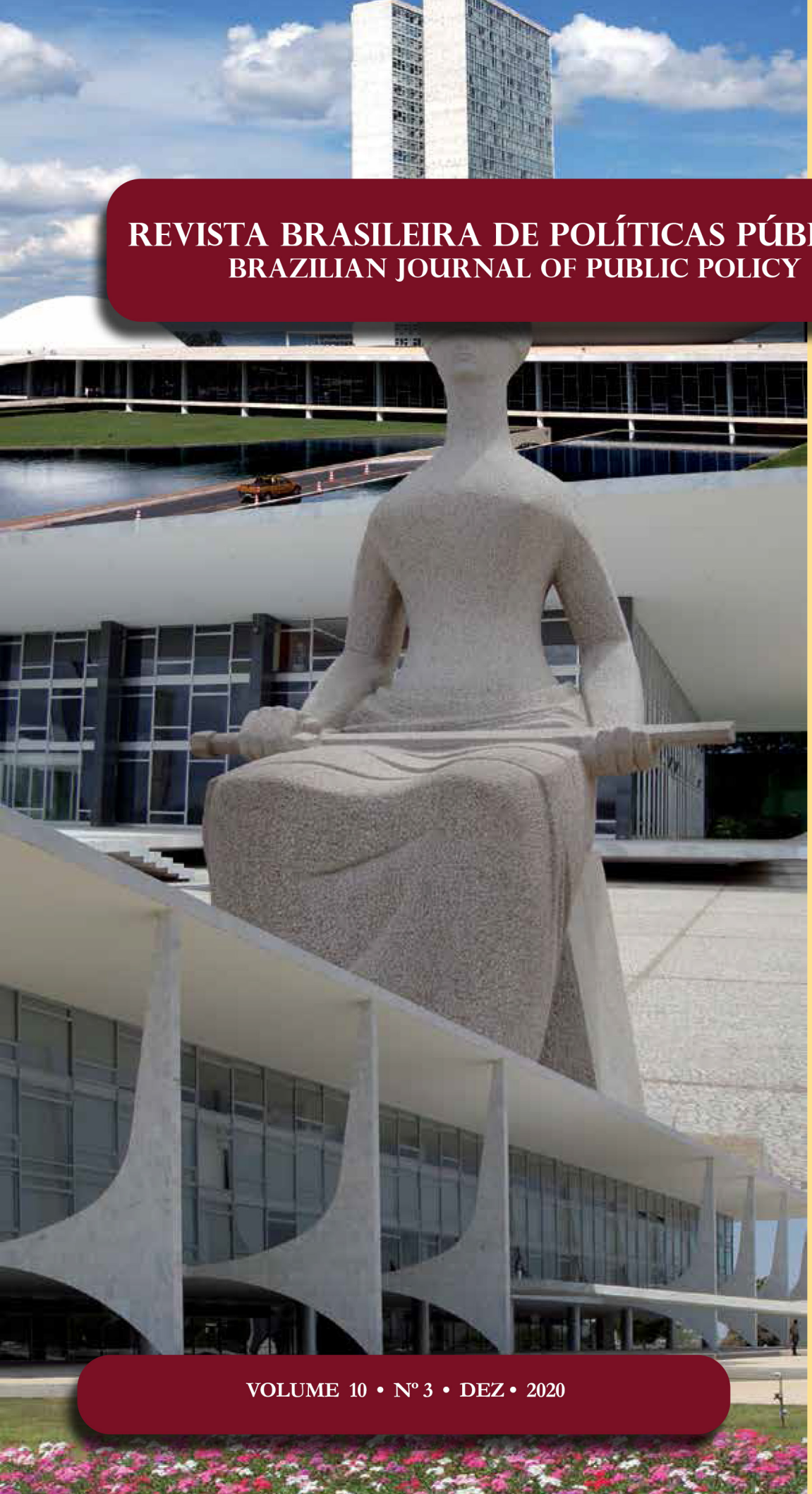

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Procedural theory of the subject of law and non-human animals: criteria for recognition of legal subjectivity from the perspective of critical theory

Teoria procedimental do sujeito de direito e animais não-humanos: critérios para reconhecimento da subjetividade jurídica sob a ótica da teoria crítica

Sthéfano Bruno Santos Divino

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Sumário

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Abstract

This article has the following research problem: what is it like to be a subject of law? As a general objective, it aims to understand how the subject of law is formed. As a specific objective, it intends to answer the following question: are non-human animals subject of law? It is based on the assumption of a critical and analytical theory of law. By this, we mean that we will focus on the relationship between the individual and the norm. As a result, we obtain three processes for the formation of the subject of law. The emancipatory process is responsible for the struggle to form and transform the individual into a subject. The recognition process presupposes that there is in interspecies relations a connection between the subjects of law already consolidated and those who have just entered the legal norm. The subjectification process and personification process refers to the legal system's granting of personality in the face of the claimant subject's demands. Thus, we can conclude that non-human animals are not considered subjects of law because they do not dominate the language and cannot fight against legal domination and exercise by themselves their rights and duties, an elementary and indispensable condition for the configuration of this legal category. Thus, one contributes to the thesis of the procedural theory of the subject of law to the extent that one can reduce contingencies and social complexity, being them directly proportional. This does not mean that animals cannot be protected. The environmental protection established in the Federal Constitution is apt and efficient for such exercise since these non-human animals will be considered centers of legal imputation and deserving of security based on environmental law, and not in their condition as subjects of law. The methodology used to develop this reasoning is the integrated revision and bibliographical research.

Keywords: Animals. Legal theory. Non-human animals. Rights. Subject of law.

