Pontifícia Universidade Católica
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CORPORATE LEGAL PERSONHOOD AND THE CAPITAL FETISHISM:
a theoretical analysis triggered by the Mariana mining disaster

Tese de Doutorado

Tese apresentada ao Programa de Pós-graduação em Direito da PUC-Rio como requisito parcial para obtenção do grau de Doutor em Direito.

Orientadora: Profa. Danielle de Andrade Moreira

Co-orientador: Prof. Klaus Dörre

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Abstract

Riva, Gabriel Vicente; Moreira; Danielle de Andrade Moreira (Advisor); Dörre, Klaus (Co-Advisor). **Corporate legal personhood and capital fetishism: a theoretical analysis triggered by the Mariana mining disaster.** Rio de Janeiro, 2021.Tese de Doutorado – Departamento de Direito, Pontifícia Universidade Católica do Rio de Janeiro.

This work uses the Mariana mining disaster (2015) as a trigger case to analyze how corporations are legally perceived in the context of disasters, specifically, tailings dam failures. The legal personality of corporations carries the mystery of being similar to a natural person judicially at the same time that are completely different from a human person when analyzed outside of the legal realm. Under that puzzle, the corporate legal personality nature was analyzed before the hegemonic theories of Brazilian legal scholars, revealing their insufficiencies to approach the Mariana Mining Disaster. Subsequently, an alternative approach is assessed through the studies of Evguieni Pashukanis and some recent authors that endorse his main ideas. Pashukanis reveals potentialities and limits that led to a proper elaboration of the corporate legal personhood concept and its internal dynamics in two steps. Firstly, revisiting the capital fetishism and the value-form theories, which led to a better understanding of the most developed and fetishized forms of capital, the interest bearing capital, as well as the contradictory developments between the capital and productive circuits. Secondly, revisiting the historic construction of the corporate form and its legal features in both USA and United Kingdom, in order to perceive the ascension of the corporate legal personality concept. Finally, some the corporate legal personhood concept characteristics and dynamics are proposed.

Keywords

Corporate legal personhood; Pashukanis; capital fetishism; legal person; Mariana mining disaster; tailings dam failures.

Resumo

Riva, Gabriel Vicente; Moreira; Danielle de Andrade Moreira (Orientadora); Dörre, Klaus (Co-orientador). **A Personalidade jurídica corporativa e o fetichismo do capital: uma análise teórica baseada no desastre de Mariana.** Rio de Janeiro, 2021.Tese de Doutorado – Departamento de Direito, Pontifícia Universidade Católica do Rio de Janeiro.

Este trabalho utiliza o caso do desastre de Mariana (2015) como caso-gatilho para analisar a abordagem jurídica das corporações no contexto de produção econômica de falhas em barragens de rejeito. A personalidade jurídica de corporações carrega o mistério de ser similar a uma pessoa física, juridicamente, ao mesmo tempo em que completamente diferente de uma pessoa humana quando vista por fora da dimensão jurídica. Assim sendo, é analisado o conceito de personalidade jurídica corporativa conforme as teorias hegemônicas do direito, revelando suas insuficiências para abordar o caso do desastre de Mariana. Em seguida, são a avaliadas alternativas teóricas nos estudos de Evguieni Pachukanis e alguns autores que fazem referência aos seus conceitos. Os limites e potencialidades identificados na construção teórica pachukaniana conduzem à elaboração preliminar do conceito de personalidade jurídica corporativa e suas dinâmicas internas em dois passos. Primeiro, revisitando as teorias do fetichismo do capital e da forma-valor, que levam à uma melhor compreensão de formas mais desenvolvidas e fetichizadas como no caso do capital portador de juros, bem como o papel das transações jurídicas no circuito do capital. Segundo, revisitando a construção histórica da forma corporativa e dos seus atributos legais nos Estados Unidos da América e Reino Unido. Finalmente, são propostas algumas características e dinâmicas para interpretação da personalidade jurídica corporativa, considerando as variáveis descritas na análise prévia do desastre de Mariana.

Palavras-chave

Personalidade jurídica corporativa; Pachukanis; fetichismo do capital; pessoa jurídica; desastre de Mariana; falhas em barragem de rejeitos.

Abstrakt

Riva, Gabriel Vicente; Dörre, Klaus (Advisor); Moreira, Danielle de Andrade, Dörre, Klaus (Co-Advisor). **Rechtspersönlichkeit des Unternehmens und Kapitalfetischismus: Eine theoretische Analyse ausgehend von der Tragödie von Mariana.** Rio de Janeiro, 2021.Doctaral Thesis – Friedrich Schiller University Jena

Diese Dissertation nimmt den Fall der Tragödie von Mariana (2015) als Ausgangspunkt, um zu analysieren, wie Unternehmen im Zusammenhang von Naturkatastrophen – insbesondere von Dammbrüchen – rechtlich wahrgenommen werden. Unternehmen als juristische Personen tragen ein Geheimnis in sich: Einerseits sind sie rechtlich gesehen den natürlichen Personen ähnlich, andererseits sind sie aber außerhalb des rechtlichen Raums ganz anders als menschliche Personen. Zunächst wird der von den vorherrschenden Rechtstheorien vertretene Begriff der Rechtspersönlichkeit des Unternehmens herausgearbeitet und dessen Unzugänglichkeiten bei der Analyse der Tragödie von Mariana werden aufgezeigt. Anschließend wird der alternative Ansatz von Evguieni Pashukanis und seinen Nachfolgern analysiert. Die bei Pashukanis identifizierten Grenzen und Potenziale führen zu der Formulierung eines neuen Begriffs der Rechtspersönlichkeit des Unternehmens und deren internen Dynamiken, und zwar in zwei Schritten. Erstens werden die Konzeption des Kapitalfetischismus und die der Wertform wieder aufgegriffen, was zu einem besseren Verständnis der entwickeltesten und fetischisiertesten Ausprägungen des Phänomens führt, nämlich des Falles des verzinslichen Kapitals sowie der Rolle juristischer Transaktionen im Kapitalkreislauf. Zweitens wird die historische Konstruktion der Unternehmensform und deren rechtlichen Eigenschaften sowohl in den USA als auch in Großbritannien rekonstruiert. Zum Schluss werden einige Merkmale und Dynamiken zur Deutung der Rechtspersönlichkeit des Unternehmens vorgeschlagen, wobei die Variablen berücksichtigt werden, die in der vorherigen Analyse der Tragödie von Mariana beschrieben wurden.

Schlüsselwörter:

Rechtspersönlichkeit des Unternehmens, Paschukanis, Kapitalfetischismus; juristische Person, Tragödie von Mariana, Dammbrüche.

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SUMMARY

LIST OF ABBREVIATIONS AND ACRONYMS

ACP	Ação Civil Pública
ADR	American Depositary Receipts
BB	Banco do Brasil
BNDESPar	Banco Nacional de Desenvolvimento Econômico e Social Participações
CEO	Chief Executive Officer
CIF	Comitê Interfederativo
CJP	Comissão de Justiça e Paz
FCDRD	Fórum Capixaba de Entidades em Defesa do Rio Doce
FUNCEF	Fundação dos Economiários Federais
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis
ICMBIO	Instituto Chico Mendes de Conservação da Biodiversidade
ICOLD	International Commission on Large Dams
JT	Juridical Transaction
LLC	Limited Liability Company
LTDA	Limitada
MAB	Movimento dos Atingidos por Barragens
MG	Minas Gerais
PETROS	Fundação Petrobras de Seguridade Social
PREVI	Caixa de Previdência dos Funcionários do Banco do Brasil
TDA	Tailings Dams Amnesia
TFD	Tailings Dams Failures
TAC	Termo de Ajustamento de Conduta
TTAC	Termo de Transação Ajustamento de Conduta
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
S.A.	Sociedade Anônima

LIST OF FIGURES

Esse negócio de rejeito é complicado.
Só a manga sobreviveu.
Não morre porque a casa é grossa.
A de casca fina, foi tudo embora.
Laranja...
Você visse esse quintal aqui,
Ih menina, como era bonito.
Banana igual tinha nesse quintal da prima...
Isso aí tinha ameixa, jabuticaba, abacaxi.
Ali tinha três poço.
Tambaqui, piau, carpa, tilápia.
No Natal, a gente ia assar um peixe.
Hum. Assou?
Foi tudo embora, teve peixe não.

Se quiser tem que comprar pra comer.
Seu João (de Pedras)

INTRODUCTION

On the 5th of November 2015, a tailings dam ruptured in Minas Gerais, Brazil, producing the biggest environmental disaster in Brazilian history (TOLEDO *et al.*, 2019) considering the damaged area extension. Still in November, a number of social movements gathered in the Espírito Santo federal state – whose biggest river, the Rio Doce, was ruined by the tailings wave - in order to organize a legitimate social reaction, creating the Fórum Capixaba de Entidades em Defesa da Bacia Hidrográfica do Rio Doce (or in short translation, the Rio Doce Capixaba Forum). The Forum's aim was to vocalize the afflicted and to demand a just redressing process, so such a tragedy would never occur again. As time went by and the redressing process was being postponed and weakened, expectations became low. About three years after the Mariana Dam Rupture, in 2019, another tailings dam ruptured in Brumadinho, Brazil. Involving the same state (Minas Gerais), same type of dam, one common protagonist company – Vale S.A. -, and being more than one hundred times deadlier, considering the human lives loss. It showed drastically how ineffective had been the measures from the Mariana Dam rupture, still ongoing and still insufficient. This research was originated from the author's participation in the Forum and academic.

Two major elements inspired this work. On the one hand, the concrete action in the Forum thinking collectively on redressing mechanisms and solutions to prevent from happening other tragedies of that nature. Moreover, the decisive stage of the redressing demands was in courts. Social movement's political actions pressured internationally, nationally, and locally, but were in no position to compel the corporations for a multiplicity of reasons. The federal and the state legislatives debated reforms in the dam safety legislation, but these took time and merely stated procedural elements that did not assure the safety of the dams. Other political institutional powers soon had established judicial agreements with the mining companies and also started a negotiating position, thus, leaving the constraining actions to the courts. Courts were the only ones definitely able to impose obligations. They were the central stage where the disputes and negotiations took place. In this sense, the struggle had the court's as the conflict's axis. There, a few juridical aporias emerged and needed a theoretical explanation. For instance, as social movements, we were left with no option other than aiming for a redressing process that could never restore the nature's *status quo ante* and to which we had to price. Additionally, the afflicted were responsible to lead the

redressing process themselves where the only available instrument to do so was the judicial sphere. It goes without saying that specific experts are needed for this process since it requires technical expertise (not only juridical), engagement and availability, definitely scarce and distant from the afflicted. Any solution imagined by us would be translated to the corporations involved as an extra expense with hiring, indemnity or any other nature or yet the imprisonment of a few individuals if so, making the promises of intimidating corporations to change their behavior through judicial constraints not that clear. How would these extra expenses be distributed inside the corporation? Who would be arrested? How could we affirm, with these blind spots, that these impositions would help to prevent other tragedies of the same nature from happening? Judicially, one of the first measures was the creation of another legal person to execute the redressing process, the Renova Foundation. What could that mean? We noticed that from the Law's perspective it was enough to impose a judicial sanction on a legal person without having to question its inner complexity and its internal dynamic. Yet, how would these judicial impositions be metabolized inside it and distributed socially?

On the other hand, legal theoretical divergences accompanied these questions. Some authors defended highlighting judicial principles as the main argument to impose a redressing process and preventive judicial measures. Others would argue for the need to develop a Brazilian disaster law. Some, recognizing the failure of the judicial sphere, would point to negotiation alternatives in dispute resolution as a just and prompt response. The struggle raised questions about how much can the government in fact impose preventive actions to all mining companies and inspect them. Most of these questions presumed the corporation as one legal person and this point remained largely untouched. What does it mean to address the corporation as a legal person? In terms of a Marxist theory of Law, Pashukanis had already brought the legal subject category to the center of the debate, denouncing that "the question of the legal form is not even posed" (PASHUKANIS, 2017, p. 72-73). In many ways Pashukanis' statement is still true and specifically about the corporate form in Brazil. Nevertheless, in the last two decades a Pashukanian string of legal scholars has been on the rise along with this question, finding the limits of the Pashukanian contribution and trying to overcome them as with Gonçalves, Miéville, Knox, Baars, Casalino, Sartori, Kashiura Jr., Buckel, among others. This research was guided by these two references: the concrete struggle in the context of the Rio Doce disaster and the recent materialist theory of Law debates from the past 20 years.

The first chapter is directed to understand the original context, answering how Brazilian legal scholars[1] approach the problem of tailings dam failures both generically analyzing disasters and proposing legal principles as effective means. Subsequently, we will assess specifically the tailings dam failures production according to their economic variables, which are metabolized inside corporations. Using these economic lenses we will assess the Mariana and Brumadinho cases in order to understand specific causes of tailings dam ruptures. Once we outline the economic factors and the corporate behavior that produces the tailings dams failures, we should turn ourselves back to the legal realm: how do these dynamics appear juridically? What is the corporate legal personhood according to the legal theory? Methodologically, we analyzed the recent Brazilian legal studies bibliography dedicated to the Rio Doce case, to disasters or tailings dam ruptures in order to raise some questions about the assumed origins and solution proposals. Also, we have assessed social movements documents, judicial petitions, corporate reports, and United Nations (UN) documents among other studies in order to not only outline the economic production of tailings dam failures but also to understand this economic context of the dam failures production and redressing process. Once these economic processes are hardly seen in the judicial sphere, we move to the next question: what is seen through the legal person concept by legal operators? What is, to them, the corporate legal person nature?

The second chapter will describe how Brazilian hegemonic legal scholars answer to these questions. We will organize their theories in three categories according to the following elements that they highlight: 1) an extra legal substance; 2) an axiological orientation; and 3) their legal formality/instrumentality. Revisiting the legal theory general bibliography and prominent recent debates, we will identify these elements and their emphasis variation from author to author. The legal formality/instrumentality is the most recognized element in the legal person concept among these authors. Furthermore, two representatives of this string stand out. First, Hans Kelsen, whose dialogues with Pashukanis help to contrast a formalist Marxist approach. Secondly, the denaturalization of the legal person school. We will also pinpoint insufficiencies of these theories, concerning their

[1] This practical inspiration of the research led us to one methodological option, regarding the legal concepts applied to the tragedy and the hegemonic concepts of the legal person. Concerning them, we strictly used Brazilian authors once we are driving our attention to the Brazilian jurisdiction, the one applied to the case. The only exception made was Hans Kelsen for two reasons. First, for his wide current use among Brazilian legal scholars, probably not matching any other. Secondly, because of the debate he engages with Pashukanis, not only addressing him in his main work, but also because it was object of Kelsen analysis.

application to the corporate legal personhood dynamics in the Rio Doce case, already exposed in the first chapter.

The third chapter will deepen and review the Pashukanian perspective on the legal subject theory. Our aim is to outline the Pashukanian's approach and to explore how far it can reach the corporate legal person concept. We will reflect upon these potentials and limits both before the concept of finance capital as before the Marxian theory generic approach. A string of Pashukanian theorists has recently advanced his approach both nationally and internationally. We also ran through their contributions concerning Marxian core concepts and the corporate legal personhood theory. Specially, to rethink the fetish theory uses, which will be convenient to the last chapter.

In the fourth and last chapter we have three different tones. An abstract theoretical approach of Marx's fundamental concepts, a historical analytical approach of the modern corporate personhood characteristics and developments, and an outlining proposal of the corporate legal personhood concept. Firstly, a more direct look at the Marxian theory and some recent approaches in his writings as Grespan's, Hinkellamert's, Jappe's, Assis's, Barreira's and others. The Marxian fetish theory and value theory - until its developments in the Capital third book - emerge as an essential feature to analyze the corporate legal personhood. Furthermore, the fetish theory may be used both to critique Pashukanis' limits, as to move forward his initial approach developing the commodity form towards the capital form as interest-bearing capital, a main feature of the modern corporate form. In order to descend from this abstraction level, it will be necessary to describe the modern corporate form development in the nineteenth century. We will depict two strings: 1) those that sets its origins in the British Empire along with the development of the joint-stock company; and 2) those that find in the US-American development of the corporation the most clear link to the corporate legal personhood because of its equalization to the natural person in courts. Having elaborated our proposal in a more abstract philosophical level and secondly in a more contextual historical approach, we will propose a preliminary concept and functioning of the corporate legal personhood concept, based on the value-form theory, the fetish theory, and the corporate legal personhood construction history. This concept will fill some of the gaps exposed by the first chapter, demonstrating the internal functioning of the corporation, its erasing by the legal person concept and the tendency of the corporation's internal motions. Besides, some insufficiencies of the hegemonic theories will be clarified.

1
THE SUBJECT OF TAILINGS DAMS FAILURES

O Rio? É doce.
A Vale? Amarga.

Ai, antes fosse
Mais leve a carga.

Entre estatais
E multinacionais,
Quantos ais!

A dívida interna.
A dívida externa
A dívida eterna.

Quantas toneladas exportamos
De ferro?
Quantas lágrimas disfarçamos
Sem berro?[2]

(Lira Itabirana – Carlos Drummond de Andrade)

1.1 The legal disdain for causes: the prevention principle and the disaster Law concepts in Brazil

When dealing with or reading about environmental damages or disasters in Brazil, eventually, one will face the prevention and precautionary principles as those that will present the best-case scenario, i.e., not to have a potential damage materialized. These legal principles stand for a "better safe than sorry" policy with an essential difference between them. The prevention is directed to unknown risks, while the second, the precautionary principle, to those scientifically known. These principles can be found in most Brazilian contemporary Environmental Law books[3].

Considering environmental damages and disastrous situations are challenging or impossible to regress to the *status quo ante,* they demand a more cautious policy emphasizing their avoidance. These environmental legal principles were internationally recognized in the United Nations Conference on Environment and Development, precisely in the principle 15 of the Rio Declaration on Environment and Development, which states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (UNITED NATIONS, 1992).

[2] Literal free translation: The river? It is sweet./Vale? Bitter./Oh, I wish it was/Lighter the load./Among state owned/And multinationals,/How many oh's!/The domestic debt./The external debt/The eternal debt./How many tons we export/Of iron?/How many tears we hide/With no shouting?

[3] NASCIMENTO E SILVA, 2019; TOLEDO *et al.,* 2019; CARVALHO; DAMACENA, 2013; ABELHA, 2016; AMADO, 2014; SARLET; FENSTERSEIFER, 2014; MIRRA, 2011; STEIGLEDER, 2017; FENSTERSEIFER, 2008; MOREIRA, 2015; LEITE,; AYALA, 2015; LEITE; CANOTILHO, 2010.

The prevention principle is at the roots of this research. When dealing with the Rio Doce disaster, no matter how far the redressing process goes, neither the lives nor the river nor the environmental impact by the seashore, and the workers that live with it, will have the *status quo ante*. To prescribe the prevention principle in its abstractiveness is relatively easy, though. Yet, how can we take it seriously when addressing a disaster like the Rio Doce's and take the measures *a posteriori* not only as a means of indemnity, compensation, mitigation, but also as a way to prevent others from happening?

The Disaster Law would be an obvious start. The word disaster is used in this work not as a technical one, but generically as a synonym for tragedy. Disasters are often categorized as naturally originated, human-made – technologically or sociopolitically - or hybridly produced, a distinction that is just as often followed by the observation that it is merely didactic. Thus, the concept is better unified by disaster consequences more than its unclear miscellaneous origins. (CARVALHO; DAMACENA, 2013, p. 19 and 27). Though hard to stipulate a minimum of tools that would delineate the concept of disaster, the damages' gravity is a core element. The Centre for Research on the Epidemiology of Disasters uses the following definition of disasters:

> Situation or event, which overwhelms local capacity, necessitating a request to national or international level for external assistance (definition considered in EM-DAT); An unforeseen and often sudden event that causes great damage, destruction and human suffering. Though often caused by nature (Natural Hazard-Induced Disaster), disasters can have human origins (BELOW; WALLEMACQ, 2018, p. 25).

Carvalho and Damacena add "loss of systemic stability" to the concept, as the "rupture of collective routines", and "the need for urgent unplanned measures to deal with the disastrous situation" (2013, p. 30-31), which increases the emphasis over the consequences, instead of the causes. This definition seems to have a direct path and better use towards analysis of implications – as a redressing process or compensation - , instead of finding a responsible agent and actions, for example, that would be in the origins of the disaster. The prevention principle is about avoiding these consequences, but the only way it may work is by thinking about what caused them. To depart a legal analysis from these parameters would impose the firsts obstacles towards one of this work's following questions: which was the corporations' role in the Fundão Dam rupture, the Rio Doce Tragedy? The corporate liability is a fixed point of the tragedy, unquestioned by the companies themselves. Hence, for our purposes, it is rather vague to sort our case by the

disaster tipology criteria once it may blur the questions of who/what did it and its nature.

More than merely misleading, this opened definition of disaster produces an intriguing outcome for its legal branch, as asserted by Carvalho and Damacena (2013): the "unification" of Disasters' Law "with the concept of risk management" (Ibid., p. 33), having as a premise to deal with the failure of the legal system (Ibid, p. 34). By doing so, risk management becomes a premise and constitutive function of Disaster's Law, instead of an instrument to be analyzed and used. Lifting it as an unquestioned presumption weakens its evaluation by the disasters' legal theory. The failure of the legal system, on the other hand, as a logical deduction of an upcoming disaster is actually too narrow. It only affirms the legal flaw that allowed the specific catastrophe, as it still omits every other legal fault that did not generate a tragic consequence. "Catastrophic risks have, usually, low probabilities but extreme repercussions" (CARVALHO; DAMACENA, 2013, p. 63). These low probabilities indicate a wide range of illegalities that might have not had disastrous consequences and could not be dealt with. Only by understanding the nature of a specific kind of disaster can one know how to prevent it and elect its means and instruments. Once disasters may have profound and extent different causes, the ways to anticipate and avoid them also vary drastically. Not taking them in their specificity and conjunctural motion may veil a preventive investigation.

1.2 The general legal approach towards Tailings Dam Failures (TDF) in Brazil

So we shall move from analyzing generally disaster production to specifically tailings dams failures (TDF), one kind of disaster. Here, Brazilian legal studies frequently leave aside direct recommendations to corporations, driving their attention to State regulations, inspections, technological problems, human error, economic factors, and many others usually summed in the term "multiple causes". Just as the term disaster cannot distinguish the origins of the unwanted tragic consequences, generically pointing to "multiple causes" cannot differentiate degrees of determinations. For instance, Toledo et al (2019), Nascimento e Silva (2019), and Carvalho and Damacena (2013) drive their books to the legal analysis of tailings dam ruptures or disasters. They repeatedly point to multiple undifferentiated causes, emphatically arguing for the State responsibility - even dedicating chapters of books to it - while less than secondarily addressing

corporations, as if they had a minor part in the disaster produced by their activities. Did they? This undetailed approach generates the blaming of information, culture, public and private organizations, technical issues, laws, all equally, horizontally.

This work is directed to understand the corporations' legal image and role in the production of tailings dam failures. Moreover, to comprehend their role in the Fundão collapse (2015). Calazans (2019) writes a critique over the multiple causes argument. Static liquefaction, design changes or original design problems, poor stewardship, regulatory capture, cost-cuttings, fragile inspections, among others, all may be appointed as causes of tailings dam failures. Notwithstanding, Calazans (2019) argues that this frequent multiple causes approach is rather distractive than clarifying, driving the attention towards solutions in governance or capitalist sustainable development, regulatory legislation, and others (p. 27). One example is the earthquake argument. There was an earthquake that may have contributed to triggering the Fundão dam collapse. Nonetheless, concluded the Expert Panel, the "earthquakes were small and would normally not be regarded as consequential for an ordinary dam", they "likely accelerated the failure process that was already well-advanced" (MORGENSTERN *et al.*, 2016, p. 71-72). Hence, they had a part in the dam rupture but this cannot be used as an argument for the uncontrollability of the event, or be horizontally leveled with other determinants. The risk is to strengthen the "natural disaster" or undifferentiated multiple causes narratives. We should place the determinations in a causal hierarchy.

Another example is Toledo's et al (2019) recommendations after analyzing a few cases of tailings dams failures in the last chapter of their book. They agree with Davies *et al.* (2000) when stating there are no unknown causes of tailings dam failures[4]. Thus, the only explanation would be "related to decisions of economic nature" (p. 136), settling "it is an economic problem" (TOLEDO *et al.,* 2019, p. 138). Though quite direct in the diagnosis, the authors ignore the economic determinations along their analysis and propositions. They offer legal principles, regulations and political approaches despite the economic difficulties to implement them. Their recommendations derive from implementing the prevention principle (p.137), central to their book. As already stated, though easy to be morally adopted, to implement it is rather tricky, as tailings dam collapses history shows.

They indicate the disobedience to the legislation as the main flaw in dam security policies. Hence, they propose three types of recommendations to the legislative, executive, and judicial spheres, none directly to the corporations

[4] Also quoting Luino and De Graff (2012) and Luino *et al*. (2014) over the examples they analyze.

(p.140). To the executive, they propose (1) improving norms of tailings storage, (2) enhancing the inspection with more hirings and equipment, (3) guaranteeing checks for every tailings dam and *in loco,* instead of indirectly – with the information provided by the mining companies -, (4) demanding the use of more modern tailings storage techniques, (5) the progressive reuse of the tailings and its reintroduction into other economic chains, (6) the prohibition of upstream dams, (7) the increasing substitution of dams by alternative storage solutions, (8) the adoption, in medium or long term, of solutions that would "eliminate, in origin, any possibility of environmental or social damage" (p. 147) by mining activities, (9) economic incentives to the use or development of cleaner technologies, (10) more public participation during the processes of planning, installing and operating the mining activity and tailings storage, and the (11) public information. When directed to the legislative and judiciary instances, the authors are much more generic or less demanding. To the first they suggest stimulating economic policies towards the use or research over more environmentally sustainable methods, plus adapting the norms to effective preventing mechanisms (p. 152). To the second, the general recommendation of guaranteeing access to justice and the supervision of the firsts' duties, emphasizing some aspects (p. 152-156).

The authors pinpoint the prevention principle's solution and the problem as being an economic one. Notwithstanding, they suggest State interventions that in some propositions would ignore economic determinations themselves, or would merely try to make tailings economically feasible, thus merely absorbing the economic logic. For instance, they propose more hirings and equipment to reinforce governments' direct *in loco* inspection of dams, or economic incentives, regardless of the economic conjuncture, both for income or implementation costs for a developing country, including regulatory capture by the corporations themselves. Not to mention that corporations and shareholders, i.e., protagonist economic actors, are left untouched by the propositions as if the States produced the disaster by omission in inspections and regulations. The subject that held full control of the process should be analyzed in its internal causes that created the tragedy and not be left stainless. If they suggest a more democratic process, how would it resist corporations' non-democratic operations?

Here also is a problem with legal solutions. As Carvalho and Damacena asserted, many disasters occur despite the preventive legal norms, being every tailings dam failure a legal system failure, once it could not guarantee the prevention principle and its most concrete expressions in specific rules. Not considering that legal prescriptions were put aside by the mining companies and

trying to prevent other tailings dam failures with new regulations may be inefficient. What about the non-legal causes that are causing the illegality? Authors typically identify this as Toledo et al. who found an intended "agility" to execute the projects usually reducing the rigorous criteria demanded by Law (2019, p. 119) or Nascimento e Silva that analyzes the relation between economy and mining incidents in a more detailed manner. She recognizes "economic factor" as a "powerful influencer in governments and enterprises decision-making", subsequently highlighting its "undeniable benefits", as creating jobs, and how high-risk investment mining is – for investors (2019, p. 14-15). She acknowledges Brazilian dependency on commodities and its sensitivity towards price fluctuations (2019, p. 16-17). Equally, she states that the technical issues about tailings dams were already well understood by the 70s, in Brazil, (2019, p. 22) just as the upstream dam is usually chosen because it is cheaper, despite having a higher risk of liquefaction (p. 25). The inspections of the dams are made by independent controllers hired by the companies themselves, whose successful reports depend on "the condition provided" by the companies for their supervision and their own "commitment" (p.46-47). Furthermore, those engineers who project and inspect the dams are usually challenged by "unrealistic prices and deadlines" (NASCIMENTO E SILVA, 2019, p. 90). In spite of all these acknowledgments, the authors do not guide towards a comprehension of the economic influence but rather take them as an untouchable element, passing by them straight to analyzing the possibilities of state intervention, legal reforms, and so on. These are examples of legal authors that reaffirm the prevention and precaution principles but only consider significant changes of some of the multiple causes.

That is why Calazans focus on a hierarchy of causes instead of a simple multiplicity, not merely spreading responsibility over social actors and dynamics, technical factors, or natural causes. He argues for the teleologies that underlie the gathering of these multiple causes, the company's economic interests expressed in haste towards expansion to maximize profit or reduce losses. The rush in the dam raising is symptomatic of this teleology. A standard reference of a safe raising rate is Vick's (1990), quoted by several authors (Davies *et al.,* 2002; ZARDARI, 2011; CALAZANS, 2019), and a member of the panel hired to analyze Fundão's rupture (MORGENSTERN *et al.,* 2016). He states that a safe speed for upstream dams rate is between 4,6 and 9,2 meters per year. According to Calazans, Fundão's rate from 2011 to 2014 was 11 meters per year. From July 2011 to September 2012, dike 01, from the Fundão Dam, in Mariana/MG was raised 18 meters, and 14,6 meters in 2014 (2019, p. 54). In November 2015, the dam

collapsed. Calazans argues that the moving motivation linking the chain of events characterized as the "multiple causes" that produced the disaster is the corporate economic interests. This leads in the direction of analyzing the economic factor of disaster production perspective of tailings dams failures (TDF) production.

1.3 The economic perspective of TDF

Tailings dam: what is it and how does it work? Kossoff et al define it in brief words as

> mixtures of crushed rock and processing fluids from mills, washeries or concentrators that remain after the extraction of economic metals, minerals, mineral fuels or coal from the mine resource. The word 'tailings' is generic as it describes the byproduct of several extractive industries, including those for aluminum, coal, oil sands, uranium and precious and base metals (KOSSOFF *et al.,* 2014, p. 230).

The mining industry produces an impact of "the same order of magnitude as that of fundamental earth-shaping geological processes, (…) the chief waste stream is tailings," which has an accelerating trend due to lowering of ore grades in currently explored minings.

> Approaches to the handling and storage of tailings include riverine disposal, submarine disposal, wetland retention, backfilling, dry stacking and storage behind dammed impoundments. The main method currently employed (especially by large companies in the Developed World) is the latter, with the structures produced often termed 'tailings ponds' or 'tailings dams' (KOSSOFF et al., 2014, p. 232).

Around the 2000s, there were "at least 3500 tailings dams worldwide, these range in area from a few ha to some thousands of ha". Dams are often constructed using local materials and tailings themselves. There are three manners to raise them, after an initial structure: upstream, centre-line or downstream. The upstream dam is the cheapest and the most likely to fail. Liquefaction is one of the most known failure causes for upstream dams (KOSSOFF *et al.*, 2014, p. 235), which was one of the factors that produced the Fundão Dam rupture.

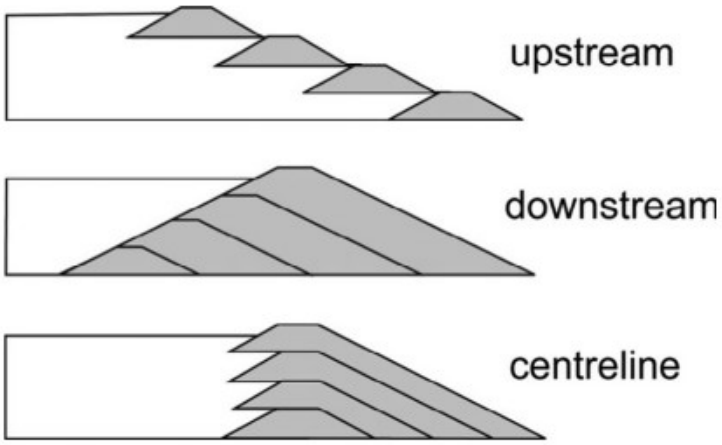

Fig. 01 – The Representation of Dam Types.

Quoting Paulo Franca, a former Vale Planning and Development General Manager, Santos and Wanderley (in MILANEZ *et al.*, 2016) uses the term dam dependency to describe Brazilian general options for tailings dams (FRANCA, 2019). Franca provides important data. By 2030 the world should process 1 million tons of metals per day in comparison to 100 tons in the 1900s. Each thirty years, tailings dams are rising ten times in volumes and doubling its height or depth, to which he adds the concern of the "rising business risk" (FRANCA, 2019, p. 02). According to the International Commission on Large Dams – ICOLD, a dam is considered large when "with a height of 15 meters or greater from lowest foundation to crest or a dam between 5 meters and 15 meters impounding more than 3 million cubic meters, and defined in greater detail in the World Register of Dams" (ICOLD, 2011). By 2009, Vale had 300 dams, and he pointed 450 large dams in Brazil (FRANCA, 2009, p. 04).

Once tailings dams are enlarging, the question of why they collapse becomes even more compelling. Davies humorously points the difficulties for making a tailings dam stable as a challenge from structure engineers to their cousins, geotechnical engineers, citing a long list of adversities, amongst them (a) the fact that tailings have "no ability to generate revenue", generally thought as "an annoying cost of doing business", (b) the frequent changing of the original project, (c) the possibly long construction time, and (d) perpetuity as a fixed condition. He concludes: "Tailings impoundments are also one of the most technically challenging elements in geotechnical practice" (2002, p. 31-32). Though highlighting the difficulties of an incomplete database on dams and their failure events, Davies estimates a failure rate for tailings dams of six to seven per two years (DAVIES; MARTIN, 2009, p. 04), never occurring less than two yearly, a rate

ten times higher than water retention dams[5]. "The comparison is even more unfavorable if less 'spectacular' tailings dam failures are considered". Among the types of failures, liquefaction is the most common (and among those, static liquefaction), also being less understood. It is not a mere coincidence that it was what caused the collapse of both Fundão Dam in 2015 and Feijão Dam I, in Brumadinho, on the 25th of January 2019. Examples of what Davies calls Tailings Dam Amnesia – TDA,

> a state of tailings dam design or stewardship where lessons available at that very site are ignored in spite of ample available information on-site, visual evidence of previous event occurrence and/or published accounts of incidents on a given project (2002, p. 32).

Davies emphasizes this technical amnesia with a few examples of the past, through which he demonstrates that lessons could have been learned since the 1920s, while self-evident and straightforward statements over static liquefaction have been continuously ignored (2002, p. 34). Hence, he concludes

> that there have been no unexplained failure events. (…) These failures, each and every one, were entirely predictable in hindsight. There are no unknown loading causes, no mysterious soil mechanics, no "substantially different material behavior" and definitely no acceptable failures. (…) There was lack of design ability, poor stewardship (construction, operating or closure) or a combination of the two, in each and every case history. If basic design and construction requirements are ignored, a tailings dam's candidacy as a potential failure case history is immediate. (…) (DAVIES, 2002, p. 35) The current database of failures is speaking clearly to all geotechnical engineers. Are we listening to the message? (DAVIES, 2002, p. 31).

Being so, the challenge, from structure engineers to geotechnical engineers, is not puzzling as a result of one's lack of knowledge or inadequate known solutions. It defies by the given conditions in which these solutions should be applied.

[5] Approximately 10 to 100 times the rate of water retention dams (GARBARINO *et al.,* 2018 *apud* BOWKER; CHAMBERS, 2019, p. 02).

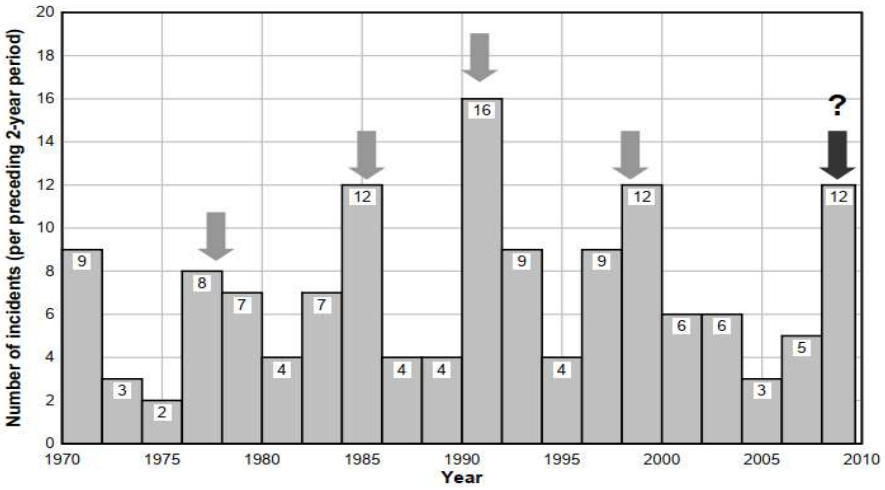

Fig. 02 – Number of Tailings Dam Failures Every Two Years. Source: DAVIES; MARTIN, 2009, p. 02.

Davies and Todd Martin discuss one hypothetical relation to commodities market cycles. They evaluated the ruptures from December 1968 until 2009 (Fig. 06), and correlated them to the cycles of copper and gold prices (Fig. 07). Davies and Martin found a subsequent incident peak between 18 to 36 months post-peak and they listed potential reasons for it, which we summarize as follows: (a) permit, investigation, design, and construction haste, and/or problems derived from it; (b) cost escalation during the boom and the consecutive cost-cutting need after the boom; (c) the designer picking; (d) rapid turnover of management due to the boom of new opportunities; (e) neglection over the operational reality of dams (DAVIES; MARTIN, 2009, p. 07-08).

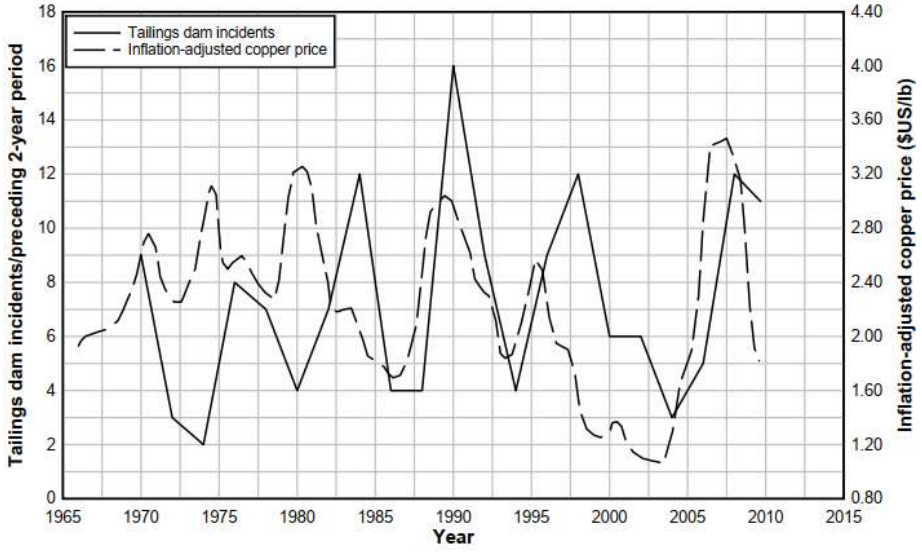

Fig. 03 - Adjusted Copper Price and Tailings Dam Incidents. Source: DAVIES; MARTIN, 2009.

Drawing the question in a more detailed manner, Bowker and Chambers (2015, 2017; CHAMBERS, 2019) made a series of articles on the matter, bringing up important information over the economics of TDF.

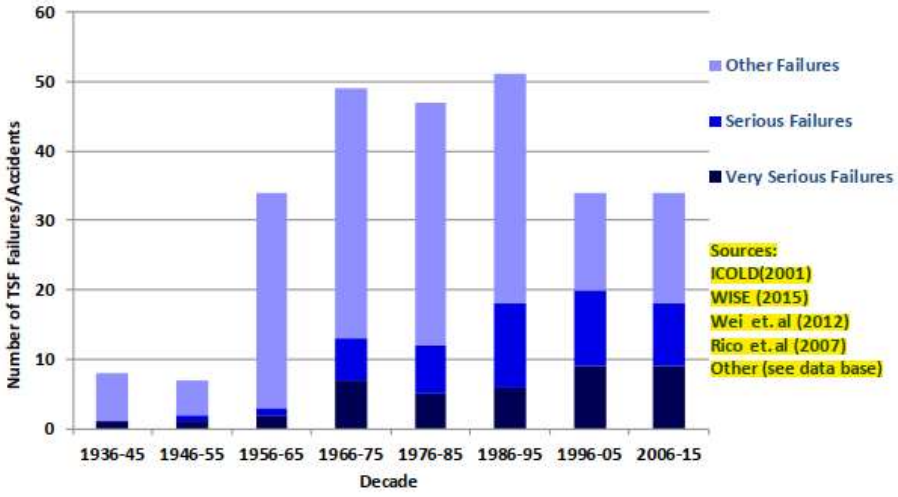

Fig. 04 – Number of Tailings Dams Failures each decade from 1936 to 2015. Source: BOWKER; CHAMBERS, 2015, p. 04.

A first important trend identified in 2015 is about the serious failures – "having a release of greater than 100.000 cubic meters and/or loss of life" - and very serious failures – "having a release of at least 1 million cubic meters, and/or a release that traveled 20 Km or more, and/or multiple deaths (generally ≥ 20)" (BOWKER; CHAMBERS, 2015, p. 04). Figure 05 is quite illustrative about it. Serious and Very Serious failures dominated the numbers from the 90s onwards. In the following articles, however, with more data, Bowker and Chambers revisited these numbers and found similar trends as in Figure 09, meaning all kinds of failures were increasing at similar rates.

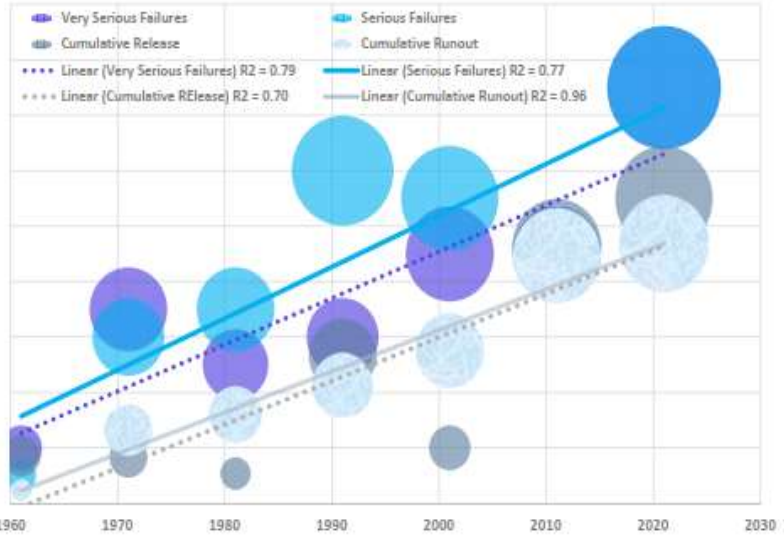

Fig. 05 – The increasing trend of Tailing Dams Failures revisited. Source: BOWKER; CHMABERS, 2017, p. 09.

The general depletion of ore grades, the falling prices of most metals and the growing production are trends irrefutably correlated to the failures, as they pose (BOWKER; CHAMBERS, 2015, p. 02). As Davies, they also blame the modification of original designs as a common problematic issue. By using statistical methods, Bowker and Chambers relate the rise of Serious and Very Serious tailings dams failures, from 1970-2000, to the long depletion of prices of the same period (BOWKER; CHAMBERS, 2015, p. 07), while the following decade rise of these categories of failures would relate to the simultaneous production cost rise and the continuously falling grades. As Davies and Martin, Bowker and Chambers also works with copper as a proxy of all the other metals.

> While each principal base metal (iron, aluminum, copper, zinc, etc.) has its own version of the Mining Metric, the basic "shape" and slope of trend lines for production and price for all base metals are the same. The basic bottom line, vis-a-vis manifest environmental loss across all metals, is the same. All operate on close margins. Copper is widely recognized as a bellwether base metal for the mining industry. Most works on mining economics use copper as the "index metal" (BOWKER; CHAMBERS, 2015, p. 08).

More emphatically they indicate the ore grade as a more significant variable in the determination of the production cost level, the amount of waste produced, and more sensitive to define the economic feasibility of the mine (Ibid., 2017, p. 14). There is "a clear and irrefutable relationship between the mega trends that squeeze cash flows for all miners at all locations, and this indisputably clear trends toward failures of ever greater environmental consequence" (BOWKER;

CHAMBERS, 2015, p. 18). In 2017, they could better estimate that "somewhere between 1/3 and 1/2 of all technically operating mines are no longer, economically viable and never were viable", pressuring even more the TDF risk due to the reducing rates of ore grades (BOWKER; CHAMBERS, 2017, p. 18). These articles identify the immediate economic haste for expansion, production and profit as a central point approached by their analysis data and findings. Capital expressed itself through prices, costs, production rates, ore grades, all as expressions of a movement in which the corporate behavior was varying according to its economic interests and the production variables. A systemic issue as TDF trends might be seen as a problem of singular personal errors from engineers, an act of immorality from directors or the company itself, and as an economic problem. The authors show that in spite of predicting these failures, and regardless the availability of enough technology to make tailings dams safe, the problem resides somewhere else: "We can also see that despite the explicit warning issued by the Mount Polley Expert Panel, Business-as-Usual is continuing" (CHAMBERS, 2019, p. 08).

