to the project of revaluation of the law within the social context. This is especially valid for jurists who consider themselves to be legal scientists, as the given example of some legal educational systems shows. Neto states that the distinction of perspectives is actually methodological in nature and means neither a distinction of (1) real positions of individuals within the social practice, (2) the actual membership in a political community, nor (3) an exclusive commitment to either description or prescription, since both perspectives must deal with both description and prescription, if only in an implicit way.

5. The problem of moral knowledge

In moral philosophy there is a well-established debate between those who defend the viability of moral knowledge, the cognitivists, and those who deny it, the non-cognitivists. The possibilities of theoretical combinations to achieve one or the other result are quite diverse, ranging from those who deny the possibility of moral facts, defending a form of nihilism, to those who accept the objectivity of all moral elements, i. e., a form of exacerbated realism. Regardless of the position assumed with respect to whether the facts, judgments, propositions or any other type of moral entity may or may not be objective, the question of the possibility of knowing these elements of reality (as being constructed or independent of the subjects) persists. One of the most interesting approaches to the problem of moral knowledge is undoubtedly found in the work of Bernard Williams. In his work *Ethics and the Limits of Philosophy*, while analyzing the possibility of moral knowledge and the conditions for it, Williams arrives at a conclusion that has since generated great controversy: the very reflection upon the conditions that create moral knowledge leads to its destruction. In other words, the well-known Socratic method of getting to know something through questions and reflection would inevitably lead to the destruction of knowledge in the moral domain. This conclusion is known in the metaethics literature as *the un-Socratic dilemma of moral knowledge*. This conclusion is discussed in detail in *A Realistic Approach to the Un-Socratic Dilemma of Moral Knowledge*, where Andrés Santacoloma Santacoloma first reconstructs the premises put forward by Williams in order to demonstrate that they are the result of at least two false assumptions: On the one hand, there is an assumption that the determination of the value of truth is a prerequisite for deciding on the capacity of a propositional content to be true. Aiming to identify the problem, he revisits the idea of minimalism of truth advanced by Williams as a form of redundancy or disquotation theory. This position is contrasted with the theses presented by F. P. Ramsey, which have served to guide the theory of disquotation in general and Williams minimalism in particular, reaching the conclusion that truth itself has an irreplaceable epistemological value, although it is not the only relevant one for the construction of knowledge. The other assumption is the mistaken idea that moral knowledge cannot be acquired through reflection, or that it does not have any kinds of constraints. Taking into account that Williams' proposition is based on the idea of epistemic convergence, an idea derived from classical pragmatism, Santacoloma puts the theories to dialogue in order to demonstrate that the premise is unfounded, as long as there are control mechanisms working with reflection, for instance those of critical common sense and fallibilism. Through these contrasts, Santacoloma proves that the conclusion reached by Williams does not follow, while introducing a realistic conception of moral knowledge which explains objectivity and rescues the value of truth in practical discourse.

6. What kind of entities are norms?

The question of the diverse possible modes of existence of things has been famously addressed by the German philosopher and mathematician Gottlob Frege in his essay *The Thought*, where he introduces a distinction between perceptibles, ideas and thoughts, which in turn compose the external, internal, and third worlds respectively. In this third world lies the particularity of the theory. According to him, thoughts are not the result of sensible impressions but are non-real, semantic, objective abstract entities that have a content of meaning (*Sinngehalt*) which can be discovered, but not constituted. In line with this tradition of thought, Henrique Gonçalves Neves argues in *Legal Norm as Semantic Entity. The Semantic Concept of Norm According to Hans Kelsen, Alf Ross and Robert Alexy* that it is possible to understand legal norms as semantic entities that cannot be reduced to either the world of the physical or that of mental states. His strategy is based on the evaluation of the conceptions about norms that Robert Alexy, Hans Kelsen and Alf Ross have presented in this sense. Neves explains how Alexy makes a recognition of the metaphysical-ontological conception of norms on the one hand, and on the other hand how it is possible to separate the concept of validity from the legal norm in order to equate norms with thoughts. This claim of semantic equality was already present in Kelsen's theory, which starts from the distinction between norm as fact and as meaning, and from the distinction between the subjective and objective meanings of norms. After reviewing some categories of Kelsenian positivism, Neves concludes that the ultimate foundation of the conception of legal norms as semantic entities rests on the consideration of the *Grundnorm* as a thought norm. An approach that already takes into account the semantic character of legal norms in general is found in Ross, who introduces the idea of proposition as the meaning of the content of a sentence, as a directive. It is precisely through the introduction of this category that Ross establishes the differences between standards and directives. What are the practical consequences of this conception? According to Neves, who follows Ota Weinberger in this regard, there are at least two consequences: it serves to explain the continued existence of a norm, even when the act of will has ceased to exist, and it allows the logical and semantic analysis of norms and their relations.