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Resumo

Este artigo tem como problema de pesquisa a seguinte questão: what it is like to be a subject of law? Como objetivo geral, pretende-se compreender e entender como se forma o sujeito de direito. Como objetivo específico, pretende-se responder a seguinte pergunta: are non-human animals subejct of law? Parte-se do pressuposto de uma teoria crítica e analítica do direito. Com isso queremos dizer que focaremos na relação entre indivíduo e norma. Como resultado obtêm-se três processos para formação do sujeito de direito. O processo emancipatório é o responsável pela luta formação e transformação do indivíduo em sujeito de direito. O processo de reconhecimento pressupõe que haja nas relações interespécies uma conexão entre os sujeitos de direito já então consolidados e os que acabam de ingressar na norma jurídica. O processo de subjetivação e personificação refere-se à concessão de personalidade pelo ordenamento jurídico diante das demandas pleiteadas pelo sujeito reivindicante. Assim, podemos concluir que animais não-humanos não são considerados sujeitos de direito em razão de não dominarem a linguagem e não serem capaz de lutar contra a dominação jurídica e exercerem por si próprios seus direitos e deveres, condição elementar e indispensável à configuração dessa categoria jurídica. Dessa forma, contribui-se com a tese da teoria procedimental do sujeito de direito na medida em que se pode reduzir contingências e complexidade social, sendo eles diretamente proporcionais. Isso não quer dizer que animais não possam ser protegidos. A tutela ambiental instaurada na Constituição Federal é apta e eficiente para tal exercício, pois serão esses animais não-humanos considerados centro de imputação jurídica e carecedores de proteção com fundamento no direito ambiental, e não em sua condição de sujeito de direito. Para desenvolver esse raciocínio, utiliza-se a metodologia de revisão integrada e a pesquisa bibliográfica.

Palavras-chave: Animais. Animais não-humanos. Direitos. Sujeito de Direito. Teoria do Direito.

1 Introduction

Contemporary technocratic and bureaucratic society focuses on the individual[1]. Social atomism, where one neglects or delegitimizes demands that arise outside one's desires or ambitions, be they from one's history, tradition, society, nature, or God. It assumes a radical anthropocentric posture.[2]

As a result, the products of moral and legal practices and grammars instrumentalize a fundamentally disconnected relationship with reality. One of the examples used by this experimentation is the given condition of the subject of law for non-human animals.[3] The existing parallel with the experience of nature at the end of the 18th century is ignored. The development of this condition begins with Cartesian[4] philosophy and reaches its apex in Kant.

This narrative of legal and moral grammar, in which history is taken from events and philosophy instead of traditional models, archetypes, or prefigurements, is the quintessentially modern form of motivation for intellectual formulations to resolve possible conflicts at this time. However, it is ignored that this supposedly

[1] "The notion of *in-dividuus*, the non-divided, was equivalent in the Middle Ages to the idea of an atom, the smallest unity - and indivisible - of something that surpassed it - an order, a state, a corporation, or any other collective entity, those yes the true and recognized social subjects". MARTINS-COSTA, J. Indivíduo, pessoa, sujeito de direitos: contribuições renascentistas para uma história dos conceitos jurídicos. *Philiae&Filia,* Porto Alegre, v. 1, n. 1, p. 69-95, 2010. p. 69-95; CLAVERO, Bartolomé. Princípio Constitucional: el individuo em Estado. *In*: CLAVERO, Bartolomé. *Happy constitution*: cultura e lengua constitucionales. Madrid: Editorial Trotta, 1997. p. 12.

[2] TAYLOR, Charles. *A ética da autenticidade*. São Paulo: É Realizações, 2011.

[3] EUROPEAN UNION. *Civil Law Rules on Robotics (2015/2103(INL)), for a proposal of giving personality to artificial intelligenc*e. Available in: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html. Acessed in: 11 set. 2020.

[4] DESCARTES, René. *Princípios da filosofia*. Lisboa: Edições 70, 2004. p. 45; DESCARTES, René. *Discurso do método*. São Paulo: Martins Fontes, 2001. p. 66.

fundamental new understanding can considerably affect social complexity and contingency[5]. The higher the number of subjects of law, the greater the possible legal, moral, ethical, and social conflicts.

This work's motivation is precisely to offer initial discussions for this research problem: what is it like to be a subject of law? To answer this question, we provide a prior explanation of the guidelines used. First, as Foucault proposed, the theoretical assumptions that will be developed in this work are not correlated with the hegemonic philosophical tradition. This tradition associates the notion of the subject of law with its etymological origin (*subjectum*). We will present an analytical[6] view of the different modes of subjectification and, specifically, the process of constitution of the subject of law.

Like Foucault, we will start from the idea that there is no a priori theory of the subject (as offered by phenomenology, existentialism, and in some cases, naturalism). This is precisely the objective of the first section: to demonstrate that the subject of law's condition is built through practices and criticism against domination. This argument is quite evident in Foucault. As a novelty criterion, we will demonstrate that the relationship between subject-grammatic-law-society is not *only* structured in instruments of power. The constitution of the subject of law has a kind of interspecies recognition. The society makes this recognition through the emancipatory realization of individual. It is this process (we call emancipatory) that we will focus on in this article.

After all, we can answer the question proposed: what is it like to be a subject of law? A subject of law is one's who can exercise his rights and duties in the legal system without someone's representing him. It is conquering his position in the system. It is winning a battle against the domination process. It is being rational and linguistic subject to contribute to society for their interspecies relations. It is an active person in the legal system who can do whatever he wants since the law does not prohibit it. This structure will be developed now. It is not a definitive view (so far). It's a dialogue between ideas for the law system evolution.

The second section develops the concept of interspecies recognition through a critical comparison of Honneth's[7] recognition, making an important observation: the acceptance of individualistic limitations of human nature and the normative fractionation of the power relationship between subject and government for structuring procedural reason based on a social organism is capable of articulating new moral and ethical relations in social and legal grammar.

It is in this ideal that the constituent being places himself in the final process of subjectification. Self-determination and the personification, together with the society structured around interpersonal mechanisms, can achieve individual and political freedoms. Its non-compliance attributes to the incomplete subject of law a merely instrumental condition, used in the contemporary scenario only as a justification of capitalist means for modulating the social system.

With these considerations, we may answer the question: are non-human animals subject of law? Unfortunately, in our modern law system, we can not say they are subject of law because non-human animals are not linguistic individuals. As we propose, the process of emancipation is an essential requirement for the

[5] We adopt the concept expressed by Luhmann, for which complexity "is the existence of more possibilities than can be realized». At the same time, contingency is "the fact that the possibilities pointed out for other experiences could be different from those expected, referring to something misleading, non-existent, or unattainable means the forced selection of social situations capable of generating unnecessary dangers and risks". LUHMANN, Niklas. *Sociologia do Direito*. Rio de Janeiro: Tempo Brasileiro, 1983. v. 1. p. 44-45.