Marshall, while analyzing the Mount Polley and Mariana cases, addresses this business as usual as "the unregulated power of transnational corporations" (2018, p. 08), a regulatory capture,

> which occurs when regulation, or the carrying out of regulatory oversight by a government body, is directed or unduly influenced by the private industry subject to regulation. The process of capture involves not only lobbying, political contributions and "revolving doors" between government and corporate leaders, but also the advancement of a narrative that blurs the distinction between corporate interests and what is genuinely in the public interest (MARSHALL, 2018, p. 10).

And based on Davies and Martin she writes:

> In both cases, the mining companies had enjoyed a decade of rising mineral prices, during which they pursued aggressive expansion, sought more relaxed licensing and regulatory procedures, and quickly built more and bigger tailings ponds in order to capitalize on the boom. When the boom ended and commodity prices plummeted, both companies took measures to maintain their profit levels that included cost-cutting, reducing maintenance and inspections, filling tailings ponds beyond their designated capacities and ignoring warnings, recommendations and known structural flaws (2018, p. 07).

These economic influences might be more intense if we deal with iron ore and concentrates in commodity-dependent countries as Brazil. The United Nations Conference on Trade and Development (UNCTAD, 2019) classifies Brasil as a commodity dependent country, for having more than 60% of its exports due to commodities (62,8% of its exports value shares) (p. 14). The document does not

name Brazil a mineral commodity dependent country, but agriculturally dependent, (p. 14) for agriculture corresponded for 40% of the country's export in value terms in 2017, while the minerals share would be 14% (p. 54). Looking closer, though, from the three leading commodity exports among all types (as a share of total merchandise exports), iron ore and concentrates stand in the second position of all.

1.4 The Mariana Mining Disaster and corporate economic reaction

If general data points towards economic factors in TDF productions, the synthesizers of these variables are corporations. Klaus Dörre points both (1) to market oscillations, overaccumulation crises and its correlated aggressive reactions through landnahme, by States and corporations, as to (2) the financialized corporate organizations, compelled by investors and consumers interests (2015). The first imposes the commodities price oscillation and megacycles, the systemic economic instability, and fraudulent reactions in order to relieve capital from crises. This economic environment, its conditions and dynamics, in which corporations must navigate are synthesized in a

> Corporate decision-making systems and organizational structures (…) subordinated to a tight management of profit, which replaces the 'regime of organized time' and its long-term planning time frames with a one-sided profit orientation and a management regime of the short term (DÖRRE, 2015, p. 34).

This market-oriented structure creates an order that is not personal, it incarnates those in the hierarchical structure of the corporation, transferring its orders abstract and anonymously, at the same time that personally. This specific mechanism explains a problem in the legal approach. It will search individuals or abstract legal persons to blame. If it finds them, it will punish them or demand a civil or administrative action. A plausible question is how much responsibility can an individual have for this process as a whole? Or, if addressing corporations and individuals through legal liability produces any systemic changes that would impede or reduce these actions in the future, who is to be punished, and how to change a systemic behavior which Prof. Dörre describes to be conducted inside corporations?

> It articulates itself in abstract and anonymous forms. It frequently appears as a constraint that seems inescapable, as a fait accompli. The management hierarchy does not vanish but harnesses the abstract power of the market in order to disguise

> its own influence. This 'faceless' mode of rule is extremely difficult to perceive by those being ruled. It does not always function perfectly – after all, it ultimately depends on social integration to minimize disturbances, as well as on target agreements, and thus on communication with those dominated. In this sense, the pressure from world-market competition cannot be seamlessly transferred to the bottom ranks of individual corporations. However, real or simulated competitive situations can be used by top management over and over to exert pressure on workforces and organized interest representation in the name of securing particular sites of production (2015, p. 35).

And so the corporation privileges the shareholder and dismantles the social subject (Ibid., p. 38). From here, our attention drives itself to the corporate systemic functioning and asks what the Fundão Dam rupture may show us. However, one observation of the iron ore market must be made. The iron ore pricing changed in December 2008. Before that, it was defined by an "annual negotiation system, i.e., a benchmark price was negotiated annually between large producers and consumers in the two dominating regions". From December 2008 until now it has been based on spot market prices (WARREL, 2018, p. 203). This change makes the iron ore price behavior harder to track, for the historical analysis will have a fundamental breakdown in the short past. Nonetheless, both the Mariana Dam Rupture and the Brumadinho Dam Rupture occurred after this pricing change, in 2015 and 2019, respectively, and during a long descend of the prices. From the century peak of US$197 in 2008, to US$135 by the end of the last commodity cycle in December 2013, to US$46 by November 2015, when the Fundão dam collapsed, and US$76 when the Brumadinho tragedy occurred. Between the Fundão and Brumadinho tragedies, it did not surpassed US$90. Who are these corporations that synthesized these dynamics?

Samarco Mineração S.A. is a Brazilian mining company owned in joint-venture by Vale S.A.[6] and BHP Billiton Brasil Ltda. Though created in 1973, only in 2000 it acquired this nowadays ownership configuration when Vale bought its shares and equally partook it with BHP Billiton Brasil Ltda. Vale S.A. was, ironically, created as Companhia Vale do Rio Doce (Rio Doce Valley Company) in 1942 as a state-owned company. Following Dörre's description of the new landnahme's movement in low-cost privatizations (2015, p. 261-262), it was privatized in 1997 and ten years later changed its name to Vale S.A., which in Portuguese stands both for valley and value, in its verbal form. The company is both a fundamental

[6] "S.A." stands for anonymous society (sociedade anônima in Portuguese), the "Brazilian version of the business corporation" (PARGENDLER, 2018, p. 03), gathering with different degrees what she calls the corporate characteristics: (i) legal personality (including lock-in), (ii) limited liability, (iii) delegated management, (iv) transferable shares, and (v) investor ownership (PARGENDLER, 2018, p. 01).

actor and essential chapter of Brazilian mining history, likewise, one of the protagonists of the last two Brazilian biggest tragedies: Fundão and Feijão I dam ruptures. Differently, BHP Billiton Brasil Ltda assumes the form of an LLC, Limited Liability Company. By the end of 2020, the BHP Group was the most valuable mining company in the world (165,82 billion dollars) and Vale was the third (86,37 billion dollars) (MINING, 2021). Samarco, Vale and BHP are the protagonist companies in the Fundão Dam rupture.

On the 5th of November 2015, a tailings dam ruptured in Brazil, in the southeast region, the country's wealthiest. It happened in a state called Minas Gerais, literally translated as "general mines". Minas Gerais' history crosses many times with Espírito Santo's, a small state for Brazilian proportions and geographically located by the east of Minas Gerais, at the coast, where the mouth of the river Doce or Rio Doce[7] is. The dam is in a historical mining city called Mariana.

[7] Rio in Portuguese stands for river, but sometimes the word constitutes the very name of the river, which is why some works maintains as Rio Doce. Doce, in Portuguese, means sweet.

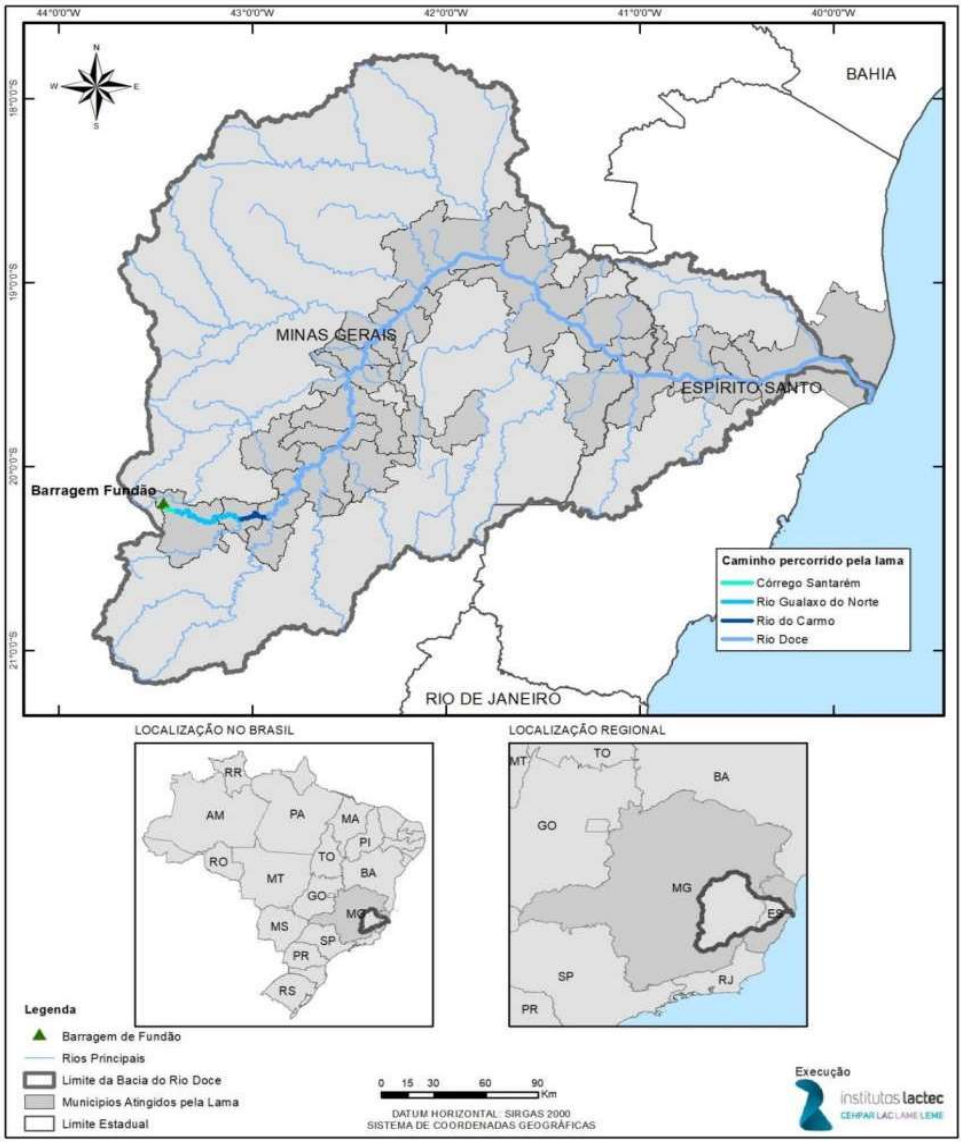

Fig. 06 – The location of the Fundão Dam (Barragem de Fundão), the river Doce (in blue) and the states of Espírito Santo and Minas Gerais. Source: INSTITUTOS LACTEC.

It belongs to the Germano Mining Complex, which started its operations in 1977, with the Germano Mine depletion occurring from 1984 (AMPLO, 2017, p. 12) to 1992 (MILANEZ *et al.,* 2016, p. 63). In the same year, the Alegria Mine Complex initiated (altogether called Germano-Alegria Complex or just Germano Complex) its activities. Mining iron ore generates tailings, a byproduct considered with no economic utility. In this case, 30% was a water mixture with soil (slimes) and 70% of sandy tailings (with higher granulometry). There are three tailings ponds in the Germano-Alegria Complex: I) Germano's; II) Santarém's and III) Fundão's. The Germano Dam is in operation since 1977, the Santarém Dam started in 1994, and the Fundão Dam in 2008, by the end of Germano's capacity. The Fundão Dam was the one that ruptured. Its project estimated 111,8 million cubic meters of

tailings storage capacity– both sandy and slimes, though in separate dikes (MILANEZ *et al.*, 2016, p. 65-67). A report from the firm Cleary Gottlieb Steen & Hamilton LLP, hired by BHP Billiton Brasil Ltda., Vale S.A. and Samarco Mineração S.A. showed three incidents that occurred in the dam previously to its rupture and concluded, in simple terms, that the burst was caused by the unsaturation and loose of the sand from the dike 1, also due to the existence of slimes among the sand ponds closer to the left abutment. The rupture overtopped the Santarém Dam, though not breaching it (MORGENSTEIN *et al.,* 2016)[8].

Fig. 07 – Fundão Dam site and reservoir before (a) and after (b) the rupture. Source: MORGENSTEIN *et al*., 2016.

The tailings first reached the Santarém brook, following the rivers Gualaxo do Norte, do Carmo, and lastly the Rio Doce, by far the longest. Before the Doce, the tailings wave traveled seventy seven kilometers and killed nineteen people (considering one body was never found). Five kilometers from the dams, the Bento Rodrigues village was devastated. It was estimated that 207 from the 271 village properties were destroyed (ANA, 2016, p. 23). Considering other partially damaged villages, as Paracatu de Baixo, Gesteira, and Barra Longa, around 1200 people were left unsheltered (WANDERLEY *et al. in* MILANEZ; LOSEKANN, 2016, p. 70).

[8] More information can be accessed in http://fundaoinvestigation.com/. The website is not completely accessible for Brazilians, once it is only partially in Portuguese.

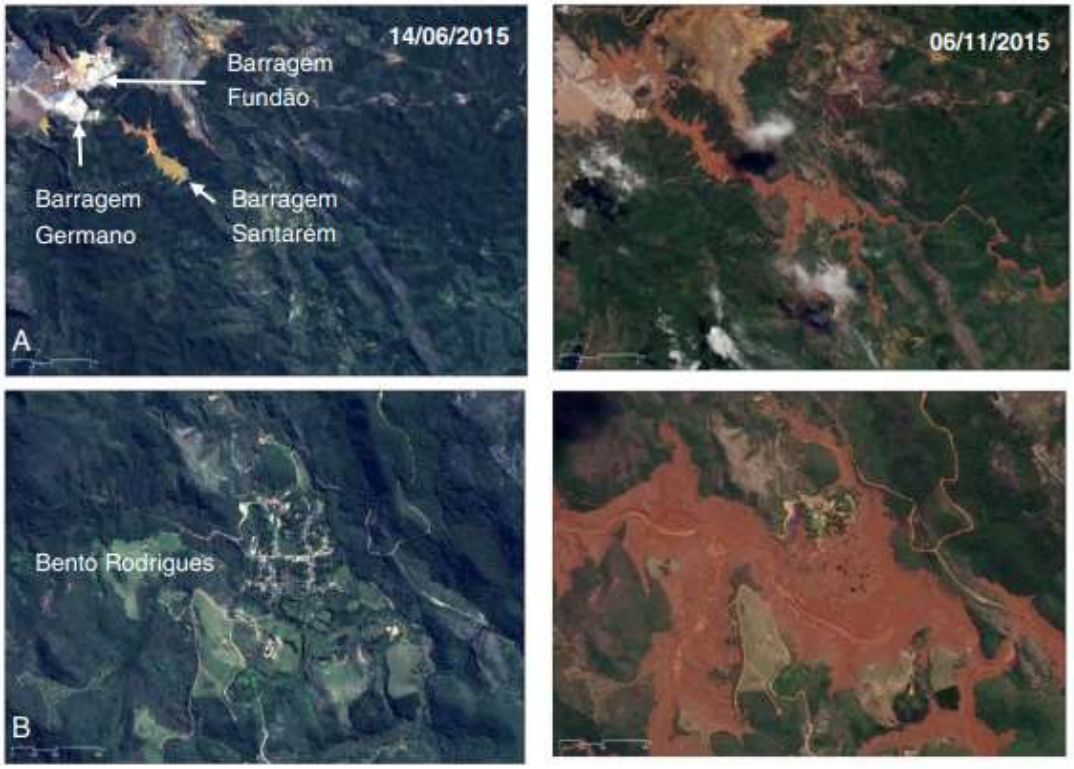

Fig. 08 – The dams and surroundings (upper images), and Bento Rodrigues (bottom images) before (left) and after (right) the rupture. Source: ANA, 2016.

Over 34 million m³ tailings of a 55 million m³ capacity pond were liberated and partially carried through 663,2 km until Espírito Santo's coast. It took 16 days for the tailings to reach the ocean, where its stain covered an area around 11.352 km² going as far as Rio de Janeiro to the south and Bahia to the north[9]. The disaster affected approximately 1,4 million people, direct or indirectly, more than 40 municipalities along the riverside, being at least 36 in the state of Minas Gerais and 6 in the state of Espírito Santo (INSTITUTOS LACTEC, 2017, p. 49). Over the coast, some other communities could be recognized as affected after social mobilization, but not every municipality reached by the tailings stain at the seashore was.

[9] In: www.governançapelodoce.com.br/pluma/10-a-14022016/. Access on: 09/03/2016.

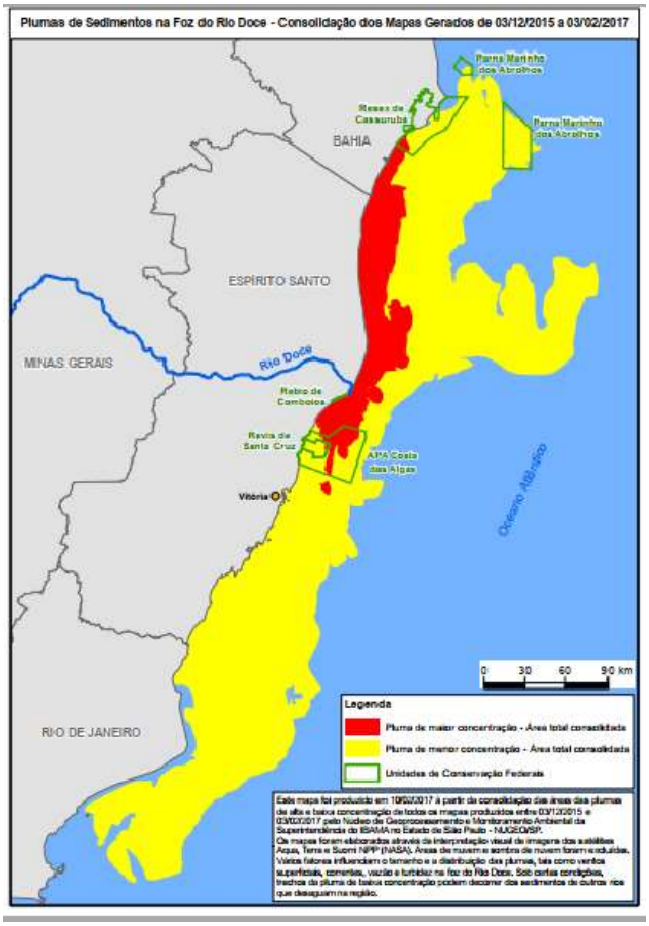

Fig. 09 – The consolidation of maps generated from 05/03/2015 to 02/03/2017, showing the area reached by the tailings mud in the ocean. The red area stands for higher concentrated tailing spots and the yellow for lower concentration tailing spots. The green line circumscribes national nature conservation areas. Source: ICMBIO.

Milanez *et al.* (2019) find in both Davies and Martin (2015) and Bowker and Chambers (2017) complementary works. The first points to the relation between corporate strategies, TDF, and commodity cycles - better answering a question of when - while the second will relate TDF to the mine's ore grades, better answering "which mines?". According to Milanez *et al.*, Fundão explicits Davies and Martin's approach, while Brumadinho, Bowker and Chambers' (2019, p. 54). The haste to benefit from the rising prices before the commodity price peak would implicate in less criterion dam planning, building and inspectionning. Plus, the same rush would lead to higher indebtments. The post boom though, would lower revenues and, pressured by highly indebted companies, would impose a cost-cutting policy that would affect the dam safety. This scenario may fit Fundão, since the installation and licensing of the dam was during the rising prices until 2008 - the commodity price peak - and its rupture during a long falling prices period of the iron ore post boom, in 2015 (MILANEZ *et al.*., 2019, p. 50).

Samarco Mineração S.A. implemented its expansion programs in two different market moments: in the commodity boom peak concluding the P3P expansion program in 2008 and in its depletion completing the P4P in 2014 (Milanez *et al.,* 2016, p. 52). Milanez *et al.* observe the centrality over an expansion

policy directed to shareholders, and quotes Jimmy Wilson, BHP Billiton Iron Ore president, responsible for activities comprising Samarco in BHP Billiton, who said that the goal was not to reduce the volume in order to raise prices for it would penalize the shareholders (Ibid., p. 59). If Samarco could lower the production cost per iron pellet unit in 6,5% from 2013 to 2014, its indebtment rate was pushing in a higher scale, going from 60% to 80% from 2009-2014 (MILANEZ *et al.,*, 2016, p. 62). Moreover, between 2011 and 2014 the number of work accidents almost doubled, suggesting a reduction related to safety spendings (MILANEZ *et al.*, 2019, p. 50).

Analyzing Vale's activities in Brumadinho imposes other obstacles, though, for its data comprises "several mines in several other countries" in an "aggregate data, making more difficult the comprehension of individual mines management" (MILANEZ *et al.*, 2019, p. 51). To Bowker and Chambers (2017) the ore grades would implicate in less profitable mines, pressuring its management towards lower costs. The lower the ore grade, the higher the needed price to make the mine profitable, and the boom stage of the cycle would stimulate the openings or maintenance of lower grade ores. According to Milanez *et al.* this approach is better suitable to the Brumadinho disaster (MILANEZ *et al.*, 2019, p. 51). Milanez *et al.* analysis also characterizes the financialization process that drove Vale's - the corporate link between Fundão and Brumadinho – to corporate strategies.

> Over 20 years (1997-2017), Vale operated through a shareholders' agreement (Valepar, 1997) that governed the relations between the company's holding company (Valepar) and its other owners. In 2017, Valepar entered into a new agreement (Valepar, 2017), which foresaw the extinction of the controlling group itself and guided the process of restructuring of Vale's property, culminating in the signing of the first corporation shareholders' agreement. Most importantly, during this process, Vale reduced the roles of shareholders previously gathered under Valepar in this structure of ownership, as it was admitted in the B3's Novo Mercado [listing segment, advancing in the process of spraying control and in an attempt to become a "true corporation" (MILANEZ et al., 2019, p. 21).

B3 is the Brazilian Stock Exchange. It has a list of segments with different rules of governance for the companies under each segment. The Novo Mercado is described by B3 as a "highly differentiated type of corporate governance" adding obligations "beyond those of the Brazilian legislation". It "expands the shareholders' rights" and only emits ordinary shares - with voting rights - and the administration council must have at least two or 20% of the seats occupied by independent councilors, among other conditions. (B3, 2020). Valepar's organization had the following structure in 2016, as shows figures 10 and 11.

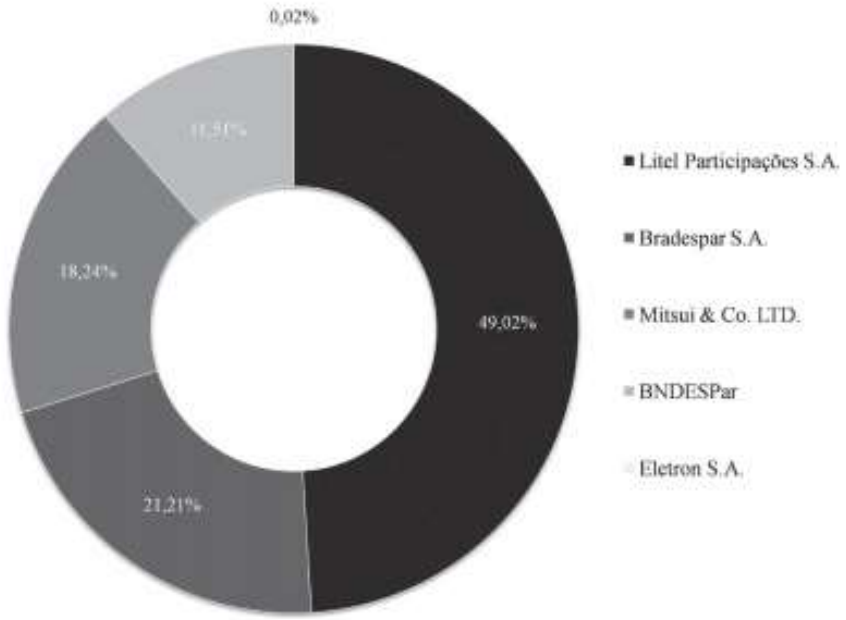

Fig. 10 – Valepar S.A. shareholders distribution. Source: MILANEZ *et al.*, 2016, p. 56.

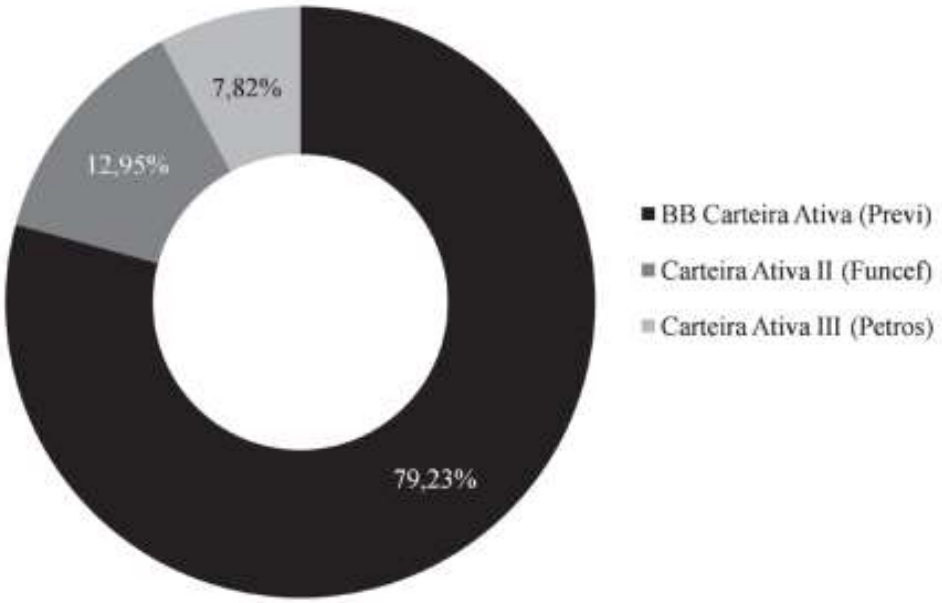

Figure 11 – Litel Participações controlling shareholders distribution. Source: MILANEZ *et al.*, 2016, p. 57.

This structure counts with a significant participation of national companies and government, as in the pension funds from state banks - BB Carteira Ativa (Previ), Carteira Ativa II (Funcef) and Carteira Ativa III (Petros) – or the BNDESPar, from the national development bank, or even the government's golden shares, among others (MILANEZ *et al.*, 2019, p. 22). This shift driven in 2017 to the Novo Mercado segment weakened these parts and drove towards a shareholder-

oriented direction, strengthening the financialization of decision-making. Firstly, by abolishing preference shares, Valepar's decision power before other shareholders, especially international ones, was diminished. According to Milanez *et al*. (2019) while Valepar owned, in 2017, 53,9% of the ordinary shares, other investors held 72.9% of the preference shares. This unification reduced Valepar's control position, in benefit of international groups as the North-Americans Capital Group and BlackRock Inc. and the British Standard Life Aberdeen plc. Secondly, the elected independent members of the administration council were supported by Standard Life Aberdeen, defeating twelve national investors. Thirdly, the change of directors was a symbol of the rise of a shareholder oriented strategy, for Fábio Schvartsman, recently had conducted other commodity companies leading their shareholders to higher revenues. Under his administration from 2017 to 2018, the dividends increased from 135% (US$1,4 to US$3,3 billions). All these changes drove to a growing control of financial foreign agents (MILANEZ *et al*. 2019, p. 24-25).

Another interesting observation is Vale's market value reaction to the disaster, which was null in the New York Stock Exchange with its American Depositary Receipts (ADRs). By 2015, Vale's ADRs were continuously falling, from US$7,7 in April 2015 to US$2,5 in January 2016, its trajectory after the Fundão Dam Rupture (nov/2015) until February 2016 and showed no reaction. Notwithstanding, feeling deceived by Vale's information about safety and risk policies, its North-American investors filed a lawsuit against the company demanding an indemnity to compensate their losses over the Rio Doce disaster. In February 2020 they reached a preliminary agreement of twenty thousand dollars (UOL/REUTERS, 2020). After the stable prices descend surrounding the Rio Doce tragedy, it began a steeply rising trajectory, from US$2,9 to US$15,1, that lasted until October 2018, two months before Brumadinho (jan/2019). Despite the tragedy, its value remained steadily stable during the trimester: US$12,4 in January, US$12,5 in February and US$12,9 in March (MILANEZ *et al*. 2019, p. 28). Thus, investors in NYSE did not feel the disasters as economically relevant or, at least, not in a negative way that could have affected the company's performance. In the Brazilian B3, by the 4th of November 2015, VALE3 was traded by R$13,98 and by the day 4 of each following months it had the subsequent values: R$9,92 (dec/2015), R$10,20 (jan/2016), R$8,41(Feb/2016), R$13,30 (Mar/2016), R$11,89 (Apr/2016), R$13,98(May/2016), R$13,57(Jun/2016), R$13,64 (Jul/2016), R$15,08 (Aug/2016), R$ 14,38 (Sep/2016), R$ 14,18 (Oct/2016), R$ 17,37 (Nov/2016) R$23,93 (Dec/2016). It took about six months to recover the value of the day before the rupture. In the Brumadinho case, there was

a deep decrease of prices right after the rupture. On January 24th, 2019, Vale stocks were traded in R$ 52,71, falling to R$ 39,04 in the 08 of February. For an year the share price fluctuated between this range and in two years the shares valued R$102,00 (08/01/2021).

In 2020, the investment analysis of Bradesco BBI evaluated Vale S.A. as an "underestimated money maker machine in lower risk mode" (VALOR, 2020). Moreover,

> For Bradesco BBI analysts, the possibility of the mining company making a new provision at substantial levels to deal with Brumadinho's agreements and indemnities is very low, estimating that the amount of US $ 6 billion reserved - US $ 4 billion for indemnities and $ 2 billion for decommissioning dams - should be enough. The resolution of the Brumadinho episode will enable Vale to resume its dividend policy in the first half. Analysts estimate that the company can pay between $ 5 billion and $ 7 billion over the year, which would represent a dividend return of 8% to 10%, respectively (VALOR, 2020).

Though the immediate descend of prices after the disaster means a market reaction, it stabilization between this range for a year and having its price doubled in two are not critical reactions at all. If one assumes the idea of environmentally responsible investors and that we are dealing with a double aggression towards humanity and the environment in three years - Brazilian largest environmental disaster and its most murderous dam rupture, subsequently - how intimidating was that reaction in terms of an economic reproval? Should we expect a change of behavior born in a highly financialized corporation through a spontaneous financial reaction? Would this reaction sufficiently intimidate others before assuming that behavior?

1.5 The Mariana Mining Disaster and the corporate liability: what/who is liable?

In legal terms, it is precisely the prevention through intimidation that Steigleder affirms was overcome, arguing that the prevention principle should aim to change the *modus operandi* that resulted in the environmental damage (STEIGLEDER, 2017, p. 169). Being the production of TDF linked to the economic factors, as affirmed, a legal scholar might ask how does Brazilian Law approaches these economic dynamics. If these determinations are absorbed and processed in corporations and guide their internal policies, how are corporations and Capital seen by the courts and dealt with? These judicial reactions are linked to

corporations by the concept of legal liability or responsibility. Environmentally, it is mentioned in the Brazilian Constitution as stated below.

> Article 225. Everyone has the right to an ecologically balanced environment, a good for the common use of the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.
> § 3 Conducts and activities considered harmful to the environment will subject offenders, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused (free translation, BRASIL, 1988).[10]

This implies (a) corporations are addressed as possible offenders and that (b) a triple simultaneous responsibility is established: in the criminal, the administrative and the civil spheres. Those are the potential legal routes through which a company may be held responsible in Brazil, and the only ways by which they are addressed legally. A usual problem of environmental responsibility is the identification of the offenders for environmental issues due to the commented multiple causes problem. Danielle de Andrade Moreira diagnosis the matter precisely:

> The definition of liability distribution mechanisms is crucial to solving problems related to "organized irresponsibility"[11] which characterizes the risk society model, either because of the dispersion of the causality nexus – which occurs in a context in where damages have multiple origins and derive from synergic and cumulative effects – or due to its elasticity MOREIRA, 2015, p. 234).

"Organized irresponsibility" is Ulrich Beck's argument highlighted by David Goldblatt. In risk societies, legal reaction – with penalties and other impositions – virtually grows according to the severity of the environmental damage. Notwithstanding, neither individuals nor institutions seem to be directly and specifically liable for these damages. Goldblatt attribute this irresponsibility to an anachronism of "laws, institutions and capacities" that deal with the ecological matters (GOLDBLATT, 1998, p. 241). In this sense, Moreira highlights the difficulties of finding environmental damage with precise and distinguishable causes and causers. Although we share the author's position, it is not the Rio Doce or Brumadinho disasters' cases. Our cases have clear and distinguished causers.

[10] Originally: **"**Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações. § 3º As condutas e atividades consideradas lesivas ao meio ambiente sujeitarão os infratores, pessoas físicas ou jurídicas, a sanções penais e administrativas, independentemente da obrigação de reparar os danos causados.

Even though specific damages may be attributed to other activities, the companies were immediately identified. If the range of responsibilities may be stretched to the State and other entities, Samarco's, Vale's and even BHP Billiton's responsibilities are an indisputable point in Brazilian jurisprudence in the Fundão Dam collapse, as Vale's liability in Brumadinho's. This means that our question departures before the problematic context of the legal liability concept application for the identification of the criminal actors presupposes, considering at least we know who/what the offenders are.

Nascimento and Silva (2019), shows four cases prior to Fundão and Brumadinho tragedies and their judicial responses in Brazil: the dam ruptures of Mineração Rio Verde (2001), Florestal Cataguases Ltda. (2003), the São Francisco Dam (2006 and 2007), and the Mineração Herculano (2014). Here are the kinds of convictions used in these cases in the three spheres (civil, criminal, and administrative): (1) incarceration of the engineers; (2) provision of community services by the company, by building a parking lot; (3) demanding the payment of fines to the company's owners and the company; (4) indemnification to the afflicted families; (5) suspension of the enterprise's activities; (6) redressing of the damaged areas; (7) reinforcement of inspections and surveillance; (8) emergency actions; (9) mitigation and compensation (NASCIMENTO E SILVA, 2019, p. 30-40). If we do focus on the prevention principle as argues Nascimento e Silva (2019, p. 79) and apply it even to redressing processes as states Steigleder (2017), would they relevantly cope with the economic production of TDF? A standard answer would be that the fear from the punishment and the resocialization process would stimulate a behavior change.

Then, a conceptual problem stands before the legal scholars when dealing with corporate responsibility: who/what a corporation is? What is its nature? To treat individuals, corporations, state companies, or state organs as if their function, behavior, and nature were the same is taking them by their most superficial expression, their legal personhood. Nascimento e Silva frequently argues generically for State and corporate liability (2019, p. 76), despite identifying structural differences between them, as with the risk theories and the possibility of the State becoming an universal insurance system, if always liable for omission (2019, p. 82). In this sense, before asking who is liable, it is necessary to ask who/what can be liable, in order to prescribe legal decisions that would affect the behavior of this specific being and the origins of the disaster *sub judice.* According to Ávila Negri (2016, p. 02), this is a trap hidden behind the legal subject concept, that "tends not to demonstrate the differences, and in this sense, to mask them".

Equally, Milanez and Santos posed this question in a journal article named "Horror in Brumadinho is Vale's fault, say specialists. But what is Vale?" (2019).

> However, the search for those responsible remains a challenge. First, when stating that Vale is responsible, it is necessary to define who or what Vale is. Is Vale its workers? Its Executive Board? Or its Board of Directors? The shareholders? (…) how does it share responsibility for tragic episodes and their long-term consequences with the various members of this network? (MILANEZ; SANTOS, 2019).

The aftermath of the Fundão Dam rupture faces these questions as well as expresses the limits of legal reaction. According to Mariana A. Sobral and Rafael M. P. Campos, public defenders who worked in the case[12], more than sixty civil public actions[13] and thousands of individual suits were filed related to the Rio Doce disaster by 2018. Just a few of them had positive effects (*in* LOSEKANN; MAYORGA, 2018, p. 152). We will draw a line linking main legal events: 1) the government's class action; 2) the agreement - TTAC[14] (Termo de Transação de Ajustamento de Conduta) - and the Renova Foundation; 3) the so-called 155 billion class action or the federal public prosecution class action; 4) the governance agreement or governance TAC (Termo de Ajustamento de Conduta) and its recent developments and setbacks.

The first one, also known as the government's class action, is the Ação Civil Pública (public civil action, in some ways similar to the common law's class action) nº 69758-61.2015.4.3400 filed in the end of November, 2015, by the Federal General Attorney (Office of the Solicitor-General, is a parallel position in the United Kingdom) (DORNELAS *et al. in* MILANEZ; LOSEKANN, 2016, p. 351)[15]. This first complaint was filed by the Federal Government and the involved state's governments of Minas Gerais and Espírito Santo, along with their respective environmental foundation and autarchies, against Samarco Mineração S.A., Vale S.A. and BHP Billiton Brasil Ltda.

According to Milanez *et al.*, the company's axis stands for an unaccountability for operations and in this same sense, Samarco would assume the form of *a non operated joint venture,* finally suggesting the group would take the position of a mere investor, leaving the operational liability to Vale (2016, p.

[12] A Brazilian kind of State lawyers for the poorests.
[13] A Brazilian version parallel to the anglo-saxon class action.
[14] In free translation, TTAC stands for Transaction and Adjustment of Conduct Declaration and TAC stands for Adjustment of Conduct Declaration.
[15] The document is available at https://www.conjur.com.br/dl/inicial-agu-samarco.pdf. Access on: 09/10/2020.

54). The government's lawsuit was against the three of them, thus recognizing them as liable companies and veil piercing Samarco's limited liability. That is because Brazilian environmental Law adopts the objective civil liability theory, by which civil accountability lies upon direct and indirect polluters, regardless of intentions, as explained previously. Here, the estimated cost for the redressing process was about 20 billion reais (Ação Civil Pública nº 69758-61.2015.4.3400, p. 35). The governments of Minas Gerais and Espírito Santo argued that being Vale and BHP Brasil the only two shareholders of Samarco, there would not be any doubt that they control and are responsible for it, thus in favor of the veil-piercing (Ibid., p. 40). No question was made about the nature of the companies and the systemic treatment of the disaster. In this way, redressing means, in short, establishing a value enough to repair the damages, though we insist, it is impossible to restore a *status quo ante*. Even more deviating from that matter are the arguments quoted in the initial petition, which shows the expectation that the controlling shareholder should carry out the companies social function towards workers and the community in which it acts, having a duty of "strictly respect and attend their rights and interests" (Ibid., p. 40). Does this affirmation consider the nature of the entity over which these expectations rely upon?

By March 2016, mainly these same actors signed an judicial agreement called TTAC – Termo de Transação de Ajustamento de Conduta[16] which stated that the whole redressing process would need another legal personality, another mask[17], a private foundation (IBAMA, 2016, p. 12). The Renova Foundation was both created and ultimately controlled by the companies to manage the damage reparations' resources and execute a series of redressing socio-economic and socio-environmental programs. This institutional architecture, according to Sobral and Campos, would delegate to the Renova Foundation the power to, unilaterally, assess the afflicted conditions and, by their own criteria, decide whether or not someone would be entitled to financial assistance, indemnity or any other programs (SOBRAL; CAMPOS in LOSEKANN; MAYORGA, 2018, p. 155). An inter federal committee - CIF (Comitê Interfederativo) composed of State representations would supervise the Renova Foundation. The TTAC architecture is grand and elaborate, but some robust and straightforward pillars are transparent and simple. First, the Renova Foundation is controlled by the companies Samarco, Vale and BHP Brasil. Its most inner circle is the board of Trustees (Conselho de

[16] IBAMA. Termo de Transação e Ajustamento de Conduta – TTAC - Ação Civil Pública n° 69758-61.2015.4.01.3400. Available at: <http://www.ibama.gov.br/cif/ttac>. Access on: 27 abr. 2019.)
[17] The word person derives from personae, which stands for a theatrical mask.

Curadores), constituted by seven members: two indicated by each company as expressed by the TTAC's clause 212 (IBAMA, 2016, p. 97) and just one appointed by the Inter Federal Committee, which includes the representation of the federal government, state governments, municipal governments, and their respective interested environmental agencies and representations. An Executive Board (Diretoria Executiva) was pointed by the Trustees (clause 215), leaving clear that the foundation is a verticalized entity which higher levels are operated by the liable corporation's indications. Neither the Renova Foundation nor the Inter Federal Committee could vocalize the afflicted communities once they did not focus on their legitimate representation. This was, since its formation, one of the main claims of the two bigger social movements acting in the state of Espírito Santo, the Capixaba Forum of Entities in Defense of the Rio Doce (FCDRD - Fórum Capixaba de Entidades em Defesa do Rio Doce[18]) and the MAB – Afflicted by Dams Movement[19] (Movimento do Atingidos por Barragens). Amongst others, these movements signed a reproval open letter against the TTAC in which they argued the absence of the participation of the afflicted, the refusal to sign it from the Federal and States Public Prosecutions, and procedural illegalities[20] (FCDRD, 2016).

Besides refusing to sign the agreement, the Federal Prosecution Service Task Force for the Rio Doce case and the Espírito Santo's Prosecution Service filed a public civil action in May 2016, claiming 155 billion reais in response to the tragedy and its consequences. In what concerns us, it identified the companies and governments as both liable for the rupture. Here, Vale was considered both a direct and indirect polluter, once, they argued, it used the dams directly to dispose of its own tailings, and also for being the shareholder of Samarco (Ação Civil Pública nº 23863-07.2016.4.01.3800, p. 108). Further, this petition held that the respective governments - Federal, Minas Gerais', Espírito Santo's and the corresponding environmental agencies – were also liable for the rupture. The first

[18] It was created in the month of the disaster, November 2015. It gathered more than 70 social movements, institutions and other entities from civil society in order to supervise, denounce and demand the proper redressing actions, as to vocalize the afflicted and help their organization. Its main core member was the Justice and Peace Comission (CJP – Comissão de Justiça e Paz), from the Catholic Church, specifically from the Vitória's archdiocese. This author was an active member of this social movement from 2015 to 2018. More information see SANTOS, 2017.

[19] Movement of People Affected by Dams, founded in 1991, was originally created to organize the population around the problematic effects arising from the construction of dams. Now, it aggregates around its struggle the defense of water, responsible energy alternatives and the construction of a popular project for the country. More information, see ZEN, 2007.

[20] Before its legal ratification, the Federal and States Public Prosecutions filed a class action against the companies, making their stocks prices fall. The letter pointed as a strange coincidence the fact that the judge ratified the TTAC just two days after the stock prices fall.

two and their environmental agencies for not fulfilling the duty to supervise the activities, while the latter for its duty to guarantee the proper reparation process along with the other two (Ibid., p. 111-112). This civil public action (ACP), nicknamed "155 billion ACP" argued the signed agreement violated the due legal collective process, which states that the society, especially the afflicted, must have an active part in collective actions. The governments were also liable for the redressing process, which was ignored by the TTAC (Ibid., p. 115-116). Other arguments were brought, but these two concerns the actors better, hence, objectively pointing to this work's concern. The plaintiffs identified the absence of the afflicted in the process as well as the creation of an intermediary bureaucratic entity submitted to the "financial-economic logic and a fragile control" (Ibid., p. 276), the Renova Foundation, that cooled the direct liability of the companies, bureaucratized the decision-making process, and the addressing of afflicted demands.

Furthermore, it set the main answerable entities for the disasters, companies and governments, as those that made the diagnosis, suggestions, validations and executions of the redressing programs without significant direct participation of those afflicted (Ibid., p. 272-273). In this sense, this action meant a considerable advance in terms of perceiving the legal subject's role, both its dehumanization in terms of the absence of the afflicted, as its submission to a bureaucratic and economic logic strengthened by the creation of an extra mask, the Renova Foundation. The Prosecution Federal Service even demanded the end of the companies public financing by national banks (Ibid., p. 248), the immediate deposit of R$ 7.752.600.000,00 in a private fund in order to guarantee emergency and initial actions (Ibid., p. 273-274), the reformulation of internal management policies, norms, practices and environmental compliance (Ibid., p. 279) and most emphatically the obstruction of profit distribution and the blocking of those not yet distributed (Ibid., p. 282).