7. Language, rhetoric, and the understanding of legal reality

The relevance of language for the formation and understanding of the human condition has been a major issue within discussions about realism at least since the so-called linguistic turn. In his article *Realistic Rhetoric as a Philosophical Precondition of Tolerance*, João Maurício Adeodato carries out a reconstruction of the dominant rhetorical positions in the academic and political discourse that directly influence legal language. If one recognizes the collective nature of language, one can hardly deny its objectivity;

reality appears thus as independent from individuality. This acknowledgment of an objective parcel in language (what Adeodato calls 'material rhetoric', a branch of general rhetoric) is part of the very anthropology of human beings. The subconscious operates as a determiner of beliefs, often making individual convictions the result of a search for security derived from the collective understanding of the world; winning narratives and underlying ideologies are imposed as interpretations of it. Reality appears to be, therefore, the reality of intersubjective discourse. Different is the panorama inside the branch 'rhetoric as strategy', which operates normatively. Within normative discourse, the possibility of dissimilar understandings of the world is ordered to determine how the world should be. The process is staggered: a first moment of observation, learning and creation of parameters that work effectively in certain scenarios is stated, to move on to the application of such knowledge in collective, intersubjective life. The tendency is to cover up the ethos of the narrative, disguising itself as factual openly normative discourses. This can be explained by human nature: as a species we do not seek to explain what happened, but we understand the facts and explain them according to that understanding. It is due to the difficulties of understanding derived from this search for the imposition of worldviews that rhetoric as epistemology attempts to rescue an analytical base, and to study both materiality and the strategies that aim to direct and control it. Here, rhetoric is knowledge which results from the description of the relationships between material and strategic rhetoric while refraining from evaluative judgments. According to Adeodato, the acknowledgment of rhetoric as a real practice that leads to social cohesion requires the realization of tolerance in all its forms. The mere force of coercion of law or other normative orders of discourse is not enough to achieve unity; it is necessary to attend to intersubjectivity and to allow plurality of discourse.

8. Compatibility of normativity with facts and causes in nature

A fundamental challenge for a realist account of law is to give an account of normativity and of its relationship with facts. Normativity can be preliminarly understood as the property of entities such as norms, statutes, judicial decisions and values that consists in their existence despite deviant behavior. In this sense, normativity is fallible and forward oriented. Now, the understanding of norms as facts (e. g., as legislative acts, mental states of individuals, or social practice) normally goes along with the elimination of precisely these features, for at least in principle, fact is what *is* the case and not what *should* be the case. The common qualification of normativity as counterfactual rather than fallible only increases the problem, since a person who is a realist about normativity would have to talk about counterfactual facts to begin with. This type of dualistic thinking about fact and value has insuperable difficulties in understanding the relationship between norm and value, i. e., how fallible and forward-oriented entities