[6] This analytical view focuses on the political and grammar relations between individuals and law.

[7] "Taken together, however, both the emancipation of individual subjects and their growing communalization among each other should be initiated and driven on by the struggle for recognition, which, to the degree to which it gradually makes them aware of their subjective claims, simultaneously allows a rational feeling for their intersubjective similarities to emerge. […] "The struggle for recognition not only contributes to the reproduction of the spiritual [geistig] element of civil society (as a constitutive element of every formative process) but also (as a source of normative pressure towards legal development) innovatively influences the inner form it takes". HONNETH, Axel. *The struggle for recognition*: the moral grammar of social conflicts (Studies in Contemporary German Social Thought). Cambridge: MIT Press, 1996. p. 29, 49.

individual to fight against his normative domination and conquer his position in the law. However, this only can happen if he dominates the language because the law is essentially grammar. If any non-human animal can develop these skills, the Law can recognize them as a subject. So, can non-human animals be subject of law? Yes, since they pass in the process of emancipation, because he is indispensable for the constitution of the subject of law in social and legal grammar. The other processes (recognition and personification) are additional and complementary, and may or may not be applied depending on the linguistic and rational domain being constitutive. The methodology used to develop this reasoning is the integrated revision and bibliographical research.

2 What it is like to be a Subject of Law?

Since Singer's Animal Liberation[8], non-human animal rights[9] are challenging to the modern law system. In this scenario, some questions arise. "Do animals have ownership of rights in Brazilian law?"[10] The answer brought by Hachem and Gussoli is interesting and will be used as our standpoint: "[…] non-human animals are not subject of law, but environmental-juridical goods needed of maximum protection".[11] However, the knowledge used to achieve this answer seems to be not so right (but we think it is not wrong). According to the authors, the Brazilian federal constitution can not be read as a split, but a whole. The articles 225, §1°, VIII[12], 23, VIII[13] and 187, §1°[14] , must be read as a normative system, and the federal constitution does not authorize non-human animals to be subject of law, because there are several economic and environmental values against this idea.

However, this question seems not to be so right at all, because we do not require to be a subject of law to have rights. As an example, the environment is a common thing that does not have the status of the subject of law but has his protection assigned by the federal constitution.

We believe the right question is: what is like to be a subject of law? This is significantly different from the inquiry made by Hachem and Gussoli. While we want to understand the role of the being in the law and

8 SINGER, P. *Animal Liberation*. New York: Harper Collins, 2002.

9 There is a critical consideration of this terminology. Settanni, Ruggi, and Valluari think the term "animal right" is not correct because it brings us the idea that animals can be objects, and the law is just regulating his properties. "L'espressione «diritto animale», indubbiamente poco elegante, è oramai d'uso corrente, in quanto denominazione tratta dall'oggetto di un settore normativo. VALLAURI, L.L.; Testimonianze, tendenze tensioni del diritto animale vigente. *In:* CASTIGNONE, Vallauri, L. L. (curr.). *La questione animale.* Milano: Giuffrè, 2012;

"La questione animale pone già un primo quesito, a livello quasi embrionale: esiste un (o è in ogni caso corretto parlare di) «diritto animale»? In caso affermativo, come può essere definito e/o classificato? Esistono ripartizioni che devono essere effettuate in modo da inquadrare al meglio la materia in questione?" SETTANNI, G.; RUGGI, M. Diritto animale, diritto degli animali e diritti degli animali. L'auspicio di un intervento riorganizzativo del legislatore tra esigenze sociali e necessità giuridiche di sistema. *BioLaw Journal – Rivista di BioDiritto*, n. 1, 2019. p. 480.

10 HACHEM, D. W.; GUSSOLI, F. K. Do animals have the ownership of rights in Brazilian law? *Revista Brasileira de Direito Administrativo,* Salvador, v. 13, n. 3, p. 141-172, set./dez. 2017.

11 HACHEM, D. W.; GUSSOLI, F. K. Do animals have the ownership of rights in Brazilian law? *Revista Brasileira de Direito Administrativo,* Salvador, v. 13, n. 3, p. 141-172, set./dez. 2017.

12 Art. 225, Everyone has the right to an ecologically balanced environment, a 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.

§1° § 1 In order to ensure the effectiveness of this right, it is incumbent upon the Public Power:

VII - protect fauna and flora, prohibited, in accordance with the law, practices that put their ecological function at risk, cause the extinction of species or subject animals to cruelty.

13 Art. 23. It is the common competence of the Union, the States, the Federal District and the Municipalities: VIII - to promote agricultural production and organize food supply;

14 Art. 187. The agricultural policy will be planned and executed according to the law, with the effective participation of the production sector, involving producers and rural workers, as well as the commercialization, storage and transport sectors, taking into account, especially: § 1 Agribusiness, farming, fishing and forestry activities are included in agricultural planning.

the purpose of being a subject of law, Hachem and Gussoli just made a critical analysis of the constitutional system. They did not provide the requirements to be a subject of law. This is where we will work.

First, we propose that we have a big mistake in the animalist doctrine. They support animal rights in the pain and in the subjectivity of these creatures.[15] We do not deny they suffer. However, in history, suffering is not the law's main requirement to ensure its condition. If we push this argument to his limits, it seems neither life can be an attribute of being subject to the law. The Kantian[16] vision proposed by Regan[17] of life and pain as a condition of the subject of law is not compatible with our modern system. The juridical person (as corporations, for example) does not have biological life, and yet they can own rights.

This chapter aims to describe a theory that we believe can form and construct the individual to a subject of law: the procedural idea. According to this theory, the law as a language[18] component recognizes the being a subject when he fights against his dominative system. If the law is essentially cultural and linguistic, we believe that the individual has to dominate the language to acquire the condition of subject of law. Someone may argue that it is an anthropomorphic position. However, we do not deny this exceptional condition for those able to construct their legal subjectivity since they rule the language and be rational. This is the process of emancipation.

After that, there is a process of recognition. In this process, other subjects of law recognize the emancipated individual as one of them. In this case, the law does not have some importance, because intersubjective relations make all the process.