This legal approach reaches sensitive and systemic points, which we separate into two groups: those of legal/bureaucratic impact and those of financial impact. It touches the nature of the corporate activity and the production of disasters by direct addressing the shareholders interests. Legally, it disapproves the use of the Renova Foundation as an intermediary apparatus that helps to distance the responsible companies from the process. Nevertheless, in an imaginative effort to consider the hypothetical success of this approach, it is essential to speculate about the sustainability of this entrance as a redressing process that would prevent other disasters from happening, once that is the only

repairing measure that is entirely achievable. What would mean to block the profit distribution? In addition to elevating the investment risk in corporations with activities in Brazil, it would impede pension funds from receiving this amount. As showed Milanez *et al.* and the previews figures 10 and 11, by 2015 Vale's main controlling shareholder in the Administration Council was Valepar S.A. with 53.9% of participation (2016, p. 55), which controlling shareholders are divided as showed in cited figures. Thus, the mere immediate transfer of responsibility to shareholders might have consequences for other fragile groups as workers. A mechanism would be needed to address a chain of decision-making actors and main individual investors liable for such tragedies in a worldwide chain, as far as corporations stretch to. Such a mechanism does not exist, however, so we might insist on the question if punishing indistinguishly shareholders would have the proper preventive effect.

In such complex cases, making the proper diagnosis and immediately valuing the damages is impossible. Being as it may and the political pressure getting loose as time passes, defining the amount is challenging and ineffective in the long run. In our example, the Federal Prosecution Service, merely took as a parameter an absolutely different case in terms of consequences, the DeepWater Horizon disaster in the Mexican Gulf (Ação Civil Pública nº 23863-07.2016.4.01.3800, p. 265).

Though arguing discontent and disapproval about the creation of the Renova Foundation, the referred complaint made no demands in such way. On the contrary, it stated that the reparation plans and projects would be funded, produced and executed directly or indirectly by the companies (p. 275). That is to say it merely stated the companies were responsible and, nonetheless, allowed the creation of the same disapproved bureaucracy. No clear proposals for reformulating the decision-making instances in terms of transferring to collective participation management were made by them. By September 2020, an United Nations report on Brazil concluded about Renova:

> In the aftermath of the disaster, BHP and Vale rushed to create the Renova Foundation to provide the affected communities an effective remedy. Unfortunately, the true purpose of the Renova Foundation appears to limit liability of BHP and Vale, rather than provide any semblance of an effective remedy (TUNKAC, 2020).

The following legal discussions had a climax in July 2018, when another agreement was signed, the Governance TAC (Termo de Ajustamento de Conduta), ratified in Courts in August 2018, subscribed by the companies, the

governments - Federal, Espírito Santo and Minas Gerais –, the Federal and State's Prosecution Services, and the Federal and State's Public Defenders. It formally increased the participation of the afflicted in the decision-making instances as the Board of Trustees, for example, but still not guaranteeing the majority of the chairs, merely adding, to the former seven members, two representations of organized local affected communities (clause 46, TAC GOV, 2018, p. 17). One crucial step of this agreement was creating an afflicted organizational architecture, with local and regional representations that could vocalize their interests (Chapters IV and VI, TAC GOV, 2018). In this sense, a complex legal bureaucratic structure was idealized but never really put into practice as a whole. The MAB and Capixaba Forum manifested their disapproval against this last agreement, already predicting the difficulties the affected communities would face such as the cited bureaucracy and the costs of this participation in an effort that ultimately would not be translated into decision-making authority. Consequently, it would involve an over demanded energy applied into unfruitful effort. (FCDRD, 2018).

The United Nations report on Brazil, also concluded in September 2020:

> Instead of tightening controls on extractive industries after the Mariana disaster, Brazil's Government inexplicably expedited licensing and failed to ensure adequate monitoring and oversight of operations. Following the Mariana and Brumadinho disasters, no corporate executive of Vale, BHP or Samarco stands convicted of criminal conduct, a travesty of justice suggesting some in Brazil are indeed above the law. (…) Institutional shortcomings are well-documented in literature and litigation. Today, none of 42 projects [from the TTAC] are on track. Over 200,000 affected indigenous and other community members, and others have sought legal recourse against BHP and Vale in other countries including the United Kingdom, to secure an effective remedy (TUNKAC, 2020, p. 17).

Also the Federal Prosecution Service concluded in 2020:

> "The feeling, looking at five years of disaster, is one of consternation and deep sadness at the desolation". It was in this way that the prosecutor of the Federal Public Ministry (MPF) Silmara Goulart, head of the Rio Doce Task Force, started the press conference, yesterday afternoon, about the tragedy of the Fundão dam rupture, in Mariana, in the Central region of Minas, which turns five on the next day 5. According to her, "everything is still to be done". "No group of people affected was fully compensated, the environment was not fully recovered and even the district of Bento Rodrigues was not rebuilt," she said (O TEMPO, 2020).

This failure both on the redressing process and the avoidance of another dam rupture three years later confronts us with questions about the legal approaches on corporations. To inquiry how to approach them leads to reflect upon what they are and what is the legal image of it. If they are addressed as moral

entities, collective entities or a mere legal fiction, they would demand different approaches to change their behavior. As states Baars:

> It is this separate legal person, created in law and existing only by virtue of law, that is made capable of owning property, being a party to contracts, and being a claimant or defendant in court.34 The lack of explanation of the phenomenon of corporate legal personality leads authors such as Lowry to suggest that, in relation to the corporation's main characteristic, 'a certain flexibility of mind [is] needed to deal with the legal creation of corporate personality' (2019, p. 39).

The line that conducts this research has this dual perspective of investigating who/what the corporate legal person is and how does Brazilian legal theory perceives it. Both its legal appearance and its substance for "all science would be superfluous if the outward appearance and the essence of things directly coincided" (MARX, 1999, p. 557). Moreover, we will use the Rio Doce Disaster and this initial analysis as a trigger that the following chapters will also face. The second chapter will outline some of the Brazilian hegemonic theories of Law, their perception of the legal subject, legal and natural personhood and private legal person concepts. These are the starting points of this investigation over the legal image of a corporation.

2
THREE ASPECTS OF BRAZILIAN LEGAL SUBJECT'S HEGEMONIC THEORIES AND THE PRIVATE LEGAL PERSONHOOD

> When the workers drew up a list of unanimous petitions, a long time passed before they were able to notify the banana company officially. As soon as he found out about the agreement Mr. Brown hitched his luxurious glassed-in coach to the train and disappeared from Macondo along with the more prominent representatives of his company. Nonetheless some workers found one of them the following Saturday in a brothel and they made him sign a copy of the sheet with the demands while he was naked with the women who had helped to entrap him. The mournful lawyers showed in court that that man had nothing to do with the company and in order that no one doubt their arguments they had him jailed as an impostor. Later on, Mr. Brown was surprised traveling incognito, in a third-class coach and they made him sign another copy of the demands. On the following day he appeared before the judges with his hair dyed black and speaking flawless Spanish. The lawyers showed that the man was not Mr. Jack Brown, the superintendent of the banana company, born in Prattville Alabama, but a harmless vendor of medicinal plants, born in Macondo and baptized there with the name of Dagoberto Fonseca. A while later, faced with a new attempt by the workers the lawyers publicly exhibited Mr. Brown's death certificate, attested to by consuls and foreign ministers which bore witness that on June ninth last he had been run over by a fire engine in Chicago. Tired of that hermeneutical delirium, the workers turned away from the authorities in Macondo and brought their complaints up to the higher courts. It was there that the sleight-of-hand lawyers proved that the demands lacked all validity for the simple reason that the banana company did not have, never had had, and never would have any workers in its service because they were all hired on a temporary and occasional basis. So that the fable of the Virginia ham was nonsense, the same as that of the miraculous pills and the Yuletide toilets, and by a decision of the court it was established and set down in solemn decrees that the workers did not exist
> (MARQUEZ, Gabriel Garcia, One Hundred Years of Solitude, 2003).

As mentioned in the first chapter, our legal problem departures from a possible legal indifference between an individual and something else, the corporation, which is also nurtured by the puzzling nature of the legal person concept.

> The exact nature in law of the corporate legal person once did ‘arouse … the excited attention of all who have discussed legal theories and of not a few who have professed a profound disinclination to such discussion’,37 but is no longer the subject of theoretical debate. Nevertheless, and although few contemporary authors make this explicit, different understandings of the nature of corporate personality do affect black-letter accounts of company law (BAARS, 2019, p.39)

Who is this subject protagonist in tailings dams failures and addressed as liable in courts? What would mean to have a corporation liable? Would it change its behavior? Would it teach others to avoid the same course of action? How could we answer this, in legal terms, if not by distinguishing the nature of the subjects? A corporation can only be legally liable because of its legal personality, which is usually portrayed as one of its fundamental characteristics, its “first and most basic attribute” (PARGENDLER, 2018, p. 08). According to KRAAKMAN *et al.*, a corporation is a business structure with five core elements:

> 1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure, and (5) shared ownership by contributors of equity capital (KRAAKMAN *et al.*, 2017, p. 05) [21].

As a private legal person, the corporation assumes different names and legal forms around the globe, usually expressed in a suffix as LLC, Inc., GmbH., A.G., S.A., Ltd[22]. As seen from Samarco Minerações S.A. and Vale S.A., the Brazilian corporations use the S.A. suffix, which stands for Sociedade Anônima (literally translated as anonymous society). The S.A. was created in 1976[23], and according to Pargendler it is a "watered-down form" with "lower-degree of corporateness", comparatively speaking (2018, p. 03-04)[24]. The Brazilian Civil Code states in article 44, II, that societies are private legal persons (BRASIL, Lei nº 10.406/2002). However, what does it mean to be a legal subject and to be or to have a private legal personality?

We consider the legal subject's hegemonic theories those that, ultimately, supports the concept uses in practice. Once our case is mainly Brazilian, we will analyze Brazilian works amongst historic legal scholars, their influences over contemporary theories and top-selling legal handbooks[25]. When we turn ourselves to the legal subject[26], we address a concept inseparable from legal personhood. The relation between them varied among the legal scholars we have analyzed but is usually described as genre and subgenre. While the legal subject is the wide category that points towards holders of rights and duties, it can be subdivided into natural persons – humans – and legal persons – abstract entities. This work focuses on the *personae* in its active position, as Bevilácqua states, in the sense that designates those who will be dynamized in a legal relationship. Regardless of the relation between the legal subject and the concept of person, the differentiation into legal and physical personality is at the center of our problem, which we will address merely as a way to understand the private legal person's image projected by Law[27].

[21] According to the same authors, the absence or relativity of one of these elements is common when comparing different countries and it does not disqualify the corporation as such, instead it moves the corporation into a weaker or a stronger version, according to corporate theorists This discussion is better outlined in KRAAKMAN *et al*., 2017 and PARGENDLER, 2018.

[22] See KRAAKMAN, 2017, p. 119. These different suffixes also state different characteristics for stronger and weaker version for the corporation, according to KRAAKMAN *et al.* differentiation.

[23] Law nº 6.404 from 15 December 1976.

[24] According to Pargendler, Brazilian courts made flexible the cited pillars of a corporation, as lock-in and limited liability. See PARGENDLER, 2012 and 2018.

[25] Practical and simplified legal approaches with more impact over Law School students.

[26] Both the terms legal subject and subject of law will address the same idea of the generic holder of rights and duties.

[27] Several other names will be used worldwide, varying among distinct theories as well. We should mainly adopt legal person in contrast to the natural person in order to clarify the exposition. While

We shall outline and analyze Brazilian legal hegemonic theories. We will focus on those we have identified as the three most present aspects among legal works. Meaning those that stresses (a) the extra-legal / factual substrate of the legal person, (b) shedding light over its axiological or teleological perspective, and (c) those which will develop its formal, technical or instrumental aspect. These are not the usual criteria used by Brazilian legal hegemonic scholars. It was rather created during this research by assessing the usual elements of their approaches. A few reasons endorse this methodological choice. Firstly, for the multiplicity of intersectional names and elements. Such a direct treatment may help to organize them to the purposes of this work, which is also to build a critical proposal. Secondly, for the incongruences of some of these expositions. Lastly, in order to highlight the elements that directly interests us. Currently, these are the strings pointed by the analyzed hegemonic theories[28]. (1) Equation Theory (Teoria da Equiparação) - having patrimony as the factual support -[29], (2) Objective Reality or Organicist Theory [30] - referring to a physical or social organism -, the (3) Individualist Theory[31] - pinpointing the individual as the real legal subject in every legal personality, (4) Technical Reality Theory[32], maybe the major current - making of legal personality a technical reality created by Law -, (5) the Institutionalist Theory[33] - having Maurice Hariou as its main reference and taking the legal person as an institution, primarily – (6) Negativist Theory[34] - actually gathering many of other strings denying the reality of the legal personality - , (7) Fiction Theory[35] - more traditional and identifying the legal person as a legal fiction

explaining specific theories, they may apply different terms, by when we will also expose the distinctions.

[28] Their names were directly translated from Portuguese.

[29] See BEVILÁCQUA, 2001; DINIZ, 2016; as Teoria do patrimônio de afetação in TOMAZETTE, 2016; as Teoria da Propriedade Coletiva in PEREIRA, 2016; NAHAS, 2007 as the Teoria do Patrimônio por objeto; NADER, 2018, as Teoria Objetiva ou Materialista.

[30] See BEVILÁCQUA, 2001; DINIZ, 2016; TARTUCE, 2017; TOMAZETTE, 2016; PEREIRA, 2016; COMPARATO; SALMOÃO FILHO, 2014; SHECAIRA, 2011; NAHAS, 2007; NADER, 2018; GAGLIANO; PAMPLONA FILHO, 2017.

[31] See BEVILÁCQUA, 2001; TOMAZETTE, 2016; NADER, 2018.

[32] See BEVILÁCQUA, 2001 which he adopts; SAHRAN JÚNIOR, 2017 which adopts it; TOMAZETTE, 2016 which adopts it; DINIZ, 2016, describes much alike the institutionalist theory; PEREIRA, 2016 which adopts it; NAHAS, 2007, as Realidade Jurídica (juridical reality); NADER, 2018; TARTUCE, 2017 adopting it and equaling it to the institutionalist theory. Also, he understands the realistic theory as the sum of the organicist with the fiction theory; GAGLIANO; PAMPLONA FILHO, 2017;

[33] See PEREIRA, 2016; DINIZ, 2016 adopting it; NAHAS, 2007, adopting it; NAHAS, 2007; TARTUCE, 2017.

[34] See SAHRAN JÚNIOR, 2017; GAGLIANO; PAMPLONA FILHO, 2017.

[35] See BEVILÁCQUA, 2001; TARTUCE, 2017; TOMAZETTE, 2016; DINIZ, 2016; PEREIRA, 2016; COMPARATO; SALOMÃO FILHO, 2014; SHECAIRA, 2011; NAHAS, 2007; NADER, 2018; GAGLIANO; PAMPLONA FILHO, 2017;

-, and (8) lastly some scholars indicate the will as the main pillar of the legal personality, henceforth named Will Theory[36] .

Some authors will highlight the factuality of the entities, others will dedicate to the concept's axiology and finally, some will bring forward technical-normative aspects. Although these different Brazilian currents often appear as competing theories, they can also be seen predominantly as an emphasis differentiation. They do not necessarily exclude each other's elements, almost all providing objective foundations, axiologies and the legal recognition criteria as structures of the legal subject and legal person's concept. Nevertheless, they do emphasize some aspects in spite of others. Firstly, we will acknowledge the factuality in Bevilácqua and Pontes de Miranda, by which the private legal personhood addresses a real being, a living organism that speaks through its organs. More than a biological analogy, these strings stand for the attempt to highlight the corporeal realities behind the legal persons instead of its legal frame or moral directions, giving corporations a factual body to justify their legal existence. Secondly, we will address theories pointing towards the axiology of the legal person, its essential morality and driving teleology. These are challenged to harmonize the human person dignity principle, a collaborative inspiration and other values with the modern corporate legal personality. Finally, those we interpret as the most developed in the Brazilian context. Though directly influenced by the Kelsenian normativism, the Italian nominalist school among others, we should hold to the Brazilian expressions of these original theories and portray their positions underlining the legal person's concept instrumentality and technical creation.

We believe that each of these aspects performs a diffraction from the corporate nature, producing a misleading image of the fact. At first sight, the every-day use of the natural and legal person concepts might picture a trivial thing. However, a superficial questioning of their nature is enough to clear up all the superficial banality that preceded the query and confronts us with something named a "person" which is supposed to have a factual body, an axiology and a legal form. This first chapter already foreshadows the metaphysical subtleties and theological sensibilities the concept hides.

2.1 The corporate body: the fact behind the concept

2.1.1 Bévilácqua and the legal person's social body

[36] BEVILÁCQUA, 2001; TOMAZETTE, 2016; PEREIRA, 2016.

We will start by analyzing the legal subject concepts that emphasize its body, i.e. it's factual support, its extra-legal reality. The concept of fattispecie is useful here, translating the "image of the fact", in our case, the legal image[37]. Most of the strings of the legal personality mention this body, this factual support to which Law refers. Clóvis Bevilácqua is responsible for the Brazilian Civil Code of 1916. This code was in force until 2002, thus constituting the civil legislation environment in which the S.A. Law was approved in 1976. Besides Bevilácqua, Pontes de Miranda is another eminent historic jurist, famous for his work Tratado de Direito Privado[38] and his knowledge in mathematics, his writings are still a reference in the Brazilian legal academia.

Commencing by Bevilácqua, in his work Tratado Geral de Direito Civil[39], the author addresses the concept of legal subject:

> Subject of law **is the being**, to which the legal order ensures the power to act contained in Law. Ordinarily this power is a fruition, an advantage of the subject, but there are rights that exist in favor of others. (...)
> The subjects of law are natural and legal persons. (...) The abstraction that makes us, in legal life, highlight the holder of the right, discriminating it from the relation and the object, was led to exaggeration by those who saw the bearer security as a subject of law, regardless of the person to whomever it belongs or in whose possession it is found, (…) (2001, p.100-101) (emphasis added).

At the same time the legal subject is a "being", which is only because of a mechanism of "abstraction" deriving out of "legal life", therefore, its recognition is ensured by direct determination of the "legal order"[40]. Thus, one could ask about whether Bevilácqua perceives the legal subject as an objective pre-juridical being, a being recognized by the legal order or just a normatively designated/created element[41]. In a footnote, the author states:

[37] It subsidizes the idea of a legal norm that is not the fact itself, but refers to it, producing an image. Laws and legal concepts then are taken as this articulation between a fact and its legal image (SALOMÃO FILHO, 2002).
[38] Treatise of Private Law.
[39] General Theory of Civil Law.
[40] Here we are faced with an epistemological issue that we will not be able to dwell on, but is just as crucial to que legal theory critique, as it is an over. It is a conflict revealed by the statement (1) of the fully Münchausian – autopotetic - existence of the legal subject concept - the existence of one's legal life depending only on the legal order to ensure it - which contradicts itself with (2) an objective criterion for the concept determination, which led it to understand that such a criterion could be "drive[n] to exaggeration". Later, when dealing with the contemporarian technical reality theories, this matter will be put aside by the *fattispecie* concept, which will take the legal concepts as having both a factual basis and a legal foundation, as in its origins designating the image of the fact (SALOMÃO FILHO, 2008, p. 11). In this matter, we tend to approximate to Karel Kosik's position in the *Dialectic of the concrete* (2002).
[41] Comparato and Salomão Filho will interpret this unresolved dual position of the realist theories – of trying to find the external element from the legal system that justifies the legal person itself – as aporetic. The more they try to find this external foundation, the more they leave to legislators the faculty to legally recognize this element (2014, p. 383).

> The subject of law is the man, and for him, and because of him, the law is constituted – *omne ius hominum causa constitutum est*. When the legal order recognizes personality to legal persons, it aims at the human person or human interests. For this very reason, inanimate things and animals cannot be subjects of law (2001, p. 101).

Thus, the foundation of the legal person has the human as a finality[42], but this does not mean that the individual is the end. The author divides the legal subject into natural and legal persons, being necessary to take a closer look at the debate that he engages on each of the concepts: subject of law, legal entity and natural person. Two of Beviláqcua's positions beforehand demonstrate a double movement to justify the existence of the legal personality and that of the physical or natural personality. He discusses with the currents that found the juridical personality in the personality of psychic existence. In contrast to these, which sought a foundation in psychology to determine personality, he says:

> Thus the juridical personality is more than a superior process of psychic activity; it is a social creation, demanded by the necessity to set the legal apparatus in motion, and which, therefore, is shaped by the legal order. For that some legal systems do not recognize the civil personality of certain men, (...) or make the civil personality to be extinguished, when the psychic still persists (civil death). These restrictions are opposed to the expansion of the idea of personality towards corporations and assets under certain conditions (2001, 116-117).

Therefore, the necessity for a nexus between the personality of the human being in the "legal life" and one's concrete psychic conditions is disregarded for it is allowed to subtract this personality from human beings, at the same time that it becomes possible to attribute them to corporations and other assets. When addressing the natural personality, the author emphasizes a historical recognition of the human being as a person movement and, despite that, he assumes that the fundamental criterion can only be the legal one, because in spite of addressing the "natural", this is not the criterion of recognition. The "natural personality" does not coincide with that of the "man", even though in modern Law "every human being [is] a person". The concept of natural person refers to the "individual in motion in the legal life" "such as nature created him" (2001, p.119-120). Despite an apparent reference to nature, the contours of this person are fundamentally determined by Law as when highlighting the position of detainer of partial legal capacity of the

[42] In this sense, as will be explained in Chapter 03, Pashukanis and Miaille argue exactly the fetish of Law is to make the relationship between things appear to be a relationship among people and for people.

married women, a position that he believes "tends to disappear" (2001, p.141). This double position of, on the one hand, trying to find an objective non-legal element to justify the legal subjectivity of the natural person, and on the other hand, making the legal recognition as the main element to define this legal subjectivity, has a context: the historic rise of the individual, in which "the individual's legal value is becoming detached from the common amorphous mass" and "then the man, individually considered, assumes the noblest position of the holder of rights" (2001, p.171).

While attempting to circumscribe the natural person as the human, the author is faced with the historical and actual exceptions of this, and the ways to justify this is both by blaming the past and by pointing to the legal centrality of the concept. When reflecting upon the legal personality, author's efforts point in the opposite direction, now what he needs is to recognize an existence that is not purely of legal fiction, but of legal recognition of a given reality. Bevilácqua traces an interesting panorama when dealing with the legal person, identifying that "writers considerably diverge" and the names used demonstrate the variety of positions: "(...) moral persons, prefer others to say civil, mystical, fictitious, abstract, intellectual, of ideal existence, collective, universal, composed persons, moral bodies, universities of people and goods" (2001, p.166). The author chooses to follow the Germans by the denomination legal person. Although several authors point to the origins of a personality extended to the "State, the prince, the Fiscus, the treasury, the municipalities, the cities, the inheritances, the priestly colleges, the societies and institutions" in Roman Law, Bevilácqua affirms that the Romans never called them *personae* and attributes it to the pragmatism of Roman jurists and the little concrete incidence of the concept (2001, p.168).

Bevilácqua exposes some aspects that interest us when engaging in the different currents about the nature of the legal person. We will not make an exhibition of all currents here, since the debate has changed over time, but only point out some elements the author reflects upon in order to understand the debate in the author's historical moment, which is fundamental to the development of Brazilian legal thought. The first current he contests affirms that the legal personality is a mere *legal fiction*. Against it, Bevilácqua questions "but, how to suppose that the State is a simple fiction?", and then, almost repeats a quote Marx used "the recognition of legal entities by the State, is not an act of creation, but of

confirmation" (2001, p.170)[43]. The author also counterargues Rudolf von Jhering (1818 - 1892), a prominent German jurist, would stand for

> the real subjects of law are not the legal persons, but the individuals, who compose them; they are just the special form in which they manifest their legal relations with the outside world, a form that has no importance for the members' legal relations with each other (JHERING *apud* BEVILÁCQUA, 2001, p.172).[44]

According to him, the legal person is not the recipient of rights, but the natural persons that compose or benefit from it. Bevilácqua criticizes this perspective. On the one hand, he finds it individualistic and, therefore, to the detriment of the unitary universality of the legal personality itself, distinct from the singularities that compose it (2001, p.172). This individualism is contrasted with a simple fact: if they are individual interests, what is the reason then they are not expressed directly, but only through this shield of little use - the legal person?

> What would become of them, for example, if the right to administer the patrimony, to maintain the organization of the establishment to comply with statutory determinations, was left to the discretion of each or even everyone who, at a given moment, felt entitled to receive the benefits of the institution? (...) it is one thing to affirm that the law is established for human purposes and another thing to intend that only the man individually can be the subject of law (2001, p.174).

To the individuality of the legal subject Bevilácqua opposes the collectivity. Henceforth, the author defends the autonomous existence of the State and corporations, with self-interests possibly contrary to those of their members. In short objections, the author also opposes to the inexistence of subjects behind the legal personality, as well as the same being a mere will, a collective personality or a collective property - the latter because it is a subject of law and not of property.

To define the nature of the legal entity, the Brazilian author refers to the State, which is real and "the legal entity par excellence"[45]. It is

[43] Marx wrote in the Economic philosophic manuscripts, that Law was not more than the official recognition of facts (2004, p. 84). This is stated here merely a coincidence, since or development of the Marxist approach surpasses the apparent simplicity of the sentence.

[44] Also in JHERING, 1953, p. 311. A propriedade de um ser puramente imaginário, como o é a pessoa jurídica, não corresponde a ideia alguma precisa. Essa pessoa não tira d'ella benefícios alguns; estes redundam todos em proveito dos indivíduos que, segundo os estatutos da fundação, devem gosar das vantagens que ella proporciona (destinatários, beneficiados). Esta propriedade não é mais que um mero apparelho de construcção destinado a facilitar a realisação jurídica desse fim, mas não tem para o sujeito realidade alguma pratica. Este é simples detentor do direito por interesse alheio, não é o sujeito-fim. O sujeito-fim são os beneficiados, e o direito romano assim o reconheceu concedendo-lhes uma actio popularis, como no caso das *res publicae* (').

[45] Pashukanis also states this as will be developed in the next chapter.

> the society organized in order to coerce the individual and the groups of individuals to submit their activity to social ends, which are of a higher order, (...) it is more than a simple social creation; it is society itself viewed from the side of the organization of its coactive forces (2001, p. 186- 190).

Its purpose is "harmony amongst individuals," and it stands out as "a being of a higher order". To this end, it uses the army, administration, instruments for preparing and executing laws, requires services from its members and acquires property. The form that the author recognizes in the State is the form of the corporation, "the maximum circle of social organization". In the same way the existence of this autonomous political corporation or this "political collectivity" is corporeally and legally recognized, the "collectivities constituted in the private order" must also be, with the difference that they submit to the order of Private Law rather than Public. For the author, associations and foundations are social bodies endowed with their own interests, even though the second was more specifically characterized by being a set of chattel, above all, that puts itself at the service of an end (2001, p. 186- 190).

We then realize, in one of the most recognized authors in Brazilian legal literature, the fundamentals of the legal subject and legal personality. The frontier of the concept and its grayest zone is best outlined by its concept of legal personality. Withal, his most incisive determination is perhaps revealed by the concept of natural person. The natural personality, despite being based on the natural human, may not include it. The exclusion of women, with partial legal capacity, or of slaves, demonstrates the most acute and preponderant point for conceiving a legal subject by the criterion of recognition by the legal order. It is a reflection of the social order, still it has no necessary link with natural elements. Therefore, it is a social construction shaped by Law. Legal personality, on the other hand, also refers to a being, a social one. It is a corporation and under its maximum expression, the State, presents itself as "the politically organized nation" (2001, p.187). For all of them, the property is only a means, just a necessary instrument to their goals. Formerly, they would exist as a social body with its own interests. On the foundation one will find "the patrimony transfigured by the idea that puts it at the service of a determined end", nonetheless, a person endowed with its own interests, for the realization of human purposes "of the noblest" (2001, p.190). Bevilácqua approximates to the realist string. Legal personality parallels society organized like a corporation. The association gives it concrete and human form and the foundation peculiarities do not escape the rule. Corporation here, has not the same meaning as in the first chapter. There, it meant modern corporation as

the capitalist form of big enterprises, as in the Brazilian anonymous society. Bevilácqua's use of the word designates better a form of association. To his account, this association is concrete - as in a physical sense -, it is legal - as recognized by Law – and it also has a specific teleology – existing "for human" purposes. Though we mentioned his approach highlighting the factual support in his theory, we must clearly make a warning: Bevilácqua is realist, but not as an organicist. He adopts the technical reality theory. As stated in his work:

> Thus, naturally, two kinds of persons are constituted. Those corporeal or physical, and those moral or juridical. Both are equally real; the distinction is that the firsts are naturally endowed with reason, while to the seconds the rationality is partially acquired through a special arrangement of man; the firsts received their organism from nature itself, while the seconds can only achieve an organic form for the human nature penetrates it.
> So, besides the corporeal persons are the legal ones. Erstwhile this was explained, saying these latter dressed, by fiction, men's costumes. It was a remedy from an still imperfect theory. In reality, the legal person is not a fictitious man, however a real person, created by the legal order. The notion of person is wider than that of man (BEVILÁCQUA, 2001, p. 185).

Notwithstanding, his perspective attributes the factuality of the concept not only by legal creation, but also by legal recognition of something external.

2.1.2 Pontes de Miranda's inductive method

Pontes de Miranda also gives relevance to factuality. The jurist and mathematician differentiate Law from legal rules. The prevalence of the facts would lie with the first, while the second would be the human expression of these facts, which is always susceptible to error and adaptable to those. Law's fundamental feature is that it is a social process of adapting individuals to society, a function that is not solely of its responsibility.

> We should not forget that the Law, according to PONTES DE MIRANDA, consists of only one of the seven processes of social adaptation, because alongside it others exist to promote the adaptation or the defects correction of the man's adaptation to the social environment. In that case, religion, morals, politics, economics, science, art can fully supply the law (ISEHARD, 1994, p. 152).

It is a process of adapting the individual to society that permeates Pontes de Miranda's entire work and underlies his perspective of Law. Society is characterized by some processes such as (1) the reduction of the despotic quantum, by which authoritarianism is reduced as it develops, (2) the expansion of social circles, by which social groups tend to interact expansively. Along with these

two processes are the ones of social adaptation, in which individuals are confronted continuously with "defects in adaptation to social life" inherent in the dynamics of the two previous processes. Such adaptation "takes place among men, between them and society, among men and the various social circles or even among social circles themselves" (Ibid. p.147). Law is a mechanism of internal adaptation to social circles whose function is to correct errors of adaptation.

Faced with these fundamental principles of legal sociology and philosophy in Pontes de Miranda, let us turn to the specificity of his peculiar conceptions of legal subject, personality, natural and legal person. Since Law is a phenomenon under the rules of social dynamics, which is also connected to the initially cited prevalence of facts, Pontes de Miranda approximates to the legal realistic perspective. Again, the person is a type and the legal subject is a subtype - or subject of action, of claim, of exception. It is worth transcribing:

> 1. Concept of personality. Strictly speaking, it should be only about persons after dealing with subjects of law; because being a person is just having the possibility of being a subject of Law. To be a subject of law is to be in the position of a right holder. It does not matter whether this right is subjective, whether it is equipped with claim and action, or exception. But it matters there is "right". If one is not in a legal relationship, one is not a subject of law: one is a person; that is, what can be subject of law, in addition to those rights that being a person produces. (...) Personality is the possibility of fitting into factual supports, which, due to the impact of legal rules, become legal facts; therefore, the possibility of being subject of law. (...) Who can hold a right is a person (PONTES DE MIRANDA, 2012, p.243-244).

A common contemporary approach affirms the legal subject to be broader than the concept of person, as Costa (2013) points out[46]. Pontes de Miranda comes closer to Clóvis Bevilácqua on this matter because their realistic approaches identify a reality wider than the legal world and the concept of person is material, broader than a subject restricted to the legal normative limits. Again, according to Bevilácqua, the concept of person has a greater "extension" than that of the legal subject, since "it offers two aspects, the passive and the active", while the subject of law is the person only in its "active position" (BEVILÁCQUA, 2001, p.101). The jurist and mathematician Pontes de Miranda understands the subject of law as a concretization of the person, the latter being the abstraction out of the legal borders (COSTA, 2013, p. 83). "The personality, as a possibility, faces the assets of life, contemplating and wanting them, or moving them away from itself;

[46] As will be seen in the following pages, contemporary jurists have less interest on the discussion. Nonetheless, almost unanimously they affirm the legal subject as a type, and the person – legal or natural - as a subtype. We attribute this lack of interest to distant pragmatism of the discussion. The descend of the realistic theories left behind this person concept, that may not be a subject of law.

the subject of law is to enter into factual support and to live in legal relationships, as one of their terms" (PONTES DE MIRANDA, 2012).

> "Certainly, the subject of right A in concrete, therefore, is different from being a person, which is on the above abstract plane; but the difference is not to be taken too deeply, because the person is already born with concrete ownership, which is the right to personality as such, the right to be subject of law" (PONTES DE MIRANDA, 2012, p. 254).

When it comes to existence, it refers to existence in the legal relationship. Bevilácqua discusses the active person and Pontes de Miranda the right holder. The passive person of Bevilácqua, who is not a subject of Law, parallels Pontes de Miranda person whose possibility of being a subject of law in a legal relationship has not been achieved, it is only "contemplating them, wanting them" (Ibid. p. 243).

As Isehard poses, the inductive method is the one that guides Pontes de Miranda's theory[47], in which legal science itself is natural, making its explanation about the origins of the legal subject quite peculiar. It turns out that his finding did not originate from legal theory, but from the "logical system", "above the legal system". By contemplating the legal system, a logical system perspective noticed that the legal effects that fell back on "A" in a given legal relationship appeared as an "active term", identifying the legal subject[48]. The subject of law is thus identified in the reality of the legal system, by contemplation of the logical system, and then introduced as a presupposition.

> Subsequently, the legal systems imported the statements of the system that contemplated them, to make them their statements; and these, being above their statements about effects, started to be dealt with in the General Part. First, it was necessary to consider about the possible, in order to be able to go down to what was concretely accomplished, to what happened (PONTES DE MIRANDA, 1983, p.244).

Once more, though the legal system imported the statement, it already worked under this dynamic. Pontes de Miranda does not tie what is considered in Law to the positive norm. In fact, the latter is a political element. The legal system is made in parallel and interactively. What is called Law has as its essential characteristic the incidence, which is the unconditional application of the rule before the person's will. In this way, what is understood by Law and by subject of law does not arise from mere formal recognition, it is born out of every-day legal

[47] Epistemologically, Pontes de Miranda was highly influenced by the French positivism of the XIX Century as by Comte and Durkheim. Highly influenced by the latter he drove critiques to him, for having a method “remotely or accidentally inductive”.
[48] For more methodological and epistemological details see Isehard, 1994.

practice and it is recognized by the legal system later. Although covered with apparent pure formalism, the legal subject and the person, according to Pontes de Miranda, are firstly introduced into the legal system by other social dynamics such as the adaptation, reduction of the despotic quantum and expansion of social circles. Subsequently, they are recognized and "imported" in its terms. The subject of law is therefore not a mere abstraction, but is found in social dynamics, recognized by logic, from where the statement is imported into Law. The person is the condition for holding rights. It is the identification of those who can be legal subjects, who therefore have the material and thus legal capacity, "the capacity for legal fact *strictu sensu*" (Ibid., p. 247). This differs from the capacity to act or to operate. "Legal capacity and personality are the same. (...) Different is the capacity of action, to act, which refers to legal transactions" (Ibid. p. 245). The personality itself is not a right, it is a quality. It is a matter of discussing what it is and not which rights it is entitled to. However, it can be said that with personality recognition, personality rights also are attributed (Ibid. p. 255). The natural person is the human being. Any distinction between the natural person and the human being is artificial for it would violate the natural principle of a contractual perception of society.

> The expression "legal" is used in the strict sense there, because natural and legal persons are equally legal. While there were human beings who had no legal capacity, not every human being was a person. So, artificial was the treatment of human being, since it was imposed a distinction incompatible with the same principles that presided over the formation of the *homo*. Man comes from the primitive assembly, instead of having it made. The assembly, in which all were equal, created man: it was not the man who created the assembly (Ibid, p. 245).

The equality between human beings supposedly expressed by the concept of natural personality is actually an obedience to a natural principle[49]. In this sense, it is always important to highlight the existence of the trilogy legal recognition, fact and axiology. In another sense, the term legal personality has its own outlines for the Brazilian jurist and mathematician. First, we need to differentiate the term "legal" from the expression in *lato* or *strictu sensu*. In general, every natural person is also legal, in the sense that its concept is given by the legal system. In *strictu sensu*, legal personality includes all those who are not "only a human being" (Ibid. p. 245). Such entities can also be called "moral, or fictional, or pretended" persons. At the same time that it, the juridical personality, is attributed by Law, "there must always be a human element that serves as factual data" (Ibid. p. 246). As can be

[49] In this sense, it is important to highlight the existence of the trilogy legal recognition, factual support and axiology, even though as natural principle. These elements inform every theory here described.

seen, also in Pontes de Miranda there is a double condition to the legal person, (1) the factual element, (2) the recognition by the legal system. The author explains:

> Factual data - Legal persons as natural persons are creations of law; and the legal system that assigns rights, duties, claims, obligations, actions and exceptions to human beings or entities created by them, bilaterally, multilaterally, (society, associations) or unilaterally (foundations). In all of them there is the factual support; and there is no fiction about seeing person in societies and (personified) associations and foundations: they are not said to be human beings; The distinction between natural and legal persons is even characterized, in different definitions and in different legal rules. Not always all men have been legal subject, nor only them have been and are. The discussion about whether legal persons are real or not is based on a false question: reality, in this sense, is a concept of the factual world; legal person is a concept of the legal world. What matters is to establish that the Law does not create them *ex nihilo*; brings, to create them, something from the factual world (Ibid., p. 399).

Being a concept of the legal world, its factual existence operates almost as an assumption in Pontes de Miranda, for this reason it is a false issue. Hence, he writes that the issue itself brings into question, or risks erasing, "all the elements which the system has worked with" until then. For the same reason, the author rejects the theories that consider legal personality a patrimony destined to an end "making rights exist without subjects"[50] and " the legal person transparent, also in order to arrive at its denial" (Ibid., p.399).

Pontes de Miranda seems to adopt Otto von Gierke's [51] theory of associations in order to explain the nature of legal persons. A collective body, with its own life serving a finality, a concrete being. The merits of the organic theory would be to clarify the difference between legal persons and the natural persons behind them as well as to remove the idea of representation, identifying in them, in its turn, the organs. The creation of legal entities is actually an achievement against individualism, its overcoming by an organized collectivity. Their organs are like the organs of natural persons, "the arm, the mouth, the ear" (Ibid. 402).

According to Pontes de Miranda, Brazilian Law departed from the German idea of legal entity, abandoning the romanistics to its reminiscences[52]. This latter starts from a personality that only recognized the natural person, alternating between private assets that belonged "to everyone or to none" (Ibid, p. 402). Thus,

[50] Which is Jhering's position, already mentioned.

[51] Once we decided to depict only Brazilian legal theories in this chapter, Gierke's theory will be better portrayed in the fourth chapter, while explaining the creation and rise of the legal personality of corporations.

[52] As in the creation of the legal personality of corporations, Gierke's theory was paradigmatic in the Brazilian academic context.

initially it recognizes only the public/private division[53]. Later on, that incipiently recognizing the private legal person.

> The *ius* itself for legal transactions was *publicum*, not *privatum*. When the *res publica* had to go into commerce, it was privatized. Evolution began with the municipium, which became a person, in private law: later *collegia, sodalitates* and *universitates* were personified. With the distinction between *fiscus Caesaris and aerarium populi Romanum*, that one entered the list of persons under private law. The legal person, therefore, emerged in its characteristic structure during the Empire. For this very reason, every theory that has denied, or denies the existence of a legal person, in contemporary law, against positive legal rules and the very conception that underlies legal systems, constitutes a psychic regression to the pre-imperial age (Ibid, p. 402).

Thereby, the personality is specific to the individual, and the way in which it was overcame refers to the German Law. Here, the individual is part of the totality. When one acts in the name of the totality, it is the totality manifesting itself. In this way, the idea of collectivity and of a legal personality that stands out from the physical personalities that act in it is allowed (Ibid., p. 404). Then comes the figure of the organ, a legitimate part of a particular legal personality that expresses its will. For the author, this is the idea of legal personality adopted by the Brazilian Civil Code of 1916. It is worth mentioning the breadth of the legal person's rights to the author: "the legal person is capable of all rights, except, as mentioned, those that result from legal facts in whose factual support there is an element that it cannot satisfy" (Ibid. p. 406).

2.1.3 The legal person’s body and corporations

In this way, both Bevilácqua and Pontes de Miranda operate a double movement. If, at a first glance, the author observes the factual movement by which society and nature produce the legal personality formed as a physical, biological and psychic body, in a second, the author perceives this category arising from its recognition by the legal system. Personality is a more abstract category, as it carries only the potentiality of rights - with the exception of the right to be a person, which every personality has. The legal personality is not both individual and collective, it is a collective body. There, individuality disappears and the individual/collective dichotomy is reproduced internally, erasing individuality externally. Pontes de Miranda criticizes strings that would make of legal personality a transparent body in which only natural persons would appear, yet he does the

[53] This problem will also be discussed in the context of the corporate rise in the US in the fourth chapter.

opposite, creating an entity opaque and homogeneous that erases the individualities and other variables that dynamizes it internally.

These perceptions of the legal subject and legal person include three aspects (1) materiality, a factual correspondence previous to the legal person, (2) legal formality, by which legal persons are recognized and legally born and, (3) a finality, better emphasized by Bevilácqua. Nonetheless, it is the materiality of the concept, its corporeal aspect that is the most important feature of this approach, characteristic of real entity theories. By perceiving a corporation as Samarco, Vale or the Renova Foundation as a singular collective being, with particular organs, under one formal legal subjectivity that gives them birth with a general finality, one might incur either into erasing their specificities or isolating their "organs". As a singular collective body under one formal shape, the consequences of the Rio Doce Disaster fell over workers. Not only the majority of deaths by the tailings flow were of employees - 13 out of 19 deaths -, directly or under subcontracts, but the major subsequent consequences also fell on them. By October 2015, before the dam rupture, Samarco counted 2.937 direct employees and 2.491 under subcontracts. By 2016, after a Voluntary Dismissing Program (Programa de Demissão Voluntária) the company held 1.830 and 923 respectively (SAMARCO, 2015-2016, p. 51). One may not include shareholders in this once the modern corporate design acts precisely by separating them from this legal person and its liability. If Vale's stock prices recovered fast, as mentioned in the last chapter, by 2019 Samarco held 1.312 employees (SAMARCO, 2018-2019)[54], demonstrating an asymmetry of economic impact inside this corporate body. The real entity theory also strengthens the distinction between Samarco, Vale and BHP Billiton before the Renova Foundation, for this would mean to attribute its behavior to its own actions, as if its decision-making would be separated from its owners. A corporate legal person concept must acknowledge these divisions, in which some organs are more affected than others, even considering these organs have families to take care of, as an essential feature of the corporate legal personality. Also the decision-making chain, and control hierarchies might be considered in order to analyze the guilt of tailings dams failures production. The internal dynamics of these legal persons must be seen by Courts, so they can be approached legally. Just as Law ignored married women capacity and the legal subjectivity of slaves not because of their disqualification but merely for the absence of legal recognition, if material

[54] Samarco's last report distinguished between direct employees and subcontracts.

relations inside the complex corporate structures are not enlightened, Law might equally ignore them.

We should move to theories that better emphasize the corporate axiologies.

2.2 The corporate soul: the legal person's axiology

2.2.1 Miguel Reale and the common good

Other strings will accentuate the axiological[55] justification of the legal subject's hegemonic theories[56]. Miguel Reale's approach is one of these, which ends up hyperbolizing a purpose in the legal subject. It is based on a process of social integration, in which the "history of the Modern State is, in particular, the history of increasing integration, of progressive reductions to unity". Here Law has a fundamental role, considering the relatively recent "recognition that, not the sociologist, but the politician and the jurist are able to point out the differentiating note or the specific element of the State order" (2000, p.42). The interpretation lenses are his so-called three-dimensional culturalist solution, in which facts, values and norms are three aspects that form the social unit. The integration process generates the individualization of the social parts and the coordination of these parts before a common good, from this dynamic the modern State is born. This coordination also accompanies a process of reducing the despotic quantum, in reference to Pontes de Miranda[57]. It means that there is a reduction in the use of force in a parallel trend to the increase in normative usage, a tendency to "almost-everything of organization and technique". Being at the tip of this sociological process, the legal personality must be a product of this process. It thus means, a reduction of the despotic quantum and the coordination of parts for a common good.

These are the State concept generic guidelines as well, the "fundamental legal person" (2000, p.353)[58]. The legal personality of the State is the one that

[55] Here, we use the terms teleology and axiology in a closer manner for so do the authors, once the finality of the legal subject is both intrinsic to it and a moral value to aim for. Hence, to find the factual reason of a legal person tends to coincide with an honorable moral value inserted in Law.

[56] Once more, there is no class of Axiological theories, this is part of this work's methodological approach.

[57] As can be easily inferred both authors are clearly influenced by Durkheim's sociology, specially, by the Division of the social labor (as in the Portuguese version in 1999). Miguel Reale attributes to the French sociological school the first steps towards a juridic antiformalism. Reale adopts Durkheim's social solidarity dynamic, with one correction: "subjective solidarity is never a pure result of social labour division", but a "consequences of the men's spirit before the fact", "according to value criteria" (REALE, 2000, p. 67). Thus, Reale boosts the axiological perspective of Durkheim's social solidarity.