could be caused by natural and social processes, and conversely, how they could have causal influences in the natural and social world. The latter is evidently the case, since it is also a fact that human health and the environment for example would be different than they are now if legal orders had evolved differently, for example since the Industrial Revolution. It seems, however, that there is a category that makes an adequate mediation between cause, fact and value, namely teleology: the relationship of means to ends. In biology for example, teleology describes the structure of the biotic function of organs and physical constitution. A classic example is the statement that 'the heart beats in order to provide the body with blood'. The rationale is that teleology is at the same time a fact and has the property of fallibility and forward-orientation towards goodness-states, exactly as the law ultimately does. The article *The Teleology of Reality and of Right. An Inquiry About Cause, Law and Purpose in Nature, Holistically Considered* by André Ferreira Leite de Paula advances the thesis that normativity, both moral and legal, has a teleological structure and a teleological historical origin, and fulfills (teleological) functions in society, with the consequence that normativity is itself a type of teleology. At first glance this thesis is evidently challenged by the elementary opposition between deontology and consequentialism, i. e., the idea that following rules is fundamentally distinct from following purposes and from justifying actions according to consequences. However, this dualism is overcome if one considers the deep structure of agency and the epistemological inevitability of the teleological interpretation of norms. If one aims to make sense of normativity in a world that is not only social, but also physical and biotic, i. e., a world that is simultaneously governed by both laws (moral, legal and physical) and causes, a monist account that can explain the interaction between normativity and causality in the very same reality is called for. For this purpose, de Paula's article provides an in-depth analysis of physical causation, and of the compatibility between teleology and evolution in biology, as well as an account of the emergence of social normativity from functional biotic behavior. Some consequences for the relationship between mind and causality and for ethics are worked out. Within this naturalistic and holistic approach to the existence of law, realism ultimately means that the law (and equally individuals and their thoughts) has a natural and ontological status, and is part of the same material and immaterial reality in which all other kinds of things exist. Teleology is the pattern of both causality and normativity that mediates facts and counterfactuals.

9. Sociobiological justification of values: the case of constitutionalism and honor

Jurisprudence has not yet been sufficiently enlightened by sociobiology. While biology has shown over decades that human culture and behavior are genetically predisposed, and that genetics is fundamentally altruistic and to a great extent oriented towards

kin selection, modern legal thinking remains methodologically individualist, as it conceives of the *legal subject* (*Rechtssubjekt, sujeto de derecho*), his dignity and property, his individual rights and duties, as the centers of the legal order and as the most basic notions that give sense to all other legal institutions and categories. While biology provides clear results in the sense that individuals and groups have natural differences as well as natural inclinations and capabilities depending for example on age and sex, contemporary legal orders are still based on an egalitarian world view that ascribes the same rights and duties for all. While biology shows some of the evolutionary advantages of traditional morality, of religion and in-group preferences for the welfare of groups and for human flourishing in general, modern law has established an anti-traditionalist mentality that denies binding force to religion, custom and tradition, that condemns in-group preferences as immoral and unjustified selfishness, and describes them using highly pejorative terms such as corruption and nepotism. Now, how could biology, which is a descriptive science of organic structures and behavior, show the reality of the normative facts that are involved in human flourishing? Is it possible to elaborate a justification of duty starting from the objective state of affairs of the world? This question, which has been the source of heated debates in recent decades in both legal and moral philosophy, forms the basis of the contribution *Honor and the Rule of Law: An Inquiry Concerning the Limits of Constitutionalism* by Renato Teixeira Campos de Melo, who provides a derivation of duties from the biological condition of individuals and groups. His analysis addresses the interplay of normative and natural factors in traditional morality by exploring the example of honor and related notions such as dignity, self-esteem and insult. The ontological and normative nexus between biotic constitution and legal normativity comprises the transitions from genes to personality, from personality to collective traits, from dominant collective traits to culture, and from culture to norms and values. Melo sets out to show the justification of the value of honor in human nature and to assess its necessity in the life of the legal system, especially in that of the modern rule of law. The first step in reaching his goal is defining the concept of honor, which is to be understood as a mental state of the agent that implies the recognition of personal worth or dignity based on self-development and the self-fulfillment of his own duties; the recognition by the agent of his responsibilities and duties of action. Although the discussion takes place around the value of honor, duty is at the epicenter of the discussion. This is understood here as a concept derived from the conditions of nature and the potentialities themselves, which relativizes the agent's degree of commitment. This justifies, for example, a differentiated distribution of obligations. With this in mind, Kantian moral universalism supported by the categorical imperative is deeply questioned. To justify his premise, Melo turns to sociobiology to explain how duties find justification in human nature and in the search for physical and psychological development, for both the individual and the community. This development of the community is the product of a necessary form of selective altruism, due to the randomness of the traits of each subject. It is worth clarifying that this does not