The law is again crucial in the third process: personification, subjectification, and self-determination. Here, we propose that the emancipated and recognized individual can exercise his rights in the legal system. For that, the law will authorize the individual to have a personality.

After all, we can answer the question proposed: what is it like to be a subject of law? A subject of law is one's who can exercise his rights and duties in the legal system without someone's representing him. It is conquering his position in the system. It is winning a battle against the domination process. It is being rational and linguistic subject to contribute to society for their interspecies relations. It is an active person in the legal system who can do whatever he wants since the law does not prohibit it. This structure will be developed now. It is not a definitive view (so far). It's a dialogue between ideas for the law system evolution. We will begin with the process of emancipation.

3 The process of emancipation: the impossibility of "giving" the position of subject of law

The development of the subject of Law can be studied and verified in different ways. The most common and used by hegemonic philosophical tradition uses the etymological concept[19] to trace rational parameters

[15] DIAS, Edna Cardozo. Os animais como sujeitos de direito. *Revista Brasileira de Direito Animal*, Salvador, v. 1, n. 1, p. 119- 121, jan. 2006. p. 120.

"It would be nonsense to say that it was not in the interests of a stone to be kicked along the road by a schoolboy. A stone does not have interests because it cannot suffer. Nothing that we can do to it could possibly make any difference to its welfare. The capacity for suffering and enjoyment is, however, not only necessary, but also sufficient for us to say that a being has interests-at an absolute minimum, an interest in not suffering. A mouse, for example, does have an interest in not being kicked along the road, because it will suffer if it is". SINGER, P. *Animal Liberation*. New York: Harper Collins, 2002. p. 8.

[16] KANT, I. *Crítica da razão pura*. 5. ed. Lisboa: Fundação Calouste Gulbenkian, 2001.

[17] REGAN, Tom. *The Case for Animal Rights*. Berkeley: University of California Press, 1983.

[18] "A language only exists and is maintained within a language community". TAYLOR, Charles. *The Sources of the Self*. Massachusetts: Harvard University Press, 1989. p. 35.

[19] "En griego persona es en primer lugar prósopon que, del significado de máscara teatral (literalmente aquello que se pone «delante de los ojos»), viene a designar al actor teatral, que lleva precisamente la máscara. Como tal no designa en absoluto al hombre

capable of configuring a subject of law. This idea will not be approached in this work, since we think that the new Law makes little use of this elaboration, being more tied to psychology, politics, neuroscience, and the development of the *self*[20].

In this journey, we can visualize the subject of law position under two fundamental theories that give us sufficient substract to trace initial considerations.[21] The first of them is naturalism. As naturalism, we understand the legal correlation in which the Law corresponds to a moral reality's original art to give each one thing.[22] In this case, there is an intrinsic correlation between law and subject, where the subject of the law's condition is a natural position of his status in the legal system. It is a unitary composition of the socio--relational system itself.

(ánthropos) ni en sentido general, o también físico, ni mucho menos en sentido éticoespiritual, sino al «personaje», la parte recitada por el actor, que recurre a la máscara, apareciendo aquello que no es «en propia persona», como hoy se diría, con un cambio radical de sentido evidente. También en latín persona es la máscara, la cual, como dice Aulo Gellio sobre la escucha de Gavio Basso, «magis claros canorosque sonitus facit »2. Por eso persona es llamada «a personando» y por lo mismo pasa a designar la parte teatral, el personaje y no el hombre. Mientras lo real es el hombre, la persona, sea prósopon o persona, es apariencia ficticia y lúdica tanto más que, permaneciendo el uso de no permitir recitar a las mujeres en el teatro, la máscara permite a quien es hombre parecer mujer. Nada más lejano del significado actual". COTTA, Sérgio. Persona. *Diritto, Persona, Mondo Umano*. Torino: Giappichelli, 1989. p. 59-82.

[20] "What I am as a self, my identity, is essentially defined by the way things have significance for me. And as has been widely discussed, these things have significance for me, and the issue of my identity is worked out, only through a language of interpretation which I have come to accept as a valid articulation of these issues. 6 To ask what a person is, in abstraction from his or her self-interpretations, is to ask a fundamentally misguided question, one to which there couldn't in principle be an answer. […] We are living beings with these organs quite independently of our self-understandings or -interpretations, or the meanings things have for us. But we are only selves insofar as we move in a certain space of questions, as we seek and find an orientation to the good". TAYLOR, Charles. *The Sources of the Self*. Massachusetts: Harvard University Press, 1989. p. 34.

[21] This is the position adopted by Habermas. "Le droit moderne consiste en un système de normes positives contraignantes qui ont à tout le moins la prétention de garantir la liberté. Les caractéristiques formelles de la contrainte et de la positivité s'associent ainsi à une prétention à la légitimité; en effet, le fait que les normes, assorties de menaces de sanctions étatiques, soient générées par les décisions modifiables d'un Législateur politique, est lié à l'attente qu'une garantie égale soit ainsi offerte à l'autonomie de tous les sujets de droit. Cette attente de légitimité entre en relation étroite avec la factualité aussi bien de l'édiction que de la mise en oeuvre du droit. C'est ce qu'exprime, à son tour, le mode ambivalent de la validité du droit. En effet, le droit moderne présente à ses destinataires une tête de Janus, ils peuvent considérer les normes juridiques soit comme des commandements qui définissent des restrictions factuelles de leur marge d'action et les amènent à gérer, d'un point de vue stratégique, les conséquences calculables d'une infraction éventuelle à des règles, soit comme des commandements valides qui les amènent, d'un point de vue performatif à y obéir « a u nom du respect de la lo i» . Une norme juridique est valide lorsque l'État garantit ces deux aspects en assurant, d'une part, un respect convenable des normes, le cas échéant obtenu de force au moyen de sanctions, et en garantissant, d'autre part, les conditions institutionnelles d'une genèse légitime de la norme elle-même, afin qu'elle puisse toujours être suivie au nom du respect de la loi. Sur quoi se fonde, dès lors, la légitimité des règles que le Législateur politique peut à tout moment modifier? Cette question devient plus aiguë, notamment dans les sociétés pluralistes dans lesquelles les visions du monde inclusives et les éthiques dotées de force obligatoire collective se sont désintégrées et où la morale post-traditionnelle qui subsiste et qui n'est fondée que sur la seule conscience morale de chacun, n'offre plus de base suffisante pour fonder le droit naturel autrefois légitimé par la religion ou la métaphysique. De toute évidence, dans un contexte postmétaphysique, la seule source de légitimité est la procédure démocratique par laquelle le droit est généré. D'où cette procédure tire-t-elle cependant sa force légitimante? À cette question, la théorie de la discussion apporte une réponse simple, à première vue invraisemblable; en effet, la procédure démocratique permet le libre jeu de thèmes et de contributions, des informations et des raisons, elle assure à la formation de la volonté politique son caractère de discussion et justifie ainsi la supposition faillibiliste que les résultats obtenus grâce à cette procédure sont plus ou moins raisonables". HABERMAS, Jürgen. *Droit et démocracie*: entre faits et normes. Paris: Editions Gallimard, 1997. p. 477-478.