[58] This reference of the State as a fundamental legal person is also affirmed by the realistic theories and Pashukanis himself. It situates the private person in a peculiar context, which lifts questions.

makes the modern State possible, for the "legal personality of the State and its sovereignty are aspects of the same reality: sovereignty is the right of the person of the State, State is the person endowed with sovereignty" (2000, p.355). Sovereignty asserts the State's self-awareness, its self-affirmation, its legal subjectivity, and finally, its own will in unity. For Reale, any manifestation of the State that expressed just partly the society's would be pathological. In addition to expressing the search for the common good, this legal personality allows the freedom of other physical and legal personalities who submit to their sovereignty. Miguel Reale's State legal personality is far from admitting mere legal formalism.

> In fact, the concept of the State as a legal person is the product of a long and slow cultural elaboration, it marks the final term or crowning of a millennial historical-political process, as it necessarily implies the idea of the Rule of Law, not in the sense of the State reduced to mere juridical forms, but in the sense of the State that, as a rule, subordinates its activities to the precepts of Law it declares; not in the sense of the State that is limited to the mission of protecting individual rights, but in the sense of the State that does not delimit its sphere of interference *a priori*, but establishes *a priori* the legality of any and all interference in this or that other sector of human production (2000, p.356).

The State's sovereignty and legal personality are born together, as well as the Rule of Law, that is, one that submits itself to the very norms it creates. The sovereignty of this recent borne modern legal subject "holds the duty to make or the power to demand" (2002, p.166). The legal subject does not identify with the human being, either by nature or by mere formality. Due to the historical evolution of the concept, it is "an achievement of civilization". Examples like the exclusion of slaves in Athens or Rome for not being citizens are common examples of exclusion for not belonging to the dominant political group, prevailing over private freedom. Also in Rome it is possible to separate the *pater familias* from other members, with an internal hierarchy within the group. The integration process previously described is the process of the legal subject's formation, in which "men came to emancipate themselves from the groups to which they belonged" and increasingly constituting connections tending to guarantee the free coexistence of private initiatives (2000, p.166-167). This same process consolidates human beings' exclusivity to have rights and obligations, hence excluding other living beings, to which rights are only attributed to them by affection - in contrast to the growing

Being the State the most developed legal person specie would it make the corporate private legal person an intermediary kind with a partial function? Would the basic type of legal person adapted to the corporate collective organization?

current of animal and rights[59]. Finally, among the equality of men in their legally recognized personality there is a differential element, that of capacity. If the personality identifies with the human being, the difference in capacities is also linked to the factual circumstances. It is important for us to point out this difference so that we also understand the different representative capacities attributed to different legal subjects.

In contrast to the natural person is the legal or moral person, who "is not something physical and tangible". Reale puts aside the famous fictional theory of legal personality, already mentioned. The author's argument suggests that the legal person could not be mere fiction since Law works under its consideration:

> However ingenious it may be, it is undeniable that the understanding of legal person as simple fiction does not correspond to the practice of Law. Before the Brazilian Civil Code established that the legal person is not to be confused with the person of its members, the domestic jurisprudence had great difficulties in explaining certain facts. If a corporation goes bankrupt, bankruptcy does not affect the person of the shareholders. If a recreational civil society fails in its objectives and finds itself grappling with immense debts, its members do not answer for them. How, then, to justify such facts on the basis of mere fiction? (2000, p. 170).

The argument seems circular, since supported by highly normative facts. Reale also counters Gierke's organicist theory, by which whenever human beings gather around a goal of any sort a new entity is effectively formed, thus having a real existence. To Reale the theory exaggerates by giving real existence, "of an ontological nature" to legal persons. Thereby denying both the purely fictional character and the entity's ontological perspective. What would be left? Faced with the two "extreme poles", Reale assumes Maurice Hariou's institutional theory[60].

> Supporters of institutionalism maintain that legal persons are institutions. What is meant by the word institution? We must start from the idea that there are two types of units, according to an old Thomistic tradition: a physical unit and a unit of ends or order, *unitas ordinis*. Physical unit is one in which the whole is homogeneous, so that the parts do not present fundamental or relevant differences between them. The unit of ends, on the contrary, is established by complementing different parts. An example of a physical unit is that offered by an iron or granite block. An example of a unit of order or of ends is given to us by the human body or by a watch. (...) Well, say the institutionalists, also in societies, several men come together trying to reach a determined end, and it is this end or guiding idea that gives unity to the entity that appears. The legal person is an existence, but a teleological existence, that is, finalistic. A commercial society exists because it brings together two or more people

[59] About the defense of natural elements as legal subjects see: LEOPOLD, 1989; LOVELOCK, 2000; NAESS, 2008; SERRES, 1995; STONE, 2010. For works in Portuguese see: LOURENÇO, 2012; OLIVEIRA; LOURENÇO, 2009 and 2014. Specifically about rivers as legal subjects see PACHAMAMA, 2018 and PONTES; BARROS, 2015.

[60] As Maria Helena Diniz (2016). Though she stresses that the entity must deserve the legal personality, we understand she better emphasizes the formal element.

> driven by the idea of founding an enterprise. The core element of the institution is the idea that brings together and inspires those who dedicate themselves to the same task, combining different efforts aiming at a specific purpose (2000, p.171).

The author is satisfied with the solution, as he denies the entity's biological and merely fictional existence, affirming its teleological and institutional existence. Therefore, in contrast to Kelsen, Reale goes so far as to affirm his three-dimensional theory as the fundamental basis of the legal subject concept "surpassing the Kelsenian normativism" for not considering solely the normative aspect. It recognizes the normative reality, in unity with the fact that certain men gather around an end-value that inspires and determines them (2000, p.172).

In his theory of the State, a group of people who developed historically, gathered around the purpose of the common good, organized by a legal system. It works at a level of ideation in which all bees collaborate under the norms naturally given with a view to the hive. It does not recognize States born from violent processes such as colonization, separatism and annexation, nor the conflicts that persist within these created States. Nor those who, within the same legal personality, appear to sell their labor power for others to buy, nor some that before a company's bankruptcy, have their assets protected while others have their source of income taken. To Reale, good faith is his starting point:

> As can be seen, legal persons, like all structures that the Law's experience has modeled throughout history, have as a premise good faith and ultimately the satisfaction of real private and collective interests (2000, p. 178).

Reale does not comment if that end-value was voluntarily adopted by all men or somehow imposed, nor if this would also mean its application to the corporate legal personality. Though many inferences and reflections could be withdrawn from these theoretical works, we should merely point towards Reale's principles surrounding the legal personality creation as those of the reduction of the despotic quantum, the subjective solidarity, good faith and common good. Could any of these be applied to Samarco and Vale S.A. in their internal organizations? Which one is the subjective solidaire end-value that drove them?

2.2.2 The human person's dignity and the legal personality

In a similar direction, Rosenvald and Farias built their Civil Law course (2015). The authors point to a realism of the legal subject's nature, but its purpose

takes up most of the narrative. First, the authors establish their reference for thinking about legal personality in the Brazilian legal system: the human person dignity principle,

> without which the analysis of the theory of personality and the effects resulting from it would become empty, falling into a true formalist dullness, stripped of concrete meaning, (...) the most precious value of Brazilian legal order, (...) human being at the center of the entire legal system, in the sense that rules are made for the person and for its existential realization. (...) On this reasoning path, let us repeat until satiation that the most precious value of the Brazilian legal order, erected as fundamental by the Constitution (FARIAS; ROSENVALD, 2015, p.127).

Such dignity would require respect for physical and psychological integrity, to the existence of minimal material assumptions to exist and, finally, respect for freedom and equality. In a footnote, the author refers to Kant to define such dignity: "no man can be, for another, just a means; each man is an end in itself" (Ibid., p. 128).

> Exhausting the innumerable aspects arising from the matter, Ingo Wolfgang Sarlet establishes that the dignity of the human person is the 'intrinsic and distinctive quality of each human being that makes one deserving the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties that assure to the person both against any and every act of degrading and inhumane nature, as well as guarantee to one the minimum existential conditions for a healthy life, in addition to providing and promoting one's active and co-responsible participation in destinies of existence and life in communion with other human beings' (Ibid., p. 130).

It is, therefore, a "range of humanizing and civilizing values", which could convert the legal structure put in place. This range of values needs to be implemented "in the specific case, in the legal routine", they need to "make private institutes functional." Therefore, the authors' hopes are for a "re-examination of the old civilistic institutes". Thus, the proposition is clear. In view of the consolidated dynamics of society, between correlations of powers, centuries-old legal structures, the capitalist mode of production recognized by the authors, among others, Rosenvald and Farias propose the legal reinterpretation of reality in the light of the human person dignity principle, which, citing Daniel Sarmento "does not depend only on Law" as one might think, but on the consolidation "in the hearts and minds of an altruistic ethics" (Ibid., p. 131). The human person dignity is seen as inscribed in the Constitution, and is the foundation of all legal order, yet needed to be materialized, still being necessary to "re-evaluate" the order under its light. Though the authors' opinion does not instantly change the legal and jurisprudential

norms, we need to take it as an interpretative proposal once their teleological position are inscribed in the perspective of Law.

Moving to personality, they state that "natural person and legal person are, therefore, the two different kinds of persons - that is, of potential legal subjects" and "to any and all person, it is to stress, the potential to be a legal subject is recognized" (Ibid., p. 133-134). The person is not only a potential repository of rights, it is concrete, existing, and therefore has minimum protection that guarantees its dignity. Here the authors do not only deal with the human person and therefore, dignity extends to legal person, for it expresses the "social dimension of the human being", which is inseparable from its individual dimension. The authors recognize that every person is a legal one, but not every legal subject is a person, thus pointing out depersonalized entities

> certain non-personalized entities or groups (that is, without legal personality, existing only through the factual perspective), such as, for example, the building condominium, the de facto society or the bankrupt estate can own several legal relationships, even if they do not have personality. That is, even if they do not have legal personality (which was not recognized by the legal system), depersonalized entities may be subject of law, (...) (Ibid., p. 134).

Notwithstanding, personality is in a different dimension from the existential plane (Ibid., p.136). It is an "attribute recognized to a natural or legal person so that they can act on the legal dimension (being holders of the most diverse relationships) and reclaim minimum, basic legal protection, recognized by the rights of the personality" (Ibid., p. 134). To the natural persons are attributed, based on the principle of the human person dignity, to the legal persons, by derivation, once constituted by natural persons. The authors quote Gustavo Tepedino to argue that personality would be "the maximum value of the order, shaping private life, *capable of subjecting all economic activity to new criteria of validity*" (emphasis added). Personality would not be a right, but a feature that radiates rights and duties. It is "an *object of Law*, it is the person's first asset, which belongs to it as of first utility, so that it can be what it is" (emphasis added). It is from the personality and not the natural person that emanates the possibility of "reclaiming the exercise of citizenship". Finally, it is the maximum value, existential referent, foundation of citizenship, and it is for natural or legal persons (Ibid., p.135-136).

Natural persons are those who have a "biopsychological structure" typical of a "complex human structure", "in the image and likeness of the Creator" (Ibid., p.134). The authors do not go back to the historical construction of the person concept, nor that of the natural person, they only affirm the current state of affairs:

after the Federal Constitution of 1988 all human beings are natural persons and none can have this quality removed from them. Thus, the human person has a fundamental value in itself, deserving the juridical personality, whereas those who were not made in the image and likeness of the creator as "animals and inanimate beings are, naturally, averted from the concept of natural person" and the personality of "inanimate, metaphysical, celestial, mystical beings or presumably found in other spheres, in other worlds is also prohibited" (Ibid., p. 257-258)[61]. The legal person, on the other hand

> is the entity formed by the sum of efforts of natural persons or by a specific destination of patrimony, aiming, in one hypothesis or the other, to achieve a specific purpose and constituted in the form of the Law. In other words, it is an entity formed by a group of natural persons or by a patrimonial collection affected for a purpose, gaining its own autonomous legal personality and patrimony, distinct from its founders (Ibid., p.134).

The origins of legal entities is in the necessity of human beings to unite for certain activities and in this sum of efforts to fulfill functions that "go beyond their strengths and limits", it is a matter of cooperation. The legal person should bow to the human person dignity principle and perform a social function "whatever it may be, subjecting economic activities, notably capitalist, in the contemporary world, to the protective empire of the human person" (Ibid., p. 332). Such a social function would not, however, affect the end of the legal person, its essence - grouping of people or goods for a purpose -, nor would it aim at "obstructing profit", nor even "transferring state responsibilities to the individual". This social function would imply in political state regulations, for instance, as the half-price entrance for students in cultural shows, the facilities with guaranteed access for the physically disabled, the corporate veil piercing and others. They summarize "it is the affirmation of social responsible entrepreneurship, committed to humanitarian and social values" (Ibid., p. 334). Thus, an ethical content is attributed to business activities, and in the face of the violation of social function, a legal personality could even be extinguished (Ibid., p. 335). They conclude: "Anyway, it is the 'empire of being' overcoming the 'empire of owning'! It is the depatrimonialization of Civil Law, which main reference is the protection of the human person" (Ibid,. p.335).

[61] As commented before, the debate on the legal subjectivity of other natural beings is in the rise, offering a large bibliography now-a-days. About the matter, we should merely points to possible ways to develop such a research in Chapter 04.

Despite the justification presented, that the legal person arises due to the need for teamwork, human groups are much prior than the figure of the legal entity. Thus the authors admit:

> There is no reference to legal person in Ancient Rome or even in Germanic Law, only the news about the existence of *universitate*s or *collegias* (research/study groups) can be mentioned, without any personality recognized by the legal system. Because of this, it appears that the theoretical outlines of the legal person, with its contemporary meaning, are of recent construction in the history of Law. (...) In Medieval Law, it was up to the canonists to develop and hypertrophy the concept of legal person, in order to meet the needs for internal organization of the Church. The legal person is, then, defined as *persona ficta* or *corpus mysticum*, by canonists, who perceive in it a different reality and superior to the sum of its members (Ibid., p. 335).

From the original figure of the medieval Church, the Modern State either "perceived the importance of associative forms" (GONÇALVES, Oksandro *apud* Ibid., p. 336) or "imposed on the State" its recognition. Such imposition would have occurred due to the "social and economic relevance of numerous groups" (Ibid., p.336). The created legal person, the modern one, is intersubjective or patrimonial, therefore, it is either a grouping of natural persons or assets that will be dedicated to an end recognized by the State. Despite the repeated collaborative/cooperative essence of the legal person, its "distinctive note (…) is the difference between its patrimony and its founders" completely excluding "any idea of condominium or communion" (Ibid., p. 338). The need to cover up individual components and distinguish patrimony maintaining a limited liability system has a reason. Its denial "surely, would result in an economic downturn, derived from the high costs that would precede the implementation of a project, not always possible to be borne "(MARTINS *apud* Ibid,. p. 338). Rosenvald and Farias finally describe the different currents on the nature of the legal entity. Before proceeding to a typology very close to that of Carlos Roberto Gonçalves, the authors undermine the discussions consequences, for "no decisive influence exerts on the technical construction today incorporated into the legislation" (*apud* Ibid., p. 339).

2.2.3 The intended axiology and the corporation

The human person dignity principle is presented in many different facets: as an appreciation of the human being, as a reason for economic activities and to submit different legal persons, a value that imposes positive and negative actions that guarantee such dignity. The authors bring this new criterion in order to reconsider the entire legal system including their interpretation of the natural and legal persons concept. Despite their interest on proposing the reinterpretation of

the entire legal system based on the cited principle, they believe the discussion about the nature of the legal person had no effect on the legal order whatsoever.

This axiological approach allows the debate to turn to solutions such as corporate citizenship, corporate morality, compliance, corporate social responsibility and governance. Corporate Social Responsibility was specifically addressed by Baars and will be assessed in better in Chapter 04. Herein, it is more important to question some of the companies' features incompatibles with an axiological perspective such as those cited. Pragmatically, decision-making in a corporation has no strict obedience to the common good, good faith, the human person dignity principle or any other[62], as it has to the capital logic through shareholders, CEO's and creditors. This idea was discussed by Ireland while critiquing the efforts for a reconceptualization of the corporation towards a "good corporate citizenship", a corporate conscience committed with the stakeholders interests[63], an "inclusive conception of the company", a "soulful corporation" (1997). He argues this trend of well intentions would have risen with the same fundaments of managerialist theories, that identified the shareholders were not the ones in charge anymore, since the separation of the corporate control into shareholders and managers (Ibid. p. 14). Though this axiological trend of the legal person does not nurtures from the same theoretical fundaments, Ireland position serves to show its problems as well.

> Neither the historically determined nature of "the company", nor of its autonomy from shareholders, are properly scrutinized. As a consequence, the real potential and limits of the strategy are never seriously explored (Ibid., p. 21).

Herein, we must partly anticipate the analysis of Chapter 04, with Karl Marx description of money capitalists and industrial capitalists, foreseeing the different immediate interests of both heads of modern corporations[64]. Ireland parallels this difference with that between corporate assets and shares. Though they reflect different interests, both functions by the capital's dynamic. Modern company still work under the norms of the "fully social nature of capital" (Ibid., p. 25), which must be recognized, at least, as contrasting to many of the stakeholders sympathy.

[62] Miaille critiques these "idealisms" in which "history is the human progress towards a more enlightened consciousness" (MIAILLE, 2005, p. 115).

[63] The author directs the critiques mainly to que British and US American leftists, which were defending, the firsts, a stakeholders oriented corporation, and, the seconds, a corporate citizenship in order to relieve the capitalist pressure in the 90s.

[64] In Chapter 04, we should develop a critical perspective of the corporate legal person founded over Marx's Value and Fetish theories.

When tracing our way back to the Rio Doce case, we witness in Renova Foundation a legal person solely created to better execute the redressing process of the damaged areas and communities. That was its purpose. On the other hand, as demonstrated in Chapter 01, its board of directors was majorly composed by the companies representatives and according to the UN Report its “true purpose” was “to limit liability of BHP and Vale” (TUNKAC, 2020, p. 18). Vale’s main management changes after the Rio Doce Disaster was in the direction of a more shareholder oriented director as was its adjusts to the B3 Novo Mercado segment, leading to the growing control of financial foreign agents. To reconceptualize these organizations towards the human person dignity principle or the common good seriously, means to address their decision-making instances in such a way. In a deeper and larger manner, means to approach their capitalist essence directly. Instead of attributing capital as its constitutive axiologic determination of a S.A., these strings point to the axioms here depicted. If the corporate soul and the corporate body are discarded, we are left with its form.

2.3 The legal subject's form

2.3.1 Kelsen’s legal entities world

To the previews approaches some authors, maybe a current majority, stress the technicality, instrumentality, discursive or formality of the private legal person. Instead of the soul or the body, as previously assessed, the legal person would be an instrument towards a specific purpose, a device created by Law, a language apparatus to translate complex relations into simpler terms. Its stronger pillar would neither consist in its social motion beyond Law nor in a larger social finality, but in its form. Transplanting this idea to the Rio Doce case, this might be to ascript liability to whom Law defines. It also compels us to ask who will be those imputed by legal decisions.

Hans Kelsen[65] would oppose the protagonism of the legal system in the creation of the concept itself, using a self-proclaimed pure, “scientific” and “politically unbiased theory” (KELSEN, 1955, p. 97). A fictional aspect of the personality stands out for the purposes of a concept that needs to be, at least,

[65] Kelsen is the only foreign legal theoretician to whom we will dedicate a few pages. The reason is the unique direct influence he has in Brazilian legal theory and his presence in every work we have analyzed. After a rise of the post-positivist legal theories, his formalism has been retaken lately with conceptual positivists. See STRUNICHER, 2008.

legally recognized as the previews authors wrote. Here personality is a creation, an abstraction created and attributed by the legal system itself, despite the concreteness to which it is directed. What is legal departs from the legal system and so what is a person, as legal concept. The author uses an allegory to criticize those who try to extract legality from reality as a kind of primitivism that attempt to find in all things an immanent spirituality.

> This duplication of the object of knowledge is characteristic of the primitive mythological thinking, which is called animism. According to the animistic interpretation of nature every object of the perceptual world is believed to be the abode of an invisible spirit who is the master of the object, who "has" the object in the same way as the substance has its qualities, the grammatical subject its predicates. The legal person is the legal substance to which duties and rights belong as legal qualities. The idea that the person has duties and rights involves the relation of substance and quality.
> In reality, however, the legal person is not a separate entity besides "its" duties and rights, but only their personified unity or – since duties and rights are legal norms – the personified unity of a set of legal norms (KELSEN, 1949, p.93)[66].

The word personified, understood in the strictest formalism, does not refer to the social face of the individual, as stated by Miguel Reale (2002, p.168), since it is exactly the dematerialization of the legal concept that Kelsen undertakes. To say a "person is, in other words, a human being considered as a subject of duties and rights" considers the existence of a factual essence to which rights and duties should attach, but emphasizes the set of legal norms, instead of the human being or a generic social face. The personification is to create the legal subject, the subject of law, as a legal abstraction, because it only exists "insofar as it has duties and rights, apart from them the person has no existence whatsoever. (...) person is a concept of jurisprudence, of the analysis of legal norms" (1949, p.94).

This is why the Kelsenian position can do nothing but to equalize the criterion of characterization of natural and legal persons. The author uses three concepts: legal person, physical person and juristic person, through which he identifies the first as a subject of law, the second as a natural person and the third - as what we called until now - a legal person. According to Kelsen, there can be no concrete difference among them, other than those appointed by the norm itself. For this reason, the author states that, in essence, every natural person is nothing more than a legal person, as it is only a unit to which rights and duties are attributed. This maximum degree of formalism is also the maximum degree of internal

[66] It is interesting to notice Kelsen's aversion of theories that search for extra-legal fundaments to laws. Specifically interesting is his approach to the Pashukanian theory of law, in which he frequently critiques the attempt to "grasp law as a piece of social reality" or the absence of the norm as the main structure of the legal system. See KELSEN, 1955.

coherence in determining the subject of law, for it leaves the complexities and contradictions of materiality out of the equation. Here, the only criterion is the legal order itself. Concreteness and its contradictions are external to the legal form. When the non-legal foundations of norms are eliminated, the highest ideological expression of Law is also reached, when everything it states is independent from concrete determinations. The Kelsenian abstraction is a fundamental mechanism to the homogenizing role of Law[67], in which the possibility of true equality and freedom is established.

Henceforth, the author can say that the human being recognized as a natural person is a human being personified by a set of legal norms that regulate their conduct. What a person is spawns from Law and the human being is only the case which the substance fulfills, an element of reality whose legal existence is determined by Law itself. Once the content is defined by Law, the fact becomes merely a form, the manifestation of the legal concept. An inversion is operated through this formalist perspective of Law. The substance human being appears as a form, while the form person appears as the substance, inverting the world inside-out. This movement has a double implication. On the one hand, it extracts the complexity of human characteristics from its legal correlative, attributing it merely those statically legally recognized. On the other hand, it may attribute a similar personality to anything unhuman, dehumanizing the human - reifying - and humanizing the unhuman - personifying[68].

This legal substance is limited to its legal capabilities. Thus a human under this legal mask is also limited in its nature, dehumanized while legalized. The concept created can refer to humans, animals, assets or any other objects of legalization. The word personify here does not reveal the difference between the human and the non-human, but only changes the legal qualification.

> The concept of physical (natural) person means nothing but the personification of a complex of legal norms. Man, an individually determined man, is only the element in which constitutes the unity in the plurality of these norms. (…) The physical person is, thus, no natural reality but a construction of juristic thinking. (…) the so called "physical" (natural) person is indeed a juristic person (…) there can be no essential difference between the physical (natural) person and what is usually exclusively considered as a "juristic" person. (…) That only juristic persons exist within the realm of Law is after all only a tautology (1949, p.95-96).

[67] About the homogenizing role of Law, see SARTORI, 2010 and 2016.
[68] Also in this sense, SILVA E SOUZA *et al.* (2016) try to analyze the Mariana Dam Rupture case and state that “disasters are juridical facts” because they bring juridical effects (p. 59), thus, not recognize the fact, but its legal implication if it exists.

In Law, there can only be legal entities. A few details about the legal personalities of corporations are pointed. First, he establishes the decisive cause for them to be considered legal person, limited liability, i.e., liability for the actions of a corporation can be limited only to the corporation's assets, not reaching shareholders. It is this diking of the company's liability, impeding it to overflow to its associates that justifies the singularity of rights and duties inherent to legal personality (1949, p. 97). Secondly, another element that differentiates the corporation from natural persons is by-laws. Corporations are nothing but their own ordination, their regulation. In fact, they only exist when their statute is born, according to Kelsen. Here we have a crucial difference between legal and natural persons that the author does not directly address. In his normative pyramid, corporations are only part of a layer below State regulation, thus, partial legal orders. They are born by their own rules and accommodate other natural and legal personalities under them (1949, p.97-99). The other natural personalities occupy positions of normative production within the legal order of a certain company, however, all still internal to the general order of this company. Natural persons in the upper layers are the owners of the company, while those in the lower layers are workers with more subservient functions who do not produce any norm. Thus, by-laws and limited liability derives into the submission of natural persons - ultimately, always natural persons - to their order, and on the other hand, also serves to subtract liability of physical personalities that owns that legal person. Depending on the hierarchic position of the natural person inside the normative pyramid, “it” either produces by-laws and limits its liability or is submitted to them.

2.3.2 The mere formality of the juridical person

Understanding the fictional character of legal personality opens the door to its detachment from the concreteness of non-legal relations. The trivial appearance gives way to the most ghostly reality. The mask, personae, is a legal fiction covering up the reality according to the legal system determinations. Other strings sought to distance itself from the Kelsenian fictional theory without achieving it - in our interpretation - for remaining mainly formal: it is the theory of technical, formal or nominal reality. There included Carlos Roberto Gonçalves, Silvio de Salvo Venosa, Sérgio Ávila Negri, Comparato and Salomão Filho, among others.

Carlos Roberto Gonçalves in his manual on Civil Law states that personality is "the basic concept of the legal order", it is "a preliminary condition of all rights and duties" and its attribution to all human beings is an achievement of

"legal civilization"" (GONÇALVES, 2017, p. 96). In a very simple and direct way, the author equals legal subject and person, stating that in "modern law, person is synonymous with legal subject or subject of legal relationship" (Ibid., p. 99)[69]. This dilution of one concept in the other is important to highlight both the homogenizing function of the category legal subject. The author's debate over the human being's personality is developed mainly as a debate about the best nomenclature that describes the attributes of the human being. Therewith, the name "individual person" is rejected, as it would imply that the legal ones are collective, as well as the term "being of visible existence" or "natural person" because it would imply saying that the others would be "of ideal existence" or incorporeal, inconveniently attending to corporality as a criterion. Thus, although the term natural person also refers to other persons' unnaturalness, which he also takes for inconvenience, the author adopts it for not referring only to human corporality (Ibid. p. 99-101).

As for the legal personality itself, Gonçalves states that it is a moral entity, composed of associated natural persons or a patrimony, to fulfill a certain purpose (Ibid., p. 96). Although patrimony appears there as an alternative to natural persons composition of legal persons, their fundamental origin is in the primitive "need to group together to achieve a purpose, to reach a common objective or ideal", reason why the laws "came to discipline them". The legal personality, therefore, is based on the reunion of individuals, on the collectivity, on "the need or convenience of individuals to join efforts". Thus, to the group is guaranteed the necessary unity to participate in the "legal trade", a common end of such collectivity (Ibid., p. 232-233). Regarding possible nomenclatures, it is curious to note the names used: entities of ideal existence (Argentina), mystical, abstract persons, university of assets and persons (several authors), moral persons (France and Switzerland), legal persons (Brazil, Germany, Spain, Italy, and others), civil, composed (several authors), collective persons (Portugal).

Gonçalves also compile classifications. He cites the currents that deny and those that affirm the existence of a legal personality, focusing just on the latter, subdivided between the theories of fiction and reality. The fictional theories are subdivided between fiction created by law - in which he cites Savigny - or fictions created by doctrine. The author discards both because "they do not explain the existence of the State as a legal person" (Ibid., p.233-235), a common argument. Among the real entity theories, he points out three currents: (a) objective or organic reality, having Otto Von Gierke as a representative, (b) legal or institutionalist

[69] Also having the same position DINIZ, 2016.

reality, as with Maurice Hariou[70], (c) and the theory of technical reality[71]. Before (a) the organic and (b) institutionalist theories, the author opposes the same critiques. He states there is no justification for

> how social groups, which have no life of their own neither personality, which is characteristic of human beings, can acquire it and become subjects of rights and obligations. Furthermore, it reduces the role of the State to a mere connoisseur of existing realities, devoided of greater creative power (Ibid., p. 235-236).

Then he adopts the third[72]. The theory of technical reality understands that personification is a matter of concretization operated by technical means, through the State, to groups whose will and objectives are legally recognized. The author concludes:

> In spite of the criticism that is made of it, of being positivist and, thus, disconnected from material assumptions, it is the one that best explains the phenomenon by which a group of people, with common objectives, can have personality, which is not to be confused with that of each of its members and therefore the best security it offers. It is the theory adopted by Brazilian Law, as can be seen from Civil Code art. 45[73], which regulates the beginning of the legal existence of private legal persons, as well as arts. 51, 54, VI, 61, 69 and 1,033 of the same code (Ibid., p. 237).

Silvio de Salvo Venosa also takes that path, but making an historical approach from the Roman Law.

> The exposed material aims to give the beginner the notion of the *mater* of Civil Law and the main foundations of Law in general. Not only that, the intention is to make a brief account of the evolution of Roman Law, perfunctory from the historical point of view, as a preparation, a logical and necessary background for the beginning of the study of Civil Law. (...)
> Roman Law has never died; even after the barbarian invasions, it was still applied by those who subjugated Rome. Its institutions have proved to be a complete art and a perfect science. Its maxims still provide Modern Law with an inexhaustible source of innocent results (VENOSA, 2017, p. 46).

[70] Maria Helena Diniz adopts this theory, describing the "legal person as an attribute derived from the legal system in favor of the entities that deserves it" (2016, p. 274).
[71] Also Marlon Tomazette (2016), Suhel Sahran Junior (2017) and Caio Mário da Silva Pereira (2016). Though he emphasizes the "creative spirit", the human "necessity to unite" or "grouping sentiment" that led to the creation of legal persons (2016, p. 249), he stands clearly for the technical reality theory.

[72] Despite the interesting and curious criticism woven into the work of Civil Law, the foundation of the legal person in Carlos Roberto Gonçalves points towards a legal personality based on cooperativism, the need for human beings to join forces, the limitations of the individual's own strength of its ephemerality. Humans join forces and that is where the legal person originates from (Ibid., p. 234). Notwithstanding, its technical element is prevalent, lastly.
[73] Art. 45. Começa a existência legal das pessoas jurídicas de direito privado com a inscrição do ato constitutivo no respectivo registro, precedida, quando necessário, de autorização ou aprovação do Poder Executivo, averbando-se no registro todas as alterações por que passar o ato constitutivo.

Attributing perfection to Roman Law - scientific perfection in their institutions - seems to point to what Löwy and Sayre called "resigned romanticism" (LÖWY; SAYRE, 2001). The historical perspective of Roman Law reveals part of the concepts formation processes. It demonstrates the motions of concepts before power relations, from the reification of the enslaved human to the sharp nuances of the subject of Roman Law capabilities, which dramatically differentiated the representation of each person in Law.

> It was understood that the individual had a certain aptitude for each specific act of one's civil life, with specific terms, such as *commercium*, in relation to activities that involved patrimonial rights; the *connubium*, which referred to the ability to contract marriage through *iuscivile*; the *testamentifactio*, referring to the ability to make a testament; the *iussufregii*, which was the right to vote at rallies, and the *iushonorum*, the right to be invested in one of the Roman magistracies, for example (VENOSA, 2017, p. 135).

Legal personality fundamentally depended on freedom and Roman citizenship, moreover, the subjects' legal capacity varied according to the historical period and the conditions of status libertatis - condition of freedom -, *status civitatis* - condition of citizenship - and *status familiae* - family condition. One of the advantages of complexifying the theme in historical terms is that of understanding the legal capacity changes according to power relations (Ibid ,. p.136-138). Although it does not innovate in terms of the definition of natural person, the approach allows thinking about legal personality and the concept of natural person with a few more elements.

Venosa points out a cornerstone characteristic of the legal person concept, "it is the result of an abstraction" and has undergone a "slow evolution". The direction it takes in Roman Law is towards its detachment from individual citizens, a concept that arises only in the Post-classical period, which begins around the 3rd century. "It took a long time for the capacity of natural persons to be fully transferred to legal persons" (Ibid., p. 235). These would not be called *persona*, but "*universitas, corpus* or *collegium*" (Ibid., p. 236). The autonomy of these pre-forms of legal personality went hand in hand with the relations of domination, as in the case of the rising Church that accompanied the fall of the Empire:

> In the Lower Empire, churches, pious and charitable foundations have a very large capacity. Since Constantine's time, it is allowed to test in favor of the Catholic churches in Rome. This faculty was later generalized (Ibid., p. 236).

As well as the Roman citizens and their political institutions:

> With regard to legal persons in Rome, its influence was greater in Public Law, with the *populus romanus*, the maximum organization of free men, citizens of the city, not leaving this notion, however, to offer subsidy for the creation of the legal person notion of private law (Ibid., p. 237).

Moving on to contemporary times, the scholar then assesses the nowadays contextual problems related to the legal person as the economic domination of the latter, transnationalization, inability to regulate the activities of the legal personality, threats to morals and the Law, insufficiency of traditional legal literature, domination of legal person over natural ones and finally, the reification of personal relationships. The full reproduction of the excerpt follows:

> The twentieth century, we can say, was the century of the legal person. Since then, very few activities of society are performed by man as a natural person. The legal person, from the simplest to the most complex, interferes and meddles in the life of each one, even in private life. We feel an exacerbated growth in the importance of legal persons. Currently, the weight of the "economy" is accounted for by the potential of legal persons, which transcend the State itself and become supranational in those companies that call themselves "multinationals".
> The Civil Code of 1916 could not predict, at the end of the 19th century and the beginning of the 20th century, the dimension that matter would take. This statute therefore serves only as a starting point for establishing the fundamental concepts of legal persons. As a result of these limits, the study of the legal person belongs to the new Corporate, Financial and Economic Law.
> **The legislation does not keep up with the constant and rapid mutations that occur within the scope of legal persons**. It is perfectly felt, within each order of legal persons, the permanent need for the legislator, at every moment, to be disciplining a new phenomenon that appears both in the field of lawful acts and in the field of unlawful. Yes, because, if the legal person is the driving force for the economy, **it can also serve as an instrument for acts contrary to Morals and the Law**. These are the so-called **"white collar" crimes** committed by legal persons; **their damage is as great or even greater than the crimes committed by armed robbers**; they are transgressions of the law that show themselves painlessly, but that cause, or can cause, profound financial ruins in the economy, not only of the juridical person but also of the State itself, that have them as if under a protective mantle. Like the legislator**, the doctrine resents the novelty of the phenomenon of the legal persons participation in society, not going deeper and not really reaching the core** of the intricate issues that arise every day. Traditional doctrine is still insufficient. **Creators are no longer able to control their creatures**. **Legal persons made up by men become so large they become impersonal, insensitive and make human beings into men who once set them up as mere components of a cog that can be replaced at any moment, as an obsolete mechanism is replaced, quite simply, with a new one. Today, within the legal person, the natural person is depersonalized**, becomes an object, a plaything of interests. The powerful controllers of the legal person in the present can, without any hesitation, become the obsolete mechanism of tomorrow. Such effects should not be overlooked by the legislator, because they have a decisive impact on the social or economic issue with a direct relationship such as unemployment and production. **According to Antônio Chaves, when writing in the 20th century, "we live in the century of legal persons, if they are not the ones who live in our century"** (Ibid., p. 239-240) (emphasis added).

After historical and teleological digressions, he rejects the Savigny's and Kelsen's fictional theories as realist and institutionalist theories and finally concludes, being the legal person "both individual and collective, is neither a fact nor a fiction", it is a mere abstraction, ideal like all legal institutes, "because the legal person, unlike human beings, cannot be seen or touched" (Ibid., p. 244), it is only a way of "giving more strength to the human being". The author finally recognizes "both the personality of the natural person and legal persons as creations of Law", creative objectifications, technical, created reality (Ibid., p. 246). Its technicality ultimately defines it as well. Herein, the steps from what he calls a roman legal person, to the Church's legal personality until the corporate legal person, these interludes, are not detailed. Moreover, his recognition of the legal person current dominance shows no implication onto the concept as if the diagnosed reality was parallel to its creation.

Fábio Ulhoa Coelho starts by distinguishing legal subjects and persons. His criterion had already been mentioned, the depersonalized entities. "In this way, subject of law is genre and person is subgenre" (COELHO, 2012, p. 324). Apart from the exception of depersonalized entities, the elements that most interest us about the category of the legal subject in Coelho are carried over directly from the subject to the person.

> (...) In short, it is not possible to guide the overcoming of conflicts of interest in society, disregarding that every interest has a holder. Legal subject is the holder of the interests in its legal form" (Ibid., p. 324).

They are, henceforth, legal subjects, "the center for imputing rights and obligations under legal norms" (Ibid., p. 327). These conflicts can occur directly amongst human beings or "mediated by other non-human holders", abstract ones, which do not always coincide with "the reality in fact" (Ibid., p. 324) and whose purpose is "to promote the overcoming of conflicts (…) in a more rational way "(Ibid., p. 326). The personification of human beings is a concession that varies with "the level of consolidation of democracy" (Ibid., p. 367). The legal person's *raison d'être* is precisely "to better discipline potentially conflicting interests" (Ibid., p. 331), and the conflicts here are none other than essentially patrimonial, so a legal person is a set of "techniques of patrimonial separation" (Ibid., p. 366)[74].

[74] Reminding a note from Baars: A final way of thinking of (corporate) legal entities is as 'pools of assets' as per leading US corporate lawyers Hansmann and Kraakman: 'Individuals (or rather, their personal estates) and corporations are thus both examples of *legalentities*, a term we use to refer to legally distinct pools of assets that provide security to a fluctuating group of creditors and thus can be used to bond an individual's or business firm's contracts'.43 Indeed this perspective is an accurate

Despite the completely different natures between the human legal subject and the non-human - abstract, ideal - for practical purposes, the distinction "has no legal relevance" (Ibid., p. 333), as legal persons are "apt to the practice any legal transactions"[75]. The important exception is that public legal persons whose freedom to act "is, so to speak, inverted" (Ibid., p. 336-337). Private legal persons have their performance characterized by greater freedom compared to public legal persons, the prohibited acts must be expressed or issues obviously assigned to human beings[76].

His account about the legal person is extremely relevant to reflect upon how Law homogenizes human beings and purely conceptual techniques of patrimonial separation for conflict resolution in such a way that in legal practice, the distinction between them has no relevance without any influence on the current legislative technical construction. Unlike Silvio de Salvo Venosa, Coelho analyzes another historical section of the formation of legal personality, a more recent one, that is, from the Middle Ages. He perceives its foundations in the Catholic Church and makes an interesting observation:

> The foundations of the theory of the legal person are found in the Middle Ages, in notions destined **to attend the needs of organization of the Catholic Church and preservation of its patrimony**. At that time, canon law **separated the Church**, as a corporation, **from its members** (the clergy), **stating that it has a permanent existence, which transcends the transitory life of priests and bishops**. Also because the Church is a corporation independent of its members, **not everyone can legitimately speak for it**, but, depending on the subject, only members of a certain hierarchy, previously consulting, sometimes, some of their peers. Another important implication of the Church's recognition as a corporation unmistakable with its members was pertinent to assets. **Affirming the Church's life separately leads to the distinction between its patrimony and that of each member of the clergy** (Ibid., p. 528) (emphasis added).

In the adumbration of legal persons in Rome, we either found a universal expression founded on all the citizens, as public interest, or an institution that was not completely disconnected from its members. The Church, however, with its eternity linked directly to God, could personify itself more autonomously. For this to be transferred to commercial societies, yet linked to its members - a restricted

and usefully 'demystified' description of the nature of corporate personality in capitalist law – that in fact aligns with the Marxist description of the corporation as 'capital personified'. It is the *legal ideology* (why this entity is allowed to exist and function in this way) that needs further analysis (BAARS, 2019, p. 40).

[75] In this same direction Nader observes that legislatures have followed more "pragmatical" instead of "philosophical ways" (2018, section 69.1).

[76] Herein, the reference must be the legality principle. In Private Law it stablishes that no one is obliged to do or not to do something, if not determined by laws – Art. 5, II, Brazilian 1988 Constitution. On Public Law, on the other hand, it drives the State in the opposite direction, i.e., it cannot do anything if not legally ordered (DI PIETRO, 2020, p. 203).

group of individuals with particular interests - it was necessary to have a new figure, independent of them. This figure was elaborated by the German organicist theories, from the second half of the 19th century, which in fact biologized or anthropomorphized the legal person, as in the realistic theories formerly explained. Proceeds Coelho:

> These are theories that illustrate, strictly speaking, the difficulties that legal technologists faced in the past, in order to sustain the ownership of rights and obligations by non-human beings. His study is no longer technologically important. After more than a century of the final configuration of the legal person theory, and incorporating its developments in the generality of positive rights, there are no major difficulties in its operationalization in the solution of conflicts of interest (Ibid., p. 529-530).

Coelho describes the function of organicist theories as an attempt to justify beyond mere will, as if organicist theories had coined the myth necessary to transpose the divinity that empowered the Church to the independent anthropomorphic being that empowered the legal person. The core of the legal person is its autonomy - principle of autonomy - expressed in the Civil Code of 1916 and currently "revealed by the doctrine from the legal rules of the legal system" (Ibid., p. 537). As a result of its autonomy it becomes a subject of Law and then (1) "it is itself part of the legal transactions", (2) "it is, and not its members, the legitimate part to sue and be sued in court" and (3) it is impossible to "collect from its members its debts and obligations" (Ibid., p. 532-534)[77].

A much deeper and extent work is Negri's (2011; 2015; and 2017), which constructs an approach in dialogue with nominalists and technical formalists. What he denounces is the very term "legal person" and the confusion it would generate when it denotes itself as a parallel to the natural person and as a subgenre of the genre person. The very questioning of what is a legal person or its essence can disserve the answer (NEGRI, 2011, p. 18). The fact that the legal person has a name, a nationality, a will of it's own, as a patrimony are a pedagogical mantra that converges to its existential autonomy (Ibid., p. 20). Moreover, human characteristics as honor were applied indistinctively to corporations in Brazil. In the United States, in the Santa Clara County vs Southern Pacific Railroad case, the 14th Amendment was reinterpreted to corporations, guaranteeing their equal

[77] Despite emphasizing the legal person's role, Coelho also indicates the confusion in Brazilian legislation that disciplines the entrepreneurship orbiting the personal figure of the entrepreneur, instead of the legal personality itself, or the activity. He also distinguishes the entrepreneur and the shareholder or partner. (COELHO, 2016, p. 103).

treatment as to natural persons[78] [79]. Thus, denounces Negri, it became common to find a blind transposition to supra individual matters of "whole sets of instruments that took the individual as a model, isolated considered" (NEGRI, 2011, p. 23).

The terminological confusion would hide the fact that the legal personality was never referenced by the natural in ontological terms, and moreover, it covers completely different types of nature[80]. Negri adopts the allegory of the lenses and uses it to the legal person concept. If well adjusted, they would clear the image, but if not they would blur it (NEGRI, 2011, p. 12). Comparato and Salomão Filho also ground the critique.

> Even without adhering to Kelsen's and, to a certain extent, Ascarelli's normativism, we cannot fail to give reason to the latter, when he stresses a wide difference of meaning that separates a concept, such as that of "legal person" from that of "man" or "soil" (Civil Code, art. 79), for example. In the first case, the word is symbolizing a cultural object, more precisely something that only exists in the world of legal culture, while in the second the terms designate natural objects. In the first case, whatever the "support" of the given object - a group of men, a single man, a patrimony - its meaning is only given to us by the rules of certain legal system. It is therefore not without practical importance to formulate the distinction between the types of concepts, which refer to these two categories of realities (COMPARATO; SALOMÃO FILHO, 2014, p. 386).

Negri acknowledges the slow construction of the legal person concept, describing its steps in Roman and Canonical Laws. However, it is precisely the detachment of the Roman sources and theological morals, succeeded by the jusrationalism of the XVII and XVII centuries that gave the late *persona ficta* its own substance, being its hardest recognizing test, according to Negri (NEGRI, 2011, pg. 31-33). Nevertheless, this recognition was founded upon individualism and State control, which should be overcame by Gierke's organicist theory. This is when the equation trap reaches it's theoretical apex, spreading among jurists the need to find an empirical reality correlative to the legal person (NEGRI, 2011, p. 38-40). The general failure on this task – finding a non-legal substance – led jurists to more "subtle" realistic theories, as those formalists (NEGRI, 2011, p. 38-42).