mean that the condition of honor implies *per se* self-sacrifice. While in certain disagreement scenarios it would be honorable to go against one's own biotic requirements, this is not the case with most actions. Autonomy is established as a necessary condition for the achievement of honor: autonomy as willingness and real capacity to fulfill one's duties, carrying out the action independently of the possible repercussions that a breach would bring. The objection that seems to be evident is one that which emerges from relativism, to which Melo responds: "… that honor has different practical meanings … does not imply a radical relativism; on the contrary, it is a realistic admission of the supervenience of fundamental laws of nature over human affairs". The central question here is whether the rule of law can and should protect this value as an integral aspect of its ends. If the duty derived from the legal system aims at coercion when duties are not carried out, even when that can be justified or derived from natural duties, then the state and the rule of law are conceptually opposed to honor. The decisive point rests, ultimately, on the guarantee of self-realization of individuals and their autonomy.

10. Reality and legal perspective on the nature of parenthood

Discussions of philosophical categories such as reality, existence, and relativity usually go hand in hand with certain instantiations that allow a better understanding of them. The theoretical approaches that are used in this context are frequently limited to creating abstractions that explain certain premises and their possible consequences. However, despite such exemplifications, investigations in legal philosophy too often lack an exploration of the consequences that the adoption of one or another category may bring with it, for the law in particular and for society in general. The primary objective of Giulia Terlizzi's contribution to this volume, *From Nature to Intention. The Case of Surrogacy and Parenthood. Changing Paradigms in Family Law* is to review the practical consequences that have arisen from the rejection of the conditions of reality for the justification or explanation of the new models of motherhood and fatherhood in civil law. She begins her analysis with a revisit to the transformation of categories in family law. The *Mater semper certa est, Pater numquam* principle, which has served to determine maternity and the granting of rights and assignment of duties, has begun to undergo a transformation in various legal systems. According to Terlizzi, this occurs as a consequence of a transition from realistic justifications to intentional, relativistic or, as she suggests, even idealistic ones; the foundation of family relationships derived from consanguineous relationships is succeeded by acceptance of responsibilities based on social conventions and backed by legal bonds. It is a step from nature (as a determining element) to intention (as a justification for regulation), from the verification of world phenomena to the establishment of legal categories motivated by will. As a result, the principle *Mater semper certa est, Pater numquam* should make way for *Mater semper incerta est*. This is due to technological developments and the development of the new

mechanisms for procreation that are usually included in the category of Assisted Reproductive Technology, and also due to the growth of personal autonomy. Terlizzi makes a reconstruction of two historical decisions: In *Johnson v. Calvert*, the intention of procreation is recognized as the determining element of motherhood, rejecting the claims of those who have contributed genetic materials or biological processes for procreation. In *re-Marriage of Buzzanca*, the inconveniences that are generated by giving priority to intention over the elements derived from reality are revealed. In this case, it was determined that without the existence of a biological link it is not possible to establish paternity or maternity, so the baby would be born without legally recognized parents. However, the decision of the Supreme Court revisited the precedent of *Johnson v. Calvert* and considered the *will* as the determinant of parenthood: "The centrality of the principle of will in the system of artificial procreation seems to overcome the principle of genetic derivation in the system of natural procreation". These decisions transform not only the legal concepts; the truth also suffers consequences. Terlizzi shows how this new trend speaks of the truth regarding intention, while ignoring the substantial element, i. e., who contributed the genetic material or who has given birth. Truth is preserved, not as biological truth but rather as truth derived from intention. In Terlizzi's words "… the truth does not coincide with the biological and the genetic data, but with that of the conscious assumption of parental responsibility, expressed even before conception". She assumes a critical position regarding these models, while attempting to review the value that adoption has had as a model that allows the rescue and return of the lost balance in the relationship between law and reality, which if not reestablished, would bring undesirable consequences that the law would have to assume.

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