[22] HERVADA, Javier. *O que é o direito?* a moderna resposta do realismo jurídico. São Paulo: Martins Fontes, 2006. p. 16, 131.

"A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or is important only by its opposition to or unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct. Unless some such claim is justified, analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts, and must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people. A theory of natural law need not be undertaken primarily for the purpose of thus providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges, or as statesmen, or as citizens. But in either case, the undertaking cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities—a knowledge that requires the assistance of descriptive and analytical social science". FINNIS, John. *Natural Law and Natural Rights*. 2nd. New York: Oxford University Press, 2011. p. 59.

It is believed that the greatest mistake of naturalism is to consider the person in his broad sense (*lato sensu* - every human being) as a subject of law. This is not an innate situation of individual. The legal system recognizes or not this position depending on the cultural and historical aspect in force at its construction time. For example, in the Nazi regime, the terminology person was not even used in the few legislative productions. The individual was designated only as a function of social conditioning, where the Reich did not dispense with the Jewish and communist people's labor force but denied them the exercise of political rights to make their claims and their participation in legal construction norms impossible.[23] This scenario shows us that the condition of the subject of law is of political importance. There is a direct correlation between being and society in which he exists at the moment of his construction.

However, naturalism leaves us a positive contribution. Paradoxically, the condition of the subject of law is not something merely inherent to every individual. Still, it is something that is part of his existence before legal and social grammar. This means that, although the complete condition cannot be given to him solely because of his presence. The fact that he (individual) naturally possesses rational and linguistic domains allows him to claim his claims based on his nature. Here there is a close relationship between the etymological concept of *persona* and the analytical theory of law. Through the referendum and the definition of the *self*, the *I*, in the face of social contingencies, that the subject of law's position may be constituted.

The other theory that also presents a misconception, but even its contributions, is positivism. For Kelsen[24], the subject of law is a condition purely determined by the norm. There is a reduction of the figure to a complex of legal rules. The individual and the legal person are figuratively figurative entities of a reality expressed in the person (etymological), whose idea is only a personification of that unity. For Kelsen, therefore, legal duties and subjective rights are established by traditional norms and reduce the unitary problem of the person to a complex of rules.

In our view, the mistake seems to be the same as that of naturalism, where positivism considers the position of the subject of law as given. However, while naturalism is a condition of the very nature of individual, for positivism is a condition given by the norm.

The contribution of positivismis extracted from the correlation between individual and norm, where the norm act as recognition of the subjective claim, and not as a factor of arbitrary concession. In other words, the individual must build before the legal grammar its condition to become a subject of law. The standard norm will work as an instrument of grammatical and social consolidation to enter the individual in its sphere of action.

From these premises, a question arises: if there is no prior right because we reject naturalism, nor is there a constitutional attribution of personality via constituted law (according to Kelsen), then where is the right to claim individual justified?

The answer is far from simple. First of all, we need to talk about the subject of law definition; his linguistic designation. It is believed that the claim to the subject's condition has a very close correlation with naturalism. For the subject to claim something before the legal norm, *a priori* conditions must exist.[25] It is in this sense that naturalism finds its foundation. It is not, therefore, a simple claim or requisition.

Similarly, it is not a matter of merely granting this position according to positivist idealizations. Dialectic relations materialize the construction of individual in society. This dialecticism is essential for the development of identities that, in the future, will be horizons for the self. This already formed self can be built prior of the norm: the relationship of individual as a political, legal, and social agent. Therefore, for us, a right to complain is not visualized, since it does not exist. Its affirmative would result in a classic naturalistic opinion.

[23] HATTENHAUER, Hans. *Conceptos fundamentales del derecho civil*. Barcelona: Ariel Derecho, 1987; SILVA, S. S.; RODRIGUEZ, J. R. Para que serve ser uma pessoa no Direito? Diálogos no campo crítico. *Rev. Direito Práx.*, Rio de Janeiro, v. 10, n. 4, 2019. p. 2969.

[24] KELSEN, Hans. Pure Theory of Law. California: University of California Press, 1967.

[25] KANT, I. *Crítica da razão pura*. 5nd. Lisboa: Fundação Calouste Gulbenkian, 2001.

Here, we keep a dialogue between the right itself. As emphasized earlier, the subject is of law. This means that the individual has a structural correlation between the norm, the self, and society. The terminology subject epistemologically holds a meaning of subjection and dependence to law. However, as a result of social productions, this should not maintain a strict relationship of power and domination between its constituents. What is visualized is precisely the opposite, a place in which the individual assumes the subject's position, as a noun, through its political and social construct.

We believe that the main difficulty in realizing this is the extensive use of the subject of law in liberal humanist legal thought. Here, *fictio juris* is assumed that human beings are equal before the law and, therefore, have the same rights and obligations. This observation, however, cannot be easily visualized.

Within the legal norm, subjectivity and subjectification have different results depending on who is claiming it. In other words, some rights and duties for subjects of rights are determined for some and others not. The way this happens can be extracted from Foucault's reflections. The author makes a critique within the legal grammar, destining his attention to a critical or practical attitude for a resignification. This means that the target subject of normative power makes use of the normative tools at his disposal to modify them and construct himself. Foucaultian criticism is the art of not being governed, "a particular way of thinking, of saying, of acting equally, a special relationship with what exists, with what is known, what is done, a relationship with society, with culture, a relationship with others as well".[26] The subject of law in Foucault acts as a resistance to the system of normative domination for the construction of subjectivity itself.