[78] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (14th Amendment, US Constitution).

[79] "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does". The case will be further developed in chapter 04.

[80] According to Negri, Law often creates an image detached from the phenomenon it should picture, acquiring a life of it's own as if it represented an autonomous reality" (NEGRI, 2011, p. 10).

Negri position formalist theories as those tended to denaturalize the legal personality, i.e., to end its immediate transplantations with natural personalities mechanisms, presenting Francesco Ferrara, Hans Kelsen, Tullio Ascarelli, Italian nominalists and Alf Ross as the denaturalizing reaction[81]. They either concentrate their analysis onto norms or language, emptying the factual aspect of the problem. Ascarelli would argue that the legal person concept does not address directly a pre-normative reality. He distinguished two kinds of legal concepts: (1) "those referring to typical facts of social reality (*fattispecie*)" and (2) and those that simplify normative complexes, as the legal person concept case, merely meaning a center of imputation of rights and duties, a plurilateral contract (COMPARATO, SALOMÃO FILHO, 2014, p. 380/pdf). As Ascarelli, the other members of this formalist string will argue that the legal person concept is a language simplification of a complex of legal relations, thus having a meaning only when systematically interpreted, diverging mainly between those that would stand for its extinction or maintenance, recognizing utilities in this simplification process (NEGRI, 2011, p. 48-51). Negri stands by their critique of the concept, but does admit its utilities, proposing its reinterpretation.

Its critique points to several problematic issues, specially what he calls the equation trap of natural and legal persons[82]. The right to something must not be independent from what/who is the right holder (NEGRI, 2016, p. 04). Partly, Negri's critique is directed to the disadvantages these misunderstandings would generate to natural persons. Another part, though, directly points incoherencies between the legal image of legal persons and its real form. He explains that the concept is actually a "mental shortcut" (NEGRI, 2016, p. 08) with some utilities as (a) simplifying legal relations providing a unity for imputation, (b) articulating and autonomizing patrimony, (c) to produce an imputation system, and (d) to stabilize the coordination processes of an organization. On the other hand, these utilities provoke distortions in the legal person image as (a) the assessment of complex situations within an organization that perceives itself as a unity, (b) personification is seen as the only alternative to manage patrimony for an specific finality, (c) the illusion that to impute rights and duties to a legal person is a complete process, (d) the organization is seen as the legal person's monopoly (NEGRI, 2016, p. 09-10).

[81] See also ASCARELLI, 1951 and 1999; COMPARATO; SALOMÃO FILHO, 2014; ROSS, 2014).

[82] This equation or naturalization of the legal person is divided into different intensities. He calls strong naturalization when legal persons receive natural persons characteristics as honor, for example. A weak naturalization occurs when legal instruments originally thought to apply to natural persons are merely transplanted onto situations with the legal ones (NEGRI, 2011, p. 13).

Despite these distortions, Brazilian doctrine, jurisprudence and legislations converge that legal persons are entitled to fundamental rights, to personality rights as widely as possible, being able to suffer moral injuries or privacy violation regardless of their merely economic dimensions for corporations, for instance[83]. In addition, when it comes to liability, Negri highlights that only humans are the real responsible for actions and omissions, and nevertheless, these actions cannot be merely attributed to individuals while inside organizations (NEGRI, 2016, p. 14-15). Negri supports the idea that the legal person concept could be better adjusted to "perfectly represent phenomena". Its critical use could enlighten particularities and reveal the limits of this equalization trap (Ibid., p. 15). The legal person is a simplification instrument, an incomplete symbol that should not mislead to an entity, but to another complex of norms.

2.3.3 The limits of the formals

We tend to agree that the equation trap is a problematic issue of the concept, as well as the oversimplification of its significance. However, formalists characterize the legal person as a partial set of norms or a mere instrument of patrimony separation, and we should move distant from this perception, for while discussing language, a partial complex norms and specific functions, one cannot perceive the complex motions and interests that created this legal image. As Engels wrote while drawing a critique to Mr. Dühring:

> First, the concept of the object is formulated from the object itself; then, everything is inverted and the object is measured by its portrait, its concept. From here onwards, it is not the concept that should be guided by the object, but the object by the concept (ENGELS, 2015, p. 130)[84].

Because the legal system creates the illusion of being self-referenced, it is only satisfied with the conclusion that something is - juridically - because the legal system stated conceptually/normatively, thus forgetting about the objects to which they refer, their movement and own determinations. The legal lenses not only erase real determinations but also create them. If in their juridical world they attribute human capabilities to a mere object, its juridical humanization will produce

[83] In this sense also Perlingieri (2002, p. 157-159).

[84] Pashukanis cites the importance of Engels writings in the Anti-Dühring (Pashukanis, 2017, p. 60).

non-legal consequences correspondent to them. It is not a simple matter of reinterpretation, since their impositions by the legal system turn them concrete.

The norms acting upon mining and tailings dam construction regulations are made to support the economic activity, not the other way around. It is not the interest on fulfilling the mining regulation that makes the company run, but the economic interest on mining that demands a legal support. The corporate motion is driven by economic interests. If this economic interested corporation is merely seen a set of legal norms, it is emptied of its substance and perceived as its form. The corporate legal personality is the legal manifestation of the corporation, its legal platform, not its animated element. The formalist theories, though sophisticated, invert the corporation into its legal form, and its legal personality becomes autopoietic, soulless and bodyless, a mere empty form that cannot answer properly the demands of the Rio Doce case, for it drives precisely to where it already led: anywhere legally justified. The next chapters, besides their specific objectives, are naturally a critique of the formalist theories, and should develop the cited arguments.

3
THE PASHUKANIAN BRIDGE: ECONOMICS AND LAW, COMMODITY AND THE LEGAL SUBJECT FORMS

One important branch of radical materialist legal criticism was built upon the writings of Evguiéni Pashukanis (1891-1937), published in the post-revolutionary Soviet Union. One of the three protagonists of the Soviet Union legal theory in the 20s (CERRONI, 1977, p. 29) the author had a short time to develop his ideas under a stimulating academic environment (Ibid., p. 31). Already, in the beginning of the

30s he writes a first self-critique, which would be followed by others, finally disappearing around 1937-38. Notwithstanding, Pashukanis reached "the theoretical knowledge peak of the soviet juridical thought" (CERRONI, 1977, p. 75), with the "strongest possible dose of Marxism" (KELSEN, 1955, p. 89) seeking to elaborate a criticism that simultaneously dialogued with the current legal normative theories - already with a prominent role played by Hans Kelsen (1881-1973) and its emphasis on the legal norm and legal system[85] - and the Marxist criticisms of his time, more directed to the control of the State apparatus, such as that led by his friend Pyotr Ivanovitch Stuchka[86] (1865-1932). In our context, Pashukanis' works drew a steady Marxist theoretical link between the capitalist mode of production and legal theory. In Brazil, a number of authors have adopted or rebuilt the Pashukanian critique of modern law, some underlining its merits and others its limits[87]. His critique takes the legal subject category as a central one, thus, he offers a potential interesting tool to understand the economic production of tailings dam failures, the corporate subject and its legal personhood.

Many of the works on Pashukanis are a recent look, usually bringing important criticisms but far from being unison, rather controversial and complex positions that are located on the crossroads of legal theory, State theory and materialist philosophies under different epistemological, methodological, ontological perspectives, amongst other complicating factors. Henceforth, rethinking Law based on a Pashukanian criticism today means walking at the intersection of multiple discussions of a high theoretical level and without clearly built paths. The limits of a doctoral thesis (including temporal) are faced with such a complexity, leaving us the task of narrowing our contact area with Pashukanis. Because of this peculiar requirement of the critical materialist approach to Law and in order to remain rigorous work while contributing to the discussion, we opted for a modest theoretical approach, in which we will withdraw the legal subject category having the modern corporation as our landmark. We shall not move too far from it.

[85] Kelsen did answer Pashukanis and the soviet theorists in *The communist theory of law* published in 1955 (p. 89-112). We consider this critique shallow, once the author shows little proximity to Marx's categories and subsequently to Pashukanis', accusing the author of "reducing the legal phenomena to the economic phenomena" (1955, p.89).

[86] Besides him, Pashukanis and Mikhail Reisner were the cited protagonists during the 30s legal academic environment in the Soviet Union (CERRONI, 1977, p. 29).

[87] In Brazil, see CASALINO, 2019; KASHIURA JR. (2012); NAVES (2000); GONÇALVES (2017, 2018 and 2019); GRESPAN (2019); CORREA (1996); NAKATANI, (1987); SARTORI (2015, 2016 and 2019); and MASCARO (2013 and 2016). Internationally, the approaches like those from MIÉVILLE (2005); KNOX (2016a and 2016b); BAARS (2011, 2015, 2016 and 2019); BALBUS (1977); BUCKEL (2014 and 2019); EDELMAN (1976 and 2016); CERRONI (1969, 1977 and 2018); MIAILLE (1978 and 2005).

The elements that go beyond the category legal subject are treated here with greater caution and limited extent, given the controversial systematic consequences of such possible analysis. We understand that the modesty of such a cut is necessary. Therefore, we will neither support nor eliminate the debate about the State and Pashukanian derivationism, about the public/private or objective/subjective rights dichotomies, the prevalence and origin of Law in one of these poles, about the concept of State itself and the absent political mediations as criticized by Sartori (2016), or about the third intervener and the function of equivalents exchange[88].

One methodological note must be taken beforehand, about the historical approach in this chapter. Despite the importance to undertake a historic analysis enlightening the process theorized by Pashukanis, the author does not do it. He develops, mainly, a logical-dialectical derivation, as Miéville also agrees:

> But despite his claim to derive the historical development of legal forms from their systematic derivation, Pashukanis 'offers no detailed account of the historical process underlying the maturation of these [pre-capitalist] "embryonic legal forms" into bourgeois law'. His theory is a dialectical-logical theory of the legal form, and any implications for a historical narrative or theory are inchoate[89] (2005, p.97).

The logical-dialectic development of the process is actually a Marxian recommendation already inserted in the *Grundrisse*, and method applied to *The Capital*. In this sense, Marx states:

> It would therefore be unfeasible and wrong to let the economic categories follow one another in the same sequence as that in which they were historically decisive. Their sequence is determined, rather, by their relation to one another in modem bourgeois society, which is precisely the opposite of that which seems to be their natural order or which corresponds to historical development. The point is not the historic position of the economic relations in the succession of different forms of society. Even less is it their sequence' in the idea' (Proudhon) (a muddy notion of historic movement). Rather, their order within modern bourgeois society (MARX, 1993, p. 107-108).

Such development is justified, among other reasons, for the commodity is not the predominant form of every mode of production, but specifically of the

[88] Buckel (2021) summarizes the main critiques to Pashukanis' work in four points: 1) the reduction of the analysis to the circulation sphere; 2) the emphasis over civil Law as primary Law; 3) Economism; 4) the wither away thesis (the thesis about the end of the legal form (BUCKEL, 2021, p. 94-103).

[89] Mas, apesar de sua pretensão de derivar o desenvolvimento histórico de formas jurídicas de sua derivação sistemática, Pashukanis "não oferece uma descrição detalhada do processo histórico subjacente ao amadurecimento dessas" formas jurídicas embrionárias "[pré-capitalistas] na lei burguesa". Sua teoria é uma teoria lógico-dialética da forma jurídica, e quaisquer implicações para uma narrativa histórica ou teoria são incipientes/imaturas (tradução livre).

capitalist mode of production[90]. In this chapter, we intend to understand the Pashukanian concept and critique of the legal subject and then point its limits, namely in short, the underdevelopment of the fetish, value and modern corporate theories. These will be better detailed in the fourth and last chapter. Though many are the attempts to harvest from other works, his short magnum opus General Theory of Law and Marxism (2017) is most commonly the main source of his followers. It will also be this chapter's gravitational center.

3.1 Issues prior to the legal subject

Evguiéni B. Pashukanis is still one of the main references of the Marxist legal critique (SARTORI, 2019, p. 07) - if not the main one – though it has been about a century after his main work *General Theory of Law and Marxism*. This compels us both to recognize the relevance and depth of his contribution as to confront us to move beyond Pashukanis. Actually, the author himself stressed this second role in the preface to his second edition. He clarifies that the writing process was "largely for self-clarification", which is why he perceives the work as concise, abstract, one-sided and "of little use as a textbook" for a "Marxist critique of the general theory of law that is [was] just beginning". The author also admits the difficulty of critical analysis due to the lack of material for Marxist analysis of history, with only "Marxist literature on general history". For many reasons, the primary function of his work is "bringing some issues into the debate" (2017, p. 60).

We tried to look at these first Pashukanian self-evaluations rigorously, following Miéville's and Sartori's comments. If, on the one hand, we agree that he points to a fundamental direction and actually opens the debate on the indispensable and basic questions of the legal subject and the Marxian method, on the other, in disagreement with Pashukanis, we recommend caution with his

[90] Pashukanis mentions some historical contexts, but without a systematic deepening, so that the soviet author comes only to cite older and non-market expressions of societies, or even to relate the relations between the equivalents exchange form, the penalties of the "barbaric laws" and the patriarchy that dominated the Roman and medieval legal figure, with the bourgeois mode of production and its respective modern legal form. He merely mentions historic elements that occurred between the firsts and last stages of the equivalent exchange form. "Between these two extreme points legal forms development takes place, which reaches its apex in bourgeois capitalist society. This process can also be characterized as a dissolution of patriarchal organic relations and their replacement by legal relations, that is, by relations between formally equal subjects before the law. The dissolution of the patriarchal family, in which the *pater familias* was the owner of the wife's and children's workforce, and the conversion into a contractual family, in which the spouses enter into a contract of property, and the children (for example, on American farms) receive from the father a remuneration for the work, is one of the typical examples of this evolution. The development of market-monetary relations accelerates this evolution. The economic circulation sphere, embraced by formula *M-D*, *D-M*. plays a dominant role" (PASHUKANIS, 2017, p. 62-63).

observation - even if for modesty – that his would have been extracted directly from Marx and Engels (2017, p. 60). On the issue, Vitor Sartori, for example, identifies in Pashukanis a fully original criticism, since the legal subject that Marx would mention would not correspond to the subject of law, as an established legal concept, and therefore we could not attribute to the Soviet author the role of mere compiler.

> However, we believe, it is necessary to remain clear that at no time Marx mentions a "legal subject", and the relationship between the "person" and the "subject of law" is something original of the soviet jurist's thought, and not something that comes from Karl Marx's own text as sometimes assumed (SARTORI, 2015, p. 49-50).

China Miéville also admitting the originality, notice his modesty.

> Pashukanis saw this project as one of clarification of a theory already existent, although not rigorously formulated, in Marx and Engels. 'The basic thesis,' he claimed, 'namely that the legal subject of juridical theories is very closely related to the commodity owner, did not, after Marx, require any further substantiation'. This is modest to the point of coy[91] (2015, p. 77).

Henceforth, we take the Pashukanian legal subject critique as Marxist, but not Marxian. It develops incipiently beyond Marx few comments about Law, as admitted by the author. By the preface to the book's third edition, he emphasized "it contained no further essential change (…) not by the fact that I [he] had nothing to add". Because he would elaborate a detailed Marxist manual for the general theory of law, the best would be to leave this work as "an initial experience of the main juridical concepts Marxist critique" (2017, p. 57). This is how we will consider this work.

His departure point is Marx's analysis of the commodity form, but mainly in the second chapter of *The Capital*. The soviet jurist relies on Marx's considerations over the commodity guardians, their legal owners. In particular, we are interested in Chapter 02 of the *The Capital*, also mentioned by Pashukanis:

> Products cannot go to the market on their own and exchange each other. We must therefore turn to their guardians, the owners of the products. They are things, and therefore they cannot impose resistance on man. If they are not willing, he can resort to violence; in other words, you can take them by force (MARX, 2013, p. 159).

[91] "Pashukanis saw this project as a clarification of an existing theory, though not rigorously formulated, in Marx and Engels.' The basic thesis,' he stated, 'nominally, that the subject of legal theories is closely related to the owner of the products, did not require, after Marx, any increment'. This is modest to the point of being shy/demure" (Free Translation).

The commodity is the first object of the bourgeois political economy Marxian analysis, the original one, which reveals the nuclear point of the whole system. It is also Pashukanis' starting point to analyze Law. The commodity's exchange, on its turn, is based on the exchange value and immediately requires possessing agents to carry it out. As aforementioned, Marx identifies the immediate connections between the commodity and those who must be their guardians, who must possess and exchange them, for their will habits the commodity itself (MARX, 2017, p. 159). These are also the subjects who have rights to it before other equal commodity bearers, being their owners. Law must, in the market society, recognize this fact: the exchange and its guardians, for this juridical relation is the form through which commodities are exchanged. And so the law of value attaches to the back of this guardian, now a legal person and mere *persona*, mask, accompanying him.

> By falling into the oppressive dependence of the economic relations imposed at his back, in the form of the laws of value, the economic subject, already as a legal subject, receives as a reward a rare gift: a legally presumed will that makes him a possessor of commodities so absolutely free and equal before the others, just as the rest of them (Ibid., p. 121).

On the second page of the preface, Pashukanis characterizes his method as an attempt to merely approximate the legal form to the commodity form[92]: "the legal subject of legal theories has an extremely close relationship with the owners of products" (2017, p. 60). A supposed unpretentious statement, however, emphasizing the mere approximation, is much more incisive ahead when from the commodity form directly derives the legal subject and from there, the entire legal superstructure:

> Thus, if the analysis of the commodity form reveals the concrete historical meaning of the subject's category and exposes the abstract bases of the scheme of legal ideology, then the historical process of development of the mercantile-monetary and mercantile-capitalist economy accompanies the realization of these schemes in the form of concrete legal superstructure. To the extent that relationships between people are constructed as a relationship of subjects, we have all the conditions for the development of the legal superstructure with its formal laws, its courts, its processes, its lawyers, and so on. It follows that the fundamental features of bourgeois private law are at the same time the most characteristic determinant traits of the legal superstructure (Ibid, p. 62).

In this sense, the leap from the commodity form to the legal subject, by exchange relations, is revealed as an important conditioning for the "legal

[92] And does it attributing this statement to "comrade Stuchka" (2017, p. 60).

superstructure" with all its elements already quite developed – laws, courts, processes, lawyers. A large leap is here undertaken by Pashukanis, which whole trajectory we should not follow. Yet, we assume this dynamic of the legal subject recognition in the commodity form exchange dynamic as one of the modern law's pillars, especially while relating to the corporate form. If dialoguing with the hegemonic theories aforementioned, it is clear that the foundations of the legal subject to Pashukanis is extra-legal, in opposition to the formalists currents.

Continuing his approach, the hegemonic law theory founding concepts, as "the principle of legal subjectivity and the foundations of its schematic", "come[s] from the conditions of the mercantile-monetary economy" (Ibid., p. 63). It is a matter of understanding that the hegemonic legal theories are not mere fanciful creations or ideology solely as in the false consciousness sense, but even the highest degree of their fantasy reflect some aspect of the concrete relations that sustains them. They are active principles (Ibid., p. 62). This means the dogmatic concepts correspond to a concreteness. That is why Pashukanis does not simply give up the most abstract categories, for they reflect "a real process in which human relations become juridical" (Ibid., p. 62). There is, of course, a crucial difference, which does not fit in the criticism that dogmatics would do so "aiming at convenience and nothing else" (Ibid., p. 68-69), but this one is built upon the fundamental division between to be and ought to be. The dogmatics is not only detached from concreteness on which the norm is set and only interested in explaining the norms "in Latin" (Ibid., p. 71). In fact, its more general and abstract concepts should not be simplistically discarded by critics, since, in analogy to the criticism of Marxist political economy, "they reflect specific and, moreover, extremely complex social relations" (Ibid., p. 75) and if critically seized, they can explain a "single and same total and concrete reality" (Ibid., p. 81). From the hidden materiality that sustains law - capitalist sociability, the moment of exchange in which the one who exchanges, to do so, needs to recognize himself as "possessor of products" - arises the principle of legal subjectivity that enables him logically and legally.

Pashukanis also shows this need in a negative way: if one does not formally recognize the possessor, as well as his freedom and equality, the capitalist exchange relationship does not work. The "profound practical objective of legal mediation" is social production and reproduction (Ibid., p. 64). The legal subject exists in unity with the subject who exchanges, and even beyond the norm that creates it. Legal subjectivity as a principle is a creation that justifies and supports a relationship prior to it, which is independent of the norm, the State or any other

third party. It is born from the exchange itself. The Soviet jurist proposes a demystification: it is not the legal norm that precedes the other social relations, including legal relations, but the opposite[93]. Michel Miaille endorses Pashukanis' legal fetishism in his classic work *Introdução Crítica ao Direito* (2005) and develops the role of the norm in modern Law. The norm appears as a reference for the regular functioning of social relations, "before being an obligation, the legal norm is a measuring instrument" (MIAILLE, 2005, p. 91). "(...) everything happens as if Law (norms and persons) could be defined independently of other instances of the social totality" (MIAILLE, 2005, p. 93). This would constitute a legal fetishist inversion, departing from the "binomial norm/person":

> Let us therefore start from this binomial norm/person to unravel the mystery of this fetishism. We voluntarily use the word fetishism in the same sense that Marx used it for the purpose of assessing the commodity. We know that a fetish is an object to which extraordinary virtues are attributed. They become, in certain explanations, words or terms that would have the virtue of making understand, of explaining them for themselves. The commodity, for classical economists, is an illustration of this magic stroke. I will try to show that the norm fulfills more or less the same function, as does the notion of a legal person in the explanation of current Law (MIAILLE, 2005, p. 87).

Herein, the norm would appear as being the source of legal values and principles which one should follow, hiding the fact that it merely expresses the values contained in a specific relation[94] [95](MIAILLE, 2005, p. 95).

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[93] Also about this, Gonçalves, in terms of a legal fetishism, writes Gonçalves: "it creates the image that legal norms are universally valid and laid down by the community, and the result of formal State decrees and procedures, as if they had no connection with the facts that produce inequalities. With this, the legal form concludes the operation initiated by the commodity form, the concealment of the reproduction of production relations" (GONÇALVES, 2017, p. 1044).

[94] "Just as the commodity does not creates value but realizes it in the exchange moment, the norm does not creates obligation but realizes it in the social exchanges" (MIAILLE, 2005, p. 95). Miaille stretches the importance of the fetish of the norm by stating that "Commodities in the economic sphere has the same role as the norm in the legal sphere" (Ibid., p. 94).

[95]Gonçalves articulates this sense of fetish with the moment of *landnahme* (DÖRRE; LESSENICH; ROSA, 2015; GONÇALVES, 2017) or capitalist expropriation of space, as translated by the author. Retaking critically the perspective of primitive accumulation in Luxemburg, Klaus Dörre argues that when capitalism faces space-temporal limits to its expansion, before non-commodified objects, it undertakes an expropriation movement towards non-capitalist spaces *through* "state interventions, regulations, violence direct, physical and symbolic" (GONÇALVES, 2017, p. 1053-1054) . In Dörre's words: "Landnahme was and is a highly political process that depends on state intervention from the outset. Without state intervention, neither changes in property relations and the expropriation of the rural population, nor the adjustment and disciplining of displaced workers for the new mode of production are possible. This is why laws of feudal origin were used again and again to engender a general social compulsion to work and establish political wage norms suited to the system's needs. The 'agricultural people… turned into vagabonds' were to some extent 'whipped, branded, and tortured by grotesque and terrible laws - constrained to accept the discipline required by the wage system" (DÖRRE; LESSENICH; ROSA, 2015,paragraph 8.28). In those moments that Landnahme, preceded by over-accumulation crisis in which capitalism therefore limits to its expansion, Gonçalves argues: "In a situation of explicit institutional repression, the law does not function as a motivational or legitimizing resource for capitalist accumulation or even as a fetishized social form" (GONÇALVES, 2017, p. 1049). At this moment, "there is no abstract equality and freedom, there is no fetishism, alienation or distance from

Pashukanis drives these arguments towards Hans Kelsen, the aforementioned Austrian jurist, who centralizes the role of the norms. Pashukanis argues that if a certain legal norm has no effect in reality, such a norm should be considered nonexistent, thence, moving the legal field out or before the State. In this sense, the legal subject would be created as a specific relationship, before the legal norm itself. He presents the State in a secondary role the creation of legal relations:

> We can imagine a situation, in which, in addition to the two parties, a third force capable of establishing a standard is absent and ensuring its observance, for example, in a contract between varengians and Greeks – in this case, the relationship is maintained. However, it is enough to imagine the disappearance of one of the parties, that is, of one of the subjects with isolated autonomous interest, for the possibility of the relationship disappears immediately (Ibid., p. 100).

Thus, the State does not necessarily exist in every trajectory of development of the legal form. The exchange relations are imposed as dominant and the fundamental categories of law are still created without the State. Pashukanis:

> This conviction that the subject and the legal relationship do not exist outside the objective norm is as erroneous as the conviction that value does not exist and is not determined except for the offer and demand, since, empirically, it manifests itself only in price fluctuation (Ibid., p. 101).
> (...) Thus, the path that goes from production relations to legal relations, property relations is shorter than that traveled by the so-called positivist jurisprudence, which cannot pass without a link between the power of the State and its norm (Ibid., p. 103).

And this argument is reinforced by the analysis of international law, the one used by Pashukanis as an example and proof that the core of the legal form is the legal subject. Throughout its history, international law has persisted as a right without the need for any external coercive body, without a third intervention that would assume the role of guarantor. The author's argument seems to propose us one challenge: while facing international law, to choose whether to recognize its juridicity or whether we will rely on the external interventionist, such as the State, to determine what is juridical. So states Pashukanis:

> Similar contractual relations not guaranteed by any "third force" were based on the entire feudal legal system. Likewise, modern international law also knows no externally organized coercion. Such a genre of unsecured legal relations, of course,

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the world, but explicit legal recognition of asymmetry and inequality " (Ibid., P. 105 4-1055). The same idea was recently exposed in the article *Legal Form and Violence in Capitalist Accumulation: about relations of exchange and expropriation* (2019).

> is not characterized by stability, but this gives us no basis for contesting their existence (Ibid., p. 100).

It is not by chance that some recent and prominent Pashukanists apply it precisely in the field of international law, one in which the State is a legal subject, unitary, abstract and subject to international norms, rather than a third intervener. Here are the approaches of Grietje Baars, China Miéville and Robert Knox[96]. In international law the State is a legal subject who makes contracts. These are not under another sovereign global state, supported by a fundamental norm or subject to a social contract. They do not submit to any previously determined and legitimate violence and do not represent the explicit plurality of ideologies and collectivity. The legal subject original independency before the State and norm is one of his theories features. In this sense, Law would be compelled to assume these categories and forms given by the material relations, instead of voluntarily recognize them[97]. Subsequently, taking this debate to the public and private law dichotomy, it is clear which the author elects as the original instance. Jurists, concrete reality, abstractions and law itself are originated at the specific moment of private law, when "the role of the jurist as a theoretical one directly coincides with his practical social function". Private law is the “most consolidated nucleus of the juridical universe” (Ibid., p. 93). It is private law that is dedicated to the concreteness of exchanges and is the stage of the relation between generic norms, theoretical debates of jurists and the concrete social relationship. Capitalist sociability is one in which social relations are more complex, multiple and diverse, when the roots of private interests multiply and meet in the form of opposite private interests.

> It is not difficult to notice that the possibility of adopting the legal point of view is in the fact that the most diverse relations in the market production take the form of commercial exchange relations and, therefore, remain in the form of law (Ibid. p. 94-95).

This antagonism of private interests is “one of the fundamental premises of juridical regulation”. Private relationships are those that determine the modern law’s origin, the "legal superstructure in its purest form" (Ibid., p.105). In the primitive legal forms it was not even possible to identify the public/private

[96] See BAARS (2011, 2015, 2016, 2019); MIÉVILLE (2005); KNOX (2016a, 2016b).
[97] As noted in Chapter 02, some of the reality strings of the legal personality theories attribute to Law this recognition function, as in Pontes de Miranda. Law would recognize something external to its dimension.

dichotomy in its completeness, and the author's example is the *Roman ius civile*, in which its institutions,

> represent a mixture of public and private legal moments (to employ modern terminology), on the other hand, they carry, to the same extent, religious and, in a broad sense, ritualistic moments. Consequently, at that stage of development, the purely legal moment could not be distinguished or expressed in a system of general concepts (Ibid., p. 105).

Therefore, in Rome, in what he calls the prehistory of law, private relations only develop more autonomously through *ius gentium*. This is because it develops from the exchanges between the Romans and foreigners, previously excluded from commerce in the *jus civile* (Ibid., p. 105). While under the latter the obedience to traditions and internal organization was expected, the *jus gentium*

> rejects everything that is not linked to an end and to the nature of its underlying economic relations. It follows the nature of this relationship and so it seems to be a 'natural' right. It tries to reduce the assumptions of this relationship as least as possible (Ibid., p. 105).

It is in *jus gentium* that we identify a more developed legal form, possible to be structured under own and general concepts. These relations are universal, based primarily upon exchange relations, its supposed naturalness[98], and obedience of their laws. "[A]s artificially manufactured and unreal as it may seem to be a legal construction, as long as it remains within the limits of private law and, first, of the right to property, it will have a firm ground beneath it" (Ibid., p. 95). Neither the normative system nor the guarantor state would be the central activities upon which modern law would have been built. Notwithstanding the use of this division in more abstract debates, its maintenance cannot last along with the development of the theoretical construction and the adding of determinations. It is rather the separation between the public and the private - equally expressed by the dichotomy objective/subjective rights - that derives modern law's peculiarity. The separations are artificial themselves and date back to that described by the young Marx between the bourgeois and the *citoyen*[99] (Ibid., p. 111).

> The differentiation between public and private law already presents specific difficulties here, because delimiting the boundary between the selfish interests of man as a member of civil society and the general abstract interest of the political

[98] This emphasis over *the jus gentium* economic character opens an interesting dialogue line with François L'Italien's approach highlighting the Greek Chrematistics while assessing the modern corporate form. See Chapter 04 and L'ITALIEN, 2012.
[99] Referring to the famous scission of the human into the generic, universal and effectively inexistent citoyen, and the individual, private, egoistic and concrete bourgeois. See MARX, 2010.

> totality is only possible through abstractions. In fact, these moments interpenetrate each other. Hence the impossibility of indicating the concrete legal institutions in which this infamous private interest is completely incarnated without contamination and in a pure way (Pashukanis, 2017, p. 111).

The public private division is not a mere capitalist invention, it reflects the fact that in the bourgeois society the general interest is detached and opposed to the private ones, and in this contradiction they assume the private interest form, the juridical form (Ibid., p.113). There is a clear disagreement between Pashukanis and the hegemonic authors formerly cited. The collective interests, the human person dignity principle, the common good, the prevalence of the norm itself, the State's development and even the reduction of the despotic quantum: those are strange to a legal subjectivity derived from exchange relations themselves. Pashukanis displace the legal formation core, from the public sphere – norms, constitution, State, common good,… - to the private sphere.

Once the commodity exchange relations dictates the content of the legal form, it demands a form through which it will manifest itself, the viability of the mercantile relationship through the legal form. Henceforth, extrapolating the Pashukanis terms, the legal form prevails before its content, for that is given by social relations. The materialistic theory "should not only examine the material content of legal regulation in different times, but also offer a materialistic interpretation of legal regulation itself as a historical form" Ibid., p. 72), "the content is given by the economic relationship itself", and it is up to us to "examine the 'legal' form of this legal relationship as a particular hypothesis" (Ibid., p. 106). This argument approximates to the formalist perspectives. They empty the legal content merely analyzing the normative commands, its linguistic issues, creating, then, a formal reality. These maneuvers dodge the content itself. When the content is approached its concrete motions, axiologies, factualities are solely instrumental, technical, but the axiology of this technicality and its social implications are never evaluated. Therefore a hidden inversion, Law's essence lives in its form, instead of substance[100].

The form of law is based on existing capitalist sociability, specifically linked to the exchange relationship, in which the multiplicity and quality of individual encounters take on new characteristics. Not only individuality and its encounters, but also private property presents its most sophisticated form in the concreteness

[100] In this sense see Balbus (1977), who describe forms of fetishism based on the content/form dichotomy. Though the author make it too much of a general application of the fetish concept, he writes clearly about the centrality over the legal form, in order to abstract concrete elements.

of capitalist sociability. Applied to this, let us repeat one quote: "as artificially manufactured and unreal as it may seem to be a legal construction, as long as it remains within the limits of private law and, first, of the right to property, it will have a firm ground beneath it" (Ibid., p. 95). In this passage besides the centrality of private property, two other aspects are related: the artificiality and potential unreality of legal constructions and the Pashukanian understanding that the "firm ground" of legal concepts is based, first, on the right to property. This opposition of an artificiality/unreality that is built on a "firm ground" resounds the concept of fetishism, the sensitive-supersensitive or a real fantasy. On the other hand, it also highlights Pashukanis' perspective of the property right. If Karl Marx's most important work, *The Capital*, begins with an analysis of the commodity, Pashukanis, paving his own theory about the commodity centrality in Law, situates the property right as the solid rock of modern legal construction, given that it – the commodity, as the fundamental concrete abstraction of capitalist sociability - depends on this category. There is no commodity without private property. However, it is not the first, but the second Chapter of Marx's magnum opus that serves as Pashukanis main reference to departure the legal subject analysis. The commodity exists in the form of private property, this is the "firm ground" of modern law, and yet private property needs to have guardians, which are the legal subjects[101].

3.2 The legal subject: characteristics, State, Corporation and fetish

3.2.1 The commodity and the individual

Our analysis should begin by thinking about the characteristics of the juridical subject, which for the soviet author "derives immediately from the analysis of the commodity form" (PASHUKANIS, 2017, p. 61), being its "indispensable and inevitable" complement (Ibid., p. 63), as well as there is an "extremely close relationship with the owners of products" (Ibid., p. 60). According to him, what he presents as thesis, in fact, had already been proven by Marx in the relationship between the principle of equality and value, and by Engels, in the Anti-Dühring (2015). The subject with capacity for self-determination is the basis of the

[101] The "firm ground" of private property is firm only when it comes to individuals who exchange and here we see a problem, which is the absence of the value theory focused in the first chapter of The Capital. If the will of the guardians of commodities reside in the commodity, that may only be revealed by the first chapters analysis. Chapter 02 already shows reflexes and dynamics based on the first. As we will mention, this departure risks hyperbolizing the exchange agents, individuals, instead of a previously dynamized fetishized subject.

philosophy of bourgeois law and serves the realization of the law of value (Ibid. p. 60).

As we have already stated, Pashukanis identifies this subject with the guardian of the commodity, from the chapter 02 of *The Capital*, replacing the former with the second as synonyms, though the former – the legal subject – inhabits the juridical sphere. In clear divergence with Negri's claim that the nature of the rights must change according to the nature of the subjects (2011, p. 220), he will affirm that "this category can be defined and developed independently of one or other juridical norms concrete content"[102] (Ibid., p.67). Moreover, this subject of law, guardian of the commodity, legally founded on the principle of juridical personality or juridical subjectivity, is not only an "instrument of bourgeois allure", but "an actually active principle" that provides "all the conditions for the development of the legal superstructure" (Ibid., p. 62) with its specific characteristics. Four are the attributes that underlie the legal: freedom and equality that are built upon abstraction and formality.

To the preface of the second edition of his work Pashukanis unites them under the name of "principle of legal personality/subjectivity (which we understand as the formal principle of equality and freedom, the principle of autonomy of personality, etc.)" (Ibid., p. 61). These are recurrent terms to the description of the Pashukanian subject of law [103].

Still in the preface to the second edition he highlights the "self-determination" and the "'free contract'" as the fundamental elements of the bourgeois legal subject:

> Thus, the juridical subject is an abstract commodity possessor and ascended to heaven. His will, understood in the legal sense, has a real foundation in the desire to alienate by acquiring and acquiring by alienating. For this desire to be effective, it is indispensable that the will of the commodity owner meets the desire of another commodity owner. Legally, that relationship is expressed in the contract form or agreement between independent wills. That is why the contract is one of the central concepts of Law (Ibid., p. 127).

[102] In our interpretation, this divergence reveals also different dimensions of analysis. While Negri is disagrees with this independency between the subject and the entitled right, he recognizes that generally the legal system works according to it, usually attributing this to a legal theoretical and practical misconstruction. Pashukanis, on the other hand, recognizes this construction as the concept property itself. The legal subject concept is an atomized abstract homogenizing category.

[103] In the introduction to the author's work by *Boitempo* publishing house, Alysson Mascaro mentions the "bonds between people who consider themselves free and equal [of which] erects an equivalence for the production and circulation that makes them be perceived, one before the other, as subjects of law" (MASCARO in PASHUKANIS, 2017). Also Antônio Negri comments that "the subject is built in his abstraction and formality" (Ibid,. p. 16).

Herein, the foundation of freedom, both present in self-determination and in the contract, is expressed in the will of the legal subject ascended to heaven. This desire, however, already lies in the desire to buy and sell commodities, to alienate by acquiring and acquiring by alienating. Its substance is the will to buy and sell and its form is the contract. Thus, the cited freedom is attributed to an abstract subject and founded upon the private property. The contract is the highest capitalist moment of freedom and equality for it is under this form that they are routinely expressed. The equality is the one opposed to the feudal inequality, dissolving patriarchal relations and allowing the exchange of equivalents. The exchange takes place in terms of commodity equivalences, those in which the agents wills reside. Turned into the involucrum of these wills, the agent becomes merely an empty bearer, undifferentiated. Though the substance of this relation is dictated by the commodity exchange, it appears as the agent's free will. Nevertheless, juridically, the thing does not dominate the human being, but the human being dominates the thing.

> If objects dominate man economically because, as commodities, they embody a social relation which is not subordinate to man, then man rules over things legally, because, in his capacity as possessor and proprietor, he is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations (PASHUKANIS, 2003, p. 113)[104].

Hence, "man becomes a legal subject by virtue of that same need for which the natural product becomes a commodity" (PASHUKANIS, 2017, p. 83).

> Only in situations of mercantile economy is born the abstract legal form, it means, the general capacity to have rights is different from concrete legal claims. Only the continuous transfer of rights that takes place on the market creates the idea of an immutable bearer. In the market, the one that obliges at the same time is obliged. He passes at all times from the position of creditor to the position of obliged. Thus, the possibility of abstracting concrete differences between the subjects of rights and grouping them under a single generic concept is created (PASHUKANIS, 2017, p. 124-125).

The juridical subjects equality lies within the subtraction of the subjects' concreteness, by the abstraction of individual wills expressed in the contract form. Because they have supposedly indefinite wills, "the human will a priori"[105] (Ibid., p.

[104] Still taking from The Capital, chapter 02 as quoted subsequently by Pashukanis: In order that these objects may enter into relations with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property.

[105] Precisely criticized by Engels (2015) and cited by Pashukanis.

63) - but which concretely already resides in the products themselves – these wills, under its abstraction and formalities can be equated with all as legal subjects. Summarizing, to hide the concrete and systemic inequalities and dominations, everything must be ascended to heaven, abstracted from their concreteness[106]. The only way to concretize this abstraction is through formality, the contract. The role of the rule in determining the legal subject is equally voided and formal, given that the substance is not legal, for " the law does not create, but finds before itself and determines it" (Ibid., p. 103-104). Which is why "the legal dogmatics use this concept in its formal aspect" (Ibid., p. 119) and cannot explain which forces led humans “to transform itself from a zoological example into a legal subject” (Ibid., p. 119). Through legal formality, everything written becomes real in the juridical world. Under their legal subjectivities, everyone is equal and free. Freedom and equality are built upon the same basis: according to the Pashukanian Marxist critique, upon the commodity exchange, according to the bourgeois legal philosophy, upon the legal subjectivity principle. As stated by Kashiura Jr, this formal and abstract freedom of the legal subject form:

> (...) presents, however, the imposition as a choice, the compulsory as voluntarily, the socially necessary as an act of individual freedom – it makes us believe, in short, that the dynamics of capitalist society itself, including the movement of movement of man as a commodity, derives entirely from the legal representation of equal and free personality (2012, p. 153).

The fragility of such equality and freedom had already been criticized by Engels in the *Anti-Dühring*. Likewise, equality is based on freedom, which in turn lies in abstract will. Engels stresses that this will is meaningless since its initial formulation, because it never really addressed the human will universally.

> We see that the total equality of the two wills exists even as these two wills do not want anything; whereas equality ceases to exist at the moment when they cease to be human wills as such and become real individual wills, in the wills of two real human beings; whereas childhood, dementia, so-called bestiality, so-called superstition, alleged prejudice, supposed incapacity, on the one hand, and imaginary humanity, the notion of truth and science, on the other side, any difference in the quality of the two wills and in the intelligence that accompanies them justifies an inequality that can culminate in subjugation; what more can we ask for, after Mr. Dühring dismantled so radically, from the base, his own structure of equality? (2015, p. 157).

Such fragility in fact points towards the unequal element produced by the very concept. Such freedom is individualist, so this elevated subject can only be

[106] See BALBUS, 1977.

equated - formally and abstractly - with other individuals. This formal and abstract individual representation - no more a concrete human – is by consequence reified, a concept detached from its concrete reference. Thus, the apparent freedom and equality of the individuals hides the prevailing necessity and control that orders them, the apparent human centered legality hides their transformation into things to be sold in the market, selling their labor force. And so explains Gonçalves:

> The legal subject concept is one that allows to take not only the commodities, but also the man himself to the market (to sell his workforce). Such a concept can only work on the basis of the legal principles of freedom and equality. To dispose of his workforce, man must be free. In this sense, legal freedom is the free disposition of its work capacity as a commodity (GONÇALVES, 2018, p. 106)[107].

This dynamic not only dehumanizes humans as commodities to be sold. It also creates a representation that has its own qualities and can, henceforth, constitute itself as a symbolic repository of rights, as a mathematical point, attributing legal subjectivity, personhood, to something absolutely different from a human. Pashukanis sometimes points to this double movement. Notwithstanding, he most emphatically indicates the best representation of this legal subject in one of the exchange agents: the selfish capitalist individual owner, presupposing ownership.

> This freedom to access the capitalist property is unthinkable without the presence of individuals without property, that is, proletarians. The legal form of the property is by no means in contradiction with the expropriation of a large number of citizens. This is because the ability to be a subject of law is a purely formal capacity. It qualifies all people as equally "worthy" of being owners, but by no means makes them owners (Ibid., p. 132).

Thus, originally, the legal subject is identified with the "concrete personality of the selfish economic subject, of the owner holding private interests" (Ibid, p. 93), having "its material substrate in the person of the selfish economic subject" (Ibid., p. 103). The legal subject is not purely legal, for being still connected to the materiality of the individual human proprietor, nor merely individual for the value laws by its back are an essential feature, and neither sole property, because "the goods cannot go to the market and exchange themselves" (MARX, 2013, p. 159), it is the capitalist commodity owner ascended to heaven. Equality, henceforth,

[107] Gonçalves highlights both the connection of Pashukanis theory and the value theory, as the existence of moments of distortions of this legal form pillars. See more in GONÇALVES, 2017, 2018 and 2019.

means not to differentiate capitalists and workers, hosting them under the same label, derived from the capitalist owner[108].

We understand that the Pashukanian approach deposits a higher weight upon the individual moment, both as a start to the legal form theory, as to derive the legal subjectivity analysis. “Every legal relationship is a relationship between subjects. The subject is the atom of the legal theory, the simplest and indivisible element, which can no longer be decomposed. It is with him, then, that we begin our analysis (Ibid., p . 117)”. Methodologically, there is a parallel between Marx’s commodity and Pashukanis’ subject, both being taken as the central and most abstract aspect of the critique in course. At the same time, Pashukanis legal subject analysis addresses directly and with increased emphasis more aspects from the second chapter of the Capital, mentioning the guardian of the commodity. In this way, the social bond from which the author departures is “a particular relationship between persons as individuals who have commodities, as subjects ' whose will resides in these things '” (Ibid., p. 120) - last term which is also found in chapter 02 of The Capital. Being as it may, the very centrality of the value theory tends to be lost, for the subjectivity assessed has the value theory by its back, but actually is identified with the individual owner. In this case, the commodity will be turned secondary, for the legal subject, firstly is the individual. Guided by the commodity, yes, nevertheless, still one individual. As will become clear in the next paragraphs, this does not mean Pashukanis ignores the legal subjects ascension to heavens, as follows, he emphasizes the dissolution of the human into an abstract “human in general”.

> Simultaneously with this, social life disintegrates, on the one hand into a totality of spontaneously arising reified relations (including all economic relations: price level, rate of surplus value, profit rates and so forth) - in other words, the kind of relations in which people have no greater significance than objects - and, on the other hand, into relations of a kind here man is defined only by contrast with an object, that is, as a subject. The latter exactly describes the legal relation. These are the two basic forms, which differ from one another in principle, but are at the same time interdependent and extremely closely linked. The social relation which is rooted in production presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights.