The subject's inertia about the practice of criticism leads him to governamentalization, which is defined as a social practice of individual subjection by power mechanisms that claim a truth. Criticism has its importance from the moment the subject gives himself the right to "question the truth about its effects of power and power on his discourses of truth".[27] The subject is given the task of disassociation in truth politics. For Foucault, the control of power can be carried out by anti-authoritarian struggles that can affirm the right to be different, and to emphasize everything that makes subjects genuinely individual.[28] The subject, therefore, "suffers the effects of power, and it is from these effects that he can be identified and constituted as an individual".[29] For Foucault[30], the subject "is an effect of power and is, at the same time, to the same extent that it is his effect, his intermediary: power passes through the individual he has constituted".

The subject of law appears as resistance and, at the same time, a construction, from individual to law from the moment he exercises the power of domination over the persona and prevents him from using the practices of himself. The constitution of the subject of law in Foucault can be seen as a relationship of domination between the legal system aimed at normalization methods, where the individual reacts against them and builds itself up. There is an asymmetry between the social relations inscribed by the subject and the norm in which the former was constituted through practices contrary to a specific identity's coercive attribution.

The second reflection to be raised is that Foucault seems to be correct but in part. There is a correlational duality between those who subject themselves to someone, by control and dependence, as well as the transition of the subject to their autonomous synthesis, by a conscious step or self-knowledge, both of which, according to Foucault[31], "suggests a form of power that subdues and makes subject". In this sense, Fou-

[26] FOUCAULT, Michel. *O que é a crítica?* Seguido de A cultura de si. Lisboa: Texto & Grafia, 2015. p. 31.

[27] FOUCAULT, Michel. *O que é a crítica?* Seguido de A cultura de si. Lisboa: Texto & Grafia, 2015. p. 35.

[28] FOUCAULT, Michel. O sujeito e o poder. *In:* RABINOW, Paul; DREYFUS, Hubert L. (org.). *Michel Foucault:* uma trajetória filosófica (para além do estruturalismo e da hermenêutica). Rio de Janeiro: Forense Universitária, 1995. p. 234.

[29] SILVA, S. S.; RODRIGUEZ, J. R. Para que serve ser uma pessoa no Direito? Diálogos no campo crítico. *Rev. Direito Práx.*, Rio de Janeiro, v. 10, n. 4, 2019. p. 2997.

[30] FOUCAULT, Michel. O sujeito e o poder. *In:* RABINOW, Paul; DREYFUS, Hubert L. (org.). *Michel Foucault:* uma trajetória filosófica (para além do estruturalismo e da hermenêutica). Rio de Janeiro: Forense Universitária, 1995. p. 35.

[31] FOUCAULT, Michel. O sujeito e o poder. *In:* RABINOW, Paul; DREYFUS, Hubert L. (org.). *Michel Foucault:* uma trajetória filosófica (para além do estruturalismo e da hermenêutica). Rio de Janeiro: Forense Universitária, 1995. p. 235.

cault tries to avoid the reduction of social plurality through the normalization system. An attempt is made to prevent standardization through standardization. It is up to the subject and only to him to pay attention to the forms of regulatory power to transform himself and control his definitive settlement. In short, the subject must integrate the right as the building agent of his claims and rights. This is the Foucaultian right. The process of the constitution of the subject of law must be emancipatory. There must be a counter situation of subjection and resistance to the power that is in demand at that moment. The recognition becomes legitimate from the moment that the law recognizes the claims constituted in the critical practice produced by the confrontation with the dominant discourses.

To attain the status of a subject of law, it seems necessary to go through that constitutive process. Before the social and legal grammar, one must demonstrate how his existence and capacities are essential and what possible rights can be attributed before the moment of his praxis. This legal position's simple granting praises the instrumental character and ignores years of contributions and class struggles for social emancipation.

However, Foucault seems to be mistaken in reducing the condition of a subject of law while being dominated by power. The constitution of social and legal relations also occurs through interspecies recognition. It is through this recognition that social groups have been constituted before legal and social grammar for centuries, and it will be the next procedure approached for a individual to consecrate the condition of the subject of law.

4 The process of recognition: from the subject of the right to the social individual

If we consider the emancipatory process as correct, we need to find a possibility of exercising the practice aimed at the factor under analysis within the legal norm. We must open spaces to include various corporate demands, including constructions of subjects to be emancipated.[32] Legal grammar's naturalization aims only to maintain power and a particular project of society, preventing new social demands from being incorporated into the normative system. The practice against governamentalization occurs through the modification of legal grammar.[33]

As the Law is represented by language, the semantic and syntactic aspects authorize the agent to use Wittgenstein's[34] language games to create general rules capable of recognizing the emancipatory process. This can happen because, according to Neumann, the ambiguity in legal forms allows the construction of a critical theory of Law. From this ambiguity and indetermination, the subject of Law removes the possibilities for the realization of his emancipatory potential. It is the Law itself that, within its legal norms, creates a space for autonomy for the subjects to manage their lives in society. "The critical potential of the indetermination of standard rules, therefore, means exploring the possibility of constant revision of traditional meanings".[35] The subject of Law, in this case, acts as the center of the democratic legal system for the exercise of his freedoms against the practice of being governed.

[32] NEUMANN, Franz. A mudança de função da lei no direito da sociedade burguesa. *Revista Brasileira de Estudos Políticos*, Belo Horizonte, n. 109, p. 13-83, jul./dez. 2014; NEUMANN, Franz. O conceito de liberdade política. *Cadernos de Filosofia Alemã*, São Paulo, n. 22, p. 107-154, 2013.

[33] SILVA, S. S.; RODRIGUEZ, J. R. Para que serve ser uma pessoa no Direito? Diálogos no campo crítico. *Rev. Direito Práx.*, Rio de Janeiro, v. 10, n. 4, 2019. p. 2982.

[34] WITTGENSTEIN, L. *Philosophical Investigations*. Oxford: Basil Blackwell, 1958; WITTGENSTEIN, L. *Tractatus Logico-Philosophicus*. București: Humanitas, 2001.

[35] SILVA, S. S.; RODRIGUEZ, J. R. Para que serve ser uma pessoa no Direito? Diálogos no campo crítico. *Rev. Direito Práx.*, Rio de Janeiro, v. 10, n. 4, 2019. p. 2983.

This may require a syntactic and linguistic semantic domain on a human level, and that is why not all individuals will achieve this. However, the procedure of the subject of the right to social individual is not only reduced to the rational factor. As Law is a social and cultural construction, the reflexes of the insertion of a new individual in the category of the subject of Law must recognize the others already framed in this way. The norm is capable of disintegrating the status quo of things and emancipate the individual. Still, the legal institutions by themselves are not necessarily capable of guaranteeing those entities' autonomy before society. The existence of the emancipatory process for interspecies recognition becomes necessary. With the term interspecies, we want to avoid the name intersubjective, as expressed by Honneth[36].[37] Scientific advances in neuroscience and psychology have failed to delimit the mind's nature with a high degree of accuracy. In simplest terms, we do not know what the mind is. It is assumed that subjectivity is tied with the biological aspect and that only natural individuals with a brain are capable of producing subjectivity.[38] Therefore, the use of intersubjective recognition terminology seems inappropriate in this scenario.

First, legal grammar does not require subjectivity as a requirement for the subject of the law's constitution. We can subsidize this affirmation in the existence of legal corporations that assume a fictitious condition of subjects in the legal sphere from a cultural demand and demand destined to the patrimonial protection of the subjects exercising the business activity. However, we have an apparent problem in this case. If the development of the individual as an emancipatory process is required before the legal system, how can a corporation (or any legal entity) be considered a subject of law?

In a more straightforward and direct response, under the patrimonial responsibility, only. The condition of individual a subject of law attributed to an entity that does not possess the domain of legal and moral grammar seems to be a secondary situation. By this, we mean that any individual who has these qualities and builds them up before the norm and the legal grammar tends to constitute himself as a subject of primary law - the true and real subject of law. Meanwhile, corporations take a position, not as politically active entities. Although they may represent action and interference in this field, it takes place indirectly. It is not the fictitious legal entity that uses the ballot boxes to exercise universal suffrage. It is not the legal entity that builds rights and duties against the hegemonic system of domination. It is the individual that possesses the linguistic domain and postulates it before the other oppressors.

The second point is that the law is the product of social forces, human activity. The legitimacy to emancipate an individual reaches its institutional reception from simple character constructions, without destroying its legal imputation. Subjectivity is not rejected. In its most objective aspect, any vision of the world must recognize first-person speech to complete its shape. Therefore, every accurate view that rejects subjectivity seems to be in error because the subjective is part of the world.[39]

Thus, it is at the heart of the rationality of the right to the person as a center of imputation for domination and the possibility of democratic participation in the norms that govern his life. On a more abstract level, interspecies recognition is the second step that complements the emancipatory process about the State and society for the practice of acts that require responsibility and for the formation of political individuals. For a individual to be considered a subject of law, there must be a social dialogic articulation for this to occur, so that the emancipatory process gains strength from the observation of linguistic dominance and the

[36] "Moreover, because this relationship of recognition prepares the ground for a type of relation-to-self in which subjects mutually acquire basic confidence in themselves, it is both conceptually and genetically prior to every other form of reciprocal recognition. This fundamental level of emotional confidence - not only in the experience of needs and feelings, but also in their expression - which the intersubjective experience of love helps to bring about, constitutes the psychological precondition for the development of all further attitudes of self-respect". HONNETH, Axel. *The struggle for recognition*: the moral grammar of social conflicts (Studies in Contemporary German Social Thought). Cambridge: MIT Press, 1996. p. 107.

[37] "One is a self only among other selves. A self can never be described without reference to those who surround it". TAYLOR, Charles. *The Sources of the Self*. Massachusetts: Harvard University Press, 1989. p. 35.

[38] SEARLE, J. Minds, brains, and programs. *Behavioral and Brain Sciences*, v. 3, n. 3, p. 417-424, 1980.

[39] NAGEL, Thomas. *The View from nowhere*. Oxônia: Oxford University Press, 1989.

practice of not being governed. This implies that the subject of law is also a political actor.

After recognition, we understand that there is a last process called personification in which the individual self-determines himself and his difficulties and transmutes his existence towards the norm.

5 Personification, subjectification and self-determination

If you recognize the condition of individual entitled to a particular actor, you can personify it—the attribution of legal personality functions as a dual mechanism. On the one hand, the subject of law as a political agent can use his condition as an institutional and social agent against practices that restrict choices and force individuals to an instrumental reason. By this, we mean that interpersonal mechanisms and incredibly subjective mechanisms serve as the heart of political freedom and enrich this constituent individual's social, moral, and legal horizons.

The subject of law contrasts the circumstances of intelligibility. Something Taylor calls the horizon[40]. With this horizon, the subject defines and significantly alters society by suppressing or denying other backgrounds against which things acquire meaning for him. There is a laborious moral exercise in which judgments are made to build the individuals before society. In this case, we continue not adopting the persona's etymological constitution or the subject of law but an analytical disposition. The evaluative definitions of a sphere of open freedom occur according to self-centered criticism in an ideal choice that considers the possibility of defining identity in contrast with the knowledge that other things matter.

This plea before moral and legal grammar can be done differently depending on each subject of the law's constitutions. This, then, the personality may serve as a mold of material equalization for those members of the condition of the subject of law. But we do not mean that that is the rule. The point is that linguistic provisions take on a state of distinct meanings for one and not for the other. The law tends to affect certain subjects, and others do not. This is the result of the construction and the function of the personification.

The personification, therefore, is about the possibility of determining one's own moral and legal grammar. It differs from the process of subjectification in that it is the constitution of individual before the norm. Both occur in different phases. Subjectification precedes personification. The condition of the subject of law is constituted by emancipation. The personification attributes are precisely the quantity and quality of the rights and duties produced by the emancipatory process's demands. It is a dual relationship that serves its purpose.