[108] Another concrete element of this equality is its antagonistic substract. In the same way that individuals compete in concreteness, they also put themselves in law in a competitive equality, "the right that assists them as an owner has in common with the duty only the fact that it is their opposite pole" (Ibid., p. 109). So, it is the conflicting interests in the dispute, the point of appearance of Law and the subjects of law equal and competing. Therefore, such equality would be an equality of **opposition between those who exchange or between the subjects of the legal relationship.** A subject of law corresponds to a subject of duties, because in capitalist society the **antagonism of private interests** is a fundamental premise (PASHUKANIS, 2017, p. 94). Thus, the equality we are talking about is an equality based on the specific capitalist owner in opposition to the other subjects.

> Just as in the commodity, the multiplicity of use-values natural to a product appears simply as the shell of value, and the concrete types of human labour are dissolved into abstract human labour as the creator of value, so also the concrete multiplicity of the relations between man and objects manifests itself as the abstract will of the owner. All concrete peculiarities, which distinguish one representative of the genus *homo sapiens* from another dissolve into the abstraction of man in general, man as a legal subject. If objects dominate man economically because, as commodities, they embody a social relation which is not subordinate to man, then man rules over things legally, because, in his capacity as possessor and proprietor, he is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations (2003, p. 113).

Firstly, the appearance. In Law relations seems to be among persons[109], which are originally identified with the human guardian of commodities. This appearance already hides the fact that in capitalism things dominates humans. As argues Miaille:

> The fetishism of the norm and the person, now united under the word Law, makes forget that the circulation, exchange and relations between people are actually relations between things, between objects, which are exactly the same production and the capitalist circulation. And, in fact, in the legal world everything seems to happen among human persons (...). Everything seems to be the object of decision, of will, in a word, of Reason (MIAILLE, 2005, p. 94).

3.2.2 The ascension to heaven: the State and the corporation

Not only the relation between humans is mystified for being driven by the dynamics of commodities, also because the individual humans are not only kind of persons. The legal subject is an abstract feature parallel to the abstract human labor, in spite of being born attached to the individual owner. So "[a]t the same time (…) that the product of labor becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights" - even though he is a man whose will resides in things (PASHUKANIS, 2003, p. 112). The capacity of man to be a subject of law is born parallel to the commodities' value[110]. Just as the author states that the development of the commodity exchange from a casual act into a "systematic commodity circulation" "made value an economic category", "the embodiment of supra-individual social relations of production", in parallel "the

[109] See also KASHIURA JR., 2012, p. 152.

[110] Especially we must quote: "Hence law in its general definitions, law as a form, does not exist in the heads and the theories of learned jurists. It has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so (PASHUKANIS, 2003, p. 68). "The category of the legal subject corresponds to the category of the value of labor. The impersonal and general quality of commodities is enhanced by the formal qualities of equality and freedom, which owners of commodities confer upon one another. This is the starting point of Marx's criticism of abstract legal categories" (PASHUKANIS, 1980, p. 193). Also see p. 67, 69.

consolidation of social ties and the growing force of social organization, that is, of organization into classes, which culminates in the well-ordered bourgeois state produces the separation of the legal subject from “the living concrete personality” “becoming a purely social function”, “a mathematical point, a center in which a certain number of rights is concentrated” (Ibid., p. 115). The parallel continues with the fetishism of the commodity that "is completed with the legal fetishism" (Ibid., 117). The abstraction of the commodity is followed by the abstraction of the legal subject.

> From this moment on, the figure of the legal subject begins to appear as something different from what it really is, that is to say not as the reflection of a relation arising behind people's back, but rather as an artificial creation of the human intellect. Yet the relations themselves become so habitual that they appear as indispensable conditions for every community. The idea that the legal subject is a purely artificial construct is as much a step in the direction of a scientific theory of law as the idea of the artificiality of money would be for economics (Ibid., p. 118).

Detaching from the individual concrete body, the legal subject finds the State and the fetish surrounding it. The State is at the same time “a secondary, derived element” [111](PASHUKANIS, 2003, p. 91) and the highest expression of “social power, that is, of class organization” (PASHUKANIS, 2003, p. 118). It actually substitutes the subject as it loses material tangibility “as socially regulative forces become more powerful” (PASHUKANIS, 2003, p. 118). Then, “the impersonal abstraction of state power functioning (…) is the equivalent of the impersonal, abstract subject” having its “real basis in the organization of the bureaucratic machine, the standing army, the treasury, the means of communication, and so on” (PASHUKANIS, 2003, p. 119). The State’s original bases derives from “innumerable relationships of actual dependence” (Ibid., p. 147) of these buyers and sellers, to have a proper environment to exchange, to guard the competition principle, to coerce impartially, to provide public sphere administrated towards the public interest, conclusively, as a guarantor of market exchanges. “By appearing as a guarantor, authority becomes social and public, an authority representing the impersonal interest of the system” (PASHUKANIS, 2003, p. 137). This general and impersonal will of the State “forms the basis of the legal theory of the 'state as a person’ ” (PASHUKANIS, 2003, p. 146). This legal image of an impersonal character guiding the public interests though, is narrower than class domination itself, it is just one an ideological reflex of some of the class dominance aspects.

[111] “The political superstructure, particularly official statedom, is a secondary, derived element” (PASHUKANIS, 2003, p. 91).

Also the State sphere of domination is narrower than class domination. Thence, the legal image produced is distortive itself, despite better or worse lenses adjustments.

> Class rule, in both its organized and its unorganized forms, is much more far-reaching than the sphere which can be designated as the state authority's official sphere of jurisdiction. The dominance of the bourgeoisie is expressed in the dependence of governments on banks and capitalist associations, and in the dependence of every individual worker on his employer, as well as in the fact that the personnel of the civil service is closely interlinked with the ruling class. All these facts - and there are any number of them - have no kind of official legal expression at all, yet in their consequences they coincide with the facts that do indeed find official legal expression in the subordination, for instance, of those very workers, to the laws of the bourgeois state, to the orders and decrees of its organs, to the sentences of its courts, and so on. Thus, there arises, besides direct, unmediated class rule, indirect, reflected rule in the shape of official state power as a distinct authority, detached from society. This raises the problem of the state, which poses no lesser difficulties for analysis than the problem of the commodity (PASHUKANIS, 2003, p. 142).

Pashukanis highlights here the multiplicities of facts that have “no kind of official legal expression at all”, referring to the determinacies that occur behind the masks of official descriptions, as we might cite regulatory capture, dependent relations between buyers and sellers, classes, parties, for instance. The State works besides direct class domination, indirectly, “detached from society” also acting upon each individual capitalist. None of these determinacies appear in the legal personhood of the legal theory of State, the recent legal positivism or the natural Law doctrine. This drives Pashukanis to conclude that the juridical State is a mirage[112], not reflecting reality but based upon it and carrying an “element of mystification which we find in the general concept of the 'state as a person'” (PASHUKANIS, 2003, p. 147). A legal truth will always be different from historical and sociological truths, not only because the “dynamic of social life overturns [overflow] rigidified legal forms” keeping jurists always late before the social, but also because the legal frame will make them “render these facts differently” (PASHUKANIS, 2003, p. 147). Pashukanis also expresses this critique referring directly to Kelsen, “the most extreme normativist”[113], that drained the reality out of the State concept, solely elaborating his theory upon norms and duties (PASHUKANIS, 2017, p. 149).

[112] Literally translated from the Portuguese version (PASHUKANIS, 2017, p. 148). The English version used the term constitutional State (Rechtstaat) (PASHUKANIS, 2003, p. 146).
[113] The English version from 2003 translated this as “extreme normativist” (PASHUKANIS, 2003, p. 148).

> The 'state' of the jurists is linked, despite its 'ideological nature', to an objective reality, just as the most fantastic dream is still based on reality. This reality is primarily the machinery of state itself, with all its material and personal elements (PASHUKANIS, 2003, p.148).

Instead of an ideological state, the bourgeoisie first constructed its state in practice, towards the principle that establishes "a third party who personifies the reciprocal guarantees which the owners of commodities mutually agree to as proprietors", its personification as rules (PASHUKANIS, 2003, p. 149)[114]. The purity[115] of the legal State theory hides a class war, where "the machinery of the State represents a very powerful weapon". As the class struggles intensify, the bourgeoisie is compelled to "discard the mask of the constitutional state altogether, revealing the nature of state power as the organized power of one class over the other" (PASHUKANIS, 2003, p. 150). On a footnote, Pashukanis explains, again referring to the Kelsenian theory, that when taken as the "embodiment of an objective rule", impersonal and abstract, "it is almost impossible to conceive of the State as a subject". The contrary occurs when representing self-interests in international law or even domestically, when in litigation with private individuals. Then the legal subjectivity of this impartial and abstract subject appears as a self-interest representation, instead of the sole personification of an objective norm. The State's subjectivity form varies between these two poles (PASHUKANIS, 2003, p. 162-163) the impartial abstract guarantor of market relations and the public interest representative.

Pashukanis does not dedicate a chapter directly to the corporate legal personhood, but draws some of its lines. As perceived in the State assessment, he highlights the relationship between capitalists and the State, better revealed in moments of stressed class struggles. Besides those, the capitalist makes use of the State in a veiled way and, in parallel, dominates directly. One specific fragment about the stock companies, finance capital and the State is worth of transcription:

> As the capitalist mode of production develops**, the property owner** gradually rids himself of technical production functions, thereby **losing absolute legal sway over capital.** In a joint-stock company, **the individual capitalist is merely the bearer of a title to a certain quota of unearned income. His economic activity as** a proprietor is almost totally limited to the sphere **of unproductive consumption.** The main bulk of the **capital becomes an utterly impersonal class force.** To the extent that this mass of capital participates in market transactions – which presuppose that **its individual constituent parts are autonomous** - these autonomous components **appear as the property of legal persons.** In reality, the whole bulk of the **capital**

[114] The Portuguese translation will stress the terms personification of rules (PASHUKANIS, 2017, p. 150).
[115] In discrete reference to Kelsen's Pure Legal Theory.

is controlled by a relatively small group of the largest capitalists who act, moreover, not in person, but through their paid representatives or authorized agents. At this point, the juridically distinct form of **property no longer reflects the real state of affairs, since, by means of share participation and control and so forth, actual dominance extends far beyond the purely legal framework. Here we come close to that moment when capitalist society is ready to turn into its opposite**, the indispensable precondition for which is the class revolution of the proletariat. **Long before this revolution**, however, the development of the capitalist mode of production based on **the principle of free competition results in this latter principle being turned into its opposite. Monopolistic capitalism** creates the preconditions for an entirely different economic system, in which the momentum of social production and reproduction is affected. not by means of individual transactions between autonomous economic units, but with the help of a **centralized, planned organization.** This organization is brought into being by **trusts, combines, and other monopolistic associations.** The Great War witnessed **an embodiment of these tendencies** when **private capitalist and state organizations interlocked to form a powerful system of bourgeois state capital.** This practical modification of the legal fabric could not leave theory untouched. In the rosy dawn of its evolution**, industrial capitalism surrounded the principle of legal subjectivity with a halo by elevating it to the level of an absolute attribute of the human personality. Nowadays people are beginning to regard this principle rather as a purely technical determinant**, **which is well-suited to 'distinguishing risks and liabilities'** or, alternatively, they pose it simply as a speculative hypothesis **lacking any material basis.** Since this latter approach directed its fire at legal individualism, **it won the sympathies of various Marxists, who were of the opinion that it contained the elements** of a new 'social' legal theory corresponding **to the interests of the proletariat. Obviously, such an evaluation demonstrates a purely formal attitude to the problem**. In any case, the theories mentioned do not provide any criteria whatever for a genuine sociological interpretation of the individualistic categories of bourgeois law, which **they criticize**, not from the point of view of the proletarian conception of socialism, **but from the standpoint of the dictatorship of finance capital. The social significance of these doctrines is that they justify the modern imperialist state and its methods,** particularly those employed in the last War. It should therefore come as no surprise to us that an American jurist draws similar 'socialist'-sounding conclusions precisely on the strength of the lessons of the World War, that most reactionary and rapacious of wars in recent history[116] (PASHUKANIS, 2003, p.129-130) (emphasis added).

Rearranging these ideas around the legal subject concept some elements stand out. Pashukanis is describing finance capital and its innovative dynamics, that puts the individual proprietor in a new position. Some will have participation and control, whilst others will be merely entitled to an income quota, changing the property relations and becoming almost an unproductive consumer. The finance capital mass behaves as an impersonal class force. Though its constituents individual capitals are autonomous, the total bulk of the capital is controlled by a "small group of the largest capitalists" and they do not act in person, but through representatives and agents. Each of these autonomous parts is property of legal persons. Henceforth, property works differently: on the one hand, some proprietors

[116] This whole argument is preceded by critiques over the property concept with J. Karner to whom property is a relationship between person and thing, what he classifies, following Marx, as a robinsonade (PASHUKANIS, 2003, p. 128).

have no control, on the other, those who have do not act in person, thence, the impersonal class force. This different form of property no longer reflects reality. This impersonal force does leave its autonomous economic units to act freely. They tend to behave in a centralized, planned organization – trusts, combines, and others. The final embodiment of this organized impersonal class force is the powerful system of bourgeois state force, private capital and state organizations interlocked, instituting a “finance dictatorship”. In this context the legal subjectivity does not, anymore, carries the halo of an “absolute attribute of the human personality”. It is a “purely technical determinant”, “lacking any material basis” and “well-suited to distinguishing risks and liabilities”. One interesting note concerns the legal theory discussions. Pashukanis cite Marxists that were convinced by the technical nature of the legal person, as supported by the formalist theories, for its non-individualist nature. The legal subject would no longer attain merely to men. Pashukanis classifies this as a critique towards individualism from the standpoint of the “finance dictatorship”. Though not in details, Pashukanis modern corporate legal personhood appearance approximates to those of the legal formalists. Its personality persisted in the Soviet State.

> Thus the enterprises belonging to the Soviet state, for example, actually fulfill a communal task; yet, because in their work they are forced to adhere to market methods, each one of them has separate interests. They confront one another as buyer and seller, do business at their own risk, and, as a result, must inevitably engage in legal intercourse with one another. The ultimate victory of planned economy will transform their relationship into an exclusively technical expedient thereby doing away with their 'legal personality' (2003, p. 134-135).

Finally, Pashukanis exposes the three fundamental masks through which man acts in the commodity producing society" a subject Trinitarian:

> Thus the three aspects mentioned above or, as people used to call them, the three principles of the egoism, freedom, and supremely equivalent worth of the personality are indivisibly linked and represent, in their totality, the rational expression of a single social relation. The egoistic subject, the legal subject and the moral personality are the three most important character masks assumed by people in commodity-producing society (PASHUKANIS, 2003, p. 152).

This egoism is not merely selfishness, but the “naked economic calculation”, the legal subjectivity provides autonomy to decide and as moral personality means the “principle of the essential equivalence of human personalities”, thus erasing material differences, as in Engels critique formerly quoted. Though the legal subject is only one of these masks, it is dialectically connected to the other two, constituting a totality.

3.2.3 Pashukanis and the hegemonic theories

Pashukanis approach is unique, shedding light over several obscure elements of the legal subject and legal person theory through a Marxist perspective. Actually, his critiques to the formalist and organicist theories are also very important to bridge a dialogue with the dominant theories[117]. It also better explains a few of our economicist problems in the River Doce case.

Though the theories in the second chapter and Pashukanis' are general legal theories, they do express themselves in quite different terms. One example of this communication issue between these different philosophies is Kelsen's critique to Pashukanis in *The Communist Theory of Law* (1955). While the soviet author describes the legal forms differently throughout history, even considering the normative emphasis essentially a capitalist one for developing in parallel to the abstract value form, Kelsen drives the following critique to Pashukanis, which is not surprising but outlines our communication issue.

> The fact that an individual actually possesses something does not mean that he is its legal owner. Pashukanis cannot ignore this completely. He says: 'Goods-possessors were, of course, owners before they "acknowledged" each other as such'. However, since as a jurist he has to admit the difference between actual possession and ownership, he adds, 'but they were owners in another organic and extra-juridic sense'. 'Ownership' in an 'extra-juridic sense' is a contradiction in terms. Pashukanis must inevitably fall into this contradiction because he describes the legal relationship of ownership without recurring to the legal norms constituting this relationship (KELSEN, 1955, p. 93).

The sequel of the quoted Pashukanis paragraph, though, presents the contrasting use of terms.

> The jurists sense this when they try to construe the institution of private property as a relationship between subjects, in other words, between people. Yet they conceive of this relationship in a purely formal and, moreover, in a negative way, as an universal prohibition, which excludes everybody but the owner from using and disposing of the object. This interpretation may be adequate for the practical purposes of dogmatic jurisprudence, but it is quite useless for theoretical analysis. In these abstract prohibitions, the concept of property loses any living meaning and renounces its own pre-juridical history (PASHUKANIS, 2003, p. 122).

Once Kelsen departs from the normative scheme and Pashukanis from non-legal relations, and their concepts also reflect these different backgrounds, the

[117] In terms of this dialogue, it carries some original difficulties.

property concept itself needs a wider pre-analysis in order to put the dialogue under a common vocabulary. Being as it may, we shall build this dialogue under the terms previously used: body, teleology and form, being the first a reference to the non-legal or extra-legal elements of the legal subject and legal person. The second, its immanent end, which in the hegemonic legal persons theories, for instance, was guided by the human person dignity principle, or cooperation, common-good among others. Thirdly, the legal subjects form itself, how does it appear. These criteria emerged from the previous chapter.

The Pashukanian legal subject's non-legal element is a relation, more specifically, the commodity exchange relation, departing from *The Capital*, chapter 02. Its original body is the guardian of the commodity, immediately abstracted in order to be free and equal to other commodity owners. It is the undifferentiated (class or gender) universal human that is potentially recognized as an owner, also called the moral person. It is ascended to heaven when the social regulative forces increase its powers, being substituted by class organization. Then, not only human characteristics are becoming more abstract, the legal subject concept becomes a mathematical point, and can be extended to the State. This class organization expresses itself either as an impersonal abstract third intervener or as a regular buyer and seller of the international law, for example, an authentic legal subject. Both these expressions, and its intermediates, are still a class instrument and having its material basis in the organization of its bureaucratic machine. The capitalist organization reaches its apex when State and enterprises become interlocked. Pashukanis does not address vastly the modern corporation as a legal subject, but he recognizes some of its characteristics. First, attached to the individual capitalists, and in a second moment detaching from it in joint-stock companies, where some capitalists are mere unproductive consumers of its shares, and others, controls the company, but not in person anymore. Also, this kind of corporation becomes an impartial abstract subject, a merely technical determinant useful to separate risks and liabilities. He does not address its materiality but we might argue, in parallel with the State analysis that it resides in the capitalist enterprise organization itself.

In teleological terms, the legal subjectivity carried the halo of the human subject, apparently, as proposed by the hegemonic theories. Nevertheless, its substance has, since its origins, been the will of the subjects, which reside in things, specifically, the commodity. This will is expressed through an egoistic, selfish, self-interested owner. The egoistic subject of Pashukanis' trinitarian representation of man, the naked economic calculation. Even though originally

attached to the individual, in the State this teleology acquires a double aspect between two poles. Though always appearing as the representative of the public interest, it is actually a guarantor of the capitalist order, when acting as false impartial third party, always being an instrument in service of capitalism. On the other hand, while representing a self-interested part in international law or private litigations it acts in the name of a few capitalist interests. Also, the enterprise legal personality, we should deduct, autonomously works in its economic self-interest, the naked economic calculation, and develops itself in a more organized composition with the State, still having the same teleology. Notwithstanding, we should forget that Pashukanis mentions the legal person concepts' well suitness for risks and liabilities when elaborating about the development of finance capital and stock companies.

Lastly, its form. In this point there is an interesting approximation of Pashukanis with the hegemonic authors, for they indicate the abstractness and formality of the concept. The difference is that this formality originates in the normative system, for some, while to Pashukanis this formality is demanded by the exchange of commodities. To the formalists this formality is the substance of the concept, while to Pashukanis it is merely the expression of relations with determined substance and motion, and thus, purely demands a technical form to express itself juridically. Moreover, this form is fraudulent. Hides the concrete relations, disguise them with new attributes and creates a fantastic representation of the world.

> From this moment on, the figure of the legal subject begins to appear as something different from what it really is, that is to say not as the reflection of a relation arising behind people's back, but rather as an artificial creation of the human intellect. Yet the relations themselves become so habitual that they appear as indispensable conditions for every community. The idea that the legal subject is a purely artificial construct is as much a step in the direction of a scientific theory of law as the idea of the artificiality of money would be for economics (PASHUKANIS, 2003, p. 118).

In this sense, the hegemonic theories describe Karel Kosik's pseudoconcreticity, taking them as truth (KOSIK, 2002). What Negri actually criticizes is the attempt to make the legal subject more than a formal concept by "naturalizing" it. He argues that we must not think of it in analogy to a human person, but merely as a technical solution. The problem here, is not to identify that the corporation is not a human person and should not be seen as one. That is patent. On the contrary, what is curious is exactly why the corporation has almost every attribute that a human person has in the legal world. How different are their

nature presented in Courts? The personification of the commodity was named as the commodity fetish by Karl Marx. It was presented in the first chapter of first book of *The Capital*, as well as emphasized in the latter. We shall move to understand how Pashukanis works with the concept.

He frequently uses the concept of fetishism, citing the fetish of "absolute and untouchable subjective private rights" (PASHUKANIS, 2003, p. 35), the commodity fetishism itself (Ibid., p. 73, 158), the fetishization of the norm – when jurists asserts as existent inefficient regulations – (Ibid., p. 87), legal fetishism – or fetishism of statute and law - (Ibid., p. 117, 158; PASHUKANIS, 1980, p. 132, 138, 143, 180, 277), the fetishism of the State power (Ibid., p. 140), moral fetishes – also fetishism of the morality of the proletariat - (Ibid., p. 158, 159), "all fetishes" (Ibid., p. 158), the fetish of the denial of legality (PASHUKANIS, 1980, p. 138), the fetish of bourgeois democracy – also as fetishist relationship to the basis of formal democracy - (PASHUKANIS, 1980, p. 147), fetishization of economic laws (PASHUKANIS, 1980, p. 253-254). It is indeed a plural usage that stretches the fetish concept to many other matters besides the commodity[118] [119]. This is specially complicated to the fetish concept - which will be better detailed in the next chapter - for it is frequently understood as mere ideology. We could not distinguish if the author alternates the use of the concepts as synonyms or as something else. Ideology and fetishism are not the same category in Marx's work. The first is predominantly epistemological, while the second, ontological. Not only in terms of differentiating fetishism and ideology, but also in terms application we find difficulties opened by the Pashukanian approach. With these latter we should deal

[118] Buckel also gives the concept some steps away from the commodity itself, using Balbus' (1977) abstract/concrete dialectic to spread the fetish concept to other objects broadly. We tend to keep it with the commodity, for its theoretical structure is more solid and developed. As a first impression, to stretch the fetish to everything that represents an abstraction of certain concrete characteristics or brings an idea of autonomy, erases and hides concrete elements, nevertheless, does not personify things in the deep sense commodity is personified, for the commodity motion resides in labour, its dynamic through value and its centrality in the social organization. In this context other fetishes are secondary. The legal form is relationally autonomous, not only in relation to economic interests, but also in political terms. With the latter, it is historically closely linked; courts are institutionalized as state apparatus at the same time, however, the legal form is necessarily separate from the political form. The independence of the judges, the need for legal arguments, specific procedures follow a legal logic, not a political one (2019, p. 3106). It is this "high degree of own logic" (2019, p. 3105) that is the essence of the fetishized legal form expressed in legal procedures, this is where its autonomous spirit is found and from there its phantasmagoric legal corporeity is born. This is also what we find problematic in Derrida's use of the term (2006), which Buckel quotes. In reference to Derrida, Postone's write an interesting critique (1998).

[119] Before this plurality of usages we follow Jappe's recommendation in this work: Following Jappe's diagnosis about the uses of the fetish theory: "The final result of such eclecticisms was, in general, the pure and simple desertion of the very Marxian categories. All these theories have in common the fact that they never find their reference in the Marxian criticize neither of value, nor of commodity, being incapable to ascribe them any central role. And despite how frequent it was in certain times the use of the terms 'fetishism' and 'alienation', the truth is that these phenomena were never positioned in dependence of the commodity structure" (JAPPE, 2006, p. 22).

in a few pages. Now we should analyze Pashukanis' most emphasized and better constructed kind of fetish: the legal fetish.

In the same way that the commodity fetishism has not "exclusively psychological significance" or "relate[s] solely to experiences, representations, and other subjective processes" (PASHUKANIS, 2003, p. 74), the legal fetish is not a mere psychological element, from the ideal realm as Pashukanis stresses in the specific case of the principle of legal subjectivity, it is a "concretely effective principle":

> (…) the principle of legal subjectivity (which we take to mean the formal principle of freedom and equality, the autonomy of the personality, and so forth) is not only an instrument of deceit and a product of the hypocrisy of the bourgeoisie but is at the same time a concretely effective principle which is embodied in bourgeois society (PASHUKANIS, 2003, p. 40).

Pashukanis works with the commodity fetishism in parallel to the legal one[120]. "[T]he legal fetishism complements the commodity fetishism", for just as value is attributed to the object as a product of labor, "a doubly mysterious form", appearing as "relations between things", "the mystical quality of value", also as subjective law is attributed to the individual, and as "relations between the wills of autonomous entities equal to each other - of legal subjects", a "no less enigmatic phenomenon" (PASHUKANIS, 2003, p. 117). The legal subject phantasmagory resides in the fact that legal subjectivity is created and attributed to the commodity owner - an individual – as an abstract feature. Value, in its abstractness, makes the commodity materiality and use-values simply a shell for its quantitative substance. The legal subject makes of the human individual merely a shell for its abstract, free, equal and "rights holding essence". The legal subject is, in its abstractness and undifferentiation, the subject compatible with the abstract nature of value. To be a legal subject means to be a bearer of rights. It is a kind of relation where "man is defined only by contrast with an object" (PASHUKANIS, 2003, p. 113). Again:

> If objects dominate man economically because, as commodities, they embody a social relation which is not subordinate to man, then man rules over things legally,

[120] Also Balbus (1977) will theorize the legal fetishism in a kind of parallelism, identifying and "essential identity or homology between the legal form and very "cell" of the capitalist society, the commodity form" (p. 573). This fetish is moved by the abstraction of the concrete elements of reality in Law. This same dynamic is identified in politics, by the abstraction of the concrete individual into citizens, and the community into an illusory community. Herein, the subjectivity is attributed to Law, generally, which acquires a life of its own.

> because, in his capacity as possessor and proprietor, he is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations (PASHUKANIS, 2003, p. 113).

Still in a parallel, as commodity circulation becomes systematic, value ceases to be casual and acquires “objective economic significance”. This process with the legal subject is caused by the “consolidation of social ties and the growing force of social organization”. “At this point the capacity to be a legal subject is definitively separated from the living concrete personality, (…) becoming a purely social function” (PASHUKANIS, 2003, p. 115). Therefore, the mysterious forms of relations between wills of autonomous entities. Lastly, the highest form of expression of these entities would be in the State[121].

Though the parallel between the two fetishes are made, the fetish here takes a different significance. If commodities come to life and are personified, controlling individuals, for their will reside in them, mere guardians to fulfill the commodities wills, with the legal subjectivity humans are abstractized and “impersonified”, thus, being dehumanized by losing its complex characteristics. On the other hand, class organization is personified, as the State and enterprises, or anything else for the material tangibility of the concept is already lost. Some minor but important questions remain. Is the development of legal fetishism parallel to the commodity fetish or actually derived from it? Is the legal subjectivity born by the individuals back, with the commodity, or is this abstract person born by the commodities back, incarnating in the individual, its material guardian? What about capital itself? Who is his guardian? Pashukanis does not develop in details the legal fetishism by the complex and global structure of capitalism in its financialized stage, if not addressing considering the State interlocked with it? How could we develop the corporate legal personhood? Many authors use elements from the Pashukanist fetish theory, driving it into paths we should not develop. Part of these misleadings we attribute to the multiple approach of the fetish concept, the confusion between that concept and the ideology concept and also to the emphasis over the individual

[121] It is memorable the Kelsenian analogy with primitive thinking on this double existential feature. He writes that this “duplication of the object of knowledge” into an object and its invisible spirit is animism (KELSEN, 1949, p. 93)[121]. According to him, the legal person is not a separate entity besides its duties and rights, for it is only the set of norms that establishes its duties and rights, personifying it. Kelsen’s answer is Pashukanis problem. How can a set of legal norms be and determine without connecting to the materiality it addresses? Henceforth, how can this legal world be detached from the concrete one? The outcome of what Kelsen perceives as overcoming the duplication of reality is precisely the fetishized legality of which Pashukanis writes, the doubly mysterious form. Thus denying explaining how man was transformed from a zoological individual into a legal subject (PASHUKANIS, 2003, p. 111). While Kelsen affirms the autonomy of the legal system, Pashukanis understands that this autonomy is precisely the legal fetishization.

and the commodity, instead of the capital, the corporate form and more abstract legal personalities.

As seen, Pashukanis builds a bridge linking political economy, the Marxist theory and the legal theory. Notwithstanding, his concept of legal fetish maybe driven to many divergent conclusions and his developments over the corporate form and finance capital are quite modest. We should take these steps in the next chapter, presenting the value theory and the fetish theory interlocked, an assessment of the corporate form, its elements and its personification history, in order to subsidy a corporate legal personhood concept that addresses its nature.

4
MONSIEUR LE CAPITAL'S SOUL, BODY AND FORM

> "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"
> Edward, First Baron Thurlow 1731 -1806[122]

Regardless of Pashukanis crucial contributions, naturally, there are blank spaces or grey zones in his legal subject theory, specially concerning the corporate legal personality. To deal with the legal person concept in capitalism and considering the dam rupture analysis we used to start this research, two concepts seems largely uncovered. First, the fetish concept, specially in its development to corporations and financialized capital – he mentions joint stock companies and finance capital – and retaking the value-form as a central element in a Marxist critique. Second, the corporate form, the form assumed by the protagonist legal subjects of the analyzed disasters, those who conducted the economic interests in the process. Our intentions here are not to find legal fetishisms, generically or from other nature than the commodity's, for it would demand, as previously mentioned, a deeper analysis in State theory and other matters. Taking *The Capital's* last book in account, we will address fictive capital, interest bearing capital and the fetish theory that it clarifies. Besides Marx's works we will use Hinkellamert's, Silva's, Grespan's, Jappe's, Barreira's, Iacono's, among others. These approaches will present both the fetish and value theories in a convergent way, considering our purposes, taking them as central to a Marxist perspective. Here the corporate soul

[122] BAARS, 2019, p. 46.

is driven by a chrematistic dynamic of value valuing itself and constitutes the corporate legal subjectivity teleology.

This level of abstraction must substantiates and assume a specific form, thus, leading our discussions to the corporation, which historic development in Britain and the United States will be analyzed in order to understand the formation of its legal characteristics. Pineault, L'Italien, Morin, Irish, Neocleous, Dowbor, Carrol, Roy, and others, we will shed light over these characteristics as the shareholder's liability – following Pashukanis hints – its concentrating natural dynamics, the real person analogy, and its recognition. Once unveiling its main elements, we will identify a body and form to this subject and the legal subjectivity role and concept. There, unavoidably, we should mention Grietje Baars' 2019 book on corporations and some of her previous works. They connect the legal person to corporations, analyzing them historically, and the Capital fetish dynamics naming it *Monsieur Le Capital*.

4.1 Monsieur Le Capital's soul and body: fetish and value theories

4.1.1 The development of fetish theory and the capital's axiology

> Bourgeois society is the most developed and the most complex historic organization of production. The categories which express its relations, the comprehension of its structure, thereby also allows insights into the structure and the relations of production of all the vanished social formation out of whose ruins and elements it built itself upon, whose partly still unconquered remnants are carried along within it, whose mere nuances have developed explicit significance within it, etc. Human anatomy contains a key to the anatomy of the ape. The intimations of higher development among the subordinate animal species, however, can be understood only after the higher development is already known. The bourgeois economy thus supplies the key to the ancient, etc. (…) Capital is the all-dominating economic power of bourgeois society. It must form the starting-point as well as the finishing point (MARX, 1993, p. 105).

Baars (2019) directly addresses the corporate legal personhood as Capital fetishized. We shall assess the value and fetish theories analyzing the history of the concept as well as their development with Marx. Besides Marx's own works, specially *The Capital* books I and III, also supported by Iacono (2016) Rosdolsky (1977), Hinkellamert (2010), Grespan (2002, 2011, 2019), Silva (2011, 2018), and Jappe (2006, 2014). Beginning the incursion towards the fetishism theory, the Italian philosopher Alfonso Maurizio Iacono provides us a compelling account of its history. We will not absorb his interpretation of Marx's fetishism, but the historical account of its apprehension by Marx before *The Capital.* As early as 1842, about

20 years before *The Capital* books[123], when writing to the journal *Rheinische Zeitung,*

> Marx would made excerpts from some texts devoted to the issue of fetishism. These texts included a German translation of Charles de Brosses's book. He also made excerpts from Meiners's treatise on comparative religion, from Böttiger's and from Benjamin Constant's *De la Religion* (IACONO, 2016, p. 103).

Charles de Brosses (1709-1777) was a French noble and writer, Voltaire's foe, by whom was dubbed as the "little fetish" for his height and creator of the fetishism concept, according to Morris and Leonard (2017, p. 02). De Brosses' book was indirectly quoted in Marx's article *Debates on the law on thefts of wood* (Portuguese version, Boitempo, 2016; and the English version, 1975) in its last paragraph. The quote comes from de Brosses' text, entitled *On the worship of fetish gods* (2017)*,* in which he tries to link the different kinds of fetishism in history, in other words, the various expressions of the deification of an object. It is in this sense that he describes the behavior of Cuban natives. They discovered that a Spanish flotilla was coming and, as to avoid them, they tried to please the Spanish god and to send them away with his consent. As explains De Brosses, it was quite clear to the Cuban natives, which was the Spanish fetish. "One need not ask whether rifles or gunpowder are terrifying Fetishes or Manitous for them; but no Divinity of this sort has been so fatal to the Savages as gold, which they believed with certainty to be the Spaniards' Fetish" (2017, p. 58). They would pray for their God, a basket of gold, sing around it and, after pleasing him, send him away back into the sea. Native Brazilian fetishes are also described by Charles de Brosses. He would speak about a "large dried calabash into which they throw grains of corn or small stones: each household has its own, to which they present offerings" (DE BROSSES, 2017, p. 58). They believe that the spirits reside there and would respond to them.

Marx writes his first reference to the concept of fetishism directly linking to de Brosses' idea and the Cuban example, but using it not to reveal the so-called primitive conception of the savages, but instead, as a critique to the Rhinelanders.

> The savages of Cuba regarded gold as a fetish of the Spaniards. They celebrated a feast in its honour, sang in a circle around it and then threw it into the sea. If the Cuban savages had been present at the sitting of the Rhine Province Assembly, would they not have regarded wood as the Rhinelanders' fetish? But a subsequent sitting would have taught them that the worship of animals is connected with this

[123] The texts that originated the first book were written between 1866 and 1875, the second, around 1868 and 1881, and the third around 1864 and 1865 (HEINRICH *in* MARX, 2014, p. 20).

> fetishism, and they would have thrown the hares into the sea in order to save the human beings (1975, p. 262-263).

As emphasizes Iacono, this shift of senses - or shift of observers, as he writes – that Marx does "enhances a critical understanding of his world" (IACONO, 2016, p. 104). So in Marx's first use of the term, it already had a different use, though apparently the same sense, also compelling us to understand the fetish concept not as a critique of the original fetishes, or at least not as one that could not be driven towards his own society.

A socially constructed object that is "alienated", "external to men" and that becomes something "beyond and above men", like the fetish gods, appears again in Marx's critical reflections in 1844, in notes about James Mill's comments on money. There, humans appear dehumanized by the mediating activity of money, which is outside and above them.

> His slavery, therefore, reaches its peak. It is clear that this mediator now becomes a real God, for the mediator is the real power over what it mediates to me. Its cult becomes an end in itself. Objects separated from this mediator have lost their value. Hence the objects only have value insofar as they represent the mediator, whereas originally it seemed that the mediator had value only insofar as it represented them. This reversal of the original relationship is inevitable. This mediator is therefore the lost, estranged essence of private property, (…) (1975, p. 212).

The mediator and what it mediates switch their original places. Both Iacono (2016) and Rosdolsky (1977) find here the concept of fetishism. Even though the term is not used, its feature of a crude sensuous form, money/metal, that superstitiously substitutes its essence, the social dynamic by which human products complement one another. Nevertheless, “[t]he metallic existence of money is only the official palpable expression of the soul of money, which is presented in all branches of production and in all activities of bourgeois society" (MARX, 1975, p. 213)[124]. In that same year the term would be directly mentioned and the parallel with religion repeated in the *Economic and Philosophical Manuscripts of 1844* (*in* 1975b and 2004). The deforming mirror now reflects the human essence of religion or private property as something outside the human, "an external, mindless objectivity". (…) who look upon private property only as an objective substance confronting men, seem therefore to be fetishists(…)" (MARX, 1975b, p. 290-291). Here, the comparison is between Luther’s and Adam Smith’s

[124] As put by Iacono, Marx is influenced by Feuerbach's *The essence of Christianity*, comprehending this process of substituting the "soul" of money for its "metallic" existence actually as a process in which "men see their will and their activity as if in a deforming mirror and, thus, do not really perceive them" (IACONO, 2016, p. 107).

discoveries. The human essence of religion and private property was hidden behind an external and mindless objectivity of them, as if they were independent from society. The term fetishism as used here is above all bonded to money, the one good that is the bond of all bonds, what links humans and mediates imagination and sensuous reality.

> Money's properties are my — the possessors— properties and essential powers. (…) I am bad, dishonest, unscrupulous, stupid; but money is honoured, and hence its possessor. Money is the supreme good, therefore its possessor is good. (…) If money is the bond binding me to human life, binding society to me, connecting me with nature and man, is not money the bond of all bonds'? Can it not dissolve and bind all ties? Is it not, therefore, also the universal agent of separation? (…) Shakespeare stresses especially two properties of money: (1) It is the visible divinity—the transformation of all human and natural properties into their contraries, the universal confounding and distorting of things: impossibilities are soldered together by it. (2) It is the common whore, the common procurer of people and nations. The distorting and confounding of all human and natural qualities, the fraternization of impossibilities — the divine power of money—lies in its character as men's estranged, alienating and self-disposing species-nature. That which I am unable to do as a man, and of which therefore all my individual essential powers are incapable, I am able to do by means of money. Money thus turns each of these powers into something which in itself it is not—turns it, that is, into its contrary. (…) it converts my wishes from something in the realm of imagination, translates them from their meditated, imagined or desired existence into their sensuous, actual existence—from imagination to life, from imagined being into real being. In effecting this mediation, [money] is the truly creative power (1975b, p. 323-324)[125].

Marx's analysis of fully developed capitalism will only appear in *The Capital: A critique of Political Economy* and, thus, also the fully development of the fetish category. One of the most important manuscripts that leads his thought to this apex is the *Grundrisse.* There, he makes just a few uses of the term fetishism. One of its applications is still a religious allusion to the "African fetish" and its transition to Voltaire's Supreme Being in comparison to the transition of a North-American "savage" hunting tool to the Bank of England's Capital (MARX, 2011, p. 46). In this sense fetish is just an identification of idolatry, more similar to de Brosses' use, a different concept. The second use of the term though, by the second half of the book, describes its idealism and most of all its mystifying feature in the "crude

[125] In this case, the notion of fetishism is applied to nations that are not yet fully capitalist. In Capital, as it is known, (commodity) fetishism pertains to the stage of fully developed capitalism. This is due to the fact that the concept of fetishism is a general one and indicates the attribution of human qualities and products to things, whereas the objects of fetishism vary with the varying of the practical and historical conditions. Not fully capitalist nations fetishize metal money, while a fully developed capitalist system fetishizes commodities: what this step indicates, in actual fact, is the growing power of the inversion and, thus, the growth of the capitalist mode of production. This means that the process of inversion that masks or distorts real relations between people depends on what society itself makes visible, on the point of development society has arrived at and, therefore, on the point people find themselves at, as far as their effective social practices are concerned (IACONO, 2016, p. 111).

materialism of economists", that would consider social production relations as natural quality of things (MARX, 2011, p. 922). Amaro Fleck notices that, though formulated in an advanced stage, the fetish appears in the *Grundrisse* only as a matter of consciousness, once it is a problem of the crude materialism of economists (2012, p. 146). It would not be productive to debate the direct use of the term where it was little used, so we should turn ourselves to the construction of the category's sense. Following this methodology, Rodrigues (2018) would turn his attention not the word itself but its characteristics, which also were developed in these manuscripts. He understands that fetishism appears in the *Grundrisse* as an implicit aspect of money and abstract labor, attached to the ideas of strangement/alienation and autonomy.

> The social character of activity, as well as the social form of the product, and the share of individuals in production here appear as something alien and objective, confronting the individuals, not as their relation to one another, but as their subordination to relations which subsist independently of them and which arise out of collisions between mutually indifferent individuals. The general exchange of activities and products, which has become a vital condition for each individual - their mutual interconnection - here appears as something alien to them, autonomous, as a thing (MARX, 1993, p. 157).

This autonomy of social activities reaches the money-subject, the one specific commodity that acquires the privilege to represent every other commodity in their exchange value, indifferent to natural properties and manifesting its social characters as natural ones themselves. Under these social relations individuals are ruled by abstractions (MARX, 1993, p. 164-168), but not only. These abstractions command the production process, making concrete elements as machineries, animated by the same forces, to dominate workers (Ibid., p. 693). In this sense, value is the one that puts in motion all these social relations, it is the one that "enters as a subject" (Ibid., p. 311). Capital's self-realization and multiplication, its expansive value dynamic is what comes to Marx attention in the next lines. Moreover, its expansion in contradiction to the labor's value production. Conclusively, we agree with Rodrigues that the fetish category is outlined in the *Grundrisse*, even though that does not imply that the category is already developed as in *Capital*[126].

The category of fetishism opens, runs through and concludes Marx's analysis in the *Capital* books. In the very first chapter of the first book, the section four that concludes his first thoughts over the commodity is called *The fetishism of*

[126] While reification and fetishism are terms rarely found in the manuscripts, the terms alienation and strangement are used with a considerable frequency, and will be lesser used in *The Capital* books.

commodities and the secret thereof (1995 and 2013). By the third book, in its last section *Revenues and their sources* (1999 and 2016) Marx "not casually, retakes the commodity fetishism and its relation with alienation and the typical capitalist mystification" (CARCANHOLO, in MARX, 2016)[127]. Fetishism is then developed through its main work, *Capital*, not as a mere analogy but as a core feature of commodities, money and capital forms.

Though distant from the complex structure of fetishism in Marx, De Brosses' perspective already showed a pillar of this structure: the gold, as seen by the Cuban savages, was not a mere object anymore. It was, instead, a phantasmagoric deified subject. A seeming subject, not only by the Cubans belief but also for its concrete relations with the Spaniards, henceforth, more than a phenomenon from the intellect, but a concrete social one. Perhaps, their infortune was to try to deal with the Spaniards gods in the same way they would do with theirs, instead of understanding its own manners. In the Capital, though, Marx is more specific. Firstly, he locates the fetish origins:

> The mystical character of commodities does not originate, therefore, in their use-value. Just as little does it proceed from the nature of the determining factors of value (…). Whence, then, arises the enigmatical character of the product of labour, so soon as it assumes the form of commodities? Clearly from this form itself (1995, p. 34).

Then, his famous definition is stated, highlighting the fundamental inversion perpetrated by the commodity form:

> A commodity is, therefore, a mysterious thing, simply because in it the social character of men's labour appears to them as an objective character stamped upon the product of that labour; because the relation of the producers to the sum total of their own labour is presented to them as a social relation, existing not between themselves, but between the products of their labour (1995, p. 34-35).

This social relation appears as a "fantastic form of a relation between things" (MARX, 1995, p. 142/pdf), specifically because the social characteristics of private labor are only expressed through the exchange of the labor products, reduced to this moment. Being so, "they do not appear as direct social relations between persons, but rather material (*dinglich*) relations between persons and social relations between things" (MARX, 1995, p. 142/pdf). Though this inversion can only be operated by a human mind, clearly, Marx explains why fetishism is not a mere concept of the intellect: it is born before the conscious perception of it.

[127] Originally: “não casualmente, a temática do fetichismo da mercadoria e sua relação com a alienação e a mistificação tipicamente capitalistas” (CARCANHOLO, in the preface of MARX 2016).

> Hence, when we bring the products of our labour into relation with each other as values, it is not because we see in these articles the material receptacles of homogeneous human labour. Quite the contrary: whenever, by an exchange, we equate as values our different products, by that very act, we also equate, as human labour, the different kinds of labour expended upon them. We are not aware of this, nevertheless we do it. Value, therefore, does not stalk about with a label describing what it is (MARX, 1995, p. 36/pdf).