We can highlight this process as dual because intersocial recognition can become secondary when subjectification and personification work together. That is why we say that although they are procedural provisions that characterize and shape the subject of law, only the first procedure is indispensable. But that does not mean that the others can be left aside. If we talk about this dual existence, social recognition may come to be consecrated later, but it must occur to complete the subject of law. If this recognition process is not carried out during the dual relationship of subjectification-personification, the individual would only be used as an instrument of capital domination. This view can be found in Pachukanis.[41]

Thus, with the personification in its broad determination, it is intended to avoid certain instrumentalism of the subject of law's condition. It will serve as a condition for realizing the ideals in question before the distribution of rights and duties before the legal norm. The embodiment of agents living in dialogic

[40] "Rather the claim is that living within such strongly qualified horizons is constitutive of human agency, that stepping outside these limits would be tantamount to stepping outside what we would recognize as integral, that is, undamaged human personhood". TAYLOR, Charles. *The Sources of the Self*. Massachusetts: Harvard University Press, 1989. p. 27.

[41] PACHUKANIS, Evguiéni B. *Teoria geral do direito e marxismo*. São Paulo: Boitempo, 2017.

conditions forms a specific way of constituting the subject of law to give meaning to life as a history that is visualized in the past and represented by future projects. Therefore, although the recognition may be a phase provisionally transposed, its configuration must happen at some point, because the constitution of the grammar in its universal terms intends to avoid an instrumental individualistic relationship before the other constituted subjects.

Therefore, personification only becomes coherent when there is a condition of the subject of law. For non-human animals to be possessed of personality, we must necessarily frame them as subjects of law. The foundation used focuses on the grammatical and interspecies relationship of the process of the individual's emancipation. The personality is of no use if not for the execution of existential and patrimonial rights and obligations. The mere attribution without observation of the Procedural Theory elaborated here seems to be dissonant from the development of the subject of law.

However, it does not mean that such animals are not susceptible to protection. A distinction must be made between animal rights and the duty to preserve the environment. As animals are part of a specific country's fauna, one can verify, for example, in the Brazilian constitution in its art. 225, §1°, VII, the environmental protection destined to these beings. They are not entitled to protection. As component beings of the environment, it is possible to use the environmental norms to accomplish their protection concretely. It includes the argument that prohibits the practice of mistreatment against these beings. Thus, there seems to be no historical, legal, or critical coherence for recognizing legal subjectivity for a being that does not have the rational argumentative and discursive capacity. This capacity is considered by us to be the main attribute of practices against government and oppression against the law. In the same sense, the recognition of personhood is related to the subjective sphere essentially linked to the dual exercise of rights and duties (a dyadic relation).

6 Final Considerations: should non-human animals be Subject of Law?

The reflections carried out in this work were focused on the response to two research problems. The first one is: what it is like to be a subject of law. With this, we intend to understand how the subject of law is formed and how it is built before legal grammar. As we recognize the law as a linguistic, political, and social phenomenon, individuals who acquire the subject of law need a reasonable linguistic mastery condition. To answer this question, we have initially elaborated on the procedural theory of the subject of law. For this theory, three processes must be observed: the emancipation process, the recognition process, and the personification, subjectification, and self-determination process. We intend to demonstrate how these processes affect the legal being's constitution and how it could be applied to non-human animals.

As expressed in the emancipation process, the individual who still does not possess the identification of the subject of law, through linguistic and political-social practices, rebels against the dominant norm and governance practices. Through this practice, the individual builds his subjectivity before the legal norm. There is no a priori condition as expressed by jusnaturalism or a situation merely granted according to positivism. It is the being that is socially constructed towards the law and forms its subjectivity before the legal system.

Through this process, we note a significant contribution: the status of the subject of law can only be granted to those who master legal grammar and act rationally. Therefore, with this, we can answer the second question: are there non-human animals subject of law? We understand that no, since the rational and essentially linguistic domain focuses on the human species. This does not mean that we are defending an anthropocentric criticism. On the contrary, we recognize in our theory that if an individual being, be it a non-human animal or non-biological being, dominates the legal grammar and the processes of rationalization to plead before the norm, his condition of the subject, he can do so. Thus, if a specific non-human

animal manages to develop a considerable rational-linguistic capacity to construct its subjectivity before the law against domination practices, it will be able to conclude the emancipatory process. Here, we take a view of law as something essentially political-discursive.

Likewise, the recognition process will be part of the complete establishment of the subject of law to the extent that the subjectivity acquired by the being through the law will be analyzed and recognized by other subjects of law. Here we use the term interspecies precisely because of the existence of the possibility of non-human animals and non-biological beings (such as AI) to possibly be able, in the long run, to master the linguistic-argumentative-discursive aspect of the norm and acquire subjectivity by themselves. Hence, interspecies recognition tends to increase the credibility of the condition of the premature subject of law before the legal norm to complete its cycle with the process of subjectification and personification.

With the attribution of personality, we understand that the subject of law is complete and apt to act both in law and in duty. Hence, the process of recognition and attribution of personality, which is essentially linked to the norm itself, will complete the being. Thus, it is not enough to grant personality to a being who has not even gone through emancipation. Since this individual does not master the rational linguistic processes, the rights and duties will have been in vain. His personality, at this moment, becomes symbolic and dispensable. Thus, any non-human animal or any non-biological being who acquires personality without going through the emancipatory process is only being used as symbolism within the legal norm. In no way will its protection be amplified by the attribution of this condition due to its exercise's impossibility or reduced due to a condition that could be attributed to other legislations.

Therefore, it is not denied that animals deserve protection. It is interpreted that the contemporary scenario, under the viewpoint of the critical theory of law, does not authorize the granting of subjectivity because it is not something "given" but conquered. The animalist protection can occur significantly based on environmental legislation, as consecrated in the Brazilian constitution in its art. 225, §1°, VII. In our opinion, the protection is not improved at all by the simple concession of the condition of the subject of law. What we see is only an increase in unjustified legal contingencies that would make it even more challenging to apply the complex rules in the personality scope that we have today.

Thus, the present work's contribution is precisely to propose a theory that allows the insertion of other subjects within the legal subjectivity, as long as duly exemplified and worked processes are followed. It is hoped that the discussions initially brought forward may foster later discourses and questions.

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