Therefore, it is also not a matter of uncovering the secret of commodities, because mere consciousness cannot undo it. Instead, to those who exchange, "their own social action takes the form of the action of objects, which rule the producers instead of being ruled by them" (MARX, 1995, p. 37/pdf). Precisely because of this domination, these relations are seen as natural by the bourgeois consciousness. Besides, its ideological role tends to get more and more sophisticated in less general and more developed forms than the commodity form, namely, money and capital fetishes (MARX, 1995, p. 40/pdf). The money form already introduces us to the capital fetish in its autonomy. Once it allows C-M-C to be decomposed into two separate and opposed moments of C-M and M-C, the money autonomy may already be glimpsed. Just a glimpse, for the commodity and money fetishes are approximations of the capital enchanted world revealed in its most developed forms (BARREIRA, 2020, p. 150-152). The most developed fetishized forms which are pointed by the third book, firstly appears in chapter 24, which is called *Externalization of the Relations of Capital in the Form of Interest-Bearing Capital.*

> The relations of Capital assume their most externalized and most fetish-like form in interest-bearing Capital. We have here M-M', money creating more money, self-expanding value, without the process that effectuates these two extremes. In merchant's Capital, M-C-M', there is at least the general form of the capitalistic movement, although it confines itself solely to the sphere of circulation, so that profit appears merely as profit derived from alienation; but it is at least seen to be the product of a social relation, not the product of a mere thing (MARX, 1999, p. 268/pdf)[128].

Not only the production process is hidden, "bringing not even a scar of its birth", but money actually creates more money, as "value that values itself". The

[128] "The character and tendency of the process M-C-M, is therefore not due to any qualitative difference between its extremes, both being money, but solely to their quantitative difference. More money is withdrawn from circulation at the finish than was thrown into it at the start. The cotton that was bought for £100 is perhaps resold for £100 + £10 or £110. The exact form of this process is therefore M-C-M', where M' = M + D M = the original sum advanced, plus an increment. This increment or excess over the original value I call "surplus-value." The value originally advanced, therefore, not only remains intact while in circulation, but adds to itself a surplus-value or expands itself. It is this movement that converts it into capital" (MARX, 1999, p. 97/pdf).

characteristics that Marx highlights during this chapter are autonomy, self-expansion and self-reproduction, which he attributes to subjects.

Following, Marx uses the term "personified"[129] in order to describe, not Capital, but the capitalist.

> We saw also that Capital - and the capitalist is merely Capital personified and functions in the process of production solely as the agent of Capital - in its corresponding social process of production, pumps a definite quantity of surplus-labor out of the direct producers, or laborers (MARX, 1999, p. 558).

In this regard, Assis (2011, 2012) argues that the genesis of Capital as an "autonomous processual figure" (2012, p. 02) depends on the capitalist to deliver his will and consciousness to Capital itself, even though unconsciously. This dynamic of the Capital that subjugates the worker through the capitalist and depends on the agency of that capitalist is crucial to comprehend responsibility. On the one hand, it means as puts Silva, that Capital hides behind the capitalist and behind all those who serve as his arms and heads, the production process itself, everything between M and M', disappearing. Notwithstanding, it is still the wheel that drives corporate disasters, for example. On the other hand, one may deduct that liability, then, is individualized, either in the capitalist or in the others that worked as his hands and heads. Among those individuals, the agents of Capital are the most precious ones, hence their protection and the protection of fetishized Capital were assured by the creation of the corporate form and the corporate legal personhood, as will be explained further more. If fetishism hides the humans of the production process, showing it as self-expanding Capital, law

[129] Personified as incarnated, embodied. If until now Marx spoke about Capital as a subject, as a personified thing, here the capitalist appears as merely Capital personified. Actually, this same apparently contradictory explanation was already seen. It occurs precisely at the end of the first chapter and at the beginning of the second. By then, Marx explains the fetish of the commodity form, the commodity becomes an autonomous subject, while in the second chapter he famously, as Pashukanis quoted, states that the commodities cannot go solely to the market and trade themselves. This puzzle brings us to the very limit of the fetish concept. Its mystifying, impossible, unexplainable, illusory features were already exposed. We have even seen it in earlier works as just a phenomenon from the intellect, but this is not the case. Its concreteness was also emphasized during the cited development of the concept. So what does Marx mean when highlighting this fetish and subsequently saying that commodities cannot go to the market to trade themselves and that the capitalist is merely Capital personified? The context of that last quote and its sequence is crucial. When writing about Capital dynamics, there are two aspects that seem contradictory specifically because of the fetish phenomenon. Fetishism inverts the very social relations in terms of the inversion of things and humans. In substance, one can tell that things can never take the place of humans, and neither humans becoming things for their nature is given. Nevertheless, Marx works with the idea of an ever-expanding social world, humanizing increasingly. Hence, in a paragraph where Marx tries to perceive capitalism through a historical perspective, then the capitalist personifies Capital (repeated in 1999, p. 561), which means that this process could never be non-human, and by the other hand, that in the dominant social relations, this human appears as merely an "agent" of Capital, by which we may understand that Capital drives humanity.

inverts this world when working with liability and Capital as a subject is hidden behind legal masks and production agents. Only individuals and legally represented parts of Capital may be addressed, specific masks, missing the dimension of Capital as a totality.

> In capital-profit, or still better capital-interest, land-rent, labour-wages, in this economic trinity represented as the connection between the component parts of value and wealth in general and its sources, we have the complete mystification of the capitalist mode of production, the conversion of social relations into things, the direct coalescence of the material production relations with their historical and social determination. It is an enchanted, perverted, topsy-turvy world, in which **Monsieur le Capital and Madame la Terre** do their ghost-walking as social characters and at the same time directly as mere things (Marx, 1995, p. 564).

Grespan will put it as the theft of subjectivity from work by the Capital. The substance of work could never be autonomous and self-determined without destroying the capital domination, its subjectivity. *Monsieur Le Capital* is a blind and automatic subject, that lives from the real subject, vampiresquely draining its subjectivity (2002, p. 43-44). As Jappe states, value "gets beneath the skin of men and make them docile executors of its logic" (2006, p. 85). Concluding Marx's thoughts on it, the theory of fetish can be separated neither from the development of commodity, money and Capital, nor from the inversion between subject and object. Lastly, Capital becomes a subject itself, though this subjectivity was built upon an illusion. It surpasses the mere human individual capitalist in many aspects, dominating it through its own social dynamic. In this sense, it dominates the capitalist individuality itself, being the source of his respectability once he is solely a gear of the capitalist mode of production, even obliged by competition to follow Capital's orders as immanent, as coercive laws[130].

By grasping this specific understanding of the fetish category, it is not possible to completely sustain Pashukanis' uses of it, that may vary from a simply illusional perspective to forms, which show no clear direct connection with Capital or the inversion between subject and thing. To comprehend the construction and full development of the legal subject concept without taking into account the fetishism, its complexity and specifities seems to leave a considerable gap in a Marxist legal theory[131]. Though Pashukanis claims to use Marx's methodology

[130] The contradiction never disappears in the capitalist heart. Quoting Goethe Marx would say that two souls live inside him, human fruition (entreasurement) and accumulation (MARX, 1995, p. 448/pdf).

[131] This perspective supports the last chapter's critiques of the fetish uses, once they have used the term either by analogy, transplanting it to another social dynamic, disregarding the subject/object dialectic from more concrete economic complexes or, as Derrida does, by highlighting specific aspects that disconnect it from the very theory of value. It is necessary to be clear about what

from the commodity form in order to construct a theory of Law, the legal subject's development is mainly built upon the second chapter of *Capital*, instead of the first. There, Marx accentuates the role of the agents of commodities, that they cannot go to the market by themselves and exchange themselves. Hence, the legal subject becomes the commodity owner, firstly, which undermines the role of fetishism and centralizes the individual's[132]. Actually to "leave temporarily the first section between parenthesis and to start to read it by the second section" is a well-known suggestion, or an "imperative recommendation" from Louis Althusser (free translation, ALTHUSSER in MARX, 2013, p. 65). According to Hinkellamert, a tradition of Marxists – that came after Pashukanis himself - divided Marx's lifetime works between a Marxian and a pre-Marxian periods, pointing to a rupture instead of continuity and leaving core categories outside of Marxism. "What was left out was precisely the fetish theory. It seemed no longer a scientific theory, but ideology or an allegory. The fact that precisely in the fetish theory is present the very roots of Marx's thought was lost" (HINKELLAMERT, 2010, p. 147).

In addition, Anselm Jappe (2014) mentions several problematic uses of the category that would lack its proper comprehension citing, for example, its psychoanalytical use that would express an exaggerated love for commodities, an admiration for its features and its vulgar Marxist use as a spontaneous ideology (JAPPE, 2014, p. 08). Other Marxists would emphasize reification as in *History and class consciousness*, from Gyorgy Lúkacs, or alienation as did István Mészáros in *Marx's theory of alienation* (2016). For Jappe, the "theory of fetishism is identical to the theory of value" translating a "basic reality of capitalism", thus bringing the fetish to a central position (free translation, 2014, p. 09)[133]. By this basic inversion, humans serve commodities, society is dominated by real and anonymous abstractions, ultimately by value as Capital, the automatic subject[134] [135].

fetishism is meant when used, since many branches of its uses had grown in the last years. To separate the Marxian use of it from Capital and the dialectic of subject and object, form and substance, seems impossible.

[132] Which could be read as emphasizing the second chapter before the first. Barreira explains the second chapter is not a continuation of the first and development of the value-form, but rather something as "structural elements for a social action theory" (BARREIRA, 2020, p. 139).

[133] Equally states Moishe Postone, in 2014, p. 172.

[134] Some debates should not be developed in this work, even though relevant and deeply connected to authors that support our argument. For example, the use of alienation and ideology as core categories instead of fetish.

[135] One of most important debates that will not be examined here concerns the precise structure of fetishism. It occurs that the fetish of commodity, money and Capital has different approaches in Hinkellamert, Jappe, Grespan, Assis and others. Jappe, for example, would have a very specific understanding of the fetish as approached in the third book of Capital and the first. Hinkellamert analyzes it holding on to the second chapter of the first book, using the inverted reflection image as the axis. Grespan will take the terms representation (vorstellung) and presentation (darstellung) as key concepts of the fetish dynamics in Marx. We should not dissect and confront those different approaches for two reasons. The first is that it escapes the objectives of this work, driving too far from

Retaking the theme, Jappe denounces that a traditional Marxist may comprehend the fetish of commodities merely as mystification, which it certainly is, but not only. Once humans' private work products are put in relation to others as things with their own qualities, as if naturally ordered, this mystification becomes "not just a representation of inverted reality but an inversion of reality itself. And, in this sense, the theory of fetishism is the center of every critique that Marx points to the fundaments of capitalism" (free translation, JAPPE, 2006, p. 33)[136]. There is an identity between the value theory and that of fetishism. Henceforth, Jappe also applies fetishism to other spheres as mentioning a constitutional fetish or a fetishist system. Here, these terms clearly follow the dynamics of Capital. Regarding the relation between the capitalist and Capital, being the latter the autonomous subject of capitalism, this fetishism would mean the impossibility of governing the dynamics that Capital has put in motion itself. Taking this meaning into account, the fetish in capitalism must ultimately address this automatic subject, its inversion of objects and subjects, and the valuation of value in itself.

4.1.2 The development of the contradiction: the separation between the liable and the decisive

Grespan will perceive a capitalist mode of representation in correspondence to the capitalist mode of production in his recent book *Marx e a crítica do modo de representação capitalista (*2019). He articulates the book using as axis two German terms: *darstellen* and *vorstellen*, respectively, to present and to represent, in free translation. He analyzes these terms in Marx's late works, in order to reveal both the logic-dialectical dynamic of concreteness in his theory (presentation) as to show the necessary representations that these developments create. Closer to our concern is Grespan's perception of the capital motion towards its autonomy and a few mentions to Law's role in it.

Grespan argues in terms of the autonomization of property in private property, a process that begins with the primitive or original accumulation when work is separated from land and the worker not anymore works for himself, but its

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the legal personhood itself. The second is that it would lead to deeper more abstract and unresolved debates, for some of these approaches are very recent. Be that as it may, their common ground is the centrality of the fetish concept, its essential and phenomenal dimensions that subjectifies Capital, and links to the value theory. This is the basis from which we shall step to corporate form and from there to legal subject/person.

[136] Originally: "o fetichismo não é apenas uma representação invertida da realidade, mas uma inversão da própria realidade. E, neste sentido, a teoria do fetichismo é o centro de toda a crítica que Marx dirige aos fundamentos do capitalismo".

product becomes something alien to her/him. Having nothing left, s(he) is forced to sell his body and mind subordinating himself to the capitalist in equal rights. Here, Grespan highlights that the legal equality must be merely formal, once Capital and its explorative behavior dictates the substance. Thus, he writes, "to Marx, this opposition between juridical equality and social inequality is dialectical" (2019, p. 83), constituting merely formal and apparent equality, in opposition to the substantial and concrete motion of Capital. This moment indicates the next stage of Capital existing in a corporate form and legal person. Substance, he states, "consists in the anchoring of a social relation in a material substrate, so the relationship becomes something more than merely conventional and the substrate of the real aspect of fetishism" (2019, p.87). The developing of value in more alienated, ideologized and fetishized forms – commodity, money and capital – subverts the real substance of production, namely labor, into these explorative social forms. Capital, through its opposition to work, becomes the activity itself, wholly, vampiresequely stealing the substance of labor. It shows itself as the beginning and the end of the process, value valuing itself, dictating the social conditions for it to happen.

> (…) more than process, Capital is the processing substance, more than movement the moving substance. He 'passes constantly from one form to another, without losing itself in the movement, and thus converts itself in an automatic subject'. (…) Not unintentionally this subject is called 'automatic'. Opposing to the Hegelian subject, Capital's active force is not and cannot be determined as self-consciousness. When Marx writes 'subject', in this case, he has in mind a force that is independent of consciousness and will of the agents and that seems to have consciousness and will of its own (2019, p.88-89).

Although Capital becomes a subject, it is an automatic subject, therefore a subject that can never fully become one, for the opposition where it was born may never take labor out of its substance. Being as it may - a subject born in the inversion of concrete social relations - it is a formal subject that is derived into substance by concealing the worker, the production process, use-value, i.e., the social materiality that constitutes the real substance. Hence, fetishism has its hiding character not as a double movement but as single one. Capital can only be a subject when mystifying, hiding, concealing the real subject behind a form. Two terms, according to Grespan in a Marxian analysis, describes this movement: *darstellen* and *vorstellen*[137].

[137] It must be said that Grespan's uses of these terms are quite recent and yet to be discussed. An English reader should also be aware of the problem of reading it in a secondary translation, once Grespan did it from German to Portuguese and I did it freely from Portuguese to English. It also

The idea of form is used by Marx in different contexts. It describes how things and persons organize themselves, "even defining what may be an individual, by intermediation of social processes of individualization". A social form operates the motions of substance. Materially, different products may only be exchanged because of a formal involucre, which is, in other terms, the external differentiation of the internal (GRESPAN, 2019, p. 97-99). Briefly, d*arstellen* – presentation – is precisely the movement of passing from an internal opposition onto an external opposition. The internal opposition of use-value and value is presented as an external opposition of commodity and money, yet "not as if each one was a contradictory unity of opposing determinations, but as something simple and univocal, playing a harmonic role, complementary to each other" (GRESPAN, 2019, p. 105-106). Money "presents the celestial existence of commodities, while commodities present the secular existence of money" (MARX *apud* GRESPAN, 2019, p. 120). Hence, presentation (*darstellung*) is the development of an internal opposition onto an external one, hiding its origins and creating the forms by which value can move, henceforth, persons and things acquire masks that allow them to play their social roles. Representation (vorstellung), on the other hand, at first seems symmetrical to presentation, but more than that actually is an opposition. If abstract labor presents itself as the measure of money, the price form represents that abstraction as if it were of its own.

> Thus, the opposition between to present and to represent is the clash between the real measure, actually presented, with the ideal measure, as Marx puts it. Money determines itself from the beginning as the measure of value by representing it in the prices of commodities, even before the act of exchange, when it is still not actually present. This is impossible in direct exchange of commodities by commodities, in which both presents their values in each other, simultaneously being presented and represented, as Marx's example in Aristotle. With money, though, such simultaneity breaks; translated in price, the representation converges in it as its privileged form, exclusive, as product of money's own exclusivity. And, presenting itself as pure use value, commodities delegate the role of representing to the commodity which body confronts theirs as something radically different, which matter incarnates the sensible supersensible of fetishism: 'the price, or the money-form of commodities as their general value form, it is a diverse form from their palpably real corporeal form, thus, it is a merely ideal or represented form (GRESPAN, 2019, p. 116, free translation)[138].

should be highlighted that neither the Portuguese nor the English translations systematically worked with the translations of darstellen and vorstellen as Grespan did. Thus, quotations will refer only in *apud* from Grespan's work.

[138] Originally: "Assim, a oposição entre apresentar e representar configura-se pelo embate da medida real, de fato representada, com a medida que Marx chama de ideal. O dinheiro se determina já de início como medida do valor ao representa-lo nos preços das mercadorias, mesmo antes da realização da troca, quando ainda não está presente em efetivo. Isso é impossível na troca direta de mercadorias por Mercadoria, na qual ambas apresentam os recíprocos valores uma na outra, ao mesmo tempo apresentados e representados, como no exemplo de Aristóteles mencionado por Marx. Com o dinheiro, no entanto, tal simultaneidade se rompe; traduzida em 'preço', a

The position of money and Capital is the position of an inverted world. If from the commodity point of view, use value is real and value is ideal as projected in money, by the money perspective, the commodity materiality is mere form, mere materialization of value, ideally existing as money, while its reality is exchange value. The inversion is finally consummated. The dominance of money and Capital that drives production and circulation elevates this inverted idealistic world of money as the reality seen in the normal functioning of the system. Money is here the beginning and the end, while use values of commodities are consumed, money and value stay and reproduce themselves. "[F]rom it servant figure (…) it suddenly becomes god and lord in the commodity world" (MARX *apud* GRESPAN, 2019, p. 120).

> It is the very contradiction that marks the fetish, mediation hypostasized in finality, a banal thing that opens the gates of a 'celestial existence'; symbol that undermines the substance into something terrestrial. It both seems to be, by its ideal side, as it is, while product of that real ideality (GRESPAN, 2019, p. 120)[139].

The fetish is characterized by the inversion of the logical-dialectical development of the categories, a new social form that hides the contradictions of the substance, creating an ideal projection of this inverted world. According to Grespan, ultimately, Capital as a subject is the last unsolved contradiction. A formal automatic subject that presents labor productive forces as capital productive forces, representing Capital as the subject. Ultimately, Grespan perspective endorses the significance of the fetish as understood by this work[140].

What Negri perceived as the naturalization of the legal personhood and proposed to overcome it by adjusting the “lenses” of the language and concepts, could not be done from a Marxist perspective. The subjectivity of the capital is previous to the norms themselves. Such a denaturalization could not take place in the legal realm by mere reconceptualization for its economic determinacies are

representação nele converge como sua forma privilegiada, exclusiva, fruto da exclusividade do próprio dinheiro. E, apresentando-se como puro valor de uso, as mercadorias delegam o papel de representar à mercadoria cujo corpo confronta o delas como algo radicalmente distinto, cuja matéria encarna o ‘sensível suprassensível’ do fetichismo: ‘o preço, ou a forma dinheiro das mercadorias, como forma de valor delas em geral, é uma forma diversa da forma corpórea palpavelmente real delas, portanto, é uma forma apenas ideal ou representada”.

[139] Originally: “É a contradição mesma que marca o fetiche, mediação hipostasiada em finalidade; coisa banal que abre os portais de uma ‘existencial celestial’; símbolo que rebaixa a substância a algo somente ‘terreno’. Ele tanto parece ser, pelo seu lado ideal, como é também, enquanto produto daquela idealidade real”.

[140] His perspective of presentation and representation are yet to be discussed deeply and systematically, as his insights over law, private property, contracts and assets, considering his work is quite recent.

given. Also, one can understand that the fetish is no mere illusion for derived from concrete relations, at the same time, it is a misleading image that reframes concreteness (BARREIRA, 2020, p. 151). On the other hand, Pashukanis concept of legal person is centered on the individual and then virtually ascended to heaven towards the State, but mainly with no clear development of the capital form itself. This step, to perceive the theory in its totality, points towards the most fictitious aspect of the legal person concept, the one that addresses the corporate form instead of the individuals. Moreover, the capitalist organizations as corporations are not built upon associativity among individuals but domination itself (BARREIRA, 2020, p. 154). Here, the axiology and collectivity of the legal person concept could not stand. A corporate legal personality is driven by the value-form developments towards its self-expansion and its body is hierarchical, embedded in a domination process.

Without any mediation between money and more money, capital appears as a "mysterious and self-creating source of interest" (MARX, 1999, p.268/pdf), depending merely on its owner if the money will be used as money or as Capital. By choosing the latter, the capitalist leaves the process to the "automatic fetish of capital" as in a relation of a thing with itself, just as reproductive as a pear-tree generates pears, solely presupposed to its own reproduction, the capitalist mystification in its most flagrant form, its most pure fetishist form, and finally – in his own terms – M-M' as a subject. This form is different from the industrial capitalist profit because of its purity, its independence from the production process:

> The division of profit into profit of enterprise and interest (not to mention the intervention of commercial profit and profit from money-dealing, which are founded upon circulation and appear to arise completely from it, and not from the process of production itself) consummates the individualization of the form of surplus-value, the ossification of its form as opposed to its substance, its essence. One portion of profit, as opposed to the other, separates itself entirely from the relationship of capital as such and appears as arising not out of the function of exploiting wage-labour, but out of the wage-labour of the capitalist himself. In contrast thereto, interest then seems to be independent both of the labourer's wage-labour and the capitalist's own labour, and to arise from capital as its own independent source. If capital originally appeared on the surface of circulation as a fetishism of capital, as a value-creating value, so it now appears again in the form of interest-bearing capital, as in its most estranged and characteristic form. Wherefore also the formula capital -- interest, as the third to land -- rent and labour -- wages, is much more consistent than capital -- profit, since in profit there still remains a recollection of its origin, which is not only extinguished in interest, but is also placed in a form thoroughly antithetical to this origin (MARX, 1999, p. 564/pdf).

Barreira explains that the value automatism is then lifted to the position of the most developed form of capital (2020, p. 161), which leaves the production

process with labor and profit exteriorized. Capital itself becomes a commodity, sold and bought in the market and having solely its self-expansion as its use-value. This process, still represented in M-M', has in appearance all its production and circulation substituted by juridical forms. It's point of departure and return are mediated by juridical forms, which erases the economic process itself and turns it, in appearance, into a juridical transaction that hides everything between these two poles (BARREIRA, 2020, p. 162-163). Hence, if the capital fetish consists in erasing the production process and appearing independently, the legal maneuver allows it to happen, serving as a cover and providing a juridical sense. However, this covering does not address directly the worker, but rather the functional capitalist.

> Interest is, therefore, the expression of the fact that value in general-materialized labour in its general social form-value which assumes the form of means of production in the actual process of production, confronts living labour-power as an independent power, and is a means of appropriating unpaid labour; and that it is such a power because it confronts the labourer as the property of another. But on the other hand, this antithesis to wage-labour is obliterated in the form of interest, because interest-bearing capital as such has not wage-labour, but productive capital for its opposite. The lending capitalist as such faces the capitalist performing his actual function in the process of reproduction, not the wage-worker, who, precisely under capitalist production, is expropriated of the means of production. Interest-bearing capital is capital as property as distinct from capital as a function. But so long as capital does not perform its function, it does not exploit labourers and does not come into opposition to labour. On the other hand, profit of enterprise is not related as an opposite to wage-labour, but only to interest (MARX, 1999, p. 260/pdf).

An internal opposition is created between the capitalist activity attached to the production process and the pure and highest form of the capitalist fetishized circuit, driving in the same direction of the development of the value-form, its fetishization and dematerialization of the production process. This separation is made clear by the creation of stock companies (MARX, 1999, p. 302), also described later in the following excerpt:

> Capital-profit (profit of enterprise plus interest), land/ground-rent, labour-wages, this is the trinity formula which comprises all the secrets of the social production process. Furthermore, since as previously demonstrated interest appears as the specific characteristic product of Capital and profit of enterprise on the contrary appears as wages independent of Capital, the above trinity formula reduces itself more specifically to the following: Capital-interest, land/ground-rent, labour-wages, where profit, the specific characteristic form of surplus-value belonging to the capitalist mode of production, is fortunately eliminated (1999, p. 555).

By emphasizing interest in this formula, Marx reaffirms its role as the core of the capital fetish. Later on, while he describes once more Capital as social relations

that are represented in things lastly personified through the very opposition with labor force[141], he also refers to labor as "mere ghost" (MARX, 1999, p. 556). For those who defends the concreteness of these ghostly forms of subject and personified forms of things, vulgar economists, Marx writes: they only systematize, interpret and endorse the production system itself using an absurd and unexplainable formula. This might also be applied to hegemonic theoreticians of law and their consequences to disaster production analysis.

The aforementioned separation of profit and interest, the lending/owner capitalist – money-capitalist - and the capitalist functional capitalist – mere manager - reflects one crucial characteristic of the modern corporation and its ascension. Engels highlights the different context of the joint-stock companies and their importance when Marx wrote his notes that would constitute the third book, once in “1865, when the book was written, a change has taken place which today assigns a considerably increased and constantly growing role to the stock exchange”. By then, “stock exchange was still a secondary element in the capitalist system”. The “gradual conversion of industry into stock companies”, taking one branch after the other was still coming. Engels already noted that joint-sock companies

> tends to concentrate all production, industrial as well as agricultural, and all commerce, the means of communication as well as the functions of exchange, in the hands of stock exchange operators, so that the stock exchange becomes the most prominent representative of capitalist production itself (ENGELS in MARX, 1999, p. 614/pdf).

This ascension parallels the growing importance of the separation between money-capitalists and managers, through which “the capitalist disappears as superfluous from the production process” (MARX, 1999, p. 265/pdf).

Isolating the money-capitalist and linking him to the corporation merely by its dividends and reminds us of L'Italien’s critique of the organizational aspect of modern corporation. He begins relates the M-M' critique - the fetishized capital circuit – with the Aristotle distinction between Chrematistics and Oïkonomia. The first refers to the "techniques of enriching with the finality of enriching" while the second means the "group of norms that drives the art of guiding and organizing reasonably the domestic or the domain, here understood as a totality constituted of distinct realities that characterizes the realization of the practical life in the world". This separation between an activity that takes the world and its whole

[141] Also mentioning its future form, however, once the sentence is not readable, precisely its subsequent words, I won’t use it specifically here.

materiality as an end and another that makes enriching as its sole purpose is a guiding line in the development of capitalist societies. M-C-M' and C-M-C refers to Chrematistics and Oïkonomia respectively (L'ITALIEN, 2012, p. 21-22). Capital entails its chrematistic dominance over production through the formal and real subsumption of labor[142].

In this sense, the capital fetish is clearly seen in the capitalist organization of production, once the value process of valuing itself leads the shaping of the production process towards a finality. The decision-making precedes the production process. The poor subjectivity and autonomy left to workers' collective body are due to the enrichment of Capital's subjectivity and autonomy. The contradiction that underlies the commodity fetish emerges within the production organization, starting with the simple cooperation, passing by manufactories until the development of the corporate form (Ibid., p. 30). In this latter organization of production Capital is found in its most fetishized form, globally financialized and operated ultimately by shareholders and managers – capital as property and capital as function. L'Italien does not write in terms of fetishization. Instead he uses subjectivity, autonomy and most emphatically, "the new capitalist subject" that constitutes these categories in our interpretation. His conclusions are expressed this way:

> In fact, the "poverty" of an individuality dispossessed of its objective conditions of realization, "poverty" adequately expressed by the abstract category of labor-power, is, for Marx, the negative or the inverted reflection of the power of Capital itself, the power of "organizational" devices for capturing subjectivity by Capital. Saying simply, the original laying bare of subjectivity by Capital is the anthropological and historical condition necessary to the initial development of the logic of capitalist organization (Ibid., p. 30-31)[143].

[142] Through the formal subsumption “accumulation is realized primarily as the extraction of absolute plus-value, whose production and amplified reproduction is only made possible through the extension of working hours beyond the working time necessary for the reproduction of the labour force, as well as with the continuous expansion of the number of workers entering the capitalist relationship” (Ibid., p. 28-29)

[142].While the real subsumption, “unlike the typical form that precedes it, the real subordination of labour to Capital consists of a systematic dynamic and virtually limitless restructuring of the labour process itself. Instead of aiming mainly the lengthening of the working hours, the capitalist will seek to reduce the relative share of necessary labour to increase the share of surplus value. This strategy of extortion of relative surplus value will pass, as we know, by reducing the cost reproduction of the labour force, which implies the increase in the average productivity of social work”(Ibid., p. 28)[142].

[143]Originally: “En fait, la « pauvreté » d’une individualité dépossédée de ses conditions objectives de réalisation, « pauvreté » qu’exprime adéquatement la catégorie abstraite de force de travail, est, pour Marx, le négatif ou le reflet inversé de la puissance du capital lui-même, puissance des dispositifs « organisationnels » d’arraisonnement de la subjectivité par le capital. Pour le dire d’un trait, la mise à nu originelle de la subjectivité par le capital est la condition anthropologique et historique nécessaire pour le développement initial de la logique de l’organisation capitaliste”.

As he writes, workers' collective body operates a will that is strange to them, with no finality for them, but for the capitalists that run the company. L'Italien makes the bridge from Marx's Capital to the industrialist production organization highlighting its ascending autonomy and above all, it's direction towards value self-expansion.

Hinkellamert in his book *La maldición que pesa sobre la ley: las raíces del pensamiento critico de Pablo de Tarso* points to the transition from the fetish of capital to the capitalist company calling them ghosts that hides even the shareholder assembly behind them, "the characteristic mask of the capital"[144] (HINKELLAMERT, 2010, p. 153). This mask is given by the reflection of reality through juridical relations. The first inversion of reality is born in the value theory, when abstract labor is hidden by the value form, generating commodity-form, money-form and capital, as the most developed substance of this inverted world. But what is the form that capital assumes when reflected in the mirror of legally recognized institutions? As Jappe states, in the world of commodities, the State and politics are secondary, subsystems (2006, p. 157-158), necessarily obeying the value laws. In the River Doce Disaster capital is never addressed as capital, but as Vale, Samarco, BHP Billiton and Renova Foundation, as the corporate forms that provide an individual face to the capital behind them. Their substance is capital in function and capital as property. The isolation of the value in the interest bearing capital - in securities - from any material process, apparently, "opens the door" so the process of financialization can be understood as mere quantitative distortion of the real economy (BARREIRA, 2020, p. 174). Everything is quantified in terms of gains expectations related to the securities, henceforth, developing risk management (SOTIROPOULOS et al, 2013, p. 156) or making liability becoming accountability (BAARS, 2019, p. 54), under the shareholders – the personification of capital as property – control.

How does this contradiction, "the fountainhead of all manner of insane forms" (1999, p. 321/pdf) of the capitalist mode of representation[145] derives into a "specific mode of institutionalization" (BARREIRA, 2020, p. 172)?

[144] Originally: "máscara característica del capital".

[145] Barreira highlights that instead of taking this step towards the interest-bearing capital some authors would attribute to the corporate guiding wheel mere gambling, selfishness, greed, speculation, personal decisions, personal contacts, a political project of economic elites to restore their power, among others reasons residing outside the value theory itself. This leads to the conclusion that the power of capitalists emanates from the juridical structure and also emancipation might flow from Law (2020). Related to these approaches is the antiproductivist turn (GONÇALVES, 2017).

> The critique of law from the presentation of formal determinations reveals the fetishist character of its intended autonomy, though this alone does not deplete the scientific knowledge about the social-juridical reproduction, which materialization in legislation and in courts demands an analysis in another level of abstraction (BARREIRA, 2020, p. 102).

4.2 Monsieur Le Capital's: the corporate legal structure origins

4.2.1 The corporate legal structure in Britain

> John Henry said, "I feed four little brothers
> And baby sisters' walkin' on her knees
> Now did the Lord say that machines ought to take place of livin'?
> And what's a substitute for bread and beans? I ain't seen it!
> Do engines get rewarded for their steam?
> (The Legend of John Henry's Hammer, Johnny R. Cash / June Carter)

Recently, some interesting reconstructions of the subjectification process of Capital into the corporate form and its legal personhood emerged, giving an empirical, historically situated and contemporary form of Marx's value theory. Eric Pineault (2000) and François L'Italien's (2012) *Capital Béhémoth: Contribution à une théorie dialectique de la financiarisation de la grande Corporation,* for example, offer a solid analysis linking central aspects to this matter, for instance, as financialization, its domination over the material process, the autonomization of its activities through its own legal personhood and its connections to Marx's theory, hence describing a process through which Capital compels production, desubjectifies workers and produces itself as the new capitalist subject, the modern corporations. There has been a disdain for the historical approach of the corporate legal personhood in Brazil as seen in the second chapter, just as Baars highlights in other countries (BAARS, 2019, p. 35-36). .

About the ascension of the modern corporate form legal characteristics two historical interpretations diverge in the first moment, highlighting the United States of America or the British Empire as the possible stages of the corporate legal personification. L'Italien develops the corporate theory towards legal personification through the US-American history, especially at the end of the nineteenth century and beginning of the twentieth, arguing it is the first clear-cut form of corporation personified due to the direct use of the real entity theory in courts. His historical perspective draws from Horwitz (1977, 1986, 1982), Mark (1987), Perrow (2002), Pineault (2000) and Roy (1997). Furthermore, L'Italien believes the US-Americans had the appropriate environment to develop the corporation's organizational form as the capitalist subject. The relation between

corporations and the State was a crucial element for its better unfolding. In his perspective, if the European building of the State attended to an interventionist agenda, orbiting the political determination of society, in the United States of America individual rights were the most basic founding myth, meanwhile the State was perceived as alienation of individual liberty, a permanent menace to individuals. In order to mitigate this threat, the US-American State institutions would be emptied of its instituting capacities, shaping the form of an Un-state "a specialized social organization intended to coordinate society's powers functionally in the name of their reproduction", hence nurturing a political culture of an absence of a sense of State. Legislators, for example, will have their activity dried in between constitutional individual rights and a "government of judges", guaranteed by the Common Law's dynamic. In this disposition, State's governing will be developed in pragmatism and as a control of capitalism effects, never of its causes (Ibid., p. 91-98), reminding the Brazilian environmental disasters. Capital has, under these circumstances, an appropriate environment to flourish as an autonomist personalized body.

Baars will trace this development in the British Empire, drawing from Ireland (1996, 1999, 2002, 2009, 2017), Neocleous (2003), Harris (2003, 2007), among others, by the central corporate characteristics, which, they will argue, emerged in Britain in its complete modern developments in the middle of the nineteenth century. Running through both historical accounts will permit a better comprehension of modern corporations' construction as a subject and its characteristics, including juridical conjectural and structural differences. While the British historical perspective better contributes to comprehend the subjectification process itself, the US-American part adds clarity and elements to the "corporation as person" legal theoretical debate[146].

[146] One might argue for the necessity of depicting the civil law context, as it is the case of the Brazilian jurisdiction. Notwithstanding, two reasons moved this work into this approach settled upon the US-American and the British experiences. The first one touches the question of the origins and the general universality of the modern corporation characteristics. As it will be argued forward the general characteristics of modern corporations around the globe tends to be the same. According to Baars, " the rest of the world" adopted the Anglo-Saxon model (BAARS, 2019, p. 33). Taking that into account, the origins of these characteristics articulated and solid are disputed only between the two countries we have approached, later spreading even to civil law countries. The second reason refers to the possible specificities of the Brazilian experiences. In this regard, not only the aforementioned arguments would fit, but also the level of specificities would take the debate into another level of abstraction, beyond the limits of this work. Pargendler (2012 and 2018) has analyzed the Brazilian context of corporate legal personhood. She claims the Brazilian Sociedade Anônima (SA) possesses every one of the cited major corporate features but carries strong tendencies towards its "decorporatization".

Both currents bring the Italian *commenda* and the medieval corporation as the modern corporation's forerunners[147]. The *commenda* – also used similarly as the *compagnia and societas*[148] - was an investment made by wealthy families in commercial expeditions around the XVI century. According to Weber's *Economic History* (2012) this would be the first form of company (p. 195). It would put commercial organization on the tracks that would lead it towards the necessary separations of the corporate form, as those of the domestic and commercial accountabilities and between the "objective property of the *commenda* and the subjective rights of its shareholders (…) which would free at once the financial power of the corporation" (L'ITALIEN, 2012, p. 103). In the case of debts, the investor's liability would also be limited to their specific investment amount, prefiguring the idea of limited liability. Later on, these divisions would generate a specific dynamic in which the company would own the invested amount of money. It would be called the "company's body" (*corpo della compagnia*) and give birth to the concept of capital in Weber (WEBER, 2012, p.197). Thus, the *commenda* functioning has similarities with the modern corporation, more than its direct descendancy or legal form, the medieval corporation.

This latter, on the other hand, contributes with its semantic and institutional heritage, as Pineault highlights, despite designating something radically different from the modern corporations:

> The corporation in the Middle Ages appears like an organ of traditional society which received from the political authority (royalty) the recognition of the monopoly to exercise the regulatory power over a particular aspect of social and economic life which it thus transforms into status. The social mode of existence of this traditional corporation is not, like the modern corporation, modeled on that of a singular "person" exercising his free will, but rather on that of the traditional family institution. The traditional corporation does not aim at reproduction and regulation of a specific form of property, it aims at the reproduction and regulation of social status, and in doing so, rather than being a form of private economic interests concentration, it aims precisely the opposite by embedding private activity in a sphere aimed at the general interest of society (PINEAULT, 2000, p. 12)[149].

[147]Harris draws a specific account (2003).

[148]Baars, as many historians, does differentiate these three categories. About the inconsistent differences between the terms *commenda, compagnia* and *societas* see PRYOR, 1977.

[149]Originally: La corporation au moyen-âge apparaît comme un organe de la Société traditionnelle qui a reçu de l'autorité politique (la royauté) la reconnaissance du monopole de l'exercice d'une puissance de régulation sur un aspect particulier de la vie sociale et économique qu'elle transforme ainsi en statut. Le mode d'existence sociale de cette corporation traditionnelle n'est pas, comme la corporation moderne, calqué sur celui de la «personne» singulière exerçant son libre arbitre, mais plutôt sur celui de l'institution de la famille traditionnelle. La corporation traditionnelle ne vise pas la reproduction et la régulation d'une forme spécifique de propriété, elle vise la reproduction et la régulation d'un statut social et ce faisant plutôt que d'être une forme de concentration des intérêts économiques privés, elle vise justement le contraire em encastrant l'activité privée dans une sphère visant l'intérêt général de la société.

Legally, this corporation arrived the sixteenth century as one of the three main concepts applied to groups of individuals in England, besides partnerships and trusts (HARRIS, 2003, p. 15). By then, incorporating already meant creating a legal personality distinct from humans, though not theoretically based. This personification permitted some abilities: immortality of the entity, being able to own and convey land, to sue and be sued, and to make bylaws for internal affairs (HARRIS, 2003, p. 18-19). When this corporate form combines with guilds' financial elements, another "*commenda* form" is created, a joint stock corporation, "the forerunner of today's multinational corporation" (BAARS, 2019, p. 58). The spreading of corporations – as trading companies - increased in the end of the XVII century in England, especially in its last decade "the total amount of investment in joint-stock companies doubled" (BAKAN, 2004, p. 09). Though multiplying acceleratedly, these institutions that approximate to the modern corporate form still had political intervention as a core element of their creation and being, either as a regulated corporation – which emerged in short-distance trades - or as a joint-stock corporation - better fit to long-distance trades (HARRIS, 2003, p. 43). The East India Company, chartered in the 1600s, was "the first to combine incorporation, overseas trade and joint-stock raised from the general public" and, a century afterward, was one of the so-called "moneyed companies" besides the Bank of England and the South Sea Company (BAARS, 2019, p. 60). By 1714, 39% of the national debts were owed to the moneyed companies (HARRIS, 2003, p. 56). This development of joint-stock companies towards modern corporations was "inextricably linked to the rise, development and spread of capitalist social relations" (IRELAND, 2002, p.134).

If Perrow names lawyers "the shock troops of corporations" in the USA corporate legal personification process, in the British Empire they also played a role in the development of the corporate form, including trying to find loopholes in the restrictions of the Bubble Act (1720)[150]. If the intentions of the act might still be an object of discussion, it generated two consequences concerning the corporate legal form: 1) charters and statutes of incorporation became less accessible; 2) Lawyers and businessmen had to find alternative legal ways equivalent to the joint-stock corporations, achieving in some cases even limited liability, property vested

[150]The case starts with the South Sea Company, founded in 1710, one of the moneyed companies that worked mainly with public finance, despite efforts to engage with overseas trades. The company performed a scheme of converting national debts into its own stock, and selling them at the market, leading to a bubble that eventually burst (BAARS, 2019, p. 64).

in a board of trustees and the delegation of management to a board of directors – for instance, through deeds of settlement. These changes were made despite the absence of a theoretical basis and driven by immediate interests (BAARS, 2019, p. 64; IRELAND, 2017, p. 239). Even considering advances, in "empirical reality, in the eighteenth and early nineteenth centuries the line between the private partnership and the JSC was far from clear cut", "a company was a 'they', better than a 'it'" (IRELAND, 2017, p. 240-241)

An interesting common stage of the modern corporate form development in the British Empire and the USA are the railways corporations, once they demanded large amounts of Capital and were taken as highly profitable. In contrast to the US-American environment, Britain's railroad business was organized in a dispersed power environment, regulated by members of the Parliament, the Crown, and small business cartels. Generally, they focused on local and regional transportation (PERROW, 2002, p. 108-111). The railroad boom pushed the parliament towards the Bubble Act's abrogation almost one hundred years later, in 1825, and enacting the Joint Stock Companies Act in 1844. The latter one adopted the deeds of settlements to incorporate, a merely administrative registration of incorporation - still without limited liability -, and substituted the political act of incorporation by grant. Limited liability only emerged in 1855, with the Limited Liability Act, followed by the Companies Act in 1862[151]. And Baars proceeds:

> In France the main companies legislation was introduced in 1856, and the General Assembly of the German Confederation in 1868 adopted the Allgemeines Deutsches Handelsgesetzbuch (drafted with the participation of many merchants) regulated joint stock companies and the 'Kommanditgesellschaft auf Aktien'. As such, the legal developments in these countries mirrored those in the UK, while the development of capitalism had followed broadly similar paths there, too. The corporation, as it came to exist in law in the mid-nineteenth century, has not changed fundamentally since. All the key characteristics were in place (BAARS, 2019, p. 66-67).

Ireland illustrates the personification of modern corporation by the linguistic change when addressing the corporation as their members, a "they", in the first half of the nineteenth century, and referring to the corporation as an independent thing, an "it", in the second half (1996).

4.2.2 The US-American version and the main elements

[151] Engels noticed the progressive change in limited liability in the years to come: "in order to facilitate the investment of this mass floating around as money-capital, new legal forms of limited liability companies were established wherever that had not yet been done, and the liability of the shareholder, formerly unlimited, was also reduced" (ENGELS in MARX 1999, p. 615/pdf)

L'Italien claims the autonomy before the State is a condition to the modern corporate form's birth and would most clearly occur in the United States of America, where it is recognized as a person by the Supreme Court. The relation between State and Corporation is a central point. In this line, Perrow highlights conjuctural differences from the modern corporation rise in the USA and Britain, for example, the aforementioned role of small businesses in Britain. L'Italien and Pineault name this process the institutionalization of the new capitalist subject. In Gregory Mark's words, about the US-American process:

> The transformation of the private law of corporations from 1819 to the 1920s is best described as a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it (MARK, 1987, p. 1455).

For what concerns to this work, understanding the role that Law plays in these processes of autonomization before the State and the shareholders is a highly relevant aspect to visualize the rise of corporations' private legal personhood. Private corporations assumed its form by what L'Italien calls the US-American society's real history, differentiating it from the corporate legal theory development itself (2012, p. 111). Especially in the USA, the legal discussion and process were led by what he called a "government of judges" that contributed to the process of "transcendentalization and evolution of the property rights", changing their body of incarnation from the individual to the corporate "body" (L'ITALIEN, 2012, p. 98-100). This real history and its legal decisions would oppose the history of legal theory, which did not accompany side-by-side the corporate form concrete development.

Ron Harris (2007) corroborates this perception, demonstrating how this "government of judges" was detached from real entity theories themselves. On the corporate legal theory level, the US-American XIX century was dominated by three main currents. First, the State grant theory, also known as the fictitious personality theory or artificial personality theory. This was the dominant paradigm of the corporate personhood nature in the century. It asserts that the State creates the artificial corporate personality. Therefore, the corporate legal personality is an extension of its sovereignty, limited according to its charter of creation, that attached rights and duties to the corporation according to the legislative will. Instead of emphasizing the State, another way would bring the individuals to the center of the corporation. Here stands the contract, aggregate or the partnership theory. It claims the corporation is an initiative of individuals, which would produce

a legal entity in a group's name through a consensual agreement. A third theory would fulfill a gap between individuals and the State. Otto von Gierke's work was imported from Germany into the USA and England by the end of the nineteenth century, bringing the real entity theory or natural entity theory. It holds that a corporation is a pre-legal or extra-legal being, distinct from its members, with a real social existence as a fellowship, hence, claiming it's legal recognition (HARRIS, 2007, p. 1424). Harris analyzed the transplantation of the real entity theory of corporations from Germany to Britain and the United States of America and compared its uses to the courts' recognition of corporate personhood (2007).

Otto von Gierke is a key name when discussing the real entity theory and its spreading. The academic context in which he elaborated it was a juridical and political thought dispute between legal Romanists and legal Germanic theoreticians, a quarrel between individual and universalistic values, on one side, and communal and national values, on the other (HARRIS, 2007, p. 1429). Nonetheless, the debate context in Britain and in the USA was quite distinct, and that is why the word transplantation is precise. It remarks that the use and political consequences of the real entity theory application in those countries were decisively different (Ibid., p. 1436).

For instance, early von Gierke wrote his theory with political concerns in mind, as the necessity of developing intermediary alternatives between the two absolute subjects of the liberal theory: State and individual. Fellowships should be this third subject, however, in a different manner than perceived in the US-America. This young von Gierke carried worries about capitalism, believing its free-market competition would lead to a polarized economic conjuncture between rulers and ruled. Later on, his political views will become gradually more nationalist, and he shifts from an emphasis on smaller fellowships to the protagonism of the State as a form of fellowship (Ibid., 1437). His opposition to capitalism, individualism, universalism would blend to a fear of socialism, communism, Marxism and revolution (Ibid., p. 1439). As one could notice from the US-American use of the real entity theory, not only the context of the use was different from this whole development, but their very aims and tones were generally distinct from those. While in Germany the theory supported trade unions, in both of the other countries - USA and Britain - it was used against trade unions (Ibid., 1445). While it supported joint-stock companies in the USA, for Gierke,

> A meaningful fellowship was a fellowship in which the personal aspect of the membership was dominant. Though it was not essential for each person to belong

> exclusively to only one fellowship, this was desirable. A fellow was expected to have a personal and emotional affinity with the fellowship. The fellowship was expected to have an effect on the consciousness and spirit of its members. Joint-stock corporations were not well suited to this mission. The problem was not only that many investors tended to spread their risks by purchasing shares in several corporations, but also that their involvement in these corporations was often limited to transacting in shares and drawing dividends. In Gierke's classification, joint-stock corporations were economic fellowships based on property, as distinct from economic fellowships based on personality and from non-economic fellowships. While they were considered fellowships, they were not the kind of fellowships that Gierke yearned for. "[I]f [the joint-stock company] alone ruled it would lead to despotism of capital" (Ibid., p. 1460).

Gierke's early intentions of finding an intermediary actor between individuals and States might be the only common ground between his real entity theory uses in those different countries. Nevertheless, by the time his theory was adopted in the USA and Britain, around the 1900s, he had already left these intentions.

Even serving differently from its creator's purposes, the real entity theory did not play a significant part in the rise of England's corporate form, as seen. By the time it arrived in the country, the discussions around limited liability, free incorporation, unincorporated business enterprises, and the growth of publicly held corporations could already be supported by the grant theory. In that context, the real entity theory had no significant role to play (Ibid., p. 1462). This context was also different in the USA, where the grant and contract theories could not answer simultaneously and adequately to problems as with the federal interstate relations, harmonizing shareholders and director actions, establishing the primacy of individual rights and limited liability or individual rights and the majority decision by shareholders, among others. Only in 1906 the first US Supreme Court decision would apply the real entity theory. Its importation "enabled enterprises to hold for both rights and privileges" (Ibid., p. 1474).

This detachment from the theoretical basis and the juridical and political transformations that precede it points towards an *a posteriori* instrumentality of the theory, indicating that the driving force of corporate personhood does not reside in the legal theory development itself, outside or before the juridical realm. After acknowledging this, it is possible to renew questions around the legal subject's hegemonic theories described in the first chapter. The ontological theories would hold one advantage, once their argument is precisely that the legal personhood nature resides in an extra-legal moment. However, the axiological and formal/technical theories would have to be observed by new perspectives over their "non-legal instances", when they exist. If they propose an axiological basis to this legal personhood this axiology must be in the actors involved in the juridical

and political development, deeply active in these processes. The formal/technical theories, on the other hand, detach the concept from its own creating dynamic, as if the finality of an instrument was not a part of its own concept and which ontology is essentially legal. The legal person concept cannot be understood but as a real category, in a specific social-historical dynamic, constituted by the totality and multiplicity of reality determinations, including its legal aspects. Its extra-juridical nature must be addressed.

Being as it may, applicable Law, the one Pashukanis locates in the center of the legal theory having its most pure expressions in Courts, acted at the forefront of the corporate changes. As Perrow would call lawyers the "shocktroops of capitalism" (2002, p. 43), Horwitz writes:

> What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channeling economic development. In fact, common law judges regularly brought about the sort of far-reaching changes that would have been regarded earlier as entirely within the powers of the legislature. (…) In short, by 1820 the process of common law decision-making had taken on many of the qualities of legislation (HORWITZ, 1979, p. 1-2).

Despite the generally anachronic behavior between legal decisions and legal theory, the *Dartmouth College v. Woodward* case, decided in 1819, remains emblematic for both aspects. It stated two pillars for corporations when private corporations were on the rise in terms of the state grant theory. A corporation was an artificial being, different from individuals and the State, but its creation was a State product that wrote its powers and limits in a grant charter. A famous statement of this case is judge Marshall's:

> A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties, which the charter of its creation confers upon it, either expressly, or as incidental to its very existence (The Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 636 U.S. 1819, *apud* L'ITALIEN, 2012, p. 112).

As stressed by Gregory Mark, these two propositions are underpinned by the individual and State as the main subjects of social relations (MARK, 1987, p. 1447). While possessive individualism points towards a society in which the individual and its atomist interests are protagonists, as with the very concept of property, the State, on the other extreme, embodies the abstract and interventionist public interest. This leaves a wide range of actors in a secondary position, and that’s the

case with von Gierke's fellowships. Whether the corporate ownership would be public or private, Daniel Webster – an influent lawyer of the case - argued in favor of the second: a private corporate charter purpose is precisely to involve private property instead of public. Hence, private property of a collectivity different from the State or a sum of individuals. Dartmouth's case was built upon a State-individual dichotomy, being, nevertheless, the USA's personalized corporation's first shadow. In short, it stated corporations as an artificial being – instead of a collective one, a mere legal creation -, its power over its own property, and its origin and limits residing in the State's grant charter.

Dartmouth's decision not only raised questions that orbited the subjectification of corporations and its limits once its language and structure were followed by the subsequent judicial decisions throughout the nineteenth century. It also demanded a reaction of legislatures trying to reestablish State control over corporations in the first moment (MARK, 1987, p. 1450 and 1454). This reaction of legislatures did not curb the everyday practices of governments, that "were often less energetic in supervising their progeny" (MARK, 1987, p. 1455).

Until the beginning of the XIX century, around the third decade, the dominant sort of corporation in the United States of America was this quasi-public agency, used strategically to impulse infrastructure projects. Nearly, they had no independence from the federal states, existing only from a political act of creation and regulation. After the 1830s, a kind of private corporation would rise steeply in favor of the capitalist accumulation structures extension. Though private, their incorporations still depended on the State charters, limiting their activities and creating them as a private extension of the State sovereignty, a franchise. Strictly attached to the political power initially, its development in the nineteenth century is a development towards autonomy (L'ITALIEN, 2012, p. 107-109). An essential step in this direction would be the free chartering of the Jacksonian period, described by L'Italien as the charter's depoliticization. States started to make it a mere procedural act, liberalizing the control over its "finalities, internal structure and corporate external perimeters" (L'ITALIEN, 2012, p. 113)[152]. The artificial entity's political control through the charter is disappearing, becoming an administrative act like a birth certificate, for instance, as it happened in Britain with the deeds of settlements by 1844.

[152] Originally: “finalités, la structuration interne et le périmètre extérieur de la Corporation”.

As aforementioned, the railroad industry played an unique role in the autonomization of corporations also in the USA. It marks the domination of this private corporate form from the fifties on, definitively.

> NO ECONOMIC SECTOR was as important to the rise of large American business corporations as the railroads. Indeed until the end of the nineteenth century, railroad companies and large corporations were synonymous. (...) Corporate law was primarily railroad law. The corporate elite were primarily railroad leaders. In short, by the last third of the century, the corporate institutional structure was the railroad institutional structure.
> (…) First, it was railroad companies that changed the meaning of incorporation from a semipublic agency to a private business with all the accompanying freedoms and autonomy. (…) Second, by socializing Capital in a new type of property, by centralizing Capital in a form that became readily available for large-scale enterprise in other sectors, and by breeding a new segment of the capitalist class that mobilized and acted on behalf of its interests, the railroad created the institutions of corporate capitalism and the corporate class segment. (…) Finally, as frequently described, by lowering the cost of transportation, by purchasing huge quantities of goods and services, by expanding the geographical scope of markets, and by instituting new organizational forms that others could imitate, the railroad changed the context in which others made economic decisions - individual decisions which, when aggregated together, fueled economic growth. The railroad was the foundation on which corporate capitalism was built. If the railroad had not developed in the form it did, modern enterprise would not have taken the institutional forms we know as corporate capitalism (ROY, 1997, p. 78-79).

Thus, it is not a coincidence that a corporation was firstly equaled in rights to a natural person through a Supreme Court decision in *Santa Clara County. v. Southern Pacific Railroad Company* already in 1886. Further, it became "one of the prominent symbols of the subservience of the Supreme Court during the Gilded Age to the interests of big business" (HORWITZ, 1992, p. 66).

The US-American Constitution's Fourteenth Amendment was passed by Congress in 1866 and ratified in 1868, immediately after the end of the Civil War (1861-1865), in which the race motivations were crucial. Its intentions were clearly to impose formal race equality, "equal protection of the laws" by the states.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the *Santa Clara case*, though, it was used to equate corporations - legal persons - and natural persons, using the contract or partnership theory. About this instrumentality of the fourteenth amendment, Bakan reveals that "(b)etween 1890 and 1910, business interests invoked the Fourteenth Amendment 288 times before

the courts, compared to 19 times by African Americans" (BAKAN, 2004, p. 172, footnote 28). That is the Santa Clara case, in which the contract theory was used pro-business, as a way to nurture corporations with constitutional rights through the individual corporators. For that, "property of corporations could not be taxed on a higher level than the property of individuals" (HARRIS, 2007, p. 1469). To equate the corporate legal personhood to a natural as in Gierke's theory, and to equate their position constitutionally based on the contract theory are completely different positions. Nevertheless, both, in this context, were converging steps in the direction of the corporate form.

The artificial entity theory's progressive erosion started in the 80s and lasted until the beginning of the twentieth century. Both contract theories and real entity theories were used against the dominating grant theory. The second bore clear advantages against the first, though. By putting the accent over the individuals, the contract theory had no solid argument for limited liability. As describes Harris, it had a fast ascension and decline in the 80s and 90s and by "the time real entity theory was imported from Britain and Germany, it primarily encountered the revived Grant theory, not the newer and short-lived contract theory" (HARRIS, 2007, p. 472). Besides limited liability, other aspects of the corporate subjectification began to be questioned by the same time. The unanimity rule for corporate consolidation, interstate jurisdictional constraints, and shareholders dominance in corporate decision-making also tended to weaken the contract theory once they stood for individual rights. They would be overthrown in the decades to come.

> The triumph of the entity theory parallels another development in late nineteenth century corporate law - the tendency to shift power away from shareholders, first in favor of directors and later to professional managers. (…) After 1900, however, directors were more frequently treated as equivalent to the corporation itself (HORWITZ, 1985, p. 1983).

Despite the mentioned individualism, the contract theory could work against the *ultra vires* doctrine. This latter held that the corporation had a limited legal competence beyond which it could not act. The grant theory can readily deal with the matter, while one could say the contract theory tends to be essentially opposed to the *ultra vires* doctrine. The reason is explicit: it means the limitation of individual liberty, once the corporation's first and last constituents are the corporators. In 1889, New Jersey enacted an incorporation law in which "a corporation could do virtually anything it wanted" and in 1930 "the ultra vires doctrine was, if not dead, substantially eroded in practice" (HORWITZ, 1985, p. 186-187). This meant to

equate corporations in terms of liberty. If once chartered corporations could only act in line with its charter, as a State may only do what is permitted by Law, by 1930 they would carry no restraints as an individual that is free to do anything except for what is prohibited by Law.

Uniting this liberty with the possibility of consolidation allowed the escalation of corporate power. Being able to merger with another company would be a conquest from the merger movement (1898-1903), which, to be operative, needed majoritarianism to depose the unanimity rule to sell assets. In the 1880s nearly every court required unanimous consent from shareholders. By 1901 fourteen states required less than the unanimous agreement of shareholders in horizontal integrations. The matter of vertical integration was opened judicially until 1926.

Finally, limited liability came with the change of the shareholders' role. It means that shareholders and the corporation are only accountable for each other debts in the maximum measure of their shares' values – entity and shareholders shieldings. As late as the 1900s, limited liability was still not a common mechanism in the USA. Nonetheless, the tide's turn also started in the 1890s when, according to Roy, the corporate form was to be adopted by the manufacturing industry (ROY, 1997, p. 18). Until then, railroad securities dominated the security market, and in the industry branch, only coal and textile securities were known (HORWITZ, 1986, p. 210).

> Those industrial securities that did exist were usually exchanged only in "direct person-to person sales". Between 1890 and 1893, however, industrials began to be listed on the Stock Exchange and to be traded by leading brokerage houses. And only after 1897, in the midst of the merger movement, did companies publicly offer shares of stock, replacing the system of "private" subscriptions that had prevailed throughout the nineteenth century (HORWITZ, 1986, p. 210).

By merging with corporate Capital, the manufacturing industry widened the stock market exchange and accentuated the shareholder's new role, as an investor rather than a manager. Thus, the central bond that links shareholders and the legal entity is the financial one. The owners' relations to the corporation was narrowed to this economic link in the manufacturing industry, or, in other terms, the materiality of the corporate activity is undermined before the stockholder. In terms of limited liability, most courts understood that "if stockholders were to be liable beyond the value of their stock subscription" a state statute would be needed. Still, "(n)early all the states held stockholders liable up to the par value of the stock" (ROY, 1997, p. 163). Legal exceptions to this limitation were being substituted parallel to the real entity theory's ascension, as happened regarding the Trust Fund

Doctrine (see HORWITZ, 1986). Both entity and shareholder shielding – limited liability features - are mechanisms that clear the personhood contour while making it separated from its owners, independent, to whom it only has contracts, as an individual. Corporations would speak through the voices of directors and managers, instead of their proprietors. In the *Hale v. Henkel* case (1906) the U.S. Supreme Court used for the first time the real entity theory, addressing corporations as a collective body protected under the fourteenth amendment, a person (HARRIS, 2006, p. 1473).

How may this experience enhance our analysis, bringing up new elements and articulating with our theoretical perspective, previously described? Capital's urge for expansion is a core element of its own autonomization deeply connected to its legal abstraction contours. It precedes any substantial attempt to perceive property as a subject in legal terms, once its self-expanding logic and will, belongs to a moment before[153]. It is capital's dynamic that autonomizes itself as a subject and thus pressures the legal system to put it in adaptive terms. What is often called a "legal revolution that allowed corporate personhood" is revolutionary in how jurists had to distort and adapt traditional legal fundaments to provide this corporate movement juridical sustainability and form. Instead of adaptation to the ascending economic pressures, legal scholars recurrently make the reverse way, finding justice and coherence in the legal decisions or doctrines firstly, *ad hoc*, and then interpreting a specific material relation. On the British perspective of personalization, writes Baars:

> The Case of Sutton's Hospital illustrates that law was going to be developed not on the basis of higher principles or policies, but on the basis of commercial expediency on a case-by-case basis. As the potential of the corporation 'as we know it' was realized, merchant classes were quick to take up the construct and use it to their advantage, and the courts had to deal with the difficult questions on an ad hoc, reactive basis. The most difficult questions, those relating to liabilities, were not answered in a clear and systematic manner in advance of the problems of liability arising (BAARS, 2019, p.51).

It is essential to make this differentiation in a thesis addressed to the legal theory. Even though this legal revolution constitutes the very movement of the corporate autonomization in the complexity of a total reality, its legal aspects operate more, as Hinkellamerts highlights, like a mirror that inverts a specific reality by its own orders, offering an inverted image of it, erasing its contradictions and

[153] In a materialist logical derivative sense. Abstractly, this legal revolution is both in the core of capital's dynamic and is a secondary abstract element of this motion.

creating its specters in a sole motion, i.e. ideologically – instead of taking Law as the core causality of the subjectification of the corporation itself. This core causality is the Capital movement in the corporate form, considering its contradictions. Moreover, this legal image may take different forms and names. It can be called a legal person, a moral person, an anonymous society, a fictitious person, or other assumed names. As Capital demands its autonomization, it only needs specific elements, as its liberty before the State, its separation from its owner's particular properties as in limited liability, its will expressed as its own, and tradability, being driven by the most pure economic indicators as possible, .

In *The anatomy of corporate law* (Kraakman *et al.*, 2017) the authors observe that

> despite the very real differences across jurisdictions along these dimensions, the underlying uniformity of the corporate form is at least as impressive. Business corporations have a fundamentally similar set of legal characteristics — and face a fundamentally similar set of legal problems — in all jurisdictions. (…) They are: legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. These characteristics respond — in ways we will explore — to the economic exigencies of the large modern business enterprise. Thus, corporate law everywhere must, of necessity, provide for them. To be sure, there are other forms of business enterprise that lack one or more of these characteristics. But the remarkable fact — and the fact that we wish to stress — is that, in market economies, almost all large-scale business firms adopt a legal form that possesses all five of the basic characteristics of the business corporation (2017, p.01).

These economic exigencies are towards the chrematistic efficiency of the corporation, not the Greek Oïkonomia. The first of these characteristics is the legal personality, which locates the corporation in the position of a *nexus for contracts* – "the common counterparty in numerous contracts", providing it a "separate patrimony (…) distinct from other assets owned, singly or jointly, by the firms owners" and which are owned by the corporation itself, as would any human person (2017, p. 05). This generates entity shielding – granting creditors priority before the claim of personal creditors and liquidation protection before individual owners – facilitating tradability. Besides entity shielding, naming its authorities and establishing its procedures complete the legal personality shape, by establishing its functioning formally (Ibid., 2017, p. 07).

Despite of how clear these characteristics are the authors understand the personality itself is disposable - just as Negri in the first chapters -, for "almost all of which could in theory be crafted by contract even if the law did not provide for a standard form of enterprise organization that embodies them". Actually, the legal personality is just "a convenient heuristic formula", not in itself "an attribute that is

a necessary precondition for the existence of any or indeed all — of these rules, but merely a handy label for a package that conveniently bundles them together". Moreover, just like Negri, they "see no functional rationale that compels" a corporation legal personality to have other attributes than these (Ibid., 2017, p. 08).

Not only have we seen in the second chapter the formalist currents that reject the naturalization of the corporate legal person, but also in the described historical approach in this chapter we have found a disdain for the need of a theoretical basis to support most of the changes perpetrated in the origins of the corporate legal personality, especially for the real entity theory. It seems these approaches commonly attribute one of the main characteristics of the modern corporation, the legal personhood, to a mere convenience. Actually, its historical formation both in the USA and Britain also disregard the need of a legal personhood themselves, mostly taking steps upon the modern corporate characteristics, besides their juridical personhood. Though needless, according to these currents, the personification of the corporation was made and remains. What does this personification mean, then?

4.3 Monsieur Le Capital's mask: the legal person.

> How insane is it to receive wishes of Merry Christmas and Happy New Year not from a person, but from a firm, a bank or a legal being? It is not the man of the company that greets us joyfully, from Christian to Christian, but the very anonymous society that makes itself affectionate and expresses the good feelings that lift its spirit of statute or its soul of balance sheet. It is, sort of speak, Coperval Limited, a visible lyrical lady, lover of golden letters over a blue background, writing with soulfully leaning-to-the-right letters, and flowers and angels, bells and jingles. The heart of the firm is beating in affection (Rubem Braga, 1997, p. 25-26)[154]

Our departure point is now epistemologically different from those seen in the second chapter. There, the legal concepts were taken in their own hermetic juridical sense and developed until the concrete manifestations of their dynamic were coherent, mostly considering the juridical and linguistic manifestations of the concepts. Economic perspectives of the legal person concept were not in sight, or roughly taken into account, even though the concept refers to specific economic actors, which are unquestioned protagonists of the last century economic dynamics. Pashukanis, otherwise, in the third chapter, recognizes through Marx's

[154] Originally: Que existe de mais louco do que receber votos de Feliz Natal e Próspero Ano Bom não de uma pessoa, mas de uma firma comercial, um banco ou um ser jurídico? Não é o homem de empresa que nos saúda alegremente; é a própria sociedade anônima que se faz afetuosa, que exprime os bons sentimentos que empolgam seu espírito de estatuto ou sua alma de balancete. É, digamos, a Coperval. S.A., uma senhora visivelmente lírica, amante de legendas douradas sobre fundo azul, com uma letrinha sentimentalmente inclinada para a direita, flores e anjos, sinos e badalar. O coração da firma está batendo de afeto.

Capital the development of these economic actors and links the juridical concepts to this material progression. Withal, he does not dive into the specificities, neither of the legal person concept, nor of the corporate characteristics - legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. Likewise, some categories lack precision when having to be applied to our concerns, as the fetish category and the capitalist itself – subdivided into the money-capitalist and the function capitalist. What is the corporate legal person, then, and how does it operate?

The value theory explains a development in which the capital and labor contradiction progresses until a higher form of contradiction within the capitalists themselves, the lending and functional capitalists. The first representing the capital most fetishized circuit, M-M' – value -, whilst the second represents the productive circuit hidden between M-M' – where use-value resides. It is the lending capitalist the one that utterly holds the decision-making, as in Vale's shareholder general meeting and the aforementioned recent changes strengthening its shareholder orientation (MILANEZ *et al.* 2019, p. 22). Mr. Murilo Ferreira as Vale's CEO was substituted by Fábio Schvartsman with this scope. Fábio affirmed that in the next years no other mining company would produce more value to their shareholders than Vale (MILANEZ *et al.* 2019, p. 25). The legal establishment of the proprietor and functional capitalists occurred along with the creation of modern corporation as historically portrayed, while the lending capitalist acquired the investor ownership, had their liability limited and their management power turned into a power to delegate management, as in the USA and British examples. This meant the growing distance between the shareholders and management. Their relation to the corporation becoming a link to stocks values/dividends. Managers and shareholders are in different sides, they no more work through trust, confidence and personal credibility. Because the shareholders link to the corporation is the highest in hierarchy and reduced to an economic link, "responsibility becomes accountability" (BAARS, 2019, p. 74). Undermining the ideas of corporate citizenship, corporate responsibility, corporate morality, among others.

Limited liability is especially important to this analysis. In the Mariana Mining Disaster no CEO was convicted but they were formally accused before Justice. Contrarily, ADR – American Depositary Receipts - holders were even able to demand reimbursement due to lack of transparency concerning the Mariana Mining Disaster, settling with the company an agreement around 25 million dollars (UOL/REUTERS, 2020). In this sense, the contradiction of the economic field is reproduced in the juridical sphere with an uneven distribution of rights and duties

between the M-M' circuit and the productive circuit. Other consequences like ceasing production, reducing costs, workers layoffs have a determinant effect over the production circuit and, as appointed in the first chapter, may not have consequences with the same severity by the shareholders side. The finance capital circuit keeps mostly untouched in its nature, while the productive side has to deal with production standstill, resignations and individual liability on managers and others. The liability will be ultimately translated into redressing actions and, thus, into capital displacement, only moving it from more productive to less productive investments. The legal person's mask hides this dynamic, showing, judicially, just punishment to a corporation, even though it is not a subject in itself. The "corporation comes to form the 'motor' of capitalism partly because of the way that the legal form 'distributes' risk, gain and responsibility" (BAARS, 2019, p. 44).

If the capital fetish hides the productive circuit and only M-M' appears, judicially, the first concept that emerges is the legal person. It appears unitarily, as one concept covering the whole contradiction, one nexus of contracts with will and patrimony of its own. But it does not reproduce the capital fetish for it does not stand for the M-M' circuit or merely the shareholder assembly. It stands for the whole contradiction within this specific private capital circuit. Henceforth, the capital fetish is not merely projected in legal terms, but the legal terms reflect capital as one subject at the same time it hides and reproduces its internal contradictions in juridical terms. If the capital fetish best expression is through M-M', in Law it is projected as something else, as the corporate legal personhood, capital personified. The legal person is a necessary form to reproduce the capital fetish - using the word person or not – but in order to do so, it has to adopt a different form and work in other terms. Through the legal person, capital might go to the market and indeed trade itself, at least in legal terms, with their transferable shares as presented as one of the corporate characteristics, however it can do more. It can show itself as a singular entity that embraces its contradictions at the same time it mediates the dominating nature of value over use-value, of the lending capitalist over the functional capitalist, of the productive circuit over the capital circuit, and lastly of capital over labor. Legally it appears as one, concealing how its liability is internally distributed.

The substance to which the concept attaches is the inverted substance, capital itself. As puts Grespan, capital thieves the substance from labor vampiresquely and this subjectivity is legally projected as its own. The legal subject steals the legal subjectivity of the workers in their collective action, working. Their individual legal subjectivity or their collective legal subjectivity have space only

when opposed the capital subjectivity, as in Unions. Capital, then, needs the legal person concept in order to hypostasize in finality what is actually mediation through its "celestial existence" of a symbol that conceals the terrestrial (GRESPAN, 2019, p. 120). A double movement occurs. The form, the legal mask, presenting itself as the substance, both personifies what is not a human being at the same time it dehumanizes what is one. As private capital puts a human mask on, it shows itself as "more" human, while when a human puts this mask, it shows itself as less human. This mechanism allows the taking of human beings as things and the fetishization of non-human entities. The dehumanization of humans was once made by not attributing the legal personality to them, as in the case of slaves, but progressively maintained the dehumanizing exploitative *status quo* by the subjectification of capital[155]. In this way capital commodifies everything.

> (…) in the commodity, and even more in the commodity as the product of capital, it is already included what characterizes all the capitalist mode of production: the reification of the production social determinations and the subjectification of the production material basis (MARX, 2016, p. 1155).

Not only Vale's and Samarco's workers were concealed, also subcontracts and the afflicted as a collectivity. In the same way, the Renova Foundation thieves the afflicted representation in Justice, leaving just the possibilities of being an amorphous, faceless, collective actor, or pulverized group of individuals. While one concretely works as an organized collective body, the other does not, making afflicted, citizens, workers, not only disarticulated but voiceless.

In this sense, the corporate legal personhood is a demand from the capital to the juridical world. Negri argues that the legal person analogy works as lenses that help to translate a complex, having the side effect of naturalizing the legal person if these lenses are not well adjusted. Kraakmann *et al.* (2007) indicated the legal personality as one of the universal characteristics of the corporation, nonetheless, they also minimized the need of such personification. Undermining the need of the term "person" and even substituting it for any other does not erases the fact the legal personality is treated as such, having - in Brazil - the personality rights, for instance. Yet, it is the capital-subject that demands its legal personality because of its behavior as a subject, and not the legal subjectivity that attributes the subjectivity to the capital. That is also why the term use is indifferent, inasmuch as the legal entity has a will, rights, duties, goods of its own, and so on. Crucially,

[155] Recently, workers are being "hired" as one legal person, dehumanizing labor relations, as it removes rights immanent to the concept of worker as an specific subject. In this way are some debates about the Brazilian figure of an "individual society" – sociedade individual.

it must cover the whole contradiction reproducing its contradictory terms, as those cited above. If the corporation is still the one that decides about the redressing process in the Mariana Mining Disaster, changing the juridical term that names it will not denaturalize it. Better yet, changing the lenses will not alter the object, but the perception of the object.

If commodities cannot go to the market to trade themselves, capital formally can. The legal image projects exactly the mirage that reality may not produce once commodities cannot, and never may, go to the market to trade themselves, but definitely carry a social will to do it. This embodyness, corporification, personification, subjectification of capital is produced through Law. De Brosses says that Brazilians divinized a calabash with grains and rocks, which spoke to them by its sound. The sound was the way to translate what these Gods would say. The substance of the Gods was neither the calabash nor the grains, instead they were the forms to reveal the will of the divine and to give it a concrete form. Brazilian conjurers also blew smoke in the face of others for them to "receive the spirit". Law makes capital visible through contracts, the modern blow of smoke, the modern calabash. Grespan's private capitals and legal forms, Hinkellamert fetishized inverted images, L'Italien's and Pineault's new capitalist subject, Baars' capital personified, Monsieur Le Capital. In 2019 Grietje Baars published *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law In the Global Political Economy*. She states:

> Market society then is one with the corporation, Capital personified, Monsieur Le Capital driving the corporation as the engine of capitalism, accumulating power without responsibility – by means of the imperialism at the heart of the corporate form – the elephant in the room that is allowed to stay concealed through the workings of corporate ideology (BAARS, 2019, p. 75).

Her writings rebuild the concept theoretically from Pashukanis, Ireland, Neocleous, and Miéville, also pointing to the insufficiencies of company law's current approaches. Capital expresses itself in private capitals, which are organized, personified through the corporate legal form. Baars, Ireland and Neocleous show how capital is personified through the legal personhood concept. They disagree, though, on the use of the terms reification and fetishization in this process. While Baars and Ireland frequently use the term reification of the company, Neocleous uses the term fetishism. Social relations in the company are indeed translated only in terms of accountability to the shareholders, and from their supremacy, towards the board of directors and so on. On the other side, what

happens to the capital is precisely its personification, its subjectification, its fetishization. In this sense Neocleous exposes his opinion, which we follow:

> My disagreement with Ireland rests on his insistence on describing the new company that emerged as an 'object' cleansed of people (e.g. "Capitalism without the Capitalist", 40, 46) or as a 'depersonification' ("Company Law and the Myth of Shareholder Ownership", Modern Law Review (1999), 32–57). The point of course is that as much as it might in many ways be an object, so it is also a subject in its own right (NEOCLEOUS, 2003, p. 156).

Concluding:

> In fact, in contemporary capitalism one might argue that the objective market 'relations between things' assumes the form of 'relations between persons'. And just as for Marx the fetishism of the world of commodities arises from the peculiar social character of the world of labour, which produces them, so we might say that the fetishism of the world of persons arises from the peculiar legal character of the world of capital which produces them. Either way, the process of personification of capital that I have been describing is the flip side of a process in which human persons come to be treated as commodities – the worker, as human subject, sells labour as an object. As relations of production are reified so things are personified – human subjects become objects and objects become subjects – an irrational, "bewitched, distorted and upside-down world" in which "Monsieur le Capital" takes the form of a social character – a dramatis personae on the economic stage, no less (NEOCLEOUS, 2003, p. 159).

Besides Baars, Ireland and Neocleous, Casalino also points in the same direction, building from Grespan, Jappe and others.

> Well, the legal subject is not simply the commodity owner elevated to the heavens. It is, much more, the very value while a subjective manifestation of its movement, apparently autonomous. In this sense, there is no legal subject's will, but only the value's will, manifesting itself as a person[156] (CASALINO, 2019, p. 2910).

Likewise, the history of the legal person concept was neither primarily the history of a theoretical discussion, nor the conscious development of a tool, nor the natural development of Law and society while reducing its despotic quantum. Both in Britain and the United States the theoretical debate had no essential role. The economic interests of the actors involved were the ones that guided the steps of the legal revolution handled by lawyers in each historical moment. In this sense, to portray the legal person concept, specially about corporations, as a technicality or

[156]Originally: Ora, o sujeito de direito não é simplesmente o possuidor de mercadoria abstrato e ascendido aos céus. É muito mais o próprio valor enquanto manifestação subjetiva de seu movimento, aparentemente autônomo. Desse modo, não existe nenhuma vontade do sujeito de direito, mas apenas a vontade do valor, que se manifesta como pessoa.

a merely formal structure erases the process and interests that determined it, as well as the slow process of separating liability and management from the shareholders, of freeing shares to be transferred and fixating the ownership in the shareholder. This technicality must also be contextualized. The corporate legal personhood and legal subjectivity are not concepts driven towards an uncapitalistic society, rather addressing capitalist core concepts in legal theory. Even so, these concepts distort the capitalist element once again, in legal terms. As Barreira reminds us,

> the legal sense of social relations is captured by distinct manners. It is possible to find expressions as the “contract fictio juris”, “juridical illusion”, or even “juridical fiction”, among many others. Which is why it is interesting to notice the mentioned juridical forms – in plural -, in the precise sense that their transformations express economic content which they, as mere forms, cannot determine themselves (BARREIRA, 2020, p. 184).

While living through most of the US-American development towards the modern corporate form, the legal scholar and attorney William W.Cook (1858-1930) noted his impressions that "the laws of trade are stronger than the laws of men" (COOK *apud* HORWITZ, 1985, p. 196). Henceforth, the content is already given. In the inverted fetishized world of the value-form development, value acts as a thing, as a subject, as the substance, creating this capitalist topsy-turvy world, ultimately as the interest bearing capital, merely mediated by juridical transactions that hide the production process as a whole. Here, from the value-form realm, the juridical realm is merely a mediation, a form that allows the capital movement to happen. From the juridical perspective, though, capital is the one that is shown as a form, while the only reasonable content possible to this subject is its form either as norm, or a set of norms, a nexus of contracts or a legal instrument. This is the formalist perspective. Thus, a legal person might be, in this autopoietic world the inversion of capital’s inverted world, making the legal transaction that mediates the capital circuit as the juridical circuit mediated by the capital transaction. Form and content are again inverted. Money/capital is just one element needed to establish a legal person and profit orientation is just one characteristic of this person if attributed by Law.

Shareholders are portrayed almost as if they were outside the corporation. Their patrimony is separated, their liability is limited, their absence of the production process exempts them from any bond to it, making the dividends indicators the only and most sensible to their actions. Any others are not their responsibility. Before courts, this organization generates a clear cut, shareholders are left outside

as much as possible and since M-M' is hidden the company is perceived in moral or legal terms, instead of genetically constituted, firstly and ultimately, oriented by the capital self-expansion urge. Far from a mere technicality, from human dignity or the common good, the corporate legal personhood soul moves vigorously towards M', self-expanding value.

Risk and accountability are, then, key words. Baars (2019) and Sotiropoulos *et al.* (2013) recently argued – based on Marx and Weber – how corporations and finance, respectively, internalize the world complexity translating it into accountability and risk. The first based on Weber (2013) presents not only an enterprise that translates the materiality into rational accountable variables – thus hypostasizing the reality into the value criteria – and relating the calculable juridical functioning as an well suited articulation between the corporate legal person and the economic consequences. In this sense, what Law perceives as responsibility a corporation perceives as accountability. How much does the redressing process costs? How are these costs going to be distributed? Sotiropoulos *et al.* take steps in the same direction, focusing upon the concepts of fetishism, finance and risk, the same mechanism through which the "real economy" is decoded from the "world of value".

> Marx introduces the concept of fictitious capital, and speaks of fetishism, when he gives an account of the social nature of financial markets. He wants to underline the fact that capital assets are the *reified* forms of the appearance of the social relation of capital, and so their valuation is associated with a particular *organic* representation of capitalist relations. […] The financial system provides a representation and quantifications of different power and social relations in general (2013, p. 151).

If corporations internalize the concrete variables of their activity in quantifiable money-risk terms, judicial decisions should be amongst those variables. The severity of the risk, unequally distributed inside the corporation will also impact how compelling is the reason to act according to that risk. This behavior must be at least acknowledged by legislators and judicial actors. That might be one of the most important reasons to judicially recognize the corporate nature and to act accordingly. This acknowledgement might also contribute to the social movements strategies when dealing with such struggles. In Pashukanis, the problems with individualism, an unbalanced emphasis on the State, deviations from the value theory, distortions or misuses of the fetish theory led the materialist thinking to different paths that presented limits in its theories. Following this line, environmentalists' judicial strategies could be rethought to strengthen or weaken these fetishized concepts. Some currents advocate for recognizing animals or

nature's legal personhoods leaning on the fact that legal personality is attributed to corporations. i.e., upon the inverted abstraction of value as a subject, the corporate legal personhood. For example, in the Rio Doce case, a lawyer filed an action as if the Rio Doce was the subject – which is not recognized in Brazil - in order to strengthen its recognition as a legal subject[157]. Whether this strategy supports the fetishized Capital as a legal subject and its exploitative teleology or not is a question that must be taken seriously by lawyers and legal scholars.

Another important question is whether this autonomization of capital in corporations leaves the State in a secondary position or not. Its role is primarily administrative and technical, eventually legislative under continuous peripherical economic pressure and lastly, of controlling in Courts "*a posteriori* the effects – and never the causes – of corporate capitalism over society"[158] (L'ITALIEN, 2012, p. 97). i.e., not analyzing the capitalist production of disasters or the mining production of dam ruptures in its origins, or its agents in their nature.

CONCLUSION

[157]GAZETA ONLINE. Em ação inédita no país, Rio Doce entra na Justiça contra desastre. Available at: <https://www.gazetaonline.com.br/noticias/cidades/2017/11/em-acao-inedita-no-pais-rio-doce-entra-na-justica-contra-desastre-1014106870.html>. Access on: 11 nov. 2017.

[158] Originally: "(...) a posteriori des effets – et jamais des causes - du capitalisme corporatif sur la société".

The Mariana and Brumadinho disasters must turn our attention to the well-established unquestioned legal concepts. In the Forum Capixaba em Defesa do Rio Doce, one of the inhabitants of Regência, an afflicted village in Espírito Santo, said that they were tired of hosting professors and scientists to study them: their water, their behavior, their fish, their organizations, and so on. He said he wanted them to study Vale, the corporation, so they could understand them. This was an important shift to this research, and somehow, its origin. While dealing with the Rio Doce case there is a tendency to take the disaster consequences as its starting point, even though its origins reside clearly away from Regência.

In the first chapter we could acknowledge the legal perspectives that take this consequence-oriented approach. By using the concept of disaster and generically trying to prevent it by affirming a juridical principle - as the precautionary principle -, one moves away from the causal context. The concept of disaster tends to emphasize the consequences, instead of the causes. Natural and technological disasters tend to pinpoint the cause in natural or merely technical issues. That might not be the case of a corporate disaster, as could be perceived by the tailings dam failures analysis. The juridical principles, in this context, are equally broad and tends to group the causal relations in legally identifiable causes. The studies showed that tailings dam failures events from the past century and the current are not due to lack of knowledge on the field or to unexpected nature events. The reports both on the Mariana and Brumadinho cases confirms this diagnosis: mismanagement of the dams was the main cause of both tragedies, gathering a series of decisions that led predictably to them. Deepening the analysis, different recent studies pinpointed economic dynamics that might guide the chains of decisions in tailings dam management. We have found interesting studies from the past 20 years, linking economic indicators to clarify the probability of dam failures. The insertion of these economic factors into the corporations decision-making chains led us to financialization, and the reading of this dynamic in Vale and Samarco, as well as to understand the recent changes in their organizational structure, the economic impacts of the tragedies on the companies, their shareholders and creditors, finding an asymmetry between the economic reactions to the disaster inside the companies themselves. The Mariana case redressing process and the subsequent tragedy in Brumadinho involving the same corporation and a tailings dam failure brings a pessimistic perspective about the efficiency of the legal instruments used in the Mariana case. One of the firsts basic concepts that emerges within the liability aspect is the juridical personality of the corporation, also linked to the previous tailings dam failures analysis. Here lies the question of

how the legal lenses perceives the corporation itself, and its internal diversity of actors, leading us to reflect upon the nature of the legal person concept according to the hegemonic legal theories.

We divided the hegemonic approach in three groups, according to their emphasis over a corporate extra-legal existence (body) – Bevilácqua, Pontes de Miranda -, a corporate teleology (soul) - Miguel Reale, Rosenvald and Farias - or the emphasis over its formal aspects as norms, language, instrumentality, contracts, among others (form) – Kelsen, Gonçalves, Venosa, Negri, Comparato and Salomão Filho.

Drawing from these authors, the corporate legal personhood could be characterized as a plain collectivity, similar to other groups with common finalities, moved by values as the human person dignity or the common good that would unite individual efforts. More technically, the formalist theories would bring the juridical system autopoiesis to the debating stage, not only expressing the normative, contractual, linguistic, instrumental and technical nature of the corporate legal personality, but also proposing the denaturalization of the concept, mistakenly understood as an analogy with the human person. This misleading would be the reason why jurists often attribute human person characteristics to juridical persons. Throughout the chapter we have pointed some preliminary insufficiencies of these theories in order to assess the Rio Doce case and their incompatibility with pervious analysis from the first chapter. Specially, the formalist theories brought the instrumental element into the debate. Not only that with more representatives, but also being inevitably the one that reaffirms the legal system self-referencing logic and functioning. A corporate legal personality is attributed to whatever the juridical system attributes it to. Most importantly, personality *per se* is devoided of an extra-legal significance. Every analogy to the extra-legal realm must be avoided and so the analogies between natural and legal persons. The formalist theories do clarify the functioning of the legal system from an internal perspective and fails in explaining extra-legally the nature of the corporate legal personality, its functionning, its reason of existence, and so make it a neutral entity, instrumental, technical, and juridically moldable.

We chose, then, to assess the Marxist classic approach towards the legal subject in Pashukanis in order to comprehend one alternative way to construct the corporate legal person's nature. Moreover, a way that brings the economic elements to the center of the debate and has been retaken in the past years by authors as Baars, Barreira, Balbus, Buckel, Casalino, Gonçalves, Ireland, Kashiura Jr., Miéville, Neocleous, Sartori, among others. Though incipient, Pashukanis'

approach enlightens important firsts steps to rethink the legal subject's concept, along with legal personality. He inserts the economic structure in the core of the legal construct, outlining a legal subject elaborated in social relations, instead of emanating from the normativity. In this sense, Pashukanis direct debate with Kelsen explains many of their differences. Pashukanis' legal subject is born in capitalism, more precisely derived from the second chapter of Marx's Capital, being the person which will resides in the commodities and that must recognize the other proprietor as an equal and free human person. From this base upon the commodity form, Pashukanis develops the concept's ascension to heaven, and its becoming of a pure mathematical point, an abstract entity detached from any materiality. Here, the juridical system only reproduces the materiality of social relations. Corporations are not often addressed, though. Their role is bonded to the State's and finance is merely cited, barely being developed. Pashukanis' fetish concept is also not clear, sometimes indicating a proximity to the ideology concept, while in other moments to the commodity fetishism, as described by Marx in the first chapter of the Capital.

Thus, an effort to revisit Marx and better outline the corporate legal personhood concept is needed for our purposes – Barreira, Grespan, Hinkellamert, Jappe, for instance. We reconstructed the fetish theory bringing it back to its Marxian roots and demonstrating the process by which capital is subjectified, having its social features naturalized, and subsequently controlling those under its activities. From *Capital's* third book we could insert in our research Marx's references about finance through the interest bearing capital analysis and the joint stock companies. The interest-bearing capital circuit hides and reframe the production process between M and M'. The production process disappears being subjugated, due to the dominance of value over use-value, of the lending capitalist over the functional capitalist, of capital over labor. This dominance is reproduced in Law. These elements are in the core of modern financialized corporations. Notwithstanding, this abstraction level was different from the legal personhood concept itself, leading us to describe historically the born of the modern corporation in the British Empire and the USA. Both approaches revealed trajectories with many juridical maneuvers, a disdain for the theoretical approach and having the economic interests as their motor. Besides, the distancing of shareholders from the corporations decision-making, the separate patrimony and the stock tradability emerged as fundamental characteristics of this shift. Though differently, the same characteristics were identified in Brazilian corporations. The last step was to approach the corporate legal person concept itself.

The corporate legal personhood is born attached to capital's internal fetishized dynamics. This fetish produces the corporate subjectivity but is not the same as its legal image. The capital fetishism is better expressed in the capital's autonomy through the M-M' circuit, hiding the productive circuit and locating the shareholders transactions in a central position. The corporate legal personhood is not just the shareholder transaction, though, it covers the whole production process. In this sense, the corporate legal personhood hides the contradictions of the capital dynamic, but works considering these dynamics when it comes to Courts. Rights and duties, liability and profits are unequally distributed behind this legal mask. What Law perceives as responsibility, morality, consciousness, citizenship may be internally interpreted as accountability and risk management. By ignoring the legal personhood's nature, legal scholars might choose inefficient ways to approach problems as those regarding the Mariana Mining Disaster.

On the contrary, entities as corporations appear sensitive to legal terms as morality, social responsibility, citizenship, among others. As perceived in 4.2 section, the shareholders are almost taken out of the corporate legal image. Liability is directed to workers, managers, functional capitalists and just ultimately to shareholders, which carriy the most pure economic bond to the production process. In this sense, the corporate legal personhood concept reflects the capital fetishized, but not without making its own proper inversions.